

ALRC 84

Seen and heard: priority for children in the legal process

Contents

Terms of reference

Overview

Abbreviations

1. Introduction

2. A statistical picture of Australia's children

3. Children, families and the state

4. Children in the legal process

5. Responding to children — advocacy and action

6. The new working federalism

7. Advocacy

8. Introduction to Part B

9. Administrative decision making — service delivery for children

10. Children in education

11. Children as consumers

12. Introduction to Part C

13. Legal representation and the litigation status of children

14. Children's evidence

15. Jurisdictional arrangements in family law and care and protection

16. Children's involvement in family law proceedings

17. Children's involvement in the care and protection system

18. Children's involvement in criminal justice processes

19. Sentencing

20. Detention

Appendix A: Participants

Appendix B: Written submissions

Appendix C: Costing of OFC, Taskforce and Summit

Appendix D: List of recommendations

Select bibliography

Prior reports on children

Table of Legislation

Table of cases

Table of international instruments

Index

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Commission Reference: ALRC 84

The Australian Law Reform Commission was reconstituted under the *Australian Law Reform Commission Act 1996* having started operation in 1975. The main office of the Commission is at Level 10, 133 Castlereagh Street, Sydney, NSW, 2000, Australia. The Commission also maintains a small office in Canberra.

Terms of reference

Inquiry into children and the legal process

Law Reform Commission Act 1973

Human Rights and Equal Opportunity Commission Act 1986

I, MICHAEL HUGH LAVARCH, Attorney-General of Australia, in pursuance of section 6 of the *Law Reform Commission Act 1973* and sub-section 11(1) of the *Human Rights and Equal Opportunity Commission Act 1986*, HEREBY REFER to the Law Reform Commission and Human Rights and Equal Opportunity Commission for inquiry and report, matters relating to children and young people and the legal process.

In particular the Commissions are to inquire into and report on:

- (i) legal advice and access for children and young people and their legal representation before courts and tribunals in the exercise of federal jurisdiction;
- (ii) the appropriateness of procedures for pre-trial investigation and taking of evidence from children and young people;
- (iii) the appropriateness of rules of evidence for, and procedures for taking evidence in courts and tribunals from children and young people;
- (iv) the question of the desirability of children giving evidence in family law and associated proceedings and the appropriate safeguards in such circumstances;
- (v) sentencing of children and young people for federal offences;
- (vi) the treatment of children and young people convicted of federal offences;
- (vii) advocacy of the interests of children and young people before courts and tribunals;
- (viii) the appropriateness and effectiveness of the legal process in protecting children and young people as consumers;
- (ix) the particular needs in these and related areas of children and young people for whom the Commonwealth has a special responsibility; and
- (x) any related matters of particular relevance to Australia's remote communities.

The Commissions may recommend legislative and non-legislative measures that should be taken to address any issues arising from their inquiry.

IN PERFORMING their functions in relation to the Reference, the Commissions shall:

- (i) have regard to the Commonwealth's special responsibilities for children arising under the Constitution and Australia's international human rights obligations, particularly under the Convention on the Rights of the Child;
- (ii) consult widely among the Australian community and relevant bodies including organisations with an interest in children and young people, community legal centres, legal aid commissions, consumer organisations, and courts and tribunals;
- (iii) consult relevant Federal, State and Territory government authorities;

- (iv) in recognition of work already undertaken, have regard to all relevant reports, including relevant ALRC reports, Family Law Council Reports and Reports of the Human Rights and Equal Opportunity Commission;
- (v) have regard to relevant law, practice and experience overseas.

THE COMMISSIONS ARE REQUIRED to report not later than 30 September 1997.

Dated 28th August 1995

MICHAEL LAVARCH
ATTORNEY-GENERAL

Overview

Children should be seen and not heard.

Aristophanes, *The Clouds*, I. 963, (423BC)¹

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have carried out a comprehensive inquiry into children and the legal process.

A list of the Inquiry's recommendations is set out in Appendix D.

Australia's children are the nation's future. Australia's legal processes have consistently failed to recognise this fact by ignoring, marginalising and mistreating the children who turn to them for assistance. Much must be done to provide for children's access to and appropriate participation in the legal processes that affect them. Changes are needed across all levels of government and across all jurisdictions. The Commonwealth should take on a leadership and co-ordination role in this regard. The recommendations in this report are designed to give full effect to the right of children to be both seen and heard in the legal process. They include

- a summit on children to be attended by all heads of Australian Governments
- a taskforce on children and the legal process
- an Office for Children to be located in the Department of the Prime Minister and Cabinet
- national standards in the areas of school discipline, care and protection, investigative interviewing of children and juvenile justice
- child-focused service delivery charters, research to improve agency practice in regard to children and collection and publication of statistics on children's participation in various legal processes.
- restructuring current jurisdictional arrangements for dealing with children's issues, and in particular an extended cross-vesting scheme for family law and care and protection matters
- transferring appellate jurisdiction for care and protection matters to the Family Court to develop a national court of appeal for all private and public family law matters
- provision of appropriate legal advice and representation to children in need of legal services, including practice standards for children's legal representatives and establishing a legal advice line, specialist children's legal service units and a visiting solicitors' scheme
- amendments to federal legislation, including the Family Law Act, the Evidence Act, and the Trade Practices Act and negotiation with and encouragement of the States and Territories to similarly amend or enact relevant legislation

The recommendations made in this Report are accompanied by suggested implementation strategies to ensure responsibility is allocated for each recommendation. Many of these strategies refer to the Office for Children. If the Office for Children is not established immediately, alternative avenues must be found for the implementation of recommendations that relate to the Office.

Abbreviations

AAT	Administrative Appeals Tribunal
AAYPIC	Australian Association of Young People in Care
ABA	Australian Broadcasting Authority
ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
AFP	Australian Federal Police
AGPS	Australian Government Publishing Service
AIC	Australian Institute of Criminology
AIFS	Australian Institute of Family Studies
AIHW	Australian Institute of Health and Welfare
AIJA	Australian Institute of Judicial Administration
AJJA	Australian Juvenile Justice Administrators
ALRC	Australian Law Reform Commission
ASC	Australian Securities Commission
ATSIC	Aboriginal and Torres Strait Islander Commission
Beijing Rules	UN Standard Minimum Rules for the Administration of Juvenile Justice
CCTV	Closed Circuit Television
children's courts	State and Territory Children's Courts, Youth and Juvenile Courts
Crimes Act	<i>Crimes Act 1914</i> (Cth)
CROC	UN Convention on the Rights of the Child
CTS	Children's Television Standards
CYA	Common Youth Allowance
DEETYA	Department of Employment, Education, Training and Youth Affairs
Dept	Department
Design Guidelines	Design Guidelines for Juvenile Justice Facilities in Australia and New Zealand
DIMA	Department of Immigration and Multicultural Affairs
district courts	State and Territory District or County Courts
DPP	Director of Public Prosecutions
DRP 3	ALRC and HREOC Draft Recommendations Paper 3 — <i>A matter of priority: Children and the legal process</i>
DSS	Department of Social Security
Evidence Act	<i>Evidence Act 1995</i> (Cth)
Family Law Act	<i>Family Law Act 1975</i> (Cth)
Family services dept	State and Territory departments responsible for investigating allegations of abuse and for children in care
HMSO	Her Majesty's Stationery Office
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
IP 17	ALRC and HREOC Issues Paper 17 — <i>Speaking for ourselves: Children and the legal process</i>
IP 18	ALRC and HREOC Issues Paper 18 — <i>Speaking for ourselves: Children and the legal process</i>
IRT	Immigration Review Tribunal
JIT	Joint Investigation Teams
JPET	Job Placement, Employment and Training Program
magistrates courts	State and Territory courts of summary jurisdiction
MCEETYA	Ministerial Council on Employment, Education, Training and Youth Affairs
NCAVAC	National Campaign Against Violence and Crime
NSWLRC	New South Wales Law Reform Commission
NYARS	National Youth Affairs Research Scheme
OFC	Office for Children
PM&C	Department of the Prime Minister and Cabinet
QOC Standards	Australasian Juvenile Justice Administrators Quality of Care Standards
Riyadh guidelines	UN Guidelines for the Prevention of Juvenile Delinquency

RRT	Refugee Review Tribunal
SAAP	Supported accommodation assistance programs
SBS	Special Broadcasting Service Corporation
SCAG	Standing Committee of Attorneys-General
SCAN Teams	Suspected Child Abuse and Neglect Teams
SSAT	Social Security Appeals Tribunal
TAFE	College of Technical and Further Education
TR Submission	Submission on the Terms of Reference
Trade Practices Act	<i>Trade Practices Act 1974</i> (Cth)
Wood Royal Commission	Royal Commission into the NSW Police Service
YTA	Youth Training Allowance

1. Introduction

Background to the reference

The reference

1.1 On 28 August 1995, the then federal Attorney-General, the Honourable Michael Lavarch MP, referred jointly to the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) an Inquiry into children and the legal process. The terms of reference are reproduced at page 3.

The Commissions

1.2 The ALRC is an independent statutory corporation established by the *Australian Law Reform Commission Act 1996* (Cth) to examine, on referral from the Attorney-General, legal matters requiring reform. In relation to those matters referred to it, the ALRC is required to

- review federal law for the purposes of developing and reforming the law
- consider proposals for the making, consolidation or repeal of relevant laws
- consider proposals for uniformity between State and Territory law and federal law
- consider proposals for complementary federal, State and Territory law.²

1.3 HREOC is an independent federal statutory authority established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It has a variety of powers to promote and protect the human rights of all people in Australia. In particular, HREOC can

- inquire into acts or practices that may infringe on human rights
- make recommendations to remedy those infringements
- report on any actions that should be taken by Australia in order to comply with relevant international instruments.³

The federal Government has recently proposed to restructure HREOC and rename it the Human Rights and Responsibilities Commission.⁴

The terms of reference

1.4 The terms of reference require consideration of legislative and non-legislative measures that should be taken to address a number of different issues surrounding children and legal processes. These issues include legal representation and advocacy for children and their access to legal processes, the appropriateness of procedures by which children give evidence, the appropriateness and effectiveness of the legal process in protecting child consumers, and issues relating to children in federal jurisdictions. In addition, the terms of reference require the Inquiry to examine the particular needs of those children for whom the Commonwealth has a special responsibility, as well as issues relating to children in Australia's remote communities.

1.5 In considering these issues, the Inquiry has had regard to the Commonwealth's responsibilities for children arising under the Constitution and international human rights obligations, including those arising under the United Nations Convention on the Rights of the Child (CROC), as well as to relevant law, practice and experience in some overseas jurisdictions.

History of the reference

Request for submissions on the terms of the reference

1.6 Initially, the Inquiry sought submissions on the terms of reference. We received 169 submissions during September and October 1995, with suggestions on what specific issues the Inquiry should address within the broader area of children and the legal process.

Issues Papers and submissions

1.7 In March 1996, the Inquiry released two issues papers entitled *Speaking for Ourselves: Children and the Legal Process*. The first of these, Issues Paper 17 (IP 17), was a brief document aimed specifically at young people. Issues Paper 18 (IP 18), was a more comprehensive overview of the issues. Both documents called for comments.

1.8 We received 225 written submissions from individuals, organisations and government departments on the questions raised in our issues papers. This material has been invaluable to the Inquiry in assessing community concerns and priorities.

Public hearings

1.9 From April to August 1996, the Inquiry held a series of public hearings throughout Australia to take oral submissions from interested persons. Public hearings were held in Sydney, Adelaide, Canberra, Wagga Wagga, Newcastle, Melbourne, Hobart, Perth, Kalgoorlie, Darwin, Alice Springs, Brisbane, Rockhampton and Parramatta. We heard oral submissions from over 170 people. This process enabled the Inquiry to hear directly from community members, including many young people, and organisations about their concerns regarding children and the legal process.

Practitioners' forums

1.10 As part of the consultation process, the Inquiry also held a series of meetings with legal practitioners, and in some instances medical professionals and youth workers, in most of the cities that we visited for public hearings. These forums enabled the Inquiry to obtain detailed evidence from practitioners in different areas of children's involvement in the legal process.

Focus groups and surveys

1.11 As well as holding public hearings, the Inquiry endeavoured to meet with groups of young people in each of the places visited. Approximately 100 young people participated in these focus groups around Australia. The number of participants at each meeting varied from 2 to 16 young people. Each group provided the Inquiry with extremely useful information about children's impressions and experiences of legal processes. We thank the National Children's and Youth Law Centre for its assistance in organising these focus groups.

1.12 In April 1996 the Inquiry distributed approximately 2000 copies of a specialised survey on legal issues to young people in government and independent schools and in detention centres throughout Australia. The 843 responses we received have been entered on a data base. The focus groups and the surveys provided the Inquiry with detailed, first-hand information about children's views on their experiences with the legal process and their suggestions regarding these processes.

Statistical information

1.13 The Inquiry requested, and was provided with, statistical information on children's involvement with legal processes from judges, courts and tribunals, government agencies such as family services, education and juvenile justice departments, Directors of Public Prosecutions (DPPs), legal aid commissions and the Australian Bureau of Statistics (ABS). These statistics, many of which had never before been collected or reported on a national scale, provide a detailed picture of the extent to which children are involved in the legal process and were of great assistance in the preparation of this Report.

Consultations

1.14 Over the course of the Inquiry, we also consulted directly with individuals and organisations who have extensive dealings with children in different legal processes or who are experts in legal processes that affect children. The information and assistance received during these processes was of great benefit to the Inquiry, providing additional insight about the experiences of children in the legal process and informing the directions of our research.

1.15 The honorary consultants for this Inquiry provided continuing assistance throughout the reference.⁵ In addition to meetings held on 8 December 1995 and 5 March 1997, the consultants provided detailed comments on specific chapters of this Report and on the general direction of our research. We also sought comments from academics and experts in various fields of children's law. The Inquiry is grateful for the assistance of our consultants and other experts.

Draft Recommendations Paper

1.16 A Draft Recommendations Paper (DRP 3) entitled *A Matter of Priority: Children and the Legal Process* was released on 20 May 1997 to give an indication of the directions of the Inquiry in terms of priority issues of concern and proposals for reform. As the Inquiry covered an extremely wide range of issues, DRP 3 gave a brief introduction to each subject, outlined the key issues and arguments and provided drafts of the suggested recommendations. It sought the comments of interested persons or organisations on all these issues.

1.17 The Inquiry received 92 submissions on DRP 3. The great majority of these submissions were supportive of the draft recommendations, although many also had further suggestions and comments on specific recommendations. The import of these submissions is discussed in appropriate sections throughout this Report.

The Report, its scope and its context

Introduction

1.18 This is the first inquiry in Australia that has considered in such breadth issues relating to children and the legal process. Even so, the Inquiry had the benefit of considering numerous reports and previous recommendations in many of the subject areas covered in the reference. A substantial body of work was contained in these previous reports. The repetition of concerns about successive generations of children and the consistency of our findings with those made in many of these reports reflect the persistent problems facing children in the legal process and emphasise the priority that they should now receive.

1.19 The Inquiry's terms of reference were concerned with issues surrounding children's participation within the legal process. The Inquiry was not concerned with the substance of the laws, rights or entitlements of children within these processes, except as these relate to the processes themselves. Many submissions to the Inquiry suggested that we should address issues such as the levels of income support provided to young people, the law with respect to joint custody of children, the appropriateness of detention for child asylum seekers and the problems of drug abuse among young people. However, these issues are beyond the terms of the reference.

1.20 The focus of the Inquiry on a broad range of legal processes enabled consideration of children's involvement in these processes from a national perspective. This focus permitted a wide and detailed examination of legal processes in different jurisdictions, the relationships between these processes and across portfolios and the consequences of children's involvement in one or more of the processes. In some areas, the legal processes examined were within State and Territory jurisdictions. These examinations were undertaken on the basis that they were necessary and relevant to the terms of reference.

Definition of 'child'

1.21 In law, there is an 'instantaneous transformation' from childhood to adulthood at a specified age.⁶ In Australia a person is considered to be legally an adult at the age of 18. This is the age at which a person can vote, marry without prior consent of court, enter into contracts, initiate and defend civil litigation on his or her own behalf and exercise a host of other adult legal rights and responsibilities.⁷ International law, as set out in CROC, also defines a child as a person under the age of 18.⁸ The Inquiry has adopted this definition.

1.22 The term 'young people' is often used in relation to people between the ages of 12 and 25. For the sake of clarity, the term 'child' will be used throughout this Report unless it is clear that only those aged 12 to 18 are being considered, in which case the term 'young people' will be used.

1.23 Chapter 2 provides statistical data on children in Australia. In that chapter, and throughout this Report, we attempt to identify and profile the children who are involved with the legal process and the manner and appropriateness of their involvement. Chapters 3 and 4 analyse the social, legal and political context in which issues concerning children and the legal process arise.

Definition of 'the legal process'

1.24 For the purposes of this Inquiry, the legal process is interpreted broadly to include administrative processes, interaction with law enforcement and regulatory agencies, and court processes. Legal processes are the processes by which

- individuals assert and enforce their legal rights
- government agencies and courts regulate and assist those individuals
- individuals, agencies and governments alike are held accountable for their actions.

1.25 Part B of the Report focuses on processes involved in decision making in the context of administrative and other services for children and Part C deals with the formal legal processes for children, including those associated with courts and the exercise of judicial power.

Assumptions about children and the legal process

1.26 The Inquiry has made assumptions relevant to the role that children are expected or able to play in the legal process. It is assumed that the family has primary responsibility for caring for children and preparing them for adulthood.⁹ However, children's development throughout childhood is a responsibility jointly shared with the state. This joint effort between families and the state should encourage the development of an individual capable of participating in and contributing to society. This assumption is exemplified in the provision of education for all children, in the assistance offered by the state to families so that they can better care for their children, by the state's intervention in some families and by its further responsibility for children who are without family support or unable to live with their families. These assumptions concerning the roles of family and governments inform the recommendations in this Report

1.27 Within the legal system the traditional view has been that children are objects of concern to the legal system, the subjects of the law and of the legal process but not participants in the legal process. Early international declarations regarding children's 'rights' were concerned principally with the enumeration of children's economic, social and psychological needs. This reflected the assumption that children could and should rely on the exclusive protection and participation of adults in the legal process to ensure the exercise of their rights.¹⁰ This view was premised on the assumption that children do not and should not have the capacity themselves to participate in legal processes to enforce their rights.

1.28 This assumption about children's rights and their participation in the legal process is changing and it is in the context of this change that this Report is written. Changes in substantive and procedural law reflect a growing appreciation that children's abilities and capacities to make decisions develop as they mature, and that children should be afforded a progressive right to participate in legal processes that affect them. Chapter 3 further analyses these changing assumptions.

1.29 Many of these developments in the law relating to children's participation are articulated in CROC, which has been almost universally ratified.¹¹ Given the diversity of its States Parties and breadth of coverage, CROC is clear evidence of customary international norms regarding the rights and responsibilities of children. While CROC is not incorporated in its entirety into the domestic law of Australia, it is a strong statement of Australia's commitment to children's rights and their participation in legal processes.¹²

Children's participation in the legal process

1.30 The Inquiry has received extensive evidence of the problems and failures of legal processes for children. Of particular concern is evidence of

- discrimination against children, despite Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) to guarantee equal treatment before the law¹³
- failures, to some degree by each of the institutions of the legal process, to accommodate the changing notions of children's evolving maturity, responsibilities and abilities, and in particular a consistent failure to consult with and listen to children in matters that affect them
- the marginalisation of children involved in the legal process, whether by teachers, social workers, lawyers or judges, when decisions that are of significant concern to children are being made
- a lack of co-ordination in the delivery of, and serious deficiencies in, much needed services to children, particularly to those who are already vulnerable
- the systems abuse of children involved in legal processes, particularly the appalling state of care and protection systems throughout Australia and the manner in which child witnesses are treated
- the increasingly punitive approach to children in a number of juvenile justice systems
- the discriminatory impact of certain legal processes resulting in the over-representation of some groups, particularly Indigenous children, in the juvenile justice and care and protection systems
- the concentration of specialist services and programs in metropolitan areas, disadvantaging rural and remote children in their access to services, the legal process and advocacy
- inconsistencies in legislation dealing with legal capacities and liabilities of children.

1.31 Appropriate participation by children in legal processes is often difficult because legal processes are not designed for children. In making our recommendations, the Inquiry has had regard to the barriers that an adult legal system presents for children. Our emphasis is on appropriate and effective participation for children. The Inquiry does not advocate wholesale involvement of children in all legal matters or processes. However, where children are mature enough and willing to participate in the legal process, that participation should be on the basis that children are the beneficiaries of all of the law's protections.

Format of the Report

1.32 This Report is divided into three sections. The chapters in Part A detail and analyse the assumptions and conclusions on which the Report is based. In Parts B and C, the Inquiry explores the various legal processes in which children may be involved. We have made detailed recommendations in these later chapters about how children's participation in legal processes can be effectively and appropriately assisted.

2. A statistical picture of Australia's children

Introduction

2.1 Children living in Australia are not a homogenous group. Different children have different experiences and varying needs. This chapter presents a general demographic overview of children in Australia and a detailed picture of the extent to which children are involved with legal processes.

Who are Australia's children?

Age

2.2 Children make up a substantial section of the Australian community. In the latest census, the ABS counted more than 4.8 million children aged 0 to 18 living in Australia on 6 August 1996.¹⁴

Table 2.1 Australia's children by age group¹⁵

Age group	Number of children	Percentage of total child population	Percentage of total population in Australia
0-4	1 264 908	26.1	7.3
5-11	1 797 872	37.2	10.4
12-18	1 773 447	36.7	10.3
Total	4 836 227	100	28

2.3 The proportion of children in Australia's population has been slowly declining, from 36% in 1925 to 28% in 1996.¹⁶ The ABS estimates that approximately 5 million children under 18 years of age will be living in Australia by the year 2025.¹⁷

Sex

2.4 Although for the Australian population as a whole there are slightly more females than males,¹⁸ the reverse is true for Australia's children. On census night 1996, the ABS counted approximately 2.48 million boys and 2.36 million girls.¹⁹ There were slightly more boys than girls in each age group.²⁰

Aboriginality and ethnicity

2.5 Indigenous children made up around 3.5% of all Australian children counted in the 1996 census.²¹ By contrast, as Indigenous people are on average younger than non-Indigenous people, as a whole they made up only 2.0% of the total Australian population.²² On census night in 1996, almost half (48%) of all people who identified themselves as Indigenous were children,²³ and almost 13% of Indigenous people counted were aged under 5.²⁴

Table 2.2 Indigenous populations²⁵

Population	Indigenous	Total
Aged 0-18	169 564	4 836 227
All ages	352 970	17 267 825

2.6 In addition to Indigenous cultures, Australia's children come from close to two hundred different ethnic groups. Many children in Australia are from non-English speaking backgrounds. This means that they were born in countries where English is not the primary language or have at least one parent born in a country where English is not the primary language, regardless of the child's own country of birth.

2.7 The 1996 census found that almost 7.6% (365 847) of all Australian children were born overseas,²⁶ compared to 26.1% of the total Australian population.²⁷ The largest percentage of children born overseas

were born in a non-English speaking country (66%), but the United Kingdom and New Zealand were the most common country of birth for all overseas-born children.²⁸ The most common countries of birth for children born in non-English speaking countries were Vietnam, the Philippines, Hong Kong and China.

Table 2.3 Most common overseas birthplaces of children in Australia²⁹

Country	Number of children	Percentage of total overseas-born children
United Kingdom	50 056	13.7
New Zealand	44 365	12.1
Vietnam	19 019	5.19
Philippines	18 976	5.18
Hong Kong	17 180	4.7
China	10 409	2.8

2.8 The 1996 census also found that approximately 22% of all children counted in Australia had at least one parent born in a non-English speaking country.³⁰ As a result, many children in Australia speak a language other than English at home. The 1996 census counted 633 352 children (13.1% of all children counted in Australia) who spoke a language other than English at home.³¹ Approximately 17% of these children (107 267) were identified as speaking English 'not well' or 'not at all'.³²

Table 2.4 Most common language spoken at home by children in Australia³³

Language	Number of children
English	4 084 893
Chinese (incl Mandarin and Cantonese)	81 666
Arabic (incl Lebanese)	67 521
Vietnamese	47 448
Greek	47 808
Italian	44 793
Serbian, Croatian and other languages spoken in the former Yugoslavia	41 809

Children with disabilities

2.9 According to the latest ABS disability survey in 1993, approximately 267 600 children aged 0 to 14 were identified as having a disability.³⁴ Of these children, 223 200 were identified as having a handicap.³⁵ The most common dis-abling conditions for children aged 5 to 14 were intellectual and mental disorders (2.3% of the child population of that age suffered from this disability) and respiratory diseases (2.2% of the child population of that age suffered from this disability).³⁶

Where do Australia's children live?

Children in the States and Territories

2.10 Australia's child population, in common with the total population, is largely concentrated in NSW, Victoria and Queensland. The 1996 census counted almost 77% of all Australian children living in these three States on 6 August 1996.³⁷ Children made up between 25.9% and 30.1% of the populations in each of the States and Territories.

Table 2.5 Children by State/Territory³⁸

State/Territory	Number of children	Percentage of total population in the State or Territory
NSW	1 616 660	26.8
Victoria	1 169 948	26.8

Queensland	916 507	27.2
South Australia	370 208	25.9
Western Australia	485 315	28.1
Tasmania	131 231	28.5
Northern Territory	58 712	30.1
ACT	86 577	28.9

2.11 The characteristics of the child populations in the different States and Territories vary greatly. For example, the following table shows the populations of Indigenous children in each State and Territory.

Table 2.6 Indigenous children by State/Territory³⁹

State/Territory	Number of Indigenous children	Percentage of the total child population in the State or Territory
NSW	49 358	3.0%
Victoria	9 937	0.8%
Queensland	46 656	5.1%
South Australia	9 639	2.6%
Western Australia	24 262	5.0%
Tasmania	6 968	5.3%
Northern Territory	21 251	36.2%
ACT	1 399	1.6%

2.12 The majority (56.6%) of Indigenous children living in Australia live in NSW and Queensland. Yet Indigenous children in these two States made up only 3% and 5.1% respectively of the total child populations of each State. By comparison, although only 12.5% of all Indigenous children lived in the Northern Territory, Indigenous children made up 36.2% of all children aged 0 to 18 living there in 1996. Victoria's 9 937 Indigenous children (5.9% of all Indigenous children) made up only 0.8% of the Victorian child population.⁴⁰

2.13 The largest percentages of overseas-born children live in NSW and Victoria. In 1996, 37.1% of overseas-born children counted in the census were living in NSW and 24.4% were living in Victoria.⁴¹

Table 2.7 Overseas-born children by State/Territory⁴²

State/Territory	Number of overseas-born children	Percentage of the total child population in the State or Territory
NSW	134 107	8.3
Victoria	86 938	7.4
Queensland	56 551	6.0
South Australia	18 871	5.1
Western Australia	47 614	9.8
Tasmania	3 145	2.4
Northern Territory	2 644	4.5
ACT	6 722	7.8

2.14 The States and Territories also varied with respect to the ethnic make-up of their child populations, demonstrated by differences in the most common languages spoken at home by children.

Table 2.8 Most common languages (other than English) spoken at home by children, by State/Territory⁴³

	1	2	3	4	5	6
NSW	Lebanese	Chinese	Vietnamese	Serbian, Croatian	Greek	Italian
VIC	Chinese	Greek	Italian	Vietnamese	Serbian, Croatian	Lebanese
QLD	Chinese	Vietnamese	Spanish	Italian	German	Greek
SA	Greek	Italian	Vietnamese	Chinese	Serbian, Croatian	Polish
WA	Chinese	Italian	Vietnamese	Serbian, Croatian	Indonesian	Polish
TAS	Greek	German	Chinese	Spanish	Italian	Lebanese
NT	Greek	Chinese	Indonesian	Vietnamese	Portuguese	German
ACT	Chinese	Serbian, Croatian	Vietnamese	Spanish	Greek	Italian

Rural and urban distributions

2.15 Many more children in Australia live in cities and other urban areas than in rural areas.⁴⁴ The 1991 census showed that almost two thirds of the child population, or 2.7 million children, lived in major urban centres.⁴⁵ A further 24% (1 086 300) lived in other urban areas.⁴⁶ The rest of the child population lived in rural areas, including bounded localities (population clusters of 200-999 people).⁴⁷

2.16 Indigenous people and their children are more likely to be living in rural or remote areas than non-Indigenous people. In 1994, 28% of Indigenous people lived in capital cities and just under 20% lived in rural and remote areas, with 50% living in towns and bounded localities.⁴⁸ There are significant variations in the regional distribution of Indigenous people within the States. For example, in Victoria, almost half (48%) of the Indigenous population was counted in Melbourne in 1994, while in Queensland and Western Australia only 20% and 28% respectively were counted in the capital city.⁴⁹

Family life

Living arrangements

2.17 Most children in Australia live at home with their families and the vast majority of these children live in two parent families. The family and family-related statistics based on the 1996 census had not been released when this Report was drafted. Other statistics show that, in 1996, of the estimated 3.8 million children aged 0 to 14 living in Australia, approximately 87% lived in the 1.7 million families that consisted of a couple with dependent children.⁵⁰

2.18 One parent families made up 19% (467 200) of all families with dependent children in Australia in 1996.⁵¹ Of these one parent families, 87% were headed by the mother and 13% were headed by the father.⁵² Children in lone-mother families tend to be younger than those in lone-father families: in 1996 35.4% of lone mother families had a youngest child aged 0 to 4 while only 14.5% of lone-father families included children in this age group.⁵³

2.19 In 1992, the ABS estimated that there were 87 000 blended families (with both a step child and a natural, adopted or foster child) and 115 900 step families (with a step child but not a natural, adopted or foster child) and that almost 450 000 children were living in these blended or step families.⁵⁴ Many children in Australia live in more than one family type during their childhood.⁵⁵ As children grow older the chance of living with both their natural parents decreases. In 1992, 87% of children aged 0 to 4 years lived with both natural parents compared with 76% of children aged 10 to 14.⁵⁶

2.20 There has been a growing trend in Australia for young people to continue to live with their parents for longer periods. For example, in 1982 approximately 84.2% of all young people aged 15 to 19 lived with a parent. However, this proportion grew to 88.9% in 1992.⁵⁷ Only a small proportion of 15 to 19 year olds lived as partners in a couple (3.2%) or as sole parents (0.7%) in 1992.⁵⁸ Young people from non-English speaking birthplaces are less likely to be living with a parent than the general youth population.⁵⁹

2.21 Family life for Indigenous children is different in several respects from that of non-Indigenous children. In 1991, 62 037 Indigenous families were counted in Australia.⁶⁰ Of these families, 50% were couple families with dependent children (compared to 44% of non-Indigenous families) and almost one quarter were one parent families with dependent children.⁶¹ In 1994, nearly 13% of Indigenous people lived in households shared by two or more families compared with 2% of the non-Indigenous population.⁶² Only 64.1% of Indigenous young people aged 15 to 19 lived with a parent.⁶³ In addition, 6.7% lived as a partner in a couple and 3.8% were sole parents.⁶⁴

Economics and the family

2.22 Children living in low income families are more likely to be from sole parent families, Indigenous families, some families of non-English speaking backgrounds and rural or remote families. For example, in 1996, most children aged 0 to 14 who lived with both their parents lived in families in which one or both parents worked and only 7.9% of all couple families with dependent children in this age group had no employed parent.⁶⁵ However, approximately 44% of all sole parents were not employed in 1996.⁶⁶ Consistent with the lower labour force participation of sole parents, children in one parent families are more likely to live in families with lower incomes than children in couple families. In 1994-95, only 15.6% of couple families with dependent children were in the lowest income quintile compared to 32.1% of sole parent families.⁶⁷

2.23 Indigenous families and some families of non-English speaking backgrounds also have lower than average incomes: in 1992 around 32.2% of all Indigenous couple families with children and 77.4% of all Indigenous sole parent families were in the lowest or second lowest income quintile, compared with 19% and 60.9% respectively for all families.⁶⁸ In 1991, 19% of all children living in families in the lowest income quintile were of non-English speaking back-grounds.⁶⁹ The largest numbers of these children whose parents' birthplace was identified had parents born in Italy, Vietnam and Lebanon.⁷⁰

2.24 Children in rural and remote areas are also more likely to be living in families with lower incomes. In 1992, 26.1% of families living in rural areas were in the lowest income quintile compared to 17.6% of families living in capital cities.⁷¹ Approximately one quarter of rural families received a pension as their main source of income.⁷²

Children's participation in Australian society

Children as consumers

2.25 Children are significant consumers of goods and services in Australia. It is estimated that 10 to 17 year olds represent a possible commercial market of \$3.9 billion a year.⁷³

2.26 In 1995, children aged 10 to 17 were surveyed by AMR Quantum Harris to find out about their purchasing and spending patterns and to collect information about their attitudes, time usage, social behaviour and peer/family relationships.⁷⁴ On average, children in this age group were found to receive approximately \$37 a week in pocket money, from jobs or as gifts.⁷⁵ The survey results regarding average amounts of money spent by children each week are detailed below.

Table 2.9 Average total spending money per week⁷⁶

Age group (years)	Average total (\$)
10-11	12.05
12-13	21.36
14-15	32.78
16-17	80.23

2.27 Children of different age groups spend this money in different ways. A separate study on pocket money for 5 to 12 year olds found that, while the majority of children throughout this age group saved some or all of their pocket money, the next most common uses of pocket money for 5 to 7 year olds were buying lollies and

toys (42% of children in this age group spent money in each of these categories).⁷⁷ For 8 to 10 year olds, the most common uses for pocket money, after savings, were buying lollies (40%), cards (32%) and toys (28%).⁷⁸ For 11 to 12 year olds, the most common uses, after savings, were lollies (50%), snacks (30%), drinks (29%), cards (28%), outings (27%), magazines and ice cream (25% each) and video-games (23%).⁷⁹

2.28 The AMR Quantum Harris survey of 10 to 17 year olds found that most children had a savings bank account (79% of those surveyed) or an account at a credit union (6%).⁸⁰ The Inquiry's own survey of young people confirmed this use of banks. Of 788 respondents, 87% indicated that they had a bank account and 77% of 765 respondents indicated that they possessed a key card for use with a bank account.⁸¹ Many of the 10 to 17 year olds in the AMR Quantum Harris survey indicated that they were saving for specific items such as cars (24% of boys and 17% of girls aged 14 to 17), holidays (9% of boys and 15% of girls aged 14 to 17) and clothes (11% of girls aged 10 to 13 and 10% of girls aged 14 to 17).⁸²

2.29 Children are not significant consumers of credit or credit services. The majority of young people do not have a cheque account or credit card. The Inquiry's survey of young people indicated that, of 716 respondents, 89% did not have a cheque account and the same proportion did not have a credit card.⁸³ A National Youth Affairs Research Scheme (NYARS) study of 1400 young people aged 15 to 25 years found that 60% of those surveyed had never had credit.⁸⁴ This study found that most young people with credit in the 15 to 17 age group were young women with store credit cards.⁸⁵

2.30 Children are avid consumers of media and information services, including the Internet. The AMR Quantum Harris survey found that magazines were read by 68% of boys aged 10 to 13, 75% of girls aged 10 to 13, 86% of boys aged 14 to 17 and 92% of girls aged 14 to 17.⁸⁶ In addition, 64% of 14 to 17 year old boys and 52% of 14 to 17 year old girls were regular newspaper readers.⁸⁷ Another study by Nielsen Media Research found that children aged between 5 and 12 years watch an average of 2 hours 33 minutes of television per day, and that 13 to 17 year olds watch an average of 2 hours 34 minutes.⁸⁸ A national survey on Internet use conducted in 1997 found that approximately 45% of the young people aged 14 to 17 surveyed indicated that they had accessed the Internet in the past, and that 68.5% of the young people who had accessed the Internet had done so in the past month.⁸⁹

Table 2.10 Most popular uses of Internet by young people aged 14 to 17⁹⁰

Internet activity	Male	Female	Total
General 'surfing'	62%	57%	60%
Participating in interactive discussions	34%	40%	37%
Accessing education services	30%	34%	32%
Downloading software/file	31%	19%	24%
Electronic mail	17%	34%	24%
Playing games	28%	16%	23%

2.31 Although children and young people clearly constitute a considerable force in the market place, young consumers (under 25) are less likely to report consumer problems than middle-aged consumers (25 to 44 years).⁹¹ Moreover, young consumers who do report a problem are less likely than older consumers to take any further action.⁹² An analysis of reasons for young people's inaction revealed a higher expectation of failure, particularly among young women.⁹³ However, when action is taken, younger consumers tend to achieve very similar success rates to older consumers.⁹⁴

Children in school

2.32 The 1996 census counted 3 324 470 children attending educational institutions in Australia.⁹⁵ The following table sets out the distribution of these children in various types of educational institutions.

Table 2.11 Type of educational institution attended by children⁹⁶

Type of educational institution	Number attending
Pre-school	258 394

Primary (government)	1 276 198
Primary (Catholic)	332 475
Primary (other non-government)	128 896
Secondary (government)	770 027
Secondary (Catholic)	247 421
Secondary (other non-government)	167 589
Technical or further education	67 718
University or other tertiary	61 545
Other	14 207
Total Attending Schools	3 324 470
Not stated	233 136
Not applicable/not attending	1 278 608

2.33 Of the 2 922 606 children enrolled in primary and secondary schools, 70% (2 046 225) were enrolled in government schools. Of children enrolled in non-government schools 66.2% (579 896) were in Catholic schools.⁹⁷

2.34 School retention rates indicate the proportion of students who complete various levels of education. In 1995, 83% of all school students remained at school until Year 11 and 72% remained until Year 12.⁹⁸ The Year 12 retention rates vary by State and Territory, ranging from 42.7% in the Northern Territory to 91.1% in the ACT.⁹⁹ School retention rates also vary by socio-economic status. For example, in 1994, the Year 12 retention rate for students from families with a high socio-economic status was 79% compared to 65% for students from families with a low socio-economic status.¹⁰⁰

2.35 On the whole, Indigenous children and young people are less likely to be attending an educational institution than non-Indigenous children and young people. The latest statistics available showed that only 44% of Indigenous young people aged 12 to 25 years were attending educational institutions in 1991 compared with 52% of all 12 to 25 year olds.¹⁰¹ That same year, 55% of Indigenous 12 to 25 year olds who were attending an educational institution were attending a secondary school.¹⁰² Of Indigenous children attending school most were attending government schools. In 1991, 89% of Indigenous children attending school were attending a government school.¹⁰³

2.36 Indigenous young people are more likely to leave school at a younger age than non-Indigenous young people.¹⁰⁴ In 1991, one third of Indigenous young people aged 12 to 25 had left school at 15 years or younger, compared to 15% of all young people aged 12 to 25 years.¹⁰⁵ In 1994, only 31% of Indigenous 17 year olds and 6% of Indigenous 18 year olds were attending school.¹⁰⁶

2.37 Children and young people from non-English speaking birthplaces appear to fare relatively well in education in comparison with the broader Australian population. In 1991, 60% of young people aged 12 to 25 from non-English-speaking birthplaces were attending educational institutions, with half of these at secondary schools.¹⁰⁷ Approximately, 36% of children from families headed by parent/s born in non-English speaking countries were attending a non-government school in 1991.¹⁰⁸ Young people from non-English speaking backgrounds were less likely to leave school early, with only 7% leaving school at 15 years or younger compared to 15% of the total population.¹⁰⁹

2.38 Children living in rural and remote areas are less likely than city children to complete Year 12. In 1994, Year 12 completion rates for rural and remote students were 64% and 58% respectively, compared to 71% for urban students.¹¹⁰

2.39 In 1992, 1.8% of all Australian students were identified as having a disability.¹¹¹ Of these, approximately 29% were enrolled in special schools, 26% in special classes or units attached to primary and secondary schools and 44% in mainstream primary and secondary classes.¹¹² Most students with disabilities (83%) were enrolled in government schools. Of the remainder, 13% were enrolled in Catholic schools and 4% in other independent schools.¹¹³ Students with disabilities constituted 2.1% and 1.1% of all schools enrolments in the government and non-government sectors respectively.¹¹⁴

2.40 Young people with a handicap or disability are up to 38 times more likely to have a low educational level.¹¹⁵ In 1993, 82% of children with disabilities experienced schooling limitations.¹¹⁶ The most frequently reported limitation related to difficulties experienced at school (80%), which included fitting-in socially or at sport, and hearing and sight problems.¹¹⁷

Children in employment

2.41 In 1995, 59.3% of all 15 to 19 year olds in Australia were considered to be in the labour force.¹¹⁸ Of these young people, 32.2 % were working full time and 47% were in part-time employment.¹¹⁹ These rates have changed significantly over the past 20 years. In 1975, although 58.7% of all 15 to 19 year olds were employed that year, the large majority (73.7%) were working full time.¹²⁰ This change can be attributed to the increasing number of young people remaining in full-time education at later ages.¹²¹ These young people are less able to work full-time and more likely to work either part-time or not at all. In June 1996, 30.8% of students attending school full-time were also working.¹²²

Table 2.12 Most common occupations of 15 to 19 year-olds (1995)¹²³

Occupation	% of total employed youth aged 15-19
Salesperson/personal service worker	43.2
Labourer or labour-related worker	27.8
Tradesperson	14.6
Clerk	8.7
Plant and machine operator etc	2.5
Para-professional	1.5
Professional	1.2
Manager/administrator	0.4
Total employed youth	586 600

2.42 In 1995, the main industry employing young people was wholesale and retail trade (34.4%%), followed by recreation, personal and other services (13.6%), manufacturing (13%), finance, property and business services (10.9%) and community services (10.7%).¹²⁴ The average weekly earnings for young people aged 15 to 19 was \$300 for those who were employed full-time.¹²⁵ Part-time employment provided 15 to 19 year olds with an average income of \$95 per week.¹²⁶

2.43 Indigenous young people are slightly less likely to be employed than the general youth population. Approximately 55% of all Indigenous 15 to 19 year olds were in the labour force in 1994.¹²⁷ Indigenous young people living in capital cities (36%) or in rural area (35%) were more likely to be employed than those in other urban centres (25%).¹²⁸

2.44 Children from non-English speaking backgrounds also do less well in employment than the general population. In 1991, about one in three (32.3%) teenagers from non-English speaking backgrounds were unemployed, though unemployment was experienced by 23.1% of all 15 to 19 year olds in the work force.¹²⁹ In 1991 almost half (49.1%) the total population of 15 to 19 year olds and 54.8% of Indigenous teenagers were not in the labour force.¹³⁰ In comparison, 74.1% of teenagers from non-English speaking backgrounds were not in the labour force.¹³¹

Children's involvement in legal processes at school

Introduction

2.45 Often the first occasion for children to become involved with or to appear to be at risk of involvement with legal processes arises at school.¹³² This involvement or risk of involvement may be evidenced by a failure to attend school. Children may not attend school for a number of reasons. They may truant on certain days or leave school altogether before completing their education.¹³³ They may face barriers to attending school, such as cost, need to work or inadequate facilities.¹³⁴ They may be suspended or excluded from

participating in education due to their misbehaviour in school. Children in the last category, those suspended or excluded from school, are formally involved in the education system's legal process.

Truancy

2.46 School attendance data across Australia generally are poor. Available data indicate that truancy rates may vary from 8% to 19% between States and Territories.¹³⁵ In NSW approximately 11 000 students are estimated to truant from school on any given day.¹³⁶

Disciplinary actions: suspension and exclusion from school

2.47 Data relating to suspensions, exclusions and expulsions in Australian schools also are limited, although some States have made an effort to collect such data.¹³⁷ For example, in NSW there were a total of 29 478 suspensions and 276 exclusions of public school students in 1995.¹³⁸ The number of suspensions constituted an increase of 17% over 1994,¹³⁹ which in turn was a 50% increase from 1993.¹⁴⁰ Boys in Years 7 to 9 accounted for over 40% of all suspensions yet constituted only about 10% of government school students in NSW.¹⁴¹ Overall, boys made up 80% of secondary and 90% of primary school suspensions.¹⁴² Indigenous students were also over-represented: they accounted for 12% of all suspensions despite forming only 3% of the student population.¹⁴³

2.48 In Western Australia, 12 662 suspension notices were handed out and 55 students were expelled from State schools in the 18 months from January 1996 to June 1997, with boys constituting the majority (80%) of children suspended.¹⁴⁴ In the Northern Territory, 1 164 students were suspended between 1992 and 1994.¹⁴⁵ In 1994, 1 137 students of compulsory school age were suspended in Tasmania.¹⁴⁶ In Queensland, from 200 to 1000 students are suspended each month.¹⁴⁷ In 1994, of 872 students suspended with a recommendation for exclusion in Queensland, nearly half were subsequently excluded.¹⁴⁸

Children and government services

Introduction

2.49 Children may be the direct beneficiaries of many services offered by the government. In particular, student recipients of income support and children who are unemployed or homeless are often extensively involved in the legal processes surrounding application for and receipt of government assistance.

Unemployment and income support

2.50 In 1995-96, the full-time unemployment rate for young people aged 15 to 19 grew to 28.1%.¹⁴⁹ This is the highest rate of unemployment for any age group in Australia.

2.51 On 30 June 1996, there were approximately 34 200 young people receiving the Youth Training Allowance (YTA), the main income support benefit for unemployed young people under the age of 18, and an additional 2 000 young people under 18 continued to receive benefits under the Job Search Allowance.¹⁵⁰ In May 1996, unemployment benefits paid to young people under 18 represented 4% of all unemployment payments made by the Department of Social Security (DSS).¹⁵¹

2.52 Young students also receive income support through educational assistance programs such as Austudy or Abstudy. In some cases, this assistance is paid directly to the student, such as when the student qualifies for the independent rates of these programs. In 1995-96, the Austudy program assisted 204 900 secondary school students.¹⁵² Approximately 26 283 primary and secondary students benefited from Abstudy in 1994-95.¹⁵³ Up to April 1997, Student Assistance Centres had processed student recipients of Austudy and Abstudy for 1997 in the proportions indicated in the following table.

Table 2.13 Number of Austudy and Abstudy beneficiaries processed by Student Assistance Centres by age, January to April 1997¹⁵⁴

Program	under 16 years old	16 years old	17 years old
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Austudy			
Secondary	23 952	62 203	31 089
Tertiary/other	577	2 822	17 484
Abstudy			
School	3 914	2 579	1 095
Tertiary/other	157	311	630

2.53 Another income support measure received by children and young people is the Special Benefit, the benefit of last resort for people who have no other means of support and who do not qualify for other income support measures.¹⁵⁵ In May 1996, there were 900 young people aged under 18 receiving the Special Benefit.¹⁵⁶

Homelessness and assisted accommodation

2.54 The extent of homelessness in Australia has been a contentious issue for many years. It is very difficult to estimate the number of homeless children in Australia. However, most statistics indicate a significant increase in youth homelessness since 1991.¹⁵⁷ Following a census of Australian secondary schools Mackenzie and Chamberlain estimated that in May 1994 there were 21 000 homeless young people aged 12 to 18 living in Australia.¹⁵⁸ Many homeless young people have significant dealings with legal processes, particularly those processes associated with income support and housing assistance.

2.55 Statistics from DSS and the Department of Employment, Education, Training and Youth Affairs (DEETYA) help paint a picture of Australia's homeless children and the extent to which they are involved in legal processes. According to DSS, on 14 June 1996 there were 9 306 young people under the age of 18 who were receiving payments at the homeless rate from various income support programs.¹⁵⁹ Around 6% of these recipients were identified as Indigenous young people and another 6% were identified as young people of non-English speaking backgrounds¹⁶⁰ In addition, from January to June 1996, it was estimated that 6 001 students under the age of 18 were receiving Austudy or Abstudy at the student homeless rate.¹⁶¹ Estimates of students receiving these benefits at the homeless rate in 1997 is presented below.

Table 2.14 Number of Austudy and Abstudy beneficiaries at homeless rates processed by Student Assistance Centres by age, January to April 1997¹⁶²

Program	under 16 years old	16 years old	17 years old
Austudy	814	1 927	2 374
Abstudy	66	131	109
Total	880	2 058	2 483

2.56 Another indication of homelessness or risk of homelessness among young people and children and the extent to which these young people may be involved in legal processes is the number of young people assisted by supported accommodation assistance programs (SAAP) across Australia. Young people aged 15 to 19 constitute the largest age group of SAAP clients: approximately 20% of all SAAP clients are young people in this age group.¹⁶³ From July to December 1996, housing and accommodation assistance was required in 230 cases where the client was under age 15 (72.1% of all cases in this age group) and in 5 591 cases where the client was aged 15 to 19 (79.1% of all cases in this age group).¹⁶⁴ Other assistance provided by SAAP to young people in these age groups were general support and advocacy (65.2% of cases with a client under 15 years old and 69.5% of cases with a client aged 15 to 19) and financial or employment assistance (21.3% and 36.5% respectively).¹⁶⁵

2.57 Across Australia, 11.5% of all SAAP cases with a young person as a client involved Indigenous young people and 6.3% involved young people from non-English speaking backgrounds.¹⁶⁶ Other statistics also indicate that Indigenous young people may be over-represented among homeless children. In 1992, over half of the street children in Perth were estimated to be Aboriginal — some as young as 8 or 9 years of age.¹⁶⁷ In Adelaide, one outreach service reported that on a weekend night 70% of young people without accommodation were Aboriginal.¹⁶⁸

Children's involvement in care and protection systems

Introduction

2.58 Children involved in care and protection systems may have some of the most extensive dealings with legal processes. These processes include the investigation of suspected abuse and neglect, involvement in courts and continued dealings with various aspects of the system after the court processes are finished.

Reporting and investigation of child abuse and neglect

2.59 For the purposes of national data collection, an abused or neglected child is defined as a child who has been, is being or is likely to be subject to sexual, emotional or physical actions or inactions that resulted in or are likely to result in significant harm or injury to the child. The person believed to be responsible for the action/inaction must be someone with responsibility for caring for the child, such as a parent or guardian.¹⁶⁹ The States and Territories have primary responsibility for the investigation of suspected cases of child abuse and neglect and are responsible for taking appropriate action in these cases. There are significant differences in legislation, terminology, procedures and processes among the States and Territories.¹⁷⁰

2.60 During 1995-96, 91 734 cases of suspected child abuse and neglect, involving 71 766 individual children, were reported to State and Territory welfare departments.¹⁷¹ 67 816 (74%) of these notifications were investigated, 12 649 (14%) were dealt with by other means and 11 269 (12%) were not investigated at all.¹⁷² Of the cases of child abuse and neglect investigated, 61 383 (91%) were finalised during 1995-96 and 29 833 (49%) of these were substantiated.¹⁷³ These substantiated cases involved 25 558 children.¹⁷⁴ A further 1 748 children (2 372 cases) were allocated to the 'child at risk' category in those jurisdictions that have this category.¹⁷⁵ The rates at which children are subject to notification, investigation and substantiation vary considerably between States and Territories.

Table 2.15 1995-96 rates at which children aged 0 to 16 were subject to notification, investigation and substantiation by State/Territory, per 1000 children in the relevant population¹⁷⁶

State/Territory	Notifications	Finalised investigations	Substantiations
NSW	15.8	13.8	8.1
Victoria	22.0	11.9	6.0
Queensland	14.4	10.4	4.0
Western Australia	7.2	5.3	2.2
South Australia	18.0	14.4	6.0
Tasmania	18.6	8.9	1.8
ACT	14.9	11.1	4.9
Northern Territory	8.7	8.4	4.4
Australia	16.3	11.6	5.8

2.61 As the above table shows, in 1995-96 Victoria and Tasmania had the highest proportion of children subject to notification while the Northern Territory and Western Australia had the lowest. The substantiation rate was highest for children in NSW and the lowest for Tasmanian children. This variation may be explained to some extent by mandatory reporting requirements or differing policies about what constitutes an investigation or a substantiation.¹⁷⁷

2.62 Further analysis of the overall substantiation rate figures reveals that the highest numbers of substantiated reports of abuse or neglect involved children under the age of 1 (2 355), followed by those involving children aged 14 and 13 (2 270 and 2 144 respectively).¹⁷⁸ Of all substantiated reports, 53% or 15 811 substantiated cases concerned girls.¹⁷⁹

2.63 Indigenous children are over-represented in all stages of reporting and investigation of suspected child abuse and neglect across Australia. Rates of substantiation for Indigenous children vary widely between States and Territories.

Table 2.16 1995-96 rates at which Indigenous and non-Indigenous children aged 0 to 16 were subject to notification, investigation and substantiation by State/Territory, per 1000 children in the relevant population¹⁸⁰

State/Territory	Notifications		Finalised investigations		Substantiations	
	Indigenous	Other	Indigenous	Other	Indigenous	Other
NSW	55.1	14.8	48.3	12.9	30.1	7.5
Victoria	89.9	21.4	61.1	11.5	32.0	5.8
Queensland	42.4	13.1	34.2	9.3	15.1	3.5
Western Australia	27.5	6.2	21.9	4.5	9.3	1.8
South Australia	61.8	16.9	51.0	13.5	24.7	5.6
Tasmania	27.1	18.3	11.6	8.8	2.6	1.8
ACT	104.5	13.9	84.7	10.3	47.6	4.4
Northern Territory	10.0	7.9	9.8	7.6	5.6	3.6
Australia	42.3	15.5	34.4	10.9	18.0	5.4

2.64 As the above table shows, 42.3 out of every 1000 Indigenous children in Australia were involved in notifications of suspected child abuse and neglect and 18 out of every 1000 Indigenous children were involved in substantiated abuse and neglect cases. By comparison, only 5.4 out of every 1000 non-Indigenous children were subjects of substantiated reports. The ACT and Victoria had the highest substantiation rates for Indigenous children, while Tasmania and the Northern Territory had the lowest.

Children under care and protection orders

2.65 Once child abuse or neglect has been substantiated, the welfare department has a number of options, including bringing the matter to court and seeking a care and protection order.¹⁸¹ Only a small proportion of children in substantiated cases become subjects of care and protection orders. In 1995-96, of the more than 25 500 children subjects of substantiated abuse and neglect allegations in Australia, 4 123 were placed on new care and protection orders.¹⁸²

2.66 On 30 June 1996, there were 13 241 children under care and protection orders in Australia,¹⁸³ with around 10 500 children in supported alternative care placements, such as foster care or residential care, as the result of a care and protection order.¹⁸⁴ Children can also be placed in alternative care voluntarily. Overall there were 13 979 children in supported alternative care placements on 30 June 1996 and during the 1995-96 year around 20 000 children were in at least one such placement.¹⁸⁵

2.67 Most children placed in alternative care are placed in a home-based setting. On 30 June 1996, 12 162 children (87% of all children in supported alternative care placements) were in a home-based setting and 1 817 (13%) were in a facility setting.¹⁸⁶ Of the children in home-based settings, 6 500 (54%) were in foster homes and 294 (2%) were in group homes, with the rest most likely placed with their own extended families.¹⁸⁷

2.68 Indigenous children are substantially over-represented in care and protection placements. Although only two out of every 1000 non-Indigenous children in Australia were in a supported alternative care placement on 30 June 1996, approximately 20 out of every 1000 Indigenous children were in such a placement.¹⁸⁸ Overall, 19% of all children in alternative placements were Indigenous even though Indigenous children constituted only 3.5% of Australia's child population.¹⁸⁹

Children's representation in care and protection proceedings

2.69 Children whose care and protection matters are brought to court may or may not actually participate in the court's processes. One indication of the number of children who participate and are heard in this process is the number of children who are actually represented by a legal practitioner in these proceedings. While not all jurisdictions require that children in this situation will be legally represented, and while not all children's legal representatives act on the instructions of their child clients (or even meet with them, in some jurisdictions), statistics provided by the Legal Aid Commissions in many jurisdictions regarding their representation of children in care and protection proceedings provides an indication of the number of children who may be involved in this care and protection litigation process.

Table 2.17 Grants of legal aid to children for care and protection proceedings, 1996-97¹⁹⁰

State/Territory	Total number of grants	Comments
Western Australia	72	70 of these matters were handled by in-house legal practitioners
Tasmania	not available	Anecdotal evidence suggests that only a very small percentage of children are represented. Legal Aid grants are mostly for parents in these proceedings.
South Australia	329	82.7% of these matters were handled by in-house legal practitioners and 17.3% by private practitioners. Representation was offered to all children subject to care and protection proceedings and was declined in only 2 instances by young people aged 16.
ACT	219	60% of these matters were handled by in-house legal practitioners and 40% by private practitioners. These grants represent 100% of children subject to care and protection proceedings in the ACT.
Queensland	1	There is no automatic right to representation in these matters, so Legal Aid only becomes involved at the request of a party
Victoria	1 452	57.4% of these matters were handled by in-house legal practitioners and 42.6% by private practitioners
Northern Territory	2	The Department for Health and Community Services provides the 'child representative' in care and protection matters. Therefore it is unusual for legal aid grants to be made for these purposes.

Children and the Family Court

2.70 About 1% of children can expect to have their parents divorce for each year of life: that is, about 5% of 5 year olds, 10% of 10 year olds and 15% of 15 year olds.¹⁹¹ In 1993, the last year for which information is available on children's involvement in divorce, there were 48 363 divorces granted by the Family Court.¹⁹² Approximately 25 461 (52.6%) of these involved 48 106 children.¹⁹³ Roughly 10 of every 1000 children aged under 18 were involved in a divorce in 1993.¹⁹⁴ The proportion of divorces involving children varies between States and Territories. In 1994-95, NSW had the lowest proportion (50.6%) of divorces involving children, and Tasmania the highest (61.7%).¹⁹⁵

2.71 Based on the Inquiry's research, including reviews of the Family Court of Australia's Annual Reports and of other statistics reported by the Family Court to the Inquiry, it seems that a large number of these children are involved in Family Court proceedings. However, as court statistics are mostly kept for the purpose of management, they do not always present the whole picture of children's participation in family law matters.

2.72 In 1995-96, of the 67 557 files opened in the Family Court, 12 595 (18.6%) were cases where orders for guardianship or custody of children were being sought, and in a further 13 814 cases (20.4%) orders were being sought relating to access.¹⁹⁶ Only 748 cases (1%) concerned applications for child maintenance.¹⁹⁷ Most cases in the Family Court involving children's issues are resolved without the need for a hearing: only 3 644 contested cases were finalised by Family Courts during 1995-96, of which 1 496 cases involved guardianship or custody issues and 1 568 concerned access and 216 concerned child maintenance.¹⁹⁸ Of the 3 354 cases resolved through conciliation conferences in 1995-96,¹⁹⁹ 1 286 involved issues relating solely to children and 782 concerned issues relating to both children and financial matters.²⁰⁰

2.73 Whether a matter involving children's issues is contested or settled, children themselves are not necessarily involved in the Family Court's legal processes. However, many of these trials and settlement procedures do in fact include children as participants. Children's views are often heard in Family Court proceedings through Family Reports. From 1 July 1995 to 30 April 1996, 2 858 Family Reports were ordered by the Family Court of Australia.²⁰¹ During 1995-96, Family Court counsellors opened 1 529 'interventions' and conducted 6 573 interviews in preparing Family Reports.²⁰² Another indication of the extent of children's involvement in contested and non-contested Family Court proceedings is the number of orders made for the appointment of a child's representative. From 1 July 1995 to 30 April 1996, 4 528 orders were made by the Family Court of Australia that a child be separately represented.²⁰³ This was 290 more than in the entire 1994-95 year.²⁰⁴ Overall, the number of representatives ordered in Family Law proceedings has been on the increase for a number of years. Statistics provided by legal aid commissions in many jurisdictions regarding their funding of representatives for children in Family Court proceedings provides an indication of the number of children who participate in this process.

Table 2.18 Grants of legal aid to children for separate representation in family law proceedings, 1996-97²⁰⁵

State/Territory	Total number of grants	Comments
Western Australia	160	40.0% of these matters were handled by in-house legal practitioners and 60.0% by private practitioners
Tasmania	86	no comments
South Australia	399	56.1% of these matters were handled by in-house legal practitioners and 43.9% by private practitioners
ACT	82	36.6 of these matters were handled by in-house legal practitioners and 63.4 by private practitioners
Queensland	509	44.2% of these matters were handled by in-house legal practitioners and 55.8% by private practitioners
Victoria	1 486	17.6% of these matters were handled by in-house legal practitioners and 82.4% by private practitioners
Northern Territory	26	no comments

2.74 A large number of family law matters are heard not in the Family Court of Australia but in State and Territory magistrates' courts. Children may be involved in these matters as well. Most States and Territories do not keep statistics regarding the number of family law matters that are handled in their magistrates courts. Victorian figures give a limited indication of the extent of children's involvement in these matters. In 1995-96, a total of 3 975 family law matters were disposed of by the Victorian Magistrates' Court.²⁰⁶

Juvenile justice systems

Introduction

2.75 The Australian Institute of Criminology (AIC) has identified a number of deficits in the collection of statistics on juvenile offenders by some States and Territories. In particular, basic information on the numbers of arrests by age and gender is not available in all Australian jurisdictions and comparison between

jurisdictions is made difficult by varying definitions, laws and mechanisms for identifying and processing children in the juvenile justice system.²⁰⁷

2.76 The Inquiry also had considerable difficulty gathering statistics that present a national picture of children's involvement in juvenile justice processes. The statistics presented in this section are drawn mostly from compilations by the AIC. Where possible this information is supplemented by statistics from different annual reports or other documents prepared by various State and Territory children's courts,²⁰⁸ DPPs, family services departments, and crime research bodies, including statistics provided specifically to the Inquiry by these agencies. All statistics should be interpreted with caution, however, in consideration of the different collection techniques, laws and legal definitions.

Involvement with police

2.77 Children's first contact with the formal juvenile justice system often occurs when they are arrested, summonsed or have other contact with police as a person suspected or accused of a crime. Most States and Territories provide some, although differently defined, statistics on children's involvement at this entry point into the juvenile justice system.²⁰⁹ Differing definitions of 'police involvement' mean that these statistics do not accurately represent the numbers of children actually involved with police due to juvenile crime allegations. The figures are not strictly comparable across jurisdictions although they can provide an indication of the numbers of children involved with police.

2.78 In Victoria, in 1995-96, 20 137 children aged 10 to 16 were 'processed' by police as offenders in property crimes and 1 947 were 'processed' as offenders in violent crimes.²¹⁰ In Queensland approximately 13 422 children aged 10 to 16 were 'associated with cleared property crimes' in 1995-96 and 1 371 were 'associated with cleared violent crimes'.²¹¹ South Australia included only those children 'recorded' by police in its police involvement statistics. In 1995-96, 6 632 children aged 10 to 17 were recorded in property offences and 1 148 were recorded in violent offences.²¹² Western Australia included in its police involvement statistics all children aged 10 to 17 who were arrested, summonsed and cautioned. In 1995-96, 11 355 children were dealt with in these ways for property crimes and 1 141 children were dealt with for violent crimes.²¹³ In the Northern Territory, the numbers of children aged 10 to 16 'arrested' by police in 1995-96 were 1 124 for property crimes and 138 for violent crimes.²¹⁴ In the ACT, police involvement was reported as 'arrest details'. In 1995-96, 409 children aged 8 to 17 were recorded in 'arrest details' for property crimes and 132 were recorded for violent crimes.²¹⁵

2.79 Statistics regarding children's involvement with the Australian Federal Police (AFP) were provided to the Inquiry for 1994-95: 30 alleged offenders were identified as juveniles in 'AFP incidents' that year.²¹⁶

Diversionsary processes

2.80 Children's involvement with police may not be limited to investigation, formal summons or arrest. Many children's involvement with police results in a police caution rather than further involvement in the juvenile justice system. Cautioning schemes can be informal and at the discretion of individual police, or formal and connected with formal diversionsary processes. The number of informal cautions or warnings issued to children is very hard to estimate because the nature of the caution or warning might mean that no record is kept of the encounter between the child and the police. Some jurisdictions are beginning to keep statistics about the numbers of informal and/or formal cautions issued, along with statistics about other diversionsary schemes such as family group conferencing.²¹⁷ Again, the variations in these schemes make it difficult to compare statistics documenting diversionsary outcomes for children and not all jurisdictions keep such statistics.

2.81 Queensland counted 15 681 cautions issued to children in accordance with formal cautioning procedures in 1995-96.²¹⁸ In South Australia, out of 14 138 cases recorded by police as involving suspected juvenile offenders in 1995-96, approximately 3 161 were dealt with by way of informal police caution, 2 511 by a formal police caution and 1 180 by referral to a family conference.²¹⁹ Western Australian police issued 8 268 cautions to 7 021 children in 1995.²²⁰ There are no data regarding children's participation in diversionsary programs in Victoria, although it is estimated that approximately 9 000 children receive police cautions annually.²²¹ Of the 30 children dealt with by the AFP in 1994-95, only 12 were arrested or summonsed.²²²

2.82 Routine data comparing the cultural backgrounds or ethnicity of young people given informal or formal cautions are often unavailable. However, the available evidence shows that Indigenous children do not benefit from cautions to the same extent as non-Indigenous children. A study of 14 987 cautions issued in Western Australia between August 1991 and December 1994 showed that only one third of all Indigenous children formally processed by police received a caution compared to two thirds of all non-Indigenous children. These Indigenous children received only 12.3% of all cautions issued despite making up about 69% of all charges.²²³ In Victoria, Indigenous children were significantly less likely to receive a police caution than non-Indigenous children in 1995-96 (11.3% compared to 35.6%).²²⁴ In South Australia, only 17% of Indigenous youth matters ended with a police caution compared to 36% of non-Indigenous youth matters and Indigenous children accounted for only 6% of all cautions.²²⁵ In the absence of concrete data from other jurisdictions, anecdotal evidence indicates that this pattern is repeated for Indigenous children throughout Australia.²²⁶

2.83 Evidence regarding family group conferencing diversionary schemes also indicates that Indigenous children are not proportionally represented in these systems. For example, in South Australia only 11% of referrals by police to diversionary conferences involve Indigenous children, although they constitute 17% of all referrals to court.²²⁷ In addition, 36% of the Indigenous children involved with South Australian police are referred to court without the benefit of either conferences or cautions, compared to only 19% of non-Indigenous children.²²⁸

Initiating court processes

2.84 When police decide to bring a child to court, they can proceed by way of arrest or court attendance notice. The rate at which police use these mechanisms differs in each jurisdiction. For example in Queensland and NSW, approximately two thirds of all children brought before children's courts are brought by way of arrest and only one third are brought by way of summons.²²⁹ In contrast, in South Australia only 25% of children before the courts had been arrested in 1994-95.²³⁰

2.85 Indigenous children are more likely to be arrested than summonsed when they are formally processed by police. In Western Australia, for example, Indigenous people of all ages were less likely to be summonsed (12.7% compared to 27.5% for non-Indigenous people).²³¹ In South Australia, although only 25% of all children before the courts had been arrested, this figure was 41% for Indigenous children.²³² In the Northern Territory, Indigenous children comprised 70% of all children arrested and only 53% of all children summonsed.²³³ In addition, in its national survey of youth in police custody, the AIC found that Indigenous and non-Indigenous children were held in police custody at different rates.

Table 2.19 Number and percentage of children aged 10 to 17 held in police custody as at August 1995, by State/Territory²³⁴

State/Territory	Indigenous children		Non-Indigenous children		Total	
	No	%	No	%	No	%
NSW	108	36	192	64	300	100
Vic	16	7	209	93	225	100
Qld	176	42	245	58	421	100
WA	228	61	146	39	374	100
SA	123	39	196	61	319	100
Tas	3	9	31	91	34	100
NT	45	69	20	31	65	100
ACT	5	33	10	67	15	100
Australia	704	40	1 049	60	1 753	100

2.86 These figures show that Indigenous children are 26 times more likely to be held in police custody than non-Indigenous children.²³⁵ This indicates that these children may have been arrested in far greater numbers than non-Indigenous children, as arrest and subsequent bail determination is generally the only way in which a young person alleged to have committed a crime can be held in police custody.²³⁶

Court involvement

2.87 Most jurisdictions keep some statistics on the numbers of criminal matters heard in children's courts. As children may be charged with more than one offence in a single case, many jurisdictions keep statistics regarding the 'most serious offence charged' for each case, rather than the total number of charges. However, this does not present an accurate picture of the numbers of children and young people who are formally involved with juvenile justice systems at the court level. In particular, many juvenile justice matters are heard by magistrates sitting as children's courts rather than a specialist children's court, and most jurisdictions exclude these matters from their statistics. In addition, some children's matters are heard in district courts or a Supreme Court, and these too are often excluded from published data. Again, because of differing definitions, legal schemes and laws across jurisdictions, statistics regarding children's involvement with courts should be viewed and compared with caution.

2.88 **Commonwealth.** In the federal jurisdiction, 21 children were prosecuted in children's courts by the Commonwealth DPP on 45 separate charges during 1994-95.²³⁷ Five children pleaded not guilty to one or more of the charges against them, and were tried on the issue. Of the remaining children, two had their pleas taken *ex parte* (most likely because they did not appear) and the charges against them proved, one had the case against him or her withdrawn and a warrant issued and the remaining 14 pleaded guilty to one or more of the charges against them.²³⁸

2.89 **Queensland.** Queensland keeps statistics on the numbers of children involved in criminal proceedings in all its courts. In 1995-96, 6 694 juvenile defendants were charged with 16 413 offences in Queensland courts.²³⁹ Of the 16 413 separate charges the most common were theft, breaking and entering (8 499 charges), 'other' offences such as drug possession and use, drunkenness, offensive behaviour and trespassing (2 996 charges), assaults (1 559 charges), property damage (1 470 charges) and driving, traffic and related offences (1 243 charges).²⁴⁰

Table 2.20 Number of children involved in criminal cases dealt with by Queensland courts²⁴¹

Outcome	Magistrates' courts	Children's Court of Queensland	District and Supreme Courts
Discharged	1 111 (20%)	17 (5.6%)	141 (16.6%)
Convicted of at least one offence ¹	4 430 (80%)	288 (94.4%)	707 (83.4%)
Total finalised ²	5 541	305	848

1. whether the children involved in any of these courts were convicted after guilty pleas or trial was not reported
2. an additional 1 092 children were committed by magistrates courts to higher courts for sentencing or trial

2.90 Queensland also provided unpublished statistics regarding individual characteristics of young people appearing before its courts for 1994-95. Of the 3 652 individual children who appeared before courts from 1 July 1994 to 30 June 1995, 892 (24%) were identified as Indigenous and 55 (1.5%) were identified as having a non-English speaking background.²⁴² In addition, 1 097 individual children (30%) were identified as having their usual place of residence in a rural or remote area.²⁴³ In 1995-96, approximately 83.7% of the children involved in the courts were male. Approximately 22.9% of the children were aged 15, 34.5% were 16 and 20% were 17 or older.²⁴⁴

2.91 Queensland Legal Aid provided some statistics regarding the number of children represented in criminal proceedings. In 1996-97, 2 268 criminal law grants of aid were made to children aged less than 17 years old. Approximately 45% of these matters were handled by in-house legal practitioners and 55% by private practitioners. Most of the 82 applications for legal aid that were refused failed on merit grounds, for example where the applicant was involved in summary proceedings in the magistrate's court with a fine or community service order the most likely outcome.²⁴⁵

2.92 **NSW.** NSW keeps statistics on the numbers of criminal cases handled by children's courts and magistrates' courts sitting as children's courts, certain characteristics of the alleged juvenile offenders, the types of offences and the outcomes for these matters. In 1995-96, there were a total of 14 759 criminal cases

handled by the children's courts in NSW, 12 210 involving boys and 2 549 involving girls.²⁴⁶ The most serious offence charged in these cases was most commonly a theft offence (charged in 45.4% of all cases) followed by 'violent' offences (24.5%).²⁴⁷

Table 2.21 Number of criminal cases involving children handled by NSW children's courts²⁴⁸

Outcome	Number of cases
Discharged/dismissed ¹	5 097 (34.5%)
Other ²	9 662 (65.5%)
Total finalised	14 759

1. includes charges withdrawn or not proved as well as those in which the case was dismissed after the charges were proved
2. includes those outcomes involving a sentence, as well as 22 committals to higher courts.

2.93 In 10 570 cases (71.6%) the outcome was reached after a guilty plea by the child.²⁴⁹ The New South Wales children's court database does not report on the results of cases committed to higher courts or the numbers of children actually involved in criminal matters before those courts. It also does not identify the cultural or ethnic background of the children appearing in the court.²⁵⁰ NSW Legal Aid did not supply information to the Inquiry on the numbers of children represented in these proceedings.

2.94 **Victoria.** The last year for which statistics are available regarding the number of children involved in the children's court as alleged offenders is 1995. In that year, 5 932 boys and 1 209 girls were charged with offences in the children's court.²⁵¹ Approximately 36% of all children charged were aged 16, 23% were aged 17 and 22% were aged 15.²⁵²

Table 2.22 Number of children involved in criminal cases dealt with by Victorian children's courts²⁵³

Outcome	Number of children
Dismissed, withdrawn or struck out	622 (9.7%)
Convicted of at least one offence	6 519 (91.3%)
Total finalised	7 141

2.95 Approximately 6 702 children had at least one charge proved against them (although some of these children subsequently had their case dismissed without a conviction) and the 'most serious proved offence' in these cases was most often a property offence, such as theft, burglary and property damage (47% of all proved offences) followed by offences against good order, such as violations of traffic or public transportation regulations, drug or alcohol offences and disorderly conduct (44%). Only 9% of cases had an offence against the person, such as sexual offences and assaults, as the most serious proved offence.²⁵⁴

2.96 In 1996-97, Victorian Legal Aid provided 8 939 duty lawyer services in the children's court and funded an unspecified number of duty lawyer services by private practitioners in rural areas when magistrates' courts sat as children's courts. It also granted additional funding for representation in 3 772 criminal matters where the applicant was a child.²⁵⁵

2.97 **Western Australia.** 4 156 individual children were dealt with by Western Australian children's courts during 1995, the latest year for which statistics are available.²⁵⁶ Overall, children before the children's court were charged with a total of 16 232 offences, an average of 3.9 offences for each child.²⁵⁷ The most serious offence charged against children in both the children's courts and the Children's (Suspended Proceedings) Panel²⁵⁸ was most often break and enter (charged in 1 880 cases), followed by driving and motor vehicle offences (usually driving without a licence or under suspension — 1 179 cases), offences against the person (685), good order offences (516), drug offences (mostly use or possession — 303 cases) and damage offences (189).²⁵⁹ The large majority of children appearing in the children's court were boys (76.5%) and 15.8% were Indigenous children.²⁶⁰

Table 2.23 Number of children involved in criminal cases dealt with by Western Australian children's courts²⁶¹

Outcome	Number of children
Dismissed or referred to Children's (Suspended Proceedings) Panel	1 343 (32.3%)
Convicted of at least one offence ¹	2 813 (67.7%)
Total finalised	4 156

1. whether these children were convicted after guilty pleas or trial was not reported.

2.98 Legal Aid of Western Australia reported that it funded 640 requests for representation by children in criminal matters in 1996-97, 600 of which were handled in-house. An additional 2 184 grants were made for the provision of duty lawyer services by private practitioners.²⁶²

2.99 *South Australia*. There were 3 856 finalised appearances before South Australian children's courts in 1995-96.²⁶³

Table 2.24 Number of criminal cases involving children handled by South Australian children's courts²⁶⁴

Outcome	Number of cases
Acquitted	586 (15%)
Convicted of at least one offence ¹	3 270 (85%)
Total finalised	3 856

1. whether these children were convicted after guilty pleas or trial was not reported.

The outcomes for the 3 270 proved cases were 'proved but not convicted' (49.1% of all proved cases) or 'proved and convicted' (50.1%). The most serious offences proved in cases where at least one offence was proved included offences against good order (511 cases), driving offences (500 cases), 'other' larceny (368 cases), burglary, break and enter (363 cases) and larceny or illegal use of a motor vehicle (321 cases).²⁶⁵

2.100 The great majority of children involved in 'proved' cases were boys (85.6% of all proved cases) and most were aged 17 (38.4%), 16 (27.3%) or 15 (15.9%).²⁶⁶ More than 13% of all proved cases involved Indigenous children. In addition, the younger the child the more likely it was that the child was Indigenous: for example, 25% of 14 year olds, 27% of 13 year olds, 31% of 12 year olds and 50% of 11 year olds in proved cases were Indigenous children.²⁶⁷

2.101 In 1996-97, approximately 1 517 grants of legal aid were made to children for representation in criminal matters, 936 of which were handled in-house. Children were also assisted by a duty solicitor on 1 508 occasions in the same year. These services provide some manner of legal representation to an estimated 85-90% of all children appearing in the children's court.²⁶⁸

2.102 *Tasmania*. In Tasmania, 2 096 charges were laid against juveniles in 1995-96, although it is unclear whether this figure corresponds to the total number of charges or the total number of children charged.²⁶⁹ The Tasmanian Legal Aid Commission reported that, in 1996-97, 478 grants of legal aid were made to children for representation in criminal matters. This number is said to represent a very small proportion of all young people with criminal matters before the courts.²⁷⁰

2.103 *ACT*. During the 1996 calendar year, 538 children appeared before the ACT children's court, 77% of whom were boys and 23% girls.²⁷¹ The outcomes of these cases were not reported. The large majority of the children (80%) were aged 16-18 and 8% were Indigenous children. The most common offences charged were theft (123 children charged), public order/good order offences (105 children charged), acts intending to cause injury (80 children charged) and burglary (67 children charged).²⁷² Children also appeared in the ACT's higher courts. From January 1993 to August 1996 there were 21 matters in the Supreme Court's criminal jurisdiction where the accused was a child.²⁷³

2.104 In 1996-97, the ACT Legal Aid Office represented 274 children in criminal matters and granted an additional 155 applications for funding of representation by private practitioners. It also provided all duty lawyer services for bail applications and mentions. It estimates that its services provided representation for approximately 80-90% of all children charged in the children's court.²⁷⁴

2.105 **Northern Territory.** In 1995-96 there were 1 124 cases initiated in magistrates' courts sitting as a children's court.²⁷⁵ In 1996-97, the Northern Territory Legal Aid Commission granted funding for 314 juvenile justice matters. In addition, 262 duty lawyer services were provided during that year. All juvenile justice matters handled by legal aid were handled in-house.²⁷⁶ The percentage of children who are unrepresented when involved in juvenile justice matters in the Northern Territory is unknown.²⁷⁷

Sentencing

2.106 Sentences in most jurisdictions can include fines, community service, probation and other supervision and detention. A child with more than one proved offence in any given case could receive more than one penalty or sentence in most jurisdiction. Some jurisdictions therefore report the 'most serious penalty' rather than the total number of penalties given in any one case when reporting sentencing statistics.

2.107 **Queensland.** The most serious outcomes for the 4 430 children convicted of at least one offence in magistrates' courts included no penalty (1 170 cases), probation (895), good behaviour orders (755), community service orders (736), fines (426) and detention (206).²⁷⁸ The most serious outcomes for the 288 children convicted of at least one offence in the Children's Court of Queensland included probation (87), followed by community service orders (79), detention (63), no penalty (21), and good behaviour orders (23).²⁷⁹ For the 707 children convicted of at least one offence in higher courts the most serious outcomes included probation (254), community service orders (241), detention (158) and good behaviour orders (32).²⁸⁰

2.108 On 30 June 1996, the Department of Families, Youth and Community Care was supervising 1 582 children on juvenile justice orders, including 506 community service orders, 110 detention orders, 53 immediate release orders, 23 fixed release orders, 1 309 orders of probation and 6 'other' orders.²⁸¹

2.109 **NSW.** In 1995-96, the most serious outcomes for the 9 662 matters not otherwise dismissed by NSW children's courts included recognisances without supervision (2 108), fines (2 200), supervised probation (1 119), detention (1 018), community service orders (922), recognisances with supervision (678), unsupervised probation (656), fines with recognisances (5) and 956 other 'proved' outcome orders (including committal to higher court, disqualification from driving, drug programs, and compensation).²⁸²

2.110 **Victoria.** In 1995, the most serious outcome for the 6 702 children who had at least one charge proved against them in Victoria's children's courts were most commonly: fines (2 239), good behaviour bonds (1 799), dismissals with an undertaking (1 042), probation (780), youth supervision orders (343), dismissals without any penalty or conviction (255), detention in a Youth Training Centre (149), youth attendance orders (83) and detention in a Youth Residential Centre (12).²⁸³

2.111 In 1995-96, children's courts made 119 sentences of detention to be served in Youth Training Centres and 15 sentences to be served in Youth Residential Centres. Adult courts made 343 orders of detention to be served in Youth Training Centres.²⁸⁴ In addition, new admissions to juvenile justice services that year (that is, children sentenced to these services) included 268 children sentenced to Youth Training Centres, 12 children sentenced to Youth Residential Centres, 723 children on probation, 85 children on youth attendance orders, 133 children on parole and 307 children on youth supervision orders.²⁸⁵

2.112 On 30 June 1996 in Victoria, there were 110 children and young people in Youth Training Centres, 5 in Youth Residential Centres, 623 on probation, 63 on youth attendance orders, 47 on parole and 219 on youth supervision orders.²⁸⁶

2.113 **Western Australia.** In its latest statistics, those for 1995, Western Australia reported the sentencing outcomes both for children convicted by the children's court and those referred to Children's (Suspended Proceedings) Panels. These proceedings together handled a total of 2 447 children.²⁸⁷ The most common outcome was dismissal (2 107 children), which included referral by a court to the Juvenile Justice Team,

admission to the offence before the children's panel and court orders of dismissal or dismissal subject to parental scrutiny or administered punishment.²⁸⁸ All other penalties imposed by the children's court were most commonly non-custodial penalties such as probation, community service orders, good behaviour bonds and suspended sentences (1 173), 'other' penalties such as suspension of licence, compensation and restitution (278), detention (243) and fines (234).²⁸⁹

2.114 **South Australia.** The 4 445 penalties for the 3 270 cases in which at least one charge was proved in 1995-96 included 1 332 fines, 545 orders of detention or suspended detention, 497 licence disqualifications, 480 community service orders, 478 orders of 'obligations', 380 discharges without penalty and 371 orders for compensation.²⁹⁰

2.115 **Tasmania.** There were 267 children subject to supervision and other orders in 1995-96.²⁹¹

2.116 **ACT.** Approximately 44% of the 538 children who appeared in the children's court in 1995-96 were subsequently referred to the Youth Justice Service under court orders requiring supervision.²⁹² The supervision orders issued included 78 orders requiring attendance at an attendance centre (equivalent to an order of community service), 135 orders of probation with supervision and 23 orders of committal (detention).²⁹³

Children in detention

2.117 Children may be held in custody in juvenile detention centres because they are on remand or because they are sentenced to detention on conviction of an offence.²⁹⁴ On 30 June 1996, the AIC counted 782 children aged 10 to 17 in juvenile detention centres Australia-wide.²⁹⁵ These figures under-report the actual number of children in detention on that date, as they do not include children being held in police custody, any children in adult detention centres or prisons and children who are being held in facilities not identified as 'detention' centres.

Table 2.25 Number of children aged 10 to 17 in juvenile detention centres, on 30 June 1996²⁹⁶

Age	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aust
10-11	0	0	0	1	0	0	0	0	1
12	5	0	0	0	1	1	0	0	7
13	11	1	6	2	5	3	0	0	28
14	29	6	17	6	6	5	2	0	71
15	75	13	38	19	14	10	1	1	171
16	93	16	52	43	21	4	9	1	239
17	127	34	24	35	36	3	1	5	265
Total	340	70	137	106	83	26	13	7	782

2.118 The majority of these children (62.2%) appear to have been sentenced to detention rather than remanded.²⁹⁷ Boys are over-represented in these detention statistics, with 94% of all young people in juvenile detention centres being male.²⁹⁸ Indigenous children are also over-represented in juvenile detention centres in every jurisdiction. On 30 June 1996, Indigenous children were 21.3 times more likely to be in detention centres than non-Indigenous children Australia-wide, with the over-representation ratio as high as 41.1 in Queensland and 31.6 in Western Australia.²⁹⁹

2.119 Some jurisdictions provide additional statistics that are not reported on a national basis. For example, NSW reported that there were 456 people in its juvenile detention centres in June 1996 (it included young people over the age of 17 in these statistics).³⁰⁰ The cultural backgrounds of these children were recorded as Indigenous in 29% of cases and non-English speaking background in 26%.³⁰¹

2.120 In Tasmania and Victoria, most children in detention centres during 1995-96 appear to have been on remand rather than detention orders. There were 179 new admissions that year to Ashley Youth Detention Centre in Tasmania, 71% of which were on remand.³⁰² In Victoria, new admissions to juvenile justice services during 1995-96 included 268 children sentenced to Youth Training Centres compared to 397

children on remand in these facilities, and 12 children sentenced to Youth Residential Centres compared to 197 on remand in these facilities.³⁰³

2.121 South Australia reported that, of the 1 522 children admitted to its two 'secure care' juvenile detention facilities during 1995-96, 21% were identified as Indigenous.³⁰⁴ Only 212 of the admissions were based on detention orders, while 437 children were on remand, 229 were returned on first instance warrants, 434 were on police custody and 202 were on default warrants.³⁰⁵

Children as witnesses, applicants and participants in State and Territory legal processes

Children as witnesses

2.122 There are no national statistics on the number of children who appear as witnesses in legal proceedings. These statistics are rarely kept by individual courts and tribunals or by other relevant government agencies. The Inquiry conducted extensive research and requested information on child witnesses from courts, tribunals, DPPs, Legal Aid Commissions, welfare departments and other agencies that may have access to this information to develop a picture of child witnesses in Australia. While the results of this research do not provide a comprehensive account of the numbers of children involved in legal processes as witnesses, they can give an indication of the extent of children's involvement.

2.123 **Queensland.** In Queensland, children rarely give evidence before the Supreme Court in criminal or civil proceedings.³⁰⁶ However, between 1 February 1994 and 1 January 1997, 1 216 children gave evidence in criminal proceedings involving sexual assault charges, presumably in district or magistrates' courts.³⁰⁷ These figures do not include criminal matters involving other offences, civil proceedings or care and protection proceedings,³⁰⁸ and therefore the total number of child witnesses in Queensland is probably much higher.

2.124 **NSW.** In NSW, police received reports regarding 2 143 alleged victims of child sexual assault in 1995. A total of 501 alleged offenders were charged in court with respect to offences against 630 child victims.³⁰⁹ Of the alleged offenders, 94 pleaded guilty in the magistrates' court and 407 were committed for trial.³¹⁰ As 62 alleged offenders were 'no billed' before trial, and 153 pleaded guilty at arraignment or sometime before trial, there were 190 trials for child sexual assault in NSW in 1995.³¹¹ The victims of child sexual assault were likely to have given evidence in these trials, resulting in 111 acquittals and 79 convictions.³¹²

2.125 The Child Witness Unit, a section of the DPP Sydney regional office, handled 31 matters at the committal stage during 1995-96, 20 of which were committed for trial and four committed for sentencing.³¹³

2.126 **Victoria.** Victorian courts and agencies do not keep statistics on child witnesses. Again, it seems that children rarely appear as witnesses before the Supreme Court³¹⁴ but often appear as witnesses in lower courts. In 1995-96 the Witness Assistance Service of the Victorian Office of Public Prosecutions assisted witnesses in approximately 73 matters that involved allegations of child sexual assault.³¹⁵

2.127 Data from the Video and Audio Taped Evidence Project for the recording of evidence in chief of child victims and mentally impaired witnesses also gives some indication of the numbers of child witnesses in Victoria. From 1 January to 30 November 1995, 383 statements were taken in video format by the police, 66 of which were transcribed for presentation in magistrates' courts at trials and committals, in the care and protection and criminal divisions of the children's court, the Family Court and the Crimes Compensation Tribunal.³¹⁶ The legislation requires that children whose evidence in chief is given by video-taped interview in criminal proceedings be available for cross-examination in court. Children involved in this project therefore may have appeared in courts as witnesses.³¹⁷ This project is now in the second year of State-wide implementation.

2.128 It is not the practice in Victoria for children to give evidence in care and protection proceedings. Evidence relating to the child and any statements the child may have made is usually related by a child welfare worker and other professionals.³¹⁸

2.129 **Western Australia.** From 1 January 1996 to 14 November 1996, 64 children gave evidence through closed circuit television (CCTV), by using screens or by prior video-taping for later presentation in criminal trials in Western Australian district courts and the Supreme Court and in preliminary hearings.³¹⁹ This number under-reports the actual number of child witnesses in Western Australian courts.³²⁰ Children rarely give evidence in Western Australian care and protection proceedings, perhaps as few as 2 or 3 children a year, although statistics are not kept on this aspect of care and protection proceedings.³²¹

2.130 The Western Australian Child Victim Witness Service has been preparing and supporting child witnesses (most of whom give evidence in criminal trials) since July 1995. Its operations provide an additional indication of the number of child witnesses in Western Australia. In the past two years, it has received a total of 363 referrals for assistance to child witnesses. On 14 August 1997 it had a current caseload of 216 children.³²²

2.131 **South Australia.** A recent survey examining the incidence of sexual assault in South Australia found that in 1994-95 the majority of sexual assault victims were children or young people. Of all sexual assault victims reported to the police 716 (37.1%) were 14 or younger and a further 407 (21.1%) were aged 15-19.³²³ Some of these reported crimes were processed in the courts. In the 1994 calendar year, there were 60 cases in South Australian district courts and the Supreme Court in which unlawful sexual intercourse (a crime in which children 16 years old and under are, by definition, the complainants) was listed as the main charge.³²⁴ Of these 18 cases went to trial and the child victims were likely to have given evidence at the trials.³²⁵ That same year, there were another 35 cases in district courts and the Supreme Court involving charges of indecent assault of a victim who was 16 or younger, 11 of which went to trial.³²⁶ There are no data showing how many children appeared as witnesses in other criminal cases.

2.132 In South Australia's care and protection jurisdiction, again children rarely give evidence. In some complex cases, a videotape of the police officers or welfare department worker's interview with a child may be presented but children are not subject to cross-examination in these cases.³²⁷

2.133 **Tasmania.** Although children in the South and North West of Tasmania rarely appear or give evidence in care and protection proceedings, in the Launceston area children aged 12 and over give oral evidence in approximately 20% of care and protection cases.³²⁸ In addition, affidavit evidence of children aged 12 and over is presented in 50% of care and protection cases in Launceston and children may often be cross-examined on the contents of the affidavit.³²⁹ Videotaping interviews with children under the age of 12 is also common in Launceston and these videotapes are presented as the child's evidence in approximately 25% of care and protection cases.³³⁰ No Tasmanian statistics were available regarding children who appear as witnesses in other civil and criminal jurisdictions. However, it was reported that of the 1 153 victims assisted by the Victims of Crime, Response and Referral Services in 1995-96, approximately 5% (58) were children aged 17 and under.³³¹

2.134 **ACT.** According to the ACT DPP, during 1995-96 42 children aged 16 or under were potential witnesses in respect of 42 charges of sexual assault on a juvenile and 71 charges of acts of indecency with a juvenile.³³² It was again rare for children to give evidence in the Supreme Court.³³³ The ACT Supreme Court's CCTV facilities for child witnesses were used only 3 times from August 1995 to August 1996.³³⁴ The ACT children's court, opened in 1996, also has CCTV facilities which, as of May 1997, had not been used in care and protection matters but had been used by children giving evidence in an unknown number of criminal matters relating to adults.³³⁵

2.135 **Northern Territory.** In the Northern Territory, no child gave evidence in the Supreme Court's civil registries over the past 4 years.³³⁶ The Supreme Court's CCTV facilities, available for children and other vulnerable witnesses who give evidence in criminal proceedings, are used approximately 5 or 6 times per year.³³⁷ Some magistrates' courts also have CCTV facilities but no information is available about their use in this jurisdiction.³³⁸

Children as applicants and other participants

2.136 Children participate in State and Territory legal processes as applicants or in other ways, mostly in actions for compensation, damages or other civil remedies. Again, statistics are rare and the Inquiry's

research provides an indicative picture rather than a comprehensive account of child applicants or other participants.

2.137 In 1991-92, the Civil Justice Research Centre of NSW conducted a survey of NSW Supreme Court Common Law Division files to determine a profile of the court users, patterns regarding the settlement of civil actions and plaintiff satisfaction with the court system. Of the 775 matters where information was provided on the age of the plaintiff, there were 30 (3.9%) in which the plaintiff was under the age of 18.³³⁹

2.138 Legal Aid Commissions in many jurisdictions provided the Inquiry with information on the number of grants of legal aid to children for civil matters in 1996-97.

Table 2.26 Grants of legal aid to children for civil matters, 1996-97³⁴⁰

State/Territory	Total number of grants	Comments
Western Australia	12	no comments
Tasmania	52	50% of these cases concerned claims for damages for personal injury or criminal injury compensation
South Australia	1	case involved a discrimination claim
ACT	11	all cases concerned personal protection (apprehended violence orders), as criminal injuries compensation claims are mostly handled by private practitioners
Queensland	117	52 of these cases involved criminal injuries compensation, with the rest including domestic violence, anti-discrimination and consumer protection matters
Northern Territory	an estimated 10% of all civil matters funded	grants were generally made to the child's litigation guardian and included claims for personal injury and crime compensation, professional negligence matters, probate/intestacy or testator family maintenance actions and contract (consumer) disputes

2.139 Most State and Territory Supreme Courts estimated for the Inquiry the numbers of civil actions commenced by guardians *ad litem* or next friends, who conduct litigation on behalf of child litigants in civil matters. However, guardians *ad litem* and next friends can also be appointed for people other than children in certain circumstances, so the data should be evaluated cautiously.³⁴¹

2.140 The Brisbane registry of the Supreme Court of Queensland reported that between 1 January 1996 and 30 June 1996 an estimated 24 cases were filed in which a next friend was a party.³⁴² In the ACT Supreme Court, 8 matters were brought by a next friend in the civil jurisdiction from 1 January 1996 to 1 August 1996.³⁴³ The Supreme Court of the Northern Territory searched the registers for the past four years and found 4 matters in which a guardian *ad litem* had been appointed for minors.³⁴⁴

2.141 As Table 2.26 has shown, children are often involved in criminal injuries compensation proceedings as applicants or the subjects of applications for compensation. For example, from 1 January 1993 to 1 August 1996, there were 70 applications by or on behalf of children to ACT magistrates' courts and the Supreme Court for criminal injuries compensation.³⁴⁵ In 1995-96, the Victorian Crimes Compensation Tribunal made 1 943 awards of compensation to victims who were aged 0-18.³⁴⁶ Information from other jurisdictions was not available.

2.142 Another area of State and Territory civil jurisdiction involving children is adoptions. Here the child's views may be an important aspect of the proceedings. In 1995-96, there were 668 children adopted in Australia, most of whom (74%) were adopted by non-relatives.³⁴⁷ Of the 177 children adopted by relatives, 72% were between the ages of 5 and 14, and almost all (167) were adopted by a step-parent.³⁴⁸ The 491 children who were adopted by non-relatives in 1995-96 tended to be younger than those adopted by relatives. Of the 217 Australian-born children adopted by non-relatives only 33% were aged 5 or older and of the 274 overseas-born children adopted by non-relatives only 20% were aged 5 or older.³⁴⁹

2.143 In Victoria, children may make applications to the children's court in respect of 'irretrievable breakdown' with their parents or carers.³⁵⁰ There were no such applications in 1995-96,³⁵¹ one during each of 1994 and 1993 and four in 1992.³⁵² Children may also make applications for apprehended violence orders in some States and Territories. The Inquiry was unable to find any statistics on the number of children who initiate such proceedings other than those already mentioned in Table 2.26.

Children as witnesses, applicants and participants in federal legal processes

2.144 Children are involved in federal legal processes in relation to income support benefits, immigration and other federal government services, particularly where services or visas are denied or revoked. The Inquiry researched annual reports and requested information on child witnesses, applicants and other participants from federal courts and tribunals, the Commonwealth DPP and the AFP to ascertain the extent to which children were involved in federal courts and tribunals. The results, although not providing a complete picture of the numbers of children involved in the federal jurisdiction, can give an indication of the extent of this involvement.

2.145 The Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT) conducted informal surveys of their members at the Inquiry's request to ascertain the numbers of child applicants, children the subjects of applications and child witnesses who appeared in these forums.

2.146 The IRT's informal surveys indicated that in the first 3 months of 1997, 41 children were involved in 32 separate cases before the Tribunal.³⁵³ Most of these children were children of applicants or secondary applicants rather than primary visa or review applicants.³⁵⁴ The IRT member questionnaires also disclosed that four children gave oral evidence in two of these cases.³⁵⁵ One case concerned a 14 year old whose visa was cancelled along with those of his parents; the second case involved three children aged 13, 15 and 17, all of whom gave evidence in relation to their 'special need relative' application.³⁵⁶

2.147 A large number of children were primary applicants for review of a decision to cancel or refuse to grant a protective visa. From July 1993 to December 1996, 51 children lodged applications for review in the RRT.³⁵⁷ There was an oral hearing in 25 of these cases.³⁵⁸ A further 1 554 applications for review in that period listed children as a secondary applicant.³⁵⁹ In all, 42 children were represented by legal aid or migration agents in cases before the RRT.³⁶⁰ The RRT's informal survey of its members found that approximately 52 children had appeared as witnesses before 16 members of the Tribunal from July 1993 to December 1996.³⁶¹

2.148 In 1995-96, young people lodged 103 appeals in the Social Security Appeals Tribunal (SSAT) regarding decisions made about the YTA and 20 appeals regarding the now discontinued Young Homeless Allowance.³⁶² The SSAT estimated that approximately 30 of these young people were represented in their appeals by a legal or community assistance agency.³⁶³ A further 2 418 appeals were lodged regarding Austudy benefits and 16 were lodged regarding Abstudy, although these numbers were not broken down into applications by school students, tertiary students or parents.³⁶⁴ The SSAT estimates that approximately 200 children are represented by their parents in relation to Austudy appeals.³⁶⁵ Appeals were also lodged in the SSAT regarding the Special Benefit, the Child Disability Allowance and other payments that may involve or benefit children, although a breakdown regarding the age of the applicants was not available. The SSAT has a policy that face-to-face hearings are to be held wherever possible. In approximately 89% of all cases in 1995-96 the applicant, including child applicants, appeared before and took an active part in the proceedings.³⁶⁶ The SSAT rarely has witnesses in the formal sense and only three children were noted to have such appearances in 1996.³⁶⁷

2.149 The Administrative Appeals Tribunal (AAT) hears appeals from the SSAT in cases involving YTA, Austudy and other government benefits received by young people. Decisions regarding certain migration and refugee applications may also be reviewed by the AAT. However, the appellate nature of the AAT's jurisdiction means that few children are personally involved in that tribunal as witnesses.³⁶⁸ In addition, the 1 336 decisions appealed to the AAT from the SSAT in 1995-96 were not broken down into the types of benefits or ages of applicants involved,³⁶⁹ nor were the 145 appeals of migration and refugee decisions.³⁷⁰

2.150 Given the nature of the Federal Court's jurisdiction, children are unlikely to be applicants or give evidence in civil matters in that court. Matters concerning children that do come before the Federal Court are likely to be appeals or reviews of administrative matters. The RRT identified 6 children who, from July 1993 to December 1996, were primary applicants before the RRT and whose cases were appealed to the Federal Court.³⁷¹ The IRT, although noting 87 appeals to the Federal Court in 1995-96, did not indicate the number of cases in which the applicant was a child.³⁷² Statistics could not be found on other children's matters that may come before the Federal Court.

2.151 The Family Court of Australia handles many civil matters involving children. However, although a child may apply for many types of orders,³⁷³ no statistics were available regarding the number of child applicants and such applications. The general consensus is the direct participation of children as witnesses in family proceedings is discouraged by the court.³⁷⁴ As a result, child witnesses rarely appear in the Family Court.

2.152 No statistics could be found on children involved in the federal criminal jurisdiction, other than children charged by the Commonwealth DPP.³⁷⁵ Some children may appear as witnesses in federal criminal proceedings, for example as witnesses to the importation of illicit drugs or welfare fraud or as victims of sexual assault under the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth). In the only known proceedings under that Act, two Cambodian boys gave evidence for the prosecution in a committal hearing.³⁷⁶

Children's participation in complaints processes

2.153 Many complaints bodies in Australia investigate and handle complaints on federal, State and Territory issues. Statistics on children's participation in these processes are limited. Those available show that children are rarely complainants.³⁷⁷

2.154 The Commonwealth Ombudsman handles complaints about federal agencies' actions or inactions, including agencies with significant contact with children such as DSS, DEETYA, the Department of Immigration and Multicultural Affairs (DIMA) and the AFP.³⁷⁸ There are no general statistics on child complainants. A 'small but significant' number of complaints to the Ombudsman in 1995-96 nonetheless concerned children who applied for homeless rates of DSS or DEETYA payments and the protocols between the Commonwealth and the State and Territory welfare departments regarding these applications.³⁷⁹ In appointing special liaison officers for youth, the Ombudsman has sought to engender an appropriate child focus and to provide better avenues for children to make complaints.³⁸⁰

2.155 In Queensland, the *Children's Commissioner and Children's Services Appeals Tribunal Act 1996* (Qld) established a complaints body and appeals process for children's services, including services provided by the Department of Family Services, Youth and Community Care. Complaints about these services had previously been, and continue to be within the jurisdiction of the Queensland Ombudsman.³⁸¹ In 1995-96, the Ombudsman received 102 complaints about the Department of Family Services, Youth and Community Care, 67 about the Department of Education and 126 about police. Although the complainants were not identified by age or interest in the matter, 'typical' complaints were noted to be from parents or foster carers on behalf of children, with some also from 'students'.³⁸²

2.156 The Office of the NSW Ombudsman informed the Inquiry that in 1996-97, it received 380 complaints and enquiries from 'juveniles'. Approximately 47% of these concerned the police and 53% concerned other government departments.³⁸³ The Community Services Commission handles complaints about the provision of community services, including care and protection services, in New South Wales. Most complaints to the Commission regarding children concern protection and substitute care services.³⁸⁴ Children made up a very small percentage of those making complaints. In 1995-96, 2% of all complainants were under the age of 24 and 40% of all complaints on behalf of or concerning children were made by adults.³⁸⁵

2.157 The Victorian Ombudsman handles complaints on issues affecting children, such as care and protection, schools and police. In 1995-96, the 113 complaints concerning 'education' included some from students or their parents concerning tuition and examination results.³⁸⁶ Of 71 complaints on care and protection issues, most if not all were from parents or groups representing parents.³⁸⁷ An audit of the

Victorian care and protection system found that, although many people who complained to the Department of Human Services and external agencies about the department's care and protection services purported to represent children's interests, no complaints or appeals were from children directly.³⁸⁸

2.158 According to the Western Australian Parliamentary Commissioner for Administrative Investigations (the Western Australian Ombudsman) children rarely initiate complaints to his office.³⁸⁹ Complaints concerning government's actions or inactions in relation to individual children are generally made by parents, relatives and others. A number of these complaints concern care and protection services. However, only nine of the 130 complaints made since 1990 in this area were made by the subject child and even then the complaints were not made until after these children had reached adulthood.³⁹⁰ One complaint was received from a 12 year old child in 1995-96, regarding a Family Court custody order.³⁹¹ In 1995-96 the Ombudsman also received 49 complaints from parents and other adults regarding children's education, usually about discipline matters in schools, and 23 of the 1 528 complaints about police concerned the treatment of children by police officers.³⁹²

2.159 In 1995-96, the South Australian Ombudsman received 65 complaints about the Department for Education and Children's Services, approximately 35 of which could be identified as being about children or issues surrounding children's treatment by schools.³⁹³ It is unclear whether any of these were from the children themselves.³⁹⁴ There were 79 complaints about the Department of Family and Community Services, most of which concerned children's care or safety, access by parents or family members or the handling of cases by the department.³⁹⁵ Again, it is not reported whether any of these complaints came directly from children.³⁹⁶

2.160 In Tasmania, the agency most often the subject of complaints to the Ombudsman was the Department of Community and Health Services, the agency that handles care and protection services. Of the 240 complaints about the department, approximately 23 could be identified as being about the department's care and protection services in 1995-96.³⁹⁷ A further 15 of the 41 complaints about the Department of Education, Community and Cultural Development could be identified as being about the treatment of children in schools.³⁹⁸ Few, if any, of these complaints seemed to originate from children.³⁹⁹

2.161 The Northern Territory Ombudsman recorded at least one complaint made by a child. Several years ago the Ombudsman's Alice Springs office handled a complaint from a 12 year old school boy, their youngest complainant to date.⁴⁰⁰ The 33 complaints regarding the Territory Health Services, responsible for care and protection of children, the 30 complaints about the Department of Education and the 249 complaints about the Northern Territory Police made in 1995-96 did not note the age of the complainants.⁴⁰¹

2.162 The various anti-discrimination bodies throughout Australia also receive a small number of complaints from young people. For example, the Anti-Discrimination Board of New South Wales received 293 complaints about discriminatory practices based on age in 1995-96.⁴⁰² These were not classified by age but some of these complaints were from young people.⁴⁰³

2.163 Many federal, State and Territory consumer protection regimes involve tribunals or small claims courts. No statistics were available regarding the numbers of children in these legal processes. Until 31 December 1996, people complaining about false, misleading or inappropriate advertising could complain to the Advertising Standards Council. This body received an estimated two to three complaints each year identifiably from children.⁴⁰⁴ Most complaints in the consumer protection area are received from adults about advertisements or products directed at children.⁴⁰⁵

3. Children, families and the state

Introduction

3.1 Chapter 1 set out the fundamental assumptions upon which this Report is based. The first of these was that the state and the family are jointly responsible for fostering the development of children. Families have the primary responsibility for preparing children for adulthood, as the '...pre-eminent source of tutelage and control [by which] children are honed, socialized and protected while they develop into adults'.⁴⁰⁶ The state assists families in this effort and intervenes in certain families to assume direct responsibility for abused or neglected children or to give particular assistance to families that need additional support. Chapter 2 provided a detailed statistical picture of those children involved in legal processes, often due to this direct or indirect state interaction with their families. In this chapter, we analyse further the working assumption of joint family-state responsibility for children and the mechanisms by which the state interacts with families for the benefit of children, as well as Australia's current obligations and undertakings in this regard.

Childhood

3.2 Childhood is not only a legal concept — a period of limited legal capacity while a person is under the age of 18 — but also a social concept. The characteristics that constitute childhood and differentiate children from adults are significantly influenced by political and ideological perspectives, economic conditions, social, and particularly family, relations and assumptions about what constitutes experience and knowledge.⁴⁰⁷ Childhood refers to the place and condition of children in society and encompasses notions of how society views a child's maturation and development and responds to age differences.

3.3 In contemporary western societies, childhood is taken by some to be a time of innocence, during which children are in need of protection and are not fully self-reliant.⁴⁰⁸ This representation of childhood has produced laws that make parents responsible for caring for and protecting their children and justifies state intervention in families when children are being neglected or abused. Western societies also view childhood as a period of irresponsibility, during which children are in need of firm, often coercive control. This image has justified corporal punishment of children and, increasingly, laws that control or prevent children from gathering in places where it is considered they may be susceptible to adverse influences.⁴⁰⁹

3.4 These co-existing though contradictory views are manifest in contemporary Australia. Both views of childhood are reflected in legislation and practice affecting children. Where appropriate, this Inquiry questions these underlying assumptions in examining and making recommendations concerning law and legal processes.

The family and the state

3.5 The stability of the state requires that children be brought up to take their place as autonomous members of their communities. The state assists families in meeting this responsibility for children, intervening for the protection or control of children when the family is not meeting or cannot meet this responsibility to the standards set by the state.

3.6 There are a variety of theories about how the family and the state ought to relate with respect to children.⁴¹⁰ One perspective has the state taking a minimal role in caring for children, intervening only in extreme cases for the protection or correction of children. It is argued that this minimal level of intervention is necessary to respect the privacy and the sanctity of the parent-child relationship.⁴¹¹ Critics of this approach argue that the 'extreme cases' concept where intervention is permitted is too narrow, excluding categories such as 'risk of abuse' and emotional harm in which a child can suffer as much damage as in a case of physical abuse.⁴¹² They also argue that the wishes of children are neglected in this approach as children's interests are assumed to coincide with those of their parents.⁴¹³

3.7 At the other end of the spectrum, advocates for strong state intervention in family life seek to ensure that all children are provided with a right to caring adults who meet their needs.⁴¹⁴ In this model, the state makes the decisions as to whom those adults should be.⁴¹⁵ While the focus of this model is the child rather than the

adults in the family, this model of intervention may overlook the strength of bonds between parent and child, even when the parent may be considered unsatisfactory. It also places too much faith in the value of state intervention, assuming that the agents of the state, such as social workers and judges, are capable of making sound and appropriate judgments that provide better outcomes for children.⁴¹⁶

3.8 A third perspective on the role of the state in family life sees the main function of state intervention as maintaining the biological family wherever possible, or at the least maintaining the links between the family and child should separation be necessary.⁴¹⁷ State intervention is reserved for responding to problems within families, attempting to redress these so that the child can remain at home or at least in close contact with the family.⁴¹⁸ Critics argue that this view may place too much emphasis on biological ties and that it does not differentiate between the interests, feelings and welfare of children and those of parents.⁴¹⁹

3.9 Each of these models of state intervention in family life is utilised to some extent in Australian family law, care and protection legislation, juvenile justice legislation, income support regulations and other legal processes and regulations that govern childhood and families. Each perspective envisions some kind of interaction between the state and the family. The point of this interaction is the legal process.

The rights of children in family-state interactions

3.10 This Inquiry does not propose to promote one philosophy of state intervention in families over any other philosophy. CROC itself seeks to balance the competing claims, views and interests, and recognises the child's right to care and protection, the position of the family as the primary social unit and the obligations of the state towards both parents and children. However, it is important to consider how children should be involved when the state does intervene in family life, purportedly for the benefit or control of these children. CROC provides children with a right that is fundamental: the right to express their views freely and to have those views given due weight in accordance with the age and maturity of the child.⁴²⁰ In proceedings to separate a child from his or her parents, the child has the right to participate and be heard in the processes that make up this intervention.⁴²¹ This is not a new concept in Australia. Australia's ratification of CROC coincided with an increasing recognition of children's developing right to self-determination. This concept has been incorporated into Australian law through the decisions in *Marion's case*,⁴²² *H v W*⁴²³ and other cases.

3.11 Participation can mean different things in different circumstances. Exactly what the participation of children involves in the context of various legal processes is a focus of this Report. Chapter 4 sets out an overview of the Inquiry's findings regarding the problems that children face in their attempts to participate in legal processes.

Political responsibilities for children — international obligations

Introduction

3.12 The federal Government signs, ratifies and implements international instruments.⁴²⁴ It is responsible to the national and international communities for meeting the obligations embodied in those instruments it ratifies.⁴²⁵ The Commonwealth generally depends on the States and Territories to implement international treaties where the obligations are within their areas of responsibility.⁴²⁶

3.13 Australia has ratified a number of human rights treaties that contain general provisions concerning children and their rights.⁴²⁷ Australia is also committed to particular international children's rights instruments covering guardianship, foster placement and adoption,⁴²⁸ child abduction,⁴²⁹ discrimination in education,⁴³⁰ minimum employment age⁴³¹ and the employment of children in night work.⁴³² In addition, Australia is committed to two instruments concerning juvenile justice and related issues.⁴³³

3.14 However, the most comprehensive statement of Australian policy regarding children's interests is our ratification of CROC. CROC is broadly conceived, encompassing civil, political, economic, social and cultural rights for children as well as provisions regarding their care and protection. It also recognises their evolving rights to participate in legal and administrative processes. CROC was ratified by Australia on 17 December 1991.⁴³⁴

Obligations under CROC

3.15 CROC recognises that children, as members of the human family, have certain inalienable, fundamental human rights. It emphatically endorses the proposition that the family is the fundamental environment for the growth and well-being of children and states that, for the wellbeing of society, the family should be afforded protection and assistance so as to fully assume its responsibilities. At the same time, it recognises that children need special safeguards and care where the family does not or cannot assume these roles.⁴³⁵

3.16 A number of CROC provisions are particularly relevant to this Inquiry. Article 3 requires that the best interests of the child must be a primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Article 12 requires States Parties to

(1)...assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, whether directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of the national law.

These articles provide base guidelines for children's interactions with legal processes.

3.17 CROC obliges States Parties to ensure that their laws are consistent with its treaty provisions;⁴³⁶ to set and monitor the operating standards of particular institutions dealing with children;⁴³⁷ and to encourage the dissemination of appropriate and beneficial information to children.⁴³⁸ CROC also obliges States Parties to promote children's development and assist their engagement with legal processes. In particular, children in need of protection from their families or legal guardians,⁴³⁹ children in alternative care,⁴⁴⁰ child refugees,⁴⁴¹ juvenile offenders⁴⁴² and mentally or physically disabled children⁴⁴³ are to receive special assurances and protections in their dealings with legal processes. Other CROC provisions relate to States Parties' commitments to providing children, within their families, with an adequate standard of living⁴⁴⁴ and with rights to social security⁴⁴⁵ and education.⁴⁴⁶

3.18 These standards have not been created by CROC. CROC provides explicit recognition of the applicability to children of their previously existing inalienable rights. It does not limit the rights of parents or prescribe conditions on the relationship between parents and children. By ratifying CROC the Australian government has made a commitment to the children of Australia. This commitment is that in all aspects of children's involvement in society they will be treated in accordance with their fundamental human rights entitlements.

Compliance with CROC

3.19 Despite government assertions of compliance with CROC,⁴⁴⁷ several non-government reports have detailed significant breaches of its commitments on the part of federal, State and Territory governments.⁴⁴⁸ While much Australian law satisfies the requirements of CROC, there are still significant areas of law and practice that do not conform with CROC. In fact, in some jurisdictions within Australia the Inquiry has found policies and laws that are in direct violation of Australia's international obligations with respect to children.⁴⁴⁹ This Report discusses and seeks to address some of the problems which lead to these failures.

CROC in Australian law

3.20 Australia has not incorporated CROC in its entirety into domestic law, and does not propose to do so. Its provisions are not directly enforceable in law. However, Australia has consistently asserted that the provisions of CROC are fully implemented in the wide range of federal, State and Territory laws, programs and policies affecting children.⁴⁵⁰ Although CROC and other relevant international instruments on children are not directly enforceable in domestic law, there are two means by which ratified international treaties influence the development of Australian legal thought.

3.21 The first is a principle of statutory and common law interpretation. In the process of applying legislative provisions, the judiciary will presume, when faced with a number of equally valid interpretations and in the

absence of any indication to the contrary, that the interpretation which conforms most fully with Australia's relevant international treaty obligations should apply.⁴⁵¹ Australia's international human rights obligations are considered to be of persuasive influence in the judicial interpretation and application of common law.⁴⁵²

3.22 The second is based on a principle established in *Teoh*.⁴⁵³ A majority of the High Court in that case held that, by ratifying an international treaty, the Australian Government provided grounds for persons to have a legitimate expectation that, in the absence of any express provision to the contrary, the executive will act consistently with the treaty's provisions.⁴⁵⁴ Where this legitimate expectation is not met by the executive in government decision-making, judicial review is available. However, through Ministerial statements of 25 February 1997 and 10 May 1997 and in the proposed Administrative Decisions (Effect of International Instruments) Bill 1997, the federal Government has attempted to remove any legitimate expectations that may be based on ratification of international treaties such as CROC.

Implementing CROC

3.23 International treaties can be entered into by the Commonwealth without necessary reference to the state of domestic law. The practice of successive governments in Australia, however, has been to ensure that Australian law complies with a treaty's obligations before it is ratified.⁴⁵⁵ The effective implementation of this practice rests on two presumptions: first, that an assessment of the relative positions of domestic law and the treaty has been undertaken and the areas of conflict identified; and second, that any amendments to existing laws of the States, Territories or Commonwealth that are required to meet the treaty's demands must be implemented before ratification.

3.24 Although in its 1995 Report to the UN Committee on CROC the federal Government explained that this was its practice, the Government did not claim that scrutiny of all relevant legislation took place before ratification of CROC; in fact none was undertaken. Therefore, the principal concern of Australian legislators should now be to ensure that domestic legislation complies with CROC. A comprehensive review of the conformity of the existing body of legislation with CROC would fulfil the pre-condition implicit in the current practice on treaty ratification, albeit several years after the task ought to have been done. This review should be undertaken as soon as possible by a federal Parliamentary standing committee.⁴⁵⁶

3.25 This process will undoubtedly reveal inconsistencies between domestic law and CROC. Where these inconsistencies are discovered in State or Territory legislation, the Commonwealth should encourage the amendment or repeal of the offending legislation. However, where clear and flagrant violations of international law are found and the relevant jurisdiction is not amenable to changing its practices, the Commonwealth should use its external affairs power to ensure that CROC's obligations are complied with.⁴⁵⁷ While this is a serious measure that should be used sparingly, the Inquiry has identified instances where the use of this power may be appropriate.⁴⁵⁸

3.26 As important as an initial general review of existing legislation is the establishment of a mechanism to scrutinise future legislation before enactment for compliance with CROC. One commentator has noted that compliance with CROC '...clearly represents an ongoing program, rather than being a once and for all "set and forget" instrument'.⁴⁵⁹ There are, in each parliament in Australia, parliamentary committees already charged with the responsibility to scrutinise proposed and delegated legislation for compliance with a number of criteria, including broad human rights considerations. These are well placed to undertake this function. The terms of reference of each of these committees could be altered to include a direction that the committee ensure that all Bills and proposed delegated legislation coming before them comply with Australia's commitments under CROC.⁴⁶⁰

Political responsibilities for children — jurisdictional arrangements

Introduction

3.27 Legislative responsibility for the interactions between the state and the family that affect children and for the delivery of services to children and their families is divided between the Commonwealth and the States and Territories and a variety of government departments and agencies. For example, State and Territory governments are responsible for administering many of the legal processes that affect children,

including juvenile justice and care and protection. Family law and income support services are federal responsibilities. In addition, the Commonwealth has assumed an over-arching responsibility for the well being of all Australian children as a result of its international legal obligations.⁴⁶¹

3.28 The terms of reference required an examination of matters relating to children in the legal process, including matters relevant to family and associated proceedings and to young offenders. In IP 18, it was noted that the terms of reference inevitably directed the Inquiry into the care and protection and juvenile justice areas which are matters of State and Territory legislative responsibility. We indicated that there was a good deal of interaction between State or Territory laws and federal laws concerning children, that the Commonwealth had an important role in children's matters and that any effective examination of federal laws and processes required consideration of State and Territory laws and arrangements. It is contrary to the interests of children to discuss only those parts of their lives presently affected by federal laws and processes, particularly as we have concluded that the federal/State jurisdictional division is part of the problem for children caught in the formal legal system.

The federal jurisdiction

3.29 The delineation of government responsibility for children and their families derives from the Constitution which sets out the powers and responsibilities of the Commonwealth.

3.30 The Constitution sets out those matters in respect of which the federal Parliament can make laws, including matters relevant to this Inquiry such as immigration and emigration,⁴⁶² aliens and naturalization,⁴⁶³ marriage,⁴⁶⁴ divorce and matrimonial causes,⁴⁶⁵ custody and guardianship of the children of marriages,⁴⁶⁶ the provision of social security benefits,⁴⁶⁷ the people of any race for whom it is deemed necessary to make special laws⁴⁶⁸ and external affairs.⁴⁶⁹

3.31 The laws made under these heads of power are administered by many federal government departments and agencies. They include DSS, DIMA, the Aboriginal and Torres Strait Islander Commission (ATSIC), DEETYA, the Department of Health and Family Services and the Attorney-General's Department. Some departments, such as DSS, deal directly with children while others, such as the Department of Health and Family Services, may provide funding so that State or Territory governments or private entities can provide services to children.

State and Territory jurisdictions

3.32 Because the Constitution gives the Commonwealth enumerated specific powers, those powers that were not transferred exclusively to the Commonwealth by the Constitution remain available for exercise by the States, subject to the operation of the federal paramountcy provisions of s 109 of the Constitution.⁴⁷⁰ The States and Territories have a wide jurisdiction over numerous legal processes that concern children, including care and protection, law enforcement and education. Each State and Territory has its own departments and agencies to administer these processes.

3.33 Further, the parliaments of the Commonwealth and the States and Territories may vest in each other certain of their powers or cross-vest in the courts of the other jurisdiction certain of their jurisdictions. This has been done in some areas of family law.⁴⁷¹

Problems of service co-ordination and delivery

3.34 The Commonwealth has documented over 230 pieces of federal, State and Territory legislation dealing with issues relevant to children.⁴⁷² The administration of these laws is beset by inconsistencies in policy, duplication of services and gaps in services.⁴⁷³ The division of responsibilities between different levels of government and between different departments within each level of government means that children and their families often have to negotiate a complex web of agencies when they come into contact with legal processes.⁴⁷⁴ Agencies that are so disposed are able to play a waiting game, 'standing off' and hoping another agency will assume responsibility for a particular child's needs.

3.35 This fractured responsibility for children's issues often leads to inadequate, incomplete and inappropriate results for the children involved.⁴⁷⁵ In such a system, children may be the responsibility of

more than one agency. For example, some children appear to fall into both State or Territory care and protection and the Family Court jurisdictions. Some are homeless and might be seen as the responsibility of a State's care and protection department or alternatively of federal agencies such as DSS or DEETYA. Others may come into adverse contact with the police but could just as easily be seen as in need of care by a State or Territory care and protection department. These children can and do slip through the cracks and end up being failed by the system.

Current federal policies and undertakings regarding children

Introduction

3.36 Federal, State and Territory governments allocate significant resources to children's issues in accordance with their various jurisdictional responsibilities. The Commonwealth provides significant levels of funding for services, programs and initiatives for children and their families, and develops and implements policy on a national level.⁴⁷⁶ It not only supports programs that are within the federal jurisdiction, but also many that are within State and Territory control. It also provides federal oversight and co-ordination within these areas, reflecting the Commonwealth's co-ordinating role on many children's issues.

Income support and employment assistance

3.37 Children and young people benefit from income support programs directed to their families. Current income support programs that assist families with children include⁴⁷⁷

- the family payment budgeted at \$6 428 million in 1997–98
- sole parent pensions and allowances budgeted at \$2 176 million in 1997–98
- the parenting allowance budgeted at \$1 647 million in 1997–98
- family tax payments budgeted at \$573 million in 1997–98
- the maternity allowance budgeted at \$183.7 million in 1997–98

Families of children with disabilities and people caring for children whose parents are deceased also receive extra financial assistance, with these non-means tested assistance programs budgeted at \$257 million in 1997–98.⁴⁷⁸

3.38 Income support and employment assistance for unemployed young people are currently provided by DSS through the YTA and by DEETYA's Youth Training Initiative as well as other youth grants and support. However, the establishment of the Commonwealth Service Delivery Agency (Centrelink) and the Common Youth Allowance may change the manner in which these programs are delivered and therefore may affect the amount of funding directed at children and young people.⁴⁷⁹

3.39 The YTA is the income support component of the Youth Training Initiative. Total expenditure on YTA in 1996–97 was estimated at \$154.8 million and is expected to be approximately \$150.9 million in 1997–98.⁴⁸⁰ YTA will be subsumed into the Common Youth Allowance starting on 1 July 1998.⁴⁸¹

3.40 DEETYA funding for Youth Policy and Support Programs (Youth Training Initiative, Homeless and At Risk Youth Support and Youth Policy) was \$23 million in 1995–96.⁴⁸² Other DEETYA funded programs which assisted unemployed young people (both Youth Training Initiative clients and others) in 1995–96 included⁴⁸³

- Job Start \$22.4 million
- National Training Wage \$14.5 million
- Landcare and Environmental Action Programme \$46.2 million

- New Work Opportunities \$20.3 million
- Job Train \$8.8 million
- Special Intervention \$10.7 million
- Accredited Training for Youth \$4.2 million
- SkillShare \$9.9 million
- Job Clubs \$1.9 million
- Mobility Access Scheme \$584 000

3.41 Certain of these programs may have been discontinued since 1995–96 and in the current climate of rapid change others may be altered.

Education

3.42 ***Assistance to schools.*** The federal Government focuses its school funding on general assistance (general recurrent grants, capital grants and national priorities) and targeted assistance.⁴⁸⁴ In 1997–98, general assistance to both government and non-government schools in these areas was budgeted at \$3 184.7 million.⁴⁸⁵ Targeted assistance was budgeted at \$366.4 million in 1997–98, and focused on five priority areas of literacy, languages, special learning needs, school-to-work and quality outcomes.⁴⁸⁶ Under the Indigenous Education Strategy, supplementary assistance is provided to preschools, government and non-government school systems, TAFE authorities and independent Indigenous education providers to improve educational outcomes for Indigenous children. In 1997–98, this program was budgeted at \$111.2 million.⁴⁸⁷

3.43 ***Assistance to students.*** Austudy is the Commonwealth's means-tested, non-competitive scheme of financial assistance to secondary and tertiary students aged 16 or over (or to under 16 year olds of school leaving age in special circumstances). Its principal aim is to provide equal opportunity in education by providing financial assistance to students who would otherwise not be able to continue their education. The program is income and asset tested and rates are based on whether the student lives at home or away from home, is independent or has dependents or is homeless. In 1995–96, Austudy expenditures on 204 900 secondary school students was \$552 million.⁴⁸⁸ Austudy will be subsumed into the Common Youth Allowance starting on 1 July 1998.⁴⁸⁹

3.44 Abstudy is the Commonwealth's scheme to provide financial assistance to Aboriginal and Torres Strait Islander people who undertake approved secondary or tertiary courses or who are primary school students aged 14 or above. Some Abstudy allowances are paid regardless of family income, while others are means-tested. In 1994, \$44.8 million in Abstudy expenditures were allocated to families of primary and secondary school students.⁴⁹⁰

3.45 Finally, the Assistance for Isolated Children scheme assists the families of primary, secondary and occasionally tertiary students disadvantaged by geographical isolation, health-related conditions, disabilities or special education needs. It is also available to children whose families are involved in work that necessitates frequent moves and who therefore do not have reasonable daily access to appropriate government schooling. In 1995–96, families of 11 700 children benefited from \$28.1 million under this program.⁴⁹¹ In 1997–98, expenditure on this program is expected to be \$20.6 million.⁴⁹²

Housing

3.46 ***Public housing and rental assistance for families with children.*** The largest expenditure programs for housing services are public housing and rent assistance. Of low income renters in public housing, 7 700 households were couples with dependents and 47 700 households were sole parents with dependents.⁴⁹³ Of the recipients of DSS rent assistance (whether in private, public or community housing), 16.7% were single parent families and 7.2% were two parent families.⁴⁹⁴ In 1994–95, total Commonwealth expenditures on

housing assistance were \$1.6 billion for public housing, \$1.5 billion for rental assistance and \$61 million for 275 community housing projects.⁴⁹⁵

3.47 *Transitional housing and support services for homeless young people.* The Crisis Accommodation Program is a tied program within the Commonwealth-State Housing Agreement in which capital funds are provided to States and Territories specifically so that they can provide short-term housing assistance for people who are homeless or at risk of homelessness. This program is closely tied to SAAP, which funds the management of accommodation programs and support services for homeless people. Although the Crisis Accommodation Program and SAAP are directed at homeless people in general, both programs designate portions of their funding for services and accommodation directed at homeless young people and families with children. In 1995–96, \$72.955 million of SAAP funding was spent on services directed at youth and \$36.086 million for families with children.⁴⁹⁶ In that same year, 43 crisis accommodation projects directed at youth and 41 crisis accommodation projects directed at families were approved for grants of federal funds under the Crisis Accommodation Program.⁴⁹⁷ In 1997–98, crisis accommodation assistance services, including the Crisis Accommodation Program and SAAP, were budgeted at \$196.8 million.⁴⁹⁸

Community services

3.48 *Child care.* The Commonwealth funds child care and sets and monitors quality assurance standards for long day care centres.⁴⁹⁹ Its main focus in child care services is to promote a system that supports work force participation by adults. Most child care services eligible for financial assistance are required to give the highest priority to children of parents with work related needs. However, these centres must also give priority to children with disabilities (or to parents with disabilities), children at risk of abuse or neglect, children of parents with more than one child below school age and children of a sole parent at home. Within each of these groups, access is further prioritised, with preferences for low income families, Aboriginal and Torres Strait Islander families, socially isolated families and families from culturally and ethnically diverse backgrounds.⁵⁰⁰

3.49 In 1995–96, the federal Government significantly expanded the number of child care places, supporting 306 600 child care places used by 570 300 children across Australia. Expenditure on this program amounted to \$980 million.⁵⁰¹ Almost 80% of federal funding was allocated through payments such as Childcare Assistance and Childcare Cash Rebate.⁵⁰² In 1997–98, these two programs were budgeted at \$849.8 million.⁵⁰³ In 1995–96, other recurrent funding, such as operational subsidies paid to service providers, accounted for 18% and expenditure on capital and administration just over 1%.⁵⁰⁴ Operational subsidies to community based long day care centres were no longer being paid as of 1 July 1997, although they continue to be paid to family day care services and occasional care centres.⁵⁰⁵ They were budgeted at \$143 million in 1997–98.⁵⁰⁶

3.50 *Child welfare.* Child welfare services include child protection, supported placements for children (arrangements for children to live with people other than their parents for safety/crisis reasons) and family support services. These services have as their goal assisting children and families in difficulty or crisis situations by stabilizing the situation, alleviating its effects and reducing the likelihood of its re-occurring.

3.51 In the area of child protection, most funds come from the State and Territory governments. However, the Commonwealth has also jointly funded and implemented with the States and Territories a National Prevention Strategy for Child Abuse and Neglect. The federal aspects of the strategy were budgeted in 1994–95 at \$12 million over the following four years.⁵⁰⁷ In 1997–98, \$1.89 million was budgeted by the Government for expenditure on child abuse prevention.⁵⁰⁸ The current focus of Commonwealth efforts in child abuse prevention is on parenting education activities.⁵⁰⁹ Indirect federal funding of child protection includes family support through provision of housing assistance, health care, community services/child care and income support. Finally, some child protection costs are borne directly by the federal Government in the form of proceedings in the Family Court, many of which involve allegations of child abuse.⁵¹⁰

Child Support Scheme

3.52 The Child Support Agency ensures the payment of child support by one parent to the other parent for the benefit of children. Total outlays for this program were \$114.8 million in 1995–96.⁵¹¹ Through this agency, more than \$387 million was disbursed to custodial parents for the benefit of their children.⁵¹²

Commonwealth initiatives in co-ordination

3.53 In addition to funding specific programs, the Commonwealth has undertaken several initiatives to develop coherent and consistent policies and practices within departments, between departments and between governments.

3.54 There are bodies such as the Australian Institute of Family Studies (AIFS),⁵¹³ National Youth Affairs Research Scheme (NYARS),⁵¹⁴ AIC and the Australian Institute of Health and Welfare (AIHW)⁵¹⁵ that conduct research across jurisdictions and disseminate information. The Commonwealth has also undertaken specific initiatives to develop national policy on children's issues, such as the National Program of Action to implement the World Declaration on the Survival, Protection and Development of Children⁵¹⁶ and the National Action Plan on Human Rights.⁵¹⁷ The *Australian Youth Policy: A Statement of Principles and Objectives*, adopted by State, Territory and federal Youth Ministers in 1992, set out national objectives in a wide range of areas including education, employment, health, housing and accommodation, justice, income support, information, the environment, families, vocational education and training, transport, and sporting, recreational and cultural needs.⁵¹⁸ Finally, the recently established National Child Abuse Prevention Council and its predecessor, the National Child Protection Council, assist the federal Government to develop policies to prevent child abuse.⁵¹⁹

3.55 Inter-governmental organisations have a strong focus on co-ordinated policy development, and many address issues that concern children. They include the Standing Committee of Attorneys-General (SCAG),⁵²⁰ the Standing Committee of Community Services and Income Security Administrators,⁵²¹ the Ministerial Council on Employment, Education, Training and Youth Affairs (MCEETYA),⁵²² and the Working Group for the National Health Policy for Children and Young People.⁵²³

3.56 There are also inter-governmental and cross-jurisdictional programs and protocols on specific issues that affect children and young people, such as the Commonwealth/State Youth Protocol for the case management of homeless children,⁵²⁴ the Youth Homelessness Pilot Program,⁵²⁵ protocols between the Family Court and State and Territory courts and family services departments⁵²⁶ and crime prevention initiatives including the Strengthening Families Strategy, the Good Beginnings national parenting project, the Young Persons Sport and Recreation Development Program and the National Campaign Against Violence and Crime (NCAVAC).⁵²⁷ In establishing NCAVAC, the federal Government has recognised the links between domestic violence, child abuse, and various risk factors for juvenile crime.⁵²⁸ This campaign will include programs that address many issues affecting children and young people, such as supporting high-risk families to prevent child abuse and neglect, encouraging pre-school enrichment, remedial education and truancy reduction programs in schools and providing early intervention programs for children who have experienced or witnessed violence in the home.⁵²⁹

3.57 Finally, non-government organisations, such as the Australian Youth Foundation,⁵³⁰ the Australian Association of Young People in Care (AAYPIC)⁵³¹ and the Australian Youth Policy Action Committee⁵³² provide a co-ordination and advocacy role at the national level to promote youth issues.

4. Children in the legal process

Introduction

4.1 When the state interacts with families for the protection, assistance and control of children, it does so through its legal processes. All children are involved with some legal processes through their participation at school, in employment and in consumer transactions. On the other hand, a significant percentage of children have explicit, direct and extensive contact with formal legal processes at the point of this interaction between the state and the family, particularly in care and protection and juvenile justice proceedings. The bulk of the Inquiry's efforts has been concentrated on children's involvement in formal legal processes.

4.2 Although children are involved with the state's legal processes, they are not always able to participate in them. Some children are too young to participate formally, and others, although old enough to understand and take part in the process, may not want to participate. Other children may be unaware of legal services and processes or may not have the skills and confidence necessary to fill out forms, seek information, give evidence and otherwise participate in legal processes. The legal process itself may discourage or inhibit participation by children.

Barriers to participation

Introduction

4.3 Formidable barriers prevent or limit children's participation in legal processes. One of these barriers relates to children's developmental capacity and is not entirely amenable to improvement. Other barriers are created by the assumptions of an adult legal system about the legal capacities of children to participate and by the processes themselves that were designed by and for adults. This Report has attempted to address these barriers through recommendations that set out what children need to know to deal with the legal process (developmental capacity), how children should be engaged appropriately within the legal process (legal capacity) and how to ensure that the legal process itself does not add to the problem (the adult system).

Developmental and legal capacity to participate

4.4 Formal participation by children in legal processes requires that children understand the process and its requirements, and have the intellectual, emotional and psychological skills necessary to negotiate the process and to persist in their pursuit of a particular goal. Many adults do not have these abilities and have considerable difficulties in dealing with legal processes. However, these difficulties are significantly magnified for children. Indeed, these skills themselves are often associated with levels of development and maturity. Many children are unlikely to have the skills and experience necessary to participate successfully in legal processes without assistance.

4.5 Traditionally, the law has used general assumptions about children's developmental capacities to decide a particular child's legal capacity to participate in legal processes. These assumptions applied to all children what may be true of only a few. For example, young children have been traditionally viewed as incompetent to give evidence based on assumptions that they are untruthful, suggestible, prone to fantasy and unable to make accurate and reliable observations about events.⁵³³

4.6 Assumptions about children's incapacity mean that some children are by definition ineligible to participate in some legal processes. Current examples include prohibitions on children under 18 years of age being parties to civil actions⁵³⁴ and evidentiary rules concerning whether children are competent to give evidence and whether their evidence must be independently corroborated.⁵³⁵ Laws regarding ages of consent for sexual activity⁵³⁶ and marriage⁵³⁷ are other instances where age is used to classify children based on assumptions about the soundness of their judgment and their capacities to make fair and accurate assessments of their interests.

4.7 Psychological studies have recently allowed a fuller, more sophisticated understanding of children's cognitive abilities.⁵³⁸ They have prompted a re-evaluation of rules regarding children's capacities to participate in legal processes and focused attention on the individual child rather than on general rules for all

children. Such an approach has been adopted in the common law in Australia, following the House of Lords' decision in *Gillick*⁵³⁹ and the High Court's decision in *Marion's case*.⁵⁴⁰ In these cases, in the context of medical advice and treatment, the increasing competence of children to make their own decisions was recognised and confirmed at law.

4.8 Variations in developmental capacity do not depend solely on age. Age is a relevant differentiating factor in determining legal capacity to participate in legal processes, but as Deane J noted

[t]he extent of the legal capacity of a young person to make legal decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matter and the maturity and understanding of a particular young person.⁵⁴¹

4.9 Article 12 of CROC embodies this principle of an evolving capacity to participate. It is recognised that children who are capable of forming a view have the right to express that view in all matters affecting them, and to have that view taken into account and given due weight in accordance with the age and maturity of the individual child.

An adult system

4.10 Even where a child has the developmental and legal capacities to participate in legal processes, appropriate participation can be extremely difficult because the processes themselves are not designed for participation by children. Laws and regulations are made and implemented by adults, and the attributes, decision-making processes and language used in legal processes reflect this fact. A number of submissions pointed to the difficulties posed by the current operation of adult-oriented legal and administrative processes in relation to children.⁵⁴²

The barriers in practice — inhibiting children's participation

Introduction

4.11 Throughout this reference, the Inquiry has attempted to focus on the barriers of developmental ability, legal capacity and legal systems designed by and for adults. Evidence to the Inquiry documented numerous problems related to each of these barriers currently facing children involved in the legal process.

Stereotypes and discrimination

4.12 Children may be discriminated against simply because they are not adults.⁵⁴³ While age differentiation may be justifiable in some circumstances, age distinctions may be imposed in an arbitrary manner to streamline the administration of laws and policies relating to large numbers of people.⁵⁴⁴ The arbitrary nature of many of these age limits has been criticised.⁵⁴⁵

4.13 Children may also be treated differently by legal processes and its other participants as a result of stereotypes about their characters and abilities. In addition to the traditional assumptions about children's capacities to participate,⁵⁴⁶ children and young people often face outright discrimination based on the stereotype that young people are prone to unlawful behaviour. Laws that prohibit young people from gathering in certain places or that enforce curfews may be the result of an unjustified belief that young people commit crimes in these circumstances.⁵⁴⁷ Certainly, the media have contributed to this stereotype of young people. One survey of articles in *The West Australian* showed that from 1990 to 1992 63% of all articles about young people related to youth crime.⁵⁴⁸ In the Inquiry's survey of young people, 633 out of 786 (80.5%) believed that the media never or only sometimes portrays young people positively and 630 respondents out of 771 (81.7%) believed that the media never or only sometimes portrays young people truthfully.

4.14 Young people around Australia described to the Inquiry many instances of discriminatory treatment, including being harassed by police, shopkeepers and security guards.⁵⁴⁹ For example, 11.3% of the respondents to the Inquiry's survey of young people indicated that, when buying goods, they found the retailers 'suspicious' of them, 'assuming young people will shoplift'.⁵⁵⁰ One submission to the Inquiry even described this stereotype being held by the lawyers who were there to help young people in court.

Darryl...said [that] when he appeared in court, 'I didn't know what a duty lawyer was, and then some guy in a suit came into the court and sat next to me and the Magistrate read the charge and asked for a plea. I was about to stand up and say 'not guilty' when this guy in the suit stood up and said 'guilty your Worship', and then he turned to me and said 'oh you are pleading guilty aren't you?'⁵⁵¹

4.15 In addition, in the Inquiry's survey of young people, 66% of respondents believed that police never or only sometimes treated young people fairly and 79% believed that police never or only sometimes treat young people equally.⁵⁵² Further, out of 410 specific comments on how police treat young people, 40.2% were about police using violence against young people or treating them unfairly or disrespectfully.

Children do not complain or seek redress

4.16 The formal legal processes that most directly involve children are the family law, care and protection and criminal law systems. Yet in almost all of these systems, children are not there because they want to be. It is very rarely the child who initiates these proceedings. Rather, children are brought into these systems because parents, police officers, social workers, teachers, doctors, counsellors and others seek to resolve an issue through the legal process.

4.17 Over the course of the Inquiry, we were told of children's lack of participation in legal processes because of their reluctance to complain or seek redress when they had problems.⁵⁵³ For example, it is typical of children's involvement in legal processes that no children had approached the NSW Community Services Appeals Tribunal directly regarding the care and protection system or their out of home placements,⁵⁵⁴ that the ACT Legal Aid Commission had never been approached by a child directly requesting separate representation in family proceedings,⁵⁵⁵ and that only 2% of the complaints received by the NSW Community Services Commission were from children, even though more than 70% of complaints about care and protection are about children's issues.⁵⁵⁶ One practitioner explained this lack of participation in complaints processes.

Children are understandably reluctant to speak out against these people [lawyers, magistrates, social workers, foster carers] because of the obvious power imbalance, especially when they know they may have to deal with the lawyer [or other professional] again or appear before the magistrate again later.⁵⁵⁷

4.18 Many participants in our consultations and public hearings described the problem as a lack of access. According to one young person, '[k]ids are not aware of where they can go to get a lawyer.'⁵⁵⁸ A Family Court Registrar said the Registry of the Family Court

...does not get much child-related work from community legal centres or solicitors. Children do not appear to access these services. There have only been a few cases where children have applied to the court as parties.⁵⁵⁹

The Inquiry was also told that young people are often not aware of procedures for seeking redress.⁵⁶⁰

4.19 Young people themselves often spoke about why children and young people do not make complaints. For example, at one meeting with Indigenous young people in Sydney, not one of the young people in attendance considered that making complaints was worth it, particularly when the complaint was about alleged abuse by police.⁵⁶¹ When the young people did complain, their experiences with the process confirmed this assessment. One young person in Queensland who complained about police misconduct, with the assistance of the Youth Advocacy Centre, said

[t]he police interviewed me and then three months later sent me a letter explaining what they said 'really' happened. I won't complain again.⁵⁶²

Another young person who went to the Ombudsman with a complaint about the police said that it came to nothing. She found it a waste of time 'because the Ombudsman and the other public officials don't care about kids...they're on the side of police'.⁵⁶³ Other young people described their complaints being 'lost' or ignored.⁵⁶⁴

Children may not understand the legal process

4.20 The Inquiry received considerable evidence that children's participation in the legal process is often hindered because they do not understand it. For example, one young person who was the main witness in a

criminal trial described how he did not really understand the role of the crown prosecutor, and would have preferred to have his own solicitor acting as 'his' solicitor in the criminal case. He felt that the crown prosecutor had abandoned him and had not properly protected him, and this made giving evidence much more difficult. His youth worker explained that

...young people simply don't understand what's going on...First, they don't understand the impact of the words used. It's too complex...Secondly, young people often withdraw from the situation because it is just too overwhelming.⁵⁶⁵

4.21 These problems arise in all kinds of legal processes, but they seem to be particularly evident in processes that involve courts. As one practitioner pointed out '[m]any children come out of court saying they don't understand a word of it'.⁵⁶⁶ Another adult participant in the juvenile justice system talked about 'the incredible lack of understanding by young people [in the Northern Territory's Don Dale Detention Centre] about the juvenile justice system' and said

[b]asically, they don't know what guilty means, who the prosecutor is, or sometimes even who the judge is. A major contributing factor [in the Northern Territory] is the lack of interpreters.⁵⁶⁷

4.22 Young people emphasised to the Inquiry that they found the legal system practically incomprehensible.

It's like they all speak another language. You need an interpreter.⁵⁶⁸

All young people in the court system should have a support person to assist them and make sure they understand what's happening in court.⁵⁶⁹

The court rarely gives an explanation of the meaning of the sentence or bond and what it entails...When you go to court, you don't always understand what's happening. There is no-one there to explain things to you.⁵⁷⁰

Benefit application forms contain a lot of jargon...they're difficult to fill out without help.⁵⁷¹

In the Inquiry's survey of young people, out of the 138 respondents who were in detention facilities and who answered the relevant question, more than half (52%) indicated that they never or only sometimes understood what was happening when they were in court.⁵⁷²

Children are marginalised by the legal system and its other participants

4.23 Young people across Australia told the Inquiry of their perception that they are not listened to and that neither judicial officers nor other adult participants in legal processes take account of or care about their views. No aspect of the legal system escaped these consistent and persistent allegations of marginalisation.

4.24 For example, the Inquiry's survey of young people revealed that of the 134 respondents who were in detention and who answered the relevant question, 38% did not think that their lawyer had told the court what they had asked him or her to say. In addition, 70% stated that the judge or magistrate did not let them have a say in their case.⁵⁷³ Many young people we spoke to commented about their marginalisation by court processes and legal representatives.

Judges don't care what happens to the kids in their courtrooms and they don't understand them...they should have to really look into why things are going wrong for a kid and try to fix it.⁵⁷⁴

Kids don't get enough opportunity to express their views when they're in court. There should be more opportunities for them to say what they think...Kids are not given the chance to say anything in court, even when they ask to.⁵⁷⁵

Lawyers acting for young people rarely ask their opinions on anything...There's no point in seeing lawyers. Lawyers and judges don't really care about kids.⁵⁷⁶

[Solicitors] only do what they're told if the kid insists...Kids are just a number to duty solicitors.⁵⁷⁷

4.25 These perceptions reflect children's real experiences of legal processes. They were confirmed by other participants in these legal processes. In the public hearings and in private meetings, the Inquiry heard many examples of representatives in family law proceedings refusing to speak with their child clients or of children who were distraught after hearings because their legal representative had not done what the child had instructed.⁵⁷⁸ One young girl, aged 12, even telephoned the Inquiry to seek our intervention in Family Court

proceedings on her behalf. She was caught up in a long running Family Court case, and although she had been interviewed by various social workers, counsellors, psychologists and police officers she had never been interviewed by the legal representative appointed to her case. She believed that no-one had told the judge what her wishes were.⁵⁷⁹ Some children may also feel marginalised by the court system because it is

[an] adversarial system...dominated by legal strategising by competing parties to maximise their chances of winning the case...The interests of the child often get lost between the warring parties.⁵⁸⁰

4.26 Court processes were not the only legal processes to receive scathing criticism from young people. Service delivery agencies and schools were also seen by young people as uncaring bureaucracies in which the child's voice was often ignored. For example, one young person described a situation in which he had applied for Abstudy's living away from home allowance after he moved out of his house. He felt that there was no-one to talk to at the relevant department about the problems he was experiencing in this application process.

I was passed from person to person when I telephoned. No-one took responsibility for my case.⁵⁸¹

4.27 Another young man who had experienced the care and protection system said that he was not allowed any involvement in decisions regarding his placement with various foster parents. Sometimes he did not even know the reasons why his placement was being changed.⁵⁸² Another young person described a social worker's refusal of his request to meet prospective foster parents before being moved.⁵⁸³ Other young people confirmed that lack of consultation by child welfare workers was a consistent problem in all care and protection systems.

Kids don't have any rights when dealing with the Department of Family, Youth and Children's Services. Kids are told what to do rather than consulted. Social workers don't listen to kids' wishes.⁵⁸⁴

The Inquiry's survey of young people found that of the young people in detention facilities who had also had some involvement with care and protection systems, 72% felt that they did not have enough say in the decisions made.⁵⁸⁵

4.28 Schools too seemed to ignore children when making decisions about them. Many young people deplored their lack of participation in disciplinary proceedings in schools, commenting that young people are given no voice in suspension, exclusion and transfer decisions.⁵⁸⁶

When you get expelled or suspended from school you don't get an opportunity to defend yourself and explain your side of the story...Schools don't investigate matters properly before making a decision to expel a student.⁵⁸⁷

Another young person described being 'expelled from all Queensland state schools forever'. He said that he did not even see a school counsellor until after he was excluded from school.⁵⁸⁸

Agency complexities inhibit children's participation

4.29 Young people and professionals alike commented that the complexities of legal processes inhibit participation.

Young people can lodge an appeal against cessation or suspension of benefits but it is a lengthy and complex process. Many children don't appeal because it is too difficult.⁵⁸⁹

Young people often have to work out their entitlements for themselves as there is very little information available...you have to know a benefit exists before you can apply for it.⁵⁹⁰

Young people need someone to go with them and help them deal with government agencies. Without this kind of support, it's very easy to be discouraged and give up after the first time.⁵⁹¹

It's ironic that young people need to rely on advocates to get things that should be theirs by right.⁵⁹²

4.30 Some complexities result from the jurisdictional divisions discussed in Chapter 3. The current jurisdictional arrangements affect children's participation in legal processes in two different ways. First, responsibilities for children's matters are fragmented between a number of different agencies and levels of

government.⁵⁹³ As one professional explained, '[d]ealing with government agencies can be very confusing for young people. They may have contact with 20–30 agencies.'⁵⁹⁴ Second, this division of responsibility between governments and between agencies means that some children are left without the assistance of any agency, even when there are supposed to be mechanisms to co-ordinate agency involvement. Children in this situation may have no legal process in which to participate. These two barriers to children's participation in legal processes are discussed in detail in Chapter 5.

4.31 According to one practitioner, as a result of these problems many young people are more damaged by the legal system designed to help them than by the activities that led them there in the first place.⁵⁹⁵

Disadvantages of adverse outcomes

Introduction

4.32 Issues surrounding children's abilities to participate in legal processes affect all children because almost all children have some involvement with legal processes in the formal education system and in transactions as consumers of goods and services. However, participation is a particular issue for children who have extensive contact with legal and administrative systems, who depend on those systems to protect and provide for them and who may be without assistance in dealing with these legal processes. This group of children may include those who are involved in care and protection systems, excluded from school, in receipt of income support or housing assistance or in the juvenile justice system.

4.33 Children in this group are extremely vulnerable in dealing with legal processes. For many, this contact may be related to disadvantages they already face due to family breakdown, socio-economic and educational disadvantages, systems abuse and disabilities. Their involvement in these processes may be extensive and they may not always have the support of their families. These factors may add to their disadvantage.

4.34 Contact with legal processes may affect these children's lives in many ways. For many of these children the contact produces a satisfactory result. For example, a child may receive income support that allows him or her to complete school or a child may enter foster care and receive the support his or her parents were not able to provide.

4.35 However, legal processes are interlinked in complex and sometimes little understood ways. Should one legal process fail to address the underlying problems, contact with that process may increase the risk for some children that they will have further, and increasingly adverse, contact with other parts of the legal system. For example, damaging consequences are apparent in the links between the education, income or social support and care and protection systems.⁵⁹⁶ Children in detention centres often represent the failures of these systems to meet the needs of the children involved.

Education

4.36 There is considerable evidence that early school-leaving (leaving school before reaching the compulsory attendance age) is strongly correlated with unemployment, poverty and homelessness.⁵⁹⁷ Children who are suspended or excluded from school or whose intellectual and emotional needs are not identified and adequately addressed may therefore suffer further and greater disadvantage and contact with other legal processes. Those children who fail in the school system, whether from emotional, behavioral or intellectual difficulties, may be at risk of criminal offending.⁵⁹⁸

4.37 In one NSW study on children serving detention orders, 82.2% of the young people interviewed had already left school before being incarcerated.⁵⁹⁹ Of those who had left school and were at least 15 years old at the time of their arrest for the offence for which they were serving the detention order, 33.3% had left school before they had turned 15.⁶⁰⁰ Over half of the respondents stated that they had truanted from school on average at least one week out of every school month, 79.3% said that they had been suspended or excluded from school at least once in their lives and 30.1% said that they had been suspended or excluded from school at least 5 times.⁶⁰¹ The South Australian Department of Family and Community Services has also found that young people entering its juvenile justice system tend to have poor literacy and numeracy: 25% have a reading age of less than 10 years old and 50% do not have survival level numeracy skills.⁶⁰²

4.38 These links between education and delinquency may reflect the correlations between inadequate education, unemployment and crime. The unskilled, under-educated and unemployed are grossly over-represented in criminal statistics.⁶⁰³ For children who have been excluded from school, the links may also be a result of the alienation, low self-esteem and rejection that is often felt by these children.⁶⁰⁴

Income and social support

4.39 Contact with income and social support systems may be correlated with children's involvement in care and protection and juvenile justice systems. One case study reported to the Inquiry illustrates these links.

Eric was homeless as his step-father had told him to leave home. In order to get money for food and shelter Eric agreed to sell a bike which he had a fair idea was stolen. He was to split the proceeds [of] \$40.00 with a friend...Eric was arrested and held in custody for three days until his case could be heard...Eric already had a 'failure to appear' on his record. In explaining why he didn't appear he said that when you are homeless, its wet, you tend to lose things like little bits of paper and you lose track of what day it is, and so he didn't appear.⁶⁰⁵

4.40 Low socio-economic status may increase the risk of children becoming involved in the juvenile justice system. For example, one NSW study on juvenile theft offenders in detention found that the most common reasons for offending given by shoplifting offenders were to obtain clothes or money for clothes (20.6%) or food or money for food (17.6%).⁶⁰⁶ The most common reason for offending given by break and enter offenders was to obtain money (31.4%).⁶⁰⁷ Participation in juvenile crime has also been linked to unemployment and homelessness.⁶⁰⁸ In a study of 400 young people aged 14 to 17 in Melbourne, more than 30% thought that young people in their age group committed crimes to supplement their incomes or for survival purposes.⁶⁰⁹ However, low socio-economic status is not always or a sole predictor of juvenile crime. Other developmental, familial, peer and school-related factors are also predictors.⁶¹⁰

4.41 Economic disadvantage also correlates to involvement in care and protection systems, although child neglect and abuse is also related to a number of interlinked factors.⁶¹¹ Poverty may contribute to family instability or stress which in turn leads to an increased risk of child neglect.⁶¹² This link between poverty and child abuse does not mean that poverty itself leads to abuse or neglect. Poverty may be a factor which increases family stresses and affects parents' emotional well-being. This stress, coupled with lack of community resources, may tend to increase the vulnerability of children in low income families to abuse or neglect.⁶¹³ Lack of social support for families also increases the risk of involvement in care and protection systems. One study has found that poor child care facilities, a high turnover of residents and weak neighbour ties provide conditions which increase the risk of neglect.⁶¹⁴

Care and protection

4.42 Another case study illustrates that there may be a link between care and protection and juvenile justice systems.

Robert is 14 years old. His parents are from a non-English speaking background and have separated. He has been in care since the age of six, consisting of foster care, an adoptive placement and five Department of Community Services Residential Care placements. Robert has been diagnosed as having a conduct disorder and several assessments suggest that he is 'functioning at a mild level of intellectual disability.' Robert has been subject to criminal charges on numerous occasions, including assault, malicious damage and break, enter and steal. Some of these resulted from departmental staff pressing charges for incidents within the DOCS residential care settings. Some of the charges were later dismissed by the Children's Court under the NSW Mental Health (Criminal Procedures) Act 1990. The Magistrate acknowledged that Robert's conduct disorder, borderline developmental disability and disrupted history played a major part in his behaviour.⁶¹⁵

4.43 Children who have been extensively involved in the care and protection system are drifting into the juvenile justice system at alarming rates. A NSW study revealed that wards of the state were 15 times more likely to enter a juvenile justice detention centre than the rest of the juvenile population.⁶¹⁶ In Victoria, 21% of the children in care over 10 years of age at April 1995 had been formally processed as offenders during the period from May 1993 to May 1995 — a rate substantially higher than that for adolescents in the general community.⁶¹⁷

4.44 Statistics are unavailable from other jurisdictions. However, evidence to the Inquiry, particularly from young people, indicates that the situation is no better elsewhere. The Inquiry's survey of young people

revealed that 41% of the 113 respondents in detention facilities who answered the question about involvement in care and protection systems had been involved in welfare proceedings.⁶¹⁸

4.45 The link between the need for care and protection and criminal behaviour might be partly the result of family background and influences, particularly those factors associated with parenting behaviour and style.⁶¹⁹ When a caretaker is neglectful of a child, neglect being defined as some failure on the part of the caretaker to provide conditions essential for the child's healthy development, there is more chance that the child will be involved in some kind of delinquent behaviour, from self reported moderate delinquency to assault and homicide.⁶²⁰

4.46 However, the care and protection system itself often fails to provide an environment conducive to a child's healthy development, compounding the problem and the risk for many children.⁶²¹ The drift of children from care and protection systems into the juvenile justice system may therefore be the result of a failure by the family services department to provide an appropriate caretaker or of systems abuse.⁶²² Certainly, the number of children who become homeless while under care and protection orders indicates that care and protection systems are not adequately caring for many children. A report on SAAP revealed that 18.7% of SAAP clients under the age of 14 were under care and protection orders before they obtained SAAP assistance, as were 17.1% of 14 to 15 year old clients and 8.1% of those aged 16 to 17.⁶²³ In Victoria, 23% of children given emergency accommodation by one agency during April 1995 were identified as children currently in care.⁶²⁴

4.47 The care and protection system also often fails to deal adequately with the education of the children in its care, bringing into play the links between education and juvenile justice. One NSW study showed that 23.4% of the former state wards who were interviewed had left school before they completed Year 10 and 35.6% had completed Year 12 prior to leaving wardship. By comparison, only 5% of young people who lived at home and were interviewed for the study had left school before Year 10 and 80% completed Year 12.⁶²⁵ Another NSW study found that more than half of former wards had completed only Year 10 or less of schooling, that almost half were unemployed 12 months after being discharged from wardship and that almost half said that they were having difficulties 'making ends meet'.⁶²⁶

4.48 Instability caused by changes in placement is another influential factor for children in care. The NSW study on former wards noted that the average number of placements for a child in care was 8.4, the median being 6.5. Of these former wards, 76.9% had three or more placements while in care, 28.6% had at least ten placements and one young person had 32 placements.⁶²⁷ However, those children who had spent at least 75% of their time in care in one long-term placement had attended fewer schools, were happier, were more likely to have completed at least Year 10 at school, more likely to report that they were able to 'make ends meet', less likely to say they missed out on affection and less likely to have thought about or have attempted suicide.⁶²⁸

4.49 Children leaving care often do not receive the support they require. As has been noted by other reports, leaving care is '...a crisis which brings to the surface past deficits in care and attainment; it often requires, but does not receive, a major input of services and support'.⁶²⁹ There is a history within all care and protection jurisdictions of limited provision for the transition of young people into independent living.⁶³⁰ Young people leaving care often experience inadequate housing, unemployment, loneliness, depression and poverty.⁶³¹ Both the HREOC and the parliamentary committee reports on homelessness note the over-representation of former wards among the homeless and the inadequacy of the assistance these young people receive after they leave care.⁶³² These figures support other international studies on young people leaving care that show about one third of young people leaving care become homeless at some point.⁶³³ As shown in paragraph 4.40, lack of income and social support may be related to involvement in juvenile justice systems.

4.50 The link between care and protection and juvenile justice systems may also be more direct. Children in care are often charged and taken into police custody when those responsible for their care and protection believe that being in a more restrictive juvenile justice facility is in a particular child's 'best interests'.⁶³⁴ Child welfare workers routinely use the juvenile justice system as a treatment, punishment and holding mechanism for children whom they find difficult to manage.⁶³⁵

Problems of particular groups — varied experiences of children

Introduction

4.51 All children are disadvantaged to varying degrees in their participation in legal processes.⁶³⁶ Some children have particular problems. Children in different situations have very different experiences in their contact with legal processes. Evidence to the Inquiry described the experiences of children in rural and remote areas, Indigenous children, children from non-English speaking backgrounds and children with disabilities.

Children living in rural and remote areas

4.52 Children in rural and remote communities face particular difficulties in relation to availability of goods and services, education and employment opportunities, support services and other resources. Rural residents find welfare and community services inadequate and inaccessible and believe that rural and remote areas are not receiving an equitable share of economic and social resources. These areas have less than half the range of general community services available in urban areas and the services are more expensive to operate than in urban communities.⁶³⁷

The vast array of urban welfare services are either unavailable in rural and remote areas or are so inaccessible and under-resourced as to be virtually nonexistent.⁶³⁸

4.53 Rural and remote children involved with legal processes also experience problems such as access to appropriate and timely legal services, detention facilities that are not designed to accommodate young people and children's detention or care facilities that are hundreds of kilometres away from their families.

For young people in rural and remote communities, numerous factors make their...situation more difficult: limited access to services, inflexible program requirements and a general lack of understanding by bureaucracies [of] the unique needs of rural communities. Young people in rural and remote communities are disadvantaged by their lack of access to subsidised services such as transport, health care, charity organisations and public housing which are available to young people in larger metropolitan areas. In financial crisis, rural young people rarely have access to a social worker or local financial support like their urban counterparts.⁶³⁹

Children from non-English speaking backgrounds

4.54 Children from non-English speaking backgrounds are not a homogenous group. They have different cultural traditions, and may include first, second and even later generation immigrants, male and female children, those from high and low socio-economic backgrounds and so on. Accordingly, these children do not all have the same needs or problems. However, they may often face common difficulties with regard to their participation in legal processes.

4.55 Although Australia's population is made up of approximately two hundred different ethnic groups, many government services continue to be offered as if all people were of Anglo-Australian background and familiar with processes in Australia.⁶⁴⁰ In general, children of non-English speaking background tend to find the legal processes involved in obtaining these services bewildering and marginalizing.⁶⁴¹ They are conducted in a language with which they are not familiar and rely on a high level of communication, both written and spoken, containing highly technical terms unlikely ever to have been part of their experience.⁶⁴² As a result, many children of non-English speaking background do not have access to the government services available to them.⁶⁴³

4.56 Accessible and reliable interpreters are often critical to the administration of justice for children suspected of a crime, yet only three Australian jurisdictions provide individuals with a statutory right to an interpreter when being questioned by police.⁶⁴⁴ State and Territory police forces have different rules regarding the use of professional interpreters and there is a great deal of discretion exercised by individual police officers in judging whether a person has adequate English skills.⁶⁴⁵

4.57 Children of non-English speaking background may also encounter

- inadequate and inappropriately targeted information concerning law, procedures, rights and obligations
- legal and correctional institutions inadequately dealing with their particular needs and problems
- problematic relations with police
- inadequate research and evaluation of multicultural issues in the juvenile justice area.

Indigenous children

4.58 Many Indigenous children come from rural and remote areas and are affected by the same problems as other rural and remote children in their contact with legal processes.⁶⁴⁶ Many have difficulties similar to those facing children of non-English speaking background, due to language and/or cultural barriers. For Indigenous children these problems may be exacerbated by an expectation that they speak 'standard' English or that their mannerisms and understandings are the same as those of other Australian English speakers.⁶⁴⁷

4.59 In addition, the difficulties that commonly arise in all children's involvement in legal processes, including barriers to access, lack of understanding, marginalisation and agency complexities, affect Indigenous children on a greater scale. Indigenous children are vastly over-represented in those legal processes that have links with adverse outcomes and other legal processes.⁶⁴⁸ Statistics from New South Wales indicate that Indigenous children are over-represented in exclusion and suspension proceedings.⁶⁴⁹ In the care and protection system, they are over-represented in each stage of the process, from notification to substantiation to placement away from home.⁶⁵⁰ They are over-represented in each stage of juvenile justice processes, from charges, arrest and appearances in court to the more serious sentences.⁶⁵¹ The extensive contact by Indigenous children with these legal processes is of great concern to the Inquiry.

4.60 The operation of legal processes, particularly those involved in the care and protection and juvenile justice systems, must also be viewed against past practices which have discriminated against Indigenous peoples. The forced separation of Aboriginal children from their families has caused widespread breakdown of family relationships and structures and loss of personal, family and cultural identity among Indigenous people. Past assimilation policies and practices which tore apart families and communities continue to have a negative impact on individuals, families and communities.⁶⁵²

Children with disabilities

4.61 Children with disabilities are not a homogenous group. The term 'disability' includes behavioral problems, learning disabilities, physical or intellectual impairments and psychological and psychiatric conditions.⁶⁵³ Children with certain of these disabilities may be over-represented in the educational discipline, care and protection and juvenile justice legal processes.⁶⁵⁴

4.62 When the same discipline code is applied equally to all students in a school, it can have a harsh effect on students with certain disabilities — particularly those with disabilities that have a behavioral element.⁶⁵⁵ For example, the Inquiry was informed that a young person with Tourette's Syndrome had been suspended from school numerous times for swearing, even though he was unable to control his outbursts.⁶⁵⁶ Students with disabilities are also frequently targeted as scapegoats for the misbehaviour of other children.⁶⁵⁷

4.63 Children with physical, behavioral and intellectual disabilities are more susceptible to child abuse.⁶⁵⁸ In particular, children with intellectual disabilities are over-represented as victims of crime, particularly of sexual assault.⁶⁵⁹ One submission to the Inquiry noted that women and girls with 'impaired mental functioning' are believed to make up more than 29% of all victims of rape.⁶⁶⁰ These children may be frequently involved in care and protection or criminal witness processes.

4.64 Intellectually impaired children or those with learning disabilities may also constitute a significant percentage of children in detention facilities.⁶⁶¹ A study undertaken in NSW prisons in 1988 found that 12 to 13% of the prison population had an intellectual disability, that is, approximately four times that of the general population.⁶⁶² Although this research does not relate to children, it indicates a trend that may also be

present in the juvenile justice system. Research conducted by the South Australian Department of Family and Community Services on young people entering its juvenile justice system indicates that many of these young people could be classified as intellectually impaired — 28% were of borderline or below average intellectual functioning.⁶⁶³

4.65 Given their contact with these legal processes, children with disabilities may be particularly vulnerable to the adverse outcomes associated with some legal processes. Submissions to the Inquiry also drew attention to areas in which children with disabilities may be particularly disadvantaged within the legal system, including an inability to communicate,⁶⁶⁴ susceptibility to manipulation (particularly in the context of questioning and investigations)⁶⁶⁵ and barriers to participation based on stereotypes of their abilities to participate.

National co-ordination is needed

4.66 This chapter has shown that Australia has not secured real participation for children in many of its legal processes. These problems affect children in each jurisdiction and in each legal process examined in the Inquiry. Notwithstanding the Commonwealth's co-ordination initiatives described in Chapter 3, children who are dealt with by the Family Court, who are in care or who ought to be in care, who are drifting from the care and protection system to the juvenile justice system, or who are left to their own devices by government service delivery agencies also face problems caused by the jurisdictional division between governments and agencies.

4.67 Submissions to the Inquiry argued that the welfare of children is a national issue that requires Commonwealth oversight and assistance in developing best practice models for dealing with children. They argued that Commonwealth co-ordination is necessary to ensure better delivery of services to children by all levels of government. As Chapter 3 has detailed, the Commonwealth already funds research, provides services to children, and develops and promotes a co-ordinated approach to policy on some children's issues. The following chapters recommend that the Commonwealth should undertake a better focused, more effective role in this regard.

5. Responding to children — advocacy and action

Introduction

5.1 The Inquiry heard repeated expressions of concern about the issues facing Australia's children and about their ability to develop to a well-adjusted and successful maturity. These concerns focused on children as a substantial proportion of victims of crime, child abuse, high rates of youth unemployment, homelessness, mental illness and suicide. Many children facing these difficulties are drawn into contact with legal processes. All this, it was said, reflected a failure of government policy to provide a co-ordinated response to the needs of children and demanded effective advocacy of the interests of all children.

5.2 Submissions called for an integrated national policy for children, allowing co-ordinated policy development and service delivery for children and the provision of advocacy for children.⁶⁶⁶

Why do policies and programs for children need co-ordination?

Introduction

5.3 Government responsibility for children is split between Commonwealth, State and Territory governments, among different departments according to 'portfolios' and among a myriad of government agencies at different levels of government.⁶⁶⁷ There are over 230 pieces of federal, State and Territory legislation which deal with issues relevant to children.⁶⁶⁸

5.4 This division may enable laws and policies to be developed to meet regional needs. However, it also means that policy development and service delivery to children are fragmented and often *ad hoc*. This complexity has produced inconsistent standards with the result that the treatment of children in many important areas, such as care and protection and juvenile justice, varies widely, and at times inequitably, according to their place of residence. Co-ordination between agencies is limited and, in consequence, duplications, omissions and shifting responsibilities between government agencies are common. In consultations during the Inquiry, this lack of co-ordination was highlighted by a large number of both governmental and non-governmental bodies.⁶⁶⁹

5.5 The system as currently organised fails to address these overlapping effects of policy and service delivery on children's lives and the consequent need for co-ordination and integration across the whole of government.

Lack of co-ordination between agencies

5.6 The lack of co-ordination between agencies relating to children was noted by the ALRC as long ago as 1981 in a report on child welfare. In that report the ALRC noted that children in many serious situations could languish because no-one had clear responsibility to take decisive action. The ALRC recognised a need for an independent official to ensure

...that a case did not remain poised uncertainly between a number of agencies, the concern of all but the responsibility of none.⁶⁷⁰

In the sixteen years since the release of that report, this situation has not been improved, despite various attempts by agencies to establish clear divisions of responsibility, protocols and co-ordination.

5.7 The cost to children of the lack of co-ordination between government agencies has been discussed in a number of other reports, such as the 1989 Report of the National Inquiry into Homeless Children,⁶⁷¹ the AIFS report *The Commonwealth's Role in Preventing Child Abuse*,⁶⁷² the 1994 report of the NSW Child Protection Council,⁶⁷³ and the 1995 *Report on Aspects of Youth Homelessness* by the House of Representatives Standing Committee on Community Affairs.⁶⁷⁴ The last mentioned report noted that the situation for homeless children had not improved since *Our Homeless Children* in 1989 and, in some respects, had actually deteriorated.⁶⁷⁵

5.8 The Royal Commission into the NSW Police Service (the Wood Royal Commission) found

[a]lthough the various government agencies involved in the care and protection of children have promoted the concept of interagency co-operation in dealing with child sexual assault matters, the past track record has been poor.⁶⁷⁶

The report found pockets of co-operation but no consistent and professional interagency co-operation in this area. As the report stated, this has adversely affected the delivery of service and, more significantly, has '...undoubtedly permitted paedophiles to continue their activities unchecked'.⁶⁷⁷

5.9 This lack of co-ordination between agencies causes difficulties in program and service delivery in a variety of areas affecting children's lives. This has been a problem consistently in the care and protection system. Professionals working within the care and protection system raised with the Inquiry a number of concerns about the lack of co-ordination. In particular they noted limited co-ordination between care and protection agencies, the Children's Court and the Family Court.⁶⁷⁸ Lack of co-ordination in the care and protection system was highlighted in a report by the NSW Child Protection Council.⁶⁷⁹ Chief Justice Alistair Nicholson of the Family Court has also raised concerns.

Of all the areas where children's rights are unnecessarily compromised, one of the most disturbing issues is the variance of legal frameworks and service standards in the protection of children and adolescents from abuse.⁶⁸⁰

5.10 Lack of co-ordination also causes problems for children leaving care. The Brotherhood of St Laurence has noted

[w]hile there are a small number of non-government agencies across Australia providing some services for a very few of the children leaving guardianship, these services are scattered and unco-ordinated and can neither deal with the numbers of children leaving guardianship nor the full range of their needs.⁶⁸¹

5.11 The Inquiry was also told of the lack of co-ordination between government departments dealing with care and protection and those in juvenile justice.⁶⁸²

Social and financial costs of lack of co-ordination

5.12 When policy and practice is unco-ordinated, children are not protected and supported but failed by legal processes. The consequences for children were referred to earlier in the Report.⁶⁸³ On the one hand the lack of co-ordination means that some children 'fall through the cracks' in the system and do not received any assistance.

Too many young people are in no man's land.⁶⁸⁴

Nobody accepts responsibility for young people with mental illness. They are constantly falling between the cracks in the welfare, care and protection and juvenile justice systems because they don't fall within the specific criteria of many services.⁶⁸⁵

These problems affect most severely those children who have dealings with numerous legal processes, such as those in both the care and protection and juvenile justice systems and those dependent upon several government departments for provision of support. The Inquiry was often told of these problems by both professionals working with children and children themselves.

Where a young person has committed an offence, the welfare agency will sometimes say it is a criminal matter and pass all responsibility for the child to the juvenile justice system, even though the child is in need of care.⁶⁸⁶

Once someone has turned 15, the child welfare departments don't want to know about them, even though they're supposed to look after kids in their care until they're adults...the department doesn't even know where some of their clients are!⁶⁸⁷

In other cases, children must navigate numerous agencies and processes.

The bureaucracy is very fragmented. There is no holistic or developmental view of the young person...Dealing with government agencies can be very confusing for young people.⁶⁸⁸

5.13 These deficiencies within the system harm children, despite the best efforts by welfare workers and professionals. For example, the Inquiry was told

[w]hen young people are referred to multiple places, they feel as if they're being given the run-around. The child often becomes despondent and resistant to referral.⁶⁸⁹

The system produces 'knee-jerk' responses to particular problems rather than considered comprehensive measures which reflect a systemic approach across the whole of government. The Inquiry was told that

[g]overnment departments are not very helpful. They are not responsive to kids needs or flexible in their approach to those needs...⁶⁹⁰

Elsewhere it has been noted that

[m]ost activity has been reactive and intermittent rather than proactive and co-ordinated.⁶⁹¹

5.14 For children, decisions made in one area of their lives may have flow-on effects in other parts of their lives. For instance, a decision to take a child into care may be influenced by the lack of support and preventive services available to the child and family in the community. Children in care are less likely than other children to complete their high school education. Children who fail to complete school, in turn, are at risk of coming into contact with the juvenile justice system. Indeed, those in juvenile justice detention centres have high rates of exclusion from school.⁶⁹² For many children the consequence of contact with government services or authorities is involvement in the juvenile justice system.⁶⁹³

5.15 Professionals in direct contact with children repeatedly told the Inquiry of their frustrations at being unable to direct the system and services to assist children because of the shifting of responsibility and lack of co-ordination between different government departments and agencies.⁶⁹⁴ Young people in focus groups stated that this created serious difficulties in accessing government services.⁶⁹⁵ A submission from the Youth Advocacy Centre illustrates this.

Two departments now have responsibility for homeless young people. As a consequence, young people who are applying for income assistance are caught between two Government departments. It is our experience that this has had enormous implications for young people trying to access income support. For young people who have experienced negative contact with a state welfare department in the past, or for those young people who live in remote areas, the "safety net" is diluted even further.⁶⁹⁶

5.16 As well as harming children, this lack of co-ordination leads to inefficiencies in the allocation of government resources. Areas such as care and protection and juvenile justice receive substantial funding but spending is often ill-targeted, leading to significant inefficiencies and waste.

Social and financial efficiencies brought about by co-ordination

5.17 Proper co-ordination between agencies dealing with children should clarify the responsibilities of agencies, reduce gaps in the system and assist agencies to respond effectively to young people's difficulties at an early stage. An emphasis on preventive, early intervention and on planning and communication between agencies should bring long term savings to the system, both financial and social. As Mr Greg Levine, former Senior Magistrate of the Victorian Children's Court, has noted

[t]he link between inadequate education and offending and homelessness is obvious to those who work in the Children's Court. The cost of appropriate programmes is minimal in relation to the cost to the community of dealing with the impact of homelessness. The benefit to the community in having those otherwise lost children achieving their potential is clear.⁶⁹⁷

5.18 Young people similarly emphasised a preventive approach.

They should help young people not to do crime. Instead of just punishing the[m] all the time they should think of ways to help them not to fall into the hands of crime.⁶⁹⁸

5.19 The High/Scope Perry Pre-school study from the US documented the results of an early intervention program designed to assist disadvantaged children's school performance. The program had positive effects not only on the children's school performance but also on the children's social adjustment during adolescence

and early adulthood and in particular on their propensity for criminal behaviour. In financial terms, the study found that for every \$1 spent on the program the public saved approximately \$7 that would otherwise have been spent on criminal compensation, insurance costs, prisons and welfare.⁶⁹⁹ As a commentator noted at a recent conference on juvenile justice

[w]e will no longer be able to come across new ideas in juvenile justice provision and throw dollars at them to see if they work. Greater planning and greater integration will be required.⁷⁰⁰

Problems with current co-ordination initiatives

5.20 Numerous Commonwealth initiatives aim to develop coherent and consistent policies on children's issues.⁷⁰¹ These initiatives include cross-jurisdictional research, inter-governmental organisations, national plans of action in areas of concern to children and directed policy co-ordination by bodies such as SCAG, the Standing Committee of Community Services and Income Security Administrators and the Working Group for the National Health Policy for Children and Young People.⁷⁰² The Youth Bureau in DEETYA provides some co-ordination across federal portfolios for young people aged between 12 and 25. Across levels of government, there are also a number of portfolio-based Ministerial Councils, such as MCEETYA and Administrators' Conferences. Recent initiatives in policy co-ordination take an issues-based approach and include the Youth Homelessness Taskforce and the Youth Suicide Working Group. These initiatives have yet to achieve their stated aims. Reform in a federal system can be slow.

5.21 Protocols are often used to promote agency co-ordination in children's services. The Inquiry heard considerable criticisms of protocols. One example concerns the protocols between the Family Court, State and Territory welfare agencies and children's courts in relation to child abuse allegations. The terms of the protocols vary between different States and Territories. They also tend to be self-limiting, thereby preventing proper communication. A Family Court study concerning child abuse noted that the protocols are such that the outcome of the investigations are presented only within the protocol format, which sets out a series of pre-determined responses to be made to the Court.⁷⁰³ Evidence to the Inquiry recited many instances of lack of co-operation notwithstanding the protocols — of failures to investigate or limited investigation of Family Court referrals.⁷⁰⁴

5.22 The Commonwealth/State Youth Protocol for the case management of homeless children, in operation in all States and Territories since January 1995, has failed to provide the necessary co-ordination between DSS, DEETYA and State and Territory care and protection systems.⁷⁰⁵

5.23 Existing mechanisms fail to provide proper co-ordination, adequate service delivery or real priority for children. More is needed for this.

Why do children need advocacy?

Introduction

5.24 Children do not have political power.⁷⁰⁶ They have limited say in decisions affecting their lives and generally are unable to obtain redress when decisions are taken contrary to their best interests.

Children and young people are a relatively powerless group in society. Adults very often make significant decisions about children without consulting them or seeking to involve their participation in the decision making process. They are rarely informed or consulted about new laws and policies which will impact upon them. They are frequently denied rights and opportunities which other members of the community take for granted. Many laws treat children and young people not as people but as the property of their parents or as objects of concern. Many protectionist laws and policies are based on outdated paternalistic notions. There is a considerable imbalance between children and young people and government agencies such as the police and schools.⁷⁰⁷

Decisions are often made by professionals with children's views not being sought or, if ascertained being ignored or discounted. Children are the passive recipients of decisions made on their behalf by powerful adults. This has been described by Michael Freeman as "entrenched processes of domination" and by Penelope Leach as "benevolent authoritarianism" but, more simply, it is a modern day manifestation of the old adage "Children should be seen and not heard".⁷⁰⁸

The need for advocacy

5.25 Children rely to a large extent on adults to speak on their behalf and protect their rights. The vulnerability of children tends to be reinforced by societal attitudes and legal processes.

Children need advocates, because they cannot look after their own interests. Parents are supposed to do this for them: some don't, or can't. Children aren't heard by many of the adults who make the decisions that affect them most — teachers and school administrators; governments who decide what resources will and won't be available to their families, or to the children themselves; by welfare workers, magistrates and by the police.⁷⁰⁹

...children are grossly disadvantaged in protecting their interests, rights and freedoms. Our legal system denies them a voice — bullied into silence as witnesses, lost in care, expelled without recourse from schools, exploited and abused on the streets and in the systems designed to protect them. In principle children, as *people*, have the legal right and interest in having a say in decisions that are likely to affect them; children, as citizens, should have better access to the processes of government that directly affect them; children, as *human beings with social rights*, ought to have equal access to the law, and that the community has a duty to take their rights, and children seriously.⁷¹⁰

5.26 The serious consequences of children's inability to protect themselves against abuses has been illustrated most recently in the report of the Royal Commission into the New South Wales Police Service⁷¹¹ and the Queensland Children's Commissioner's report on Paedophilia in Queensland.⁷¹² The Report of the NSW Parliamentary Standing Committee on Social Issues, commenting on the Royal Commission's inquiry into paedophilia, noted

[e]vidence to the Royal Commission revealed that many children who were in the care of the Department of Community Services were subject to abuse. A number of these instances occurred many years ago and that they are only now public confirms the evidence to this Committee regarding the vulnerability and silence of so many "damaged" children. Moreover, further evidence to the Royal Commission from senior members of other government departments has revealed a general ignorance by senior bureaucrats to issues relating to abused children.⁷¹³

5.27 The abuses uncovered by the Royal Commission illustrate perhaps more than anything the lack of adequate advocacy mechanisms for children.

Children who claimed that they were abused, assaulted, raped and imprisoned, were disbelieved: the systems did not permit them to speak and be heard. Institutions refused to accept that their staff could act so disgracefully. Police gave priority to "operational requirements", were unduly deferent to religious bodies and respectable men, and education and child protection systems were "slack". Children did not know and could not claim their rights, even their right to bodily integrity. They lacked institutional or any advocacy. That is the problem. Our social and legal systems do not legitimate child advocacy.⁷¹⁴

5.28 The unacceptably high levels of unemployment, suicide and homelessness among young Australians also illustrate the need for advocacy of the interests of all children across agencies and systems.⁷¹⁵

5.29 Many young people say that they do not have a sufficient voice in the legal processes affecting them. For example, in the Inquiry's survey of young people, 70% with experience of the juvenile justice system indicated that the magistrate or judge did not let them have a say in the case.⁷¹⁶ Among those who had been involved in welfare proceedings, 62% did not know what was happening and 78% did not have enough say in the decisions made.⁷¹⁷

5.30 Even where there is a reasonable standard of services for children, advocacy plays an important role. One submission to this Inquiry spoke of the role of advocacy in 'humanising the bureaucracies' and assisting children and their families to navigate their way through the complex maze of bureaucratic processes to gain access to services.⁷¹⁸

5.31 Children require both systemic advocacy and advocacy as individuals. Children as a group are helped to take an active role in matters affecting all children through broad-based, systemic advocacy. Advocacy of individual children remains necessary and important. However, scrutiny and monitoring of government services and programs, lobbying of government on behalf of all children and dealing with complaints to ensure accountability have all become important advocacy functions.

Looking to the future: a national approach

Introduction

5.32 No Australian government has a particularly good record in ensuring that policies and services for children are properly co-ordinated, that waste is reduced or that service delivery is effectively targeted.

The Commonwealth will never achieve much for children while its policies and programs for children and their carers are scattered across every conceivable portfolio area ...⁷¹⁹

The Commonwealth provides significant funds for children. It has the revenue raising ability and the central position to enable it to provide leadership, co-ordination and priority for children's issues. However, it has not met its responsibilities to children even at a service delivery level in its own agencies, such as income support and immigration, and in federal legal processes in which children are commonly involved, particularly family law. As yet, it has provided little effective national leadership to the States and Territories.

5.33 The Inquiry was repeatedly and emphatically told by professionals working with children that the Commonwealth must be engaged explicitly on matters relating to children and the formulation of a national solution to specific problems. National co-ordination of agencies dealing with children's issues across the whole of government is required. Effective and independent national advocacy for children is also required. A substantial infrastructure already exists to provide these functions.

Co-ordination and advocacy: a national package

5.34 Proper co-ordination and advocacy, to a large extent, simply requires rationalising and integrating existing initiatives and agencies. The Inquiry does not advocate a proliferation of government co-ordination, monitoring and complaints bodies. That is not merely inefficient but counterproductive and confusing to consumers of services. Rather, we recommend a package of mechanisms to provide an integrated approach to co-ordination and advocacy.

5.35 Our recommendations focus on the need for national leadership in policy formulation and systemic advocacy for children, with full participation by State and Territory governments and advocacy bodies, non-government organisations and individual community and youth workers.

5.36 In recognition of the essential role of States and Territories and the significant work undertaken by non-government bodies, the Inquiry recommends the convening of a National Summit on Children comprising all Heads of Australian Governments. The aim would be for the Heads of Government to reach a consensus on nationally co-ordinated strategies and commitments to address nominated areas of particular concern in relation to children who come into contact with legal processes. The organisation of the Summit might be undertaken by a small group in the Department of the Prime Minister & Cabinet (PM&C).

5.37 Following the Summit, a small Taskforce on Children should be established. Appointments to the Taskforce would be agreed by Heads of Governments during the Summit and announced at its conclusion. The Taskforce would be responsible for implementing the nominated strategies into action plans, drawing together national standards and ensuring performance of commitments over a period of 18 months to 2 years.

5.38 The Summit's organising group, as an embryonic Office for Children (OFC), could support the Taskforce through the provision of secretariat services. The Taskforce would receive advice from relevant government agencies, community organisations, professionals and young people themselves.

5.39 When the Taskforce's work is completed OFC, either remaining with PM&C or in another central national location,⁷²⁰ could carry on the broad policy co-ordination and monitoring role in relation to children's issues. This federal co-ordination would be complemented by similar action in each State and Territory. Some jurisdictions already have these units. The OFC and State and Territory groups would ensure that nationally agreed standards and co-ordination arrangements operated effectively and efficiently.

5.40 To overcome the inadequate grievance mechanisms, the comparatively low priority given to children's interests, the poor standards of services for them and their general reluctance to complain, the Inquiry also endorses the establishment of Commissioners for Children. The Inquiry is also recommending the establishment of these offices in all States and Territories as well as the enhancement of HREOC's role and responsibility for children at the federal level by the establishment there of a specialist children's unit.⁷²¹ These federal, State and Territory Commissioners would have strong links to OFC. Commissioners or similar offices already exist in some States and Territories.

5.41 To complement these systemic advocacy bodies and in recognition of the difficulties many children face in accessing services and processes, the Inquiry is also recommending the formation of a network of individual, 'grass-roots' advocates to provide children with directed, individual assistance.⁷²² This network would also be co-ordinated by OFC.

5.42 The following two chapters discuss these recommendations in detail. The National Summit, to provide the impetus for reform, is discussed here.

National Summit on Children

5.43 National solutions to key problems facing children and young people should be addressed at the beginning of the process through high level Commonwealth, State and Territory involvement in a National Summit on Children. The Summit, to be attended by all Heads of Australian Governments, would address issues and problems facing children and young people including, but not limited to, assistance to children whose families have broken down, child abuse, causes of offending and crime prevention, youth suicide and youth homelessness.

5.44 The Summit would enable discussion and agreement between the Commonwealth, States and Territories on the strategies and co-operation needed to address these problems. Resources should be committed and responsible representatives in each relevant department nominated as contact people. OFC would be established first in limited form to organise the Summit and begin to make links with the relevant stakeholders within and outside government. During the Summit, the Heads of Government would compile a follow-up list of priority tasks for OFC to undertake.

5.45 The Summit should be convened as a matter of priority to enable Heads of Government to announce a national commitment to children.

Recommendation 1. A National Summit on Children should be convened as a matter of priority. The Summit should be attended by Heads of Australian Governments. Areas requiring particular attention to promote co-ordination include assistance to children from broken families, child abuse, causes of offending and crime prevention, youth suicide and youth homelessness.

Implementation. The Prime Minister should convene the National Summit as a matter of priority.

6. The new working federalism

Introduction

6.1 This chapter develops a model of working federalism which the Inquiry sees as essential to address the needs of children in the legal process. An outline of our integrated proposal developed in this and the next chapter is given in Chapter 5.

Co-ordination models

Introduction

6.2 Many bodies, including the DEETYA Youth Bureau, various taskforces and campaigns and State and Territory bodies seek to co-ordinate policies and programs for children and young people. None achieves this goal comprehensively. Certain of these important existing agencies are considered here.

DEETYA Youth Bureau

6.3 The Youth Bureau within DEETYA undertakes policy monitoring, research and program delivery to

- help to ensure that the Government's policies meet the needs of young people
- provide leadership in research and analysis on youth issues
- facilitate communication between young people and the Government and
- design and manage services and programs to maximise young people's participation in the Australian community.⁷²³

6.4 The Bureau undertakes a substantial amount of work in program administration and service delivery, with much of the focus being placed on education and employment-related issues. The Bureau is concerned with young people aged between 12 and 25, only some of whom are children.

MCEETYA Youth Taskforce

6.5 This Taskforce comprises Education and Employment Ministers from all federal, State and Territory Governments. The Taskforce identifies priority issues, undertakes research through the NYARS and develops policy and strategies to implement these policies. The Taskforce held two meetings during 1995–96 and submitted a report and forward plan to the July 1996 meeting of MCEETYA.⁷²⁴ Again, its focus is young people rather than children.

Youth Homelessness Taskforce

6.6 This Taskforce has an \$8 million budget for a 2 year program.⁷²⁵ It administers the Youth Homelessness Pilot Program and is responsible for establishing and monitoring various projects under that Program. It conducts 'good practice forums' based on these projects. The Taskforce is due to provide advice to the Prime Minister on the program by October 1998.

Youth Suicide Working Group

6.7 The Youth Suicide Working Group consists of several federal departments, including the Department of Health and Family Services, DEETYA, the Attorney-General's Department, DSS and ATSIC. A Youth Suicide Prevention Advisory Group was also established in 1992 to provide advice to the Department of Health and Family Services in relation to the funding of projects. The Advisory Group consists of specialist researchers, academics and professionals with expertise in the area of youth suicide.⁷²⁶

6.8 The activities of the Working Group and Advisory Group are focused on the National Youth Suicide Prevention Strategy, a \$31 million initiative to provide a co-ordinated approach to youth suicide prevention.⁷²⁷ The Strategy is administered and co-ordinated by the Department of Health and Family Services, with advice from the Youth Suicide Prevention Advisory Group. In the 1995–96 Budget, \$13 million was allocated over four years to develop, trial and evaluate implementation of best practice in service

delivery to young people at high risk of suicide and to improve information sharing and data collection systems.⁷²⁸ A further \$18 million was allocated to the Strategy in the 1996–97 Budget for counselling and telephone support services, research, education and training for professionals.⁷²⁹ As the projects have now commenced operation, the working group has not met in over a year. However, the Advisory Group continues to assist the Department of Health and Family Services.⁷³⁰

NCAVAC

6.9 This 3-year, \$13 million campaign was launched on 5 June 1997 to develop partnerships with States and Territories through the Lead Minister's National Anti-Crime Strategy Group, with other federal agencies through an Inter-Departmental Working Group and with institutions and research organisations, peak non-government organisations and the corporate sector.

6.10 The campaign is undertaking a number of national crime prevention projects on a range of issues, including youth crime prevention. The campaign is examining issues relating to homeless youth, young people's use of public space and early intervention strategies.⁷³¹ The projects consist of evaluation and implementation strategies.⁷³²

6.11 The campaign is co-ordinated by a unit located in the Attorney-General's Department. It co-ordinates the research and demonstration projects, liaises with relevant organisations and develops community education and training programs.⁷³³

NSW Office for Children and Young People

6.12 The NSW Office for Children and Young People was established in April 1997 to facilitate the co-ordination and planning of government policy relating to children and young people. It also provides advice to the Premier, liaises with organisations representing children, gathers and exchanges information and provides a secretariat function to the Premier's advisory bodies concerned with children and young people.⁷³⁴

Proposal for an integrated system

A federal co-ordination body

6.13 A federal co-ordination office must be centrally located in the policy and program development process to be able to co-ordinate policy development and service delivery across the whole of government. All governments and departments involved in policy and service delivery for children should participate in and share responsibility for the rationalisation and co-ordination process.

6.14 This requires the co-ordinating body to be located within government rather than established as a separate statutory body. It must have close involvement in day-to-day policy debate and be assured of participating vigorously in all stages of policy development. Its views must be appropriately reflected in government legislation, policy and programs affecting children. This could not be achieved if the co-ordination functions were placed in an independent statutory body.

Location of the co-ordination body

6.15 The co-ordination function also must be 'owned' by all levels of government. A process managed and directed only at a federal level would be unlikely to gain the vital support of States and Territories, which are primarily responsible for policy and program delivery for children.

6.16 Significant consideration was given to locating the co-ordination role within the DEETYA Youth Bureau. A number of policy analysis, research and liaison functions are carried out by the Youth Bureau. However, this role is diluted by the time and resources spent on the administration of education, employment and training programs. For instance, the Youth Bureau administers JPET and the Green Corps Program, designed to encourage participation by young people in employment, education and training. It also provides career information and guidance services through the provision of 'The Job Guide' and other careers information material.⁷³⁵ The Youth Bureau also may not have the appropriate expertise to deal with issues

affecting younger children. Its present focus on young people from 12 to 25 is quite different from the focus of an office to co-ordinate policies and programs for children, even though there is overlap in ages.

6.17 Apart from competing program delivery demands and limitations in scope, a service delivery portfolio such as DEETYA may not be best placed to rationalise policy and muster support from within other federal, State and Territory Government portfolios.

6.18 PM&C is centrally located within the federal Government. It already undertakes across government co-ordination, particularly through the Office of Status of Women and Office of Indigenous Affairs. They provide policy advice, briefing and support to the relevant Ministers and information and administrative support for presentation of the Government's decisions in these areas.⁷³⁶ PM&C also has significant experience in liaising with State and Territory Governments. Its central position within government gives it the status necessary to deal effectively with all jurisdictions and ensure participation. It is also responsible for servicing Cabinet. We recommend that OFC be established within PM&C.

State and Territory involvement

6.19 The States and Territories play important roles in relation to children. Various non-government organisations across Australia undertake important work for children. The Inquiry considers it essential that States and Territories and non-government organisations participate in the work of OFC.

Comment on the proposal

Introduction

6.20 Many submissions to the Inquiry endorsed the need for a national co-ordination body.⁷³⁷ This need was also emphasised a number of times during consultations and in evidence to the Inquiry.⁷³⁸ More specifically, a substantial number of submissions supported our proposal for the establishment of an OFC as set out in DRP 3. This support came from a wide range of bodies, including the Child Health Council of South Australia,⁷³⁹ the Mental Health Legal Centre⁷⁴⁰ and Australian Red Cross.⁷⁴¹ The need for a federal OFC was emphasised in consultations during the Inquiry⁷⁴² and was recently endorsed in a paper by the Australian Association of Paediatric Teaching Centres⁷⁴³ and during the Australian Institute of Early Childhood Centenary Conference in August 1997.⁷⁴⁴ A national policy co-ordination unit was also called for in a conference in 1997 on children's rights.⁷⁴⁵

Benefits of federal co-ordination: corporations law model

6.21 The value of overarching national co-ordination is exemplified by corporations law, where the Commonwealth's assumption of responsibility has resulted in significant improvements in the operation of the system. The operation of corporations law had been plagued by administrative inefficiencies and lack of co-ordination. During the late 1970s and through the 1980s corporations law operated through the Co-operative Scheme. This scheme provided for the establishment of a Ministerial Council of ministers of all the governments, a National Companies and Securities Commission, a Companies and Securities Law Review Committee and the continuation of existing Corporate Affairs Commissions in each State. Under the scheme, each State passed its own legislation applying the Commonwealth legislation. Difficulties arose because the scheme's structure diffused responsibility through the Ministerial Council so that no single government or minister was responsible for the legislation. The relationship between the National Companies and Securities Commission and the State Corporate Affairs Commissions was administratively inefficient and problems arose because each of the State Commissions adopted its own interpretations of the law and rulings.⁷⁴⁶

6.22 A Senate Standing Committee report in 1987 highlighted the deficiencies of the scheme and recommended that the Commonwealth assume responsibility for all areas covered by the scheme. In response, the federal Government introduced a legislative package which, among other things, consolidated the legislation and introduced the *Australian Securities Commission Act 1989* (Cth). The Australian Securities Commission replaced the National Companies and Securities Commission and the respective State Corporate Affairs Commissions.⁷⁴⁷ Several States were concerned that the legislation would result in loss of

control over issues relating to companies and challenged the validity of the legislation in the High Court. Their claim was upheld by the High Court.⁷⁴⁸

6.23 As a result of the High Court decision in 1990 the Commonwealth, States and Territories signed Heads of Agreement in Alice Springs (the 'Alice Springs Agreement') in which the States and the Northern Territory agreed to pass legislation that would apply the Commonwealth's legislation. This Agreement replaced the National Companies and Securities Commission and the State and Territory Corporate Affairs Commissions with the Australian Securities Commission which had regional offices in each capital city. The Australian Securities Commission was to become the sole regulatory authority, accountable only to the federal Parliament and responsible to the federal Attorney-General. The Alice Springs Agreement allowed the Ministerial Council to continue. However, it addressed the lack of co-ordination and shifting of responsibility characterised by the operation of that Council by increasing the Commonwealth's power over its decision making and reducing the Council's role in corporate law reform.⁷⁴⁹

6.24 The history of corporations law demonstrates the improvements which can be brought about through co-operative federalism and national co-ordination bodies. The Australian Securities Commission differs from our proposed OFC in that the Australian Securities Commission has wide regulatory, investigatory and information gathering powers and the power to initiate civil or criminal proceedings in certain circumstances. However, the Australian Securities Commission is analogous to OFC in that it has responsibility for achieving uniformity throughout Australia in relation to performance of certain functions.⁷⁵⁰ The Australian Securities Commission also performs an important educative function.⁷⁵¹ It has become involved in law reform, makes submissions to inquiries and publishes reports and discussion papers.⁷⁵² The formation of the Australian Securities Commission, with its regional offices in each State and Territory, illustrates how a body can achieve a level of uniformity and efficiency within the present constitutional arrangements by striking an acceptable balance between national and State interests.

Objections to the creation of OFC

6.25 A number of submissions to the Inquiry questioned the need for a co-ordination body for children on the basis that it would represent a further layer of bureaucracy.⁷⁵³ These submissions argued from two different assumptions.

6.26 On the one hand, DEETYA accepted that children's needs should be handled through a 'whole of government' approach involving co-ordination by health, education, legal and other relevant agencies but submitted that '[t]he creation of an overarching agency may hamper, rather than facilitate, this process which should be the responsibility of relevant agencies in their everyday activities'.⁷⁵⁴ At a State and Territory level, the DEETYA submission questioned whether rationalisation could be achieved through the creation of an '...additional bureaucratic body...' as the existing advocacy bodies will continue to be necessary.⁷⁵⁵

6.27 Far from duplication, the Commissions' proposals will fill a vacuum in policy and unify accountability. They will put children's interrelated needs first, above the priorities of individual agencies. State and Territory advocacy bodies are an important component in our scheme. The primary function of OFC is policy co-ordination, not advocacy. As part of this co-ordination role OFC would consult with the State and Territory advocacy bodies. Their functions would complement OFC, not duplicate it. OFC would be a facilitative agency to develop integrated policy from the different strands of policy currently being developed in separate agencies which are at some points contradictory and at times deliver considerable inequities.

6.28 Secondly, the Northern Territory Government questioned the need for national consistency, emphasising that areas such as care and protection are primarily the responsibility of States and Territories. However, the object of national co-ordination is not to take away the jurisdiction of the States and Territories over areas such as care and protection and juvenile justice. OFC is intended to monitor and sponsor co-ordinated policy-making across jurisdictions, leading to national quality standards for the operation of those systems.

6.29 A number of submissions questioned whether OFC could operate with appropriate independence.⁷⁵⁶ Action for Children SA stated that the office may be subjected to political pressure and not be able to undertake many of the independent monitoring functions required of it, becoming instead a '...campaigner for

government policy'.⁷⁵⁷ The Child Health Council of South Australia also raised concerns about the Office's vulnerability, stating that it would be dependent on the goodwill of the government of the time.⁷⁵⁸

6.30 However, co-ordination should be undertaken by a body centrally located within government. By contrast, systemic advocacy is a distinct and separate function more appropriately carried out by an independent statutory authority and non-government organisations.⁷⁵⁹ A co-ordination body does not have the same requirement for independence. Indeed, independence could preclude its access to the inner workings of government and policy development where its principal roles lie.

6.31 A small number of submissions raised concerns as to the range of functions to be accorded to the proposed OFC. The Child Health Council of SA pointed out that it can be '...quite unwieldy for a new establishment to have too wide a brief in the initial stages'.⁷⁶⁰ It also stated that some of the recommendations appear to duplicate functions better performed by extending existing government and non-government services. Action for Children also raised concerns, suggesting that OFC's functions should be limited to a focus on national standard setting and co-ordination of policy at the federal level.⁷⁶¹

6.32 The Inquiry's recommendation for a National Summit and Taskforce responds to these criticisms.⁷⁶² The National Summit and Taskforce implementation strategy will bring an energy, commitment and purpose to OFC. The priorities agreed to by the National Summit and Taskforce will set the agenda for the first stage of the OFC's co-ordination work. The Commissions recognise that OFC would have extensive functions. However, these functions would be developed gradually over time in line with other identified areas of priority. Likewise, OFC would not duplicate functions. One object of establishing OFC is to permit over time the rationalisation of other partial co-ordination arrangements so as to remove existing duplication and inconsistency.

The operation of the model

The proposal

6.33 Following the National Summit, a small Taskforce on Children and the Legal Process should be established. This would facilitate State, Territory and non-government participation in formulating co-ordination strategies, national standards and guidelines. It would operate along the same lines as NCAVAC⁷⁶³ and the MCEETYA Youth Taskforce⁷⁶⁴ in that it would develop partnerships with key stakeholders.

6.34 The Taskforce should comprise perhaps 12 members, which may include three or four representatives from relevant Commonwealth, State and Territory departments nominated by the Summit. It would also include members from non-government organisations, specialist academics, practitioners, young people and parents. Indigenous children and children from rural and remote areas particularly should be represented on the Taskforce. The Chair should be an independent and eminent person with a record of achievement in working with children's issues. The person would need to have the confidence of Heads of Government.

6.35 The Taskforce would probably need to meet monthly for 18 months in each capital city on a rotating basis. The Chair would receive part-time remuneration; other members would be provided with out-of-pocket expenses. The Taskforce would look to receive advice and direction from broader meetings and conferences organised by OFC.

6.36 The Taskforce would be required to report after 18 months on the state of implementation of the national strategies, what modifications are considered necessary and the working plans and national standards that should be implemented. It would also establish benchmarks against which to assess federal, State and Territory agencies' performance. The report would then be tabled in federal Parliament and handed to all Australian Governments for implementation in their particular jurisdiction.

6.37 Upon completion of its primary task, the Taskforce would continue as an Advisory Committee on children's issues to the Prime Minister and other Heads of Government. Co-ordination of the implementation of the national strategies and standards would be undertaken by OFC and its State or Territory counterparts.⁷⁶⁵

6.38 OFC should be established with a small number of staff initially, building over a period of two to three years to a strength of about 15. It would be funded, apart from an initial modest 'float', primarily from off-sets from those areas of administration already attempting to provide co-ordination of children's issues. As OFC is separated from program delivery, its focus would not be diverted to portfolio responsibilities. It would be free to take issues-based or thematic approaches to children's interests as appropriate rather than being limited by portfolio boundaries.

6.39 OFC would provide secretariat services to the Taskforce, enabling it to develop links with government and non-government organisations. The strategies agreed upon during the Summit and by the Taskforce would set the priorities for OFC in the first two to three years of its operation. OFC would monitor the implementation of Taskforce strategies, standards and guidelines in each jurisdiction. It would continue to report to Parliament to ensure the standards are met and are regularly updated.

6.40 OFC would have responsibility also for developing, with the involvement of the Advisory Committee, modifications to existing and new standards for consideration by all Governments, general co-ordination of children's programs and policy across agencies and monitoring new policies and programs. The Commissions envisage that OFC's functions would include research and liaison functions.

6.41 OFC should be funded to provide some resources to assist selected delegates to attend the meetings and conferences associated with the Taskforce. OFC would also have funding to engage the services of paid consultants in areas of need.

6.42 Ideally, over the life of the Taskforce, each State and Territory should establish a centrally located co-ordination unit to mirror the functions of OFC. Current co-ordination functions should be streamlined to ensure the functions of each jurisdiction are complementary. Many State and Territory entities already carry out some of these functions. However, generally these bodies have a limited scope that restricts their ability to work or forge links according to a whole of government perspective. They are often constrained by portfolio concerns and responsibilities.

Specific functions of OFC

6.43 The recommendations in this report propose that OFC be given a number of responsibilities. The major functions of OFC would be to

- co-ordinate the development of a network of grassroots advocates for children and conduct related publicity (recs 9, 10)
- commission a national advice line for children, to be funded by the Department of Health and Family Services (rec 11)
- co-ordinate research in relation to exclusion from school (rec 46)
- distribute the results of the review of research on effects of the media on children (rec 63)
- develop and distribute best practice guidelines for advertisers (rec 66)
- co-ordinate the development of national interview standards (rec 91)
- co-ordinate the development of national standards for the staffing, skills and interview methods of Child Advocacy Centres or joint interview teams (rec 92)
- co-ordinate the development of national standards for child witness support units in consultation with the relevant State and Territory agencies (rec 106)
- develop national standards for legislation and practice in the care and protection system and monitor and evaluate these standards (recs 161, 162)

- develop the Charter for Children in Care (rec 164)
- support research and co-ordinate data collection on child prevention strategies, publish the results in an annual report to Parliament and provide required advice (rec 166)
- co-ordinate research into mandatory reporting of child abuse (rec 168)
- co-ordinate research into the practice of family group conferencing and pre-hearing conference schemes in the care and protection system (rec 169)
- co-ordinate research into the drift of children in care into the juvenile justice system (rec 182)
- co-ordinate research into the appropriate mechanisms and forums for dealing with adolescent/family breakdown (rec 191)
- develop national standards for juvenile justice, monitor those standards and report annually on the results (recs 192, 193)
- convene a working party of relevant individuals to develop guidelines for security companies dealing with young people (rec 203)
- conduct a national evaluation of community visitor schemes (rec 224)
- develop guidelines for juvenile court design (rec 234)
- commission and disseminate research into non-custodial sentencing options and develop best practice models for those options (rec 243)
- monitor the operation of duty solicitor schemes for young offenders (rec 245)
- co-ordinate initiatives to address the special needs of Indigenous children in relation to sentencing (rec 252)
- analyse data on recidivism rates for detainees (rec 282)
- analyse data about specified groups of young people who enter detention, for incorporation into national standards for juvenile justice, policy and program development (rec 283).

6.44 OFC would also undertake a monitoring role and consult with other agencies as set out in other recommendations in this Report.

6.45 All these functions would not progress at the same pace.⁷⁶⁶ As stated, in the first two to three years priorities would be set by the Summit and Taskforce. After that time, OFC could gradually develop over a five to seven year period and take up functions beyond the recommendations in our report, particularly in co-ordinating aspects of youth policy beyond the scope of this Inquiry. The Inquiry concerns children in legal processes. However, there are also many significant competing concerns for children, for instance, in the medical and health fields.

Rationalisation of existing bodies

6.46 The Taskforce and, later, the Advisory Committee to Heads of Government, the OFC and its State and Territory counterparts would take over many functions currently undertaken by various existing Commonwealth departments, taskforces and Ministerial Councils. In particular, OFC would take over those policy and co-ordination functions of the DEETYA Youth Bureau, the federal Attorney-General's Department and PM&C that deal with children's issues.

Alternatives to implementation of recommendations

6.47 The provision of proper co-ordination through the development of OFC is a matter of priority for children's interests. However, the recommendations in this Report do not rely exclusively on the establishment of OFC. Should the proposal for OFC not be implemented, the Inquiry envisages that the recommendations could be handled by suitable alternative bodies. The cost of this, however, would be continued failure of co-ordination and integration.

Funding implications

Introduction

6.48 Australian governments are already funding many of the functions to be undertaken by OFC. The problem is the funding is spread too widely and too thinly. The system is unco-ordinated and inefficient. The establishment of OFC would not entail high levels of additional federal spending. Indeed, OFC and the associated Taskforce would rationalise many functions currently undertaken by other bodies. Some idea of the likely cost of the Taskforce and OFC is set out below, based upon funding for bodies performing similar functions. Detailed costings are provided in Appendix C.

Comparable bodies to the Taskforce

6.49 The Youth Homeless Taskforce is similar to the Taskforce on Children and the Legal Process envisaged by the Inquiry.⁷⁶⁷ That Taskforce has an \$8 million budget for a two year program. However, much of its funding is dedicated to administering the Youth Homelessness Pilot Program. As the Taskforce on Children and the Legal Process would not be undertaking program administration, its budget could be significantly less than that of the Youth Homelessness Taskforce.

6.50 The Taskforce on Children and the Legal Process would be closer in function to the MCEETYA Youth Taskforce. The MCEETYA Taskforce identifies priority issues, undertakes research and develops policy and strategies to implement policies. The Taskforce held two meetings during 1995–96 and submitted a report and forward plan to the July 1996 MCEETYA meeting.⁷⁶⁸ There are no available costing figures on this Taskforce.

Comparable bodies to OFC

6.51 The Youth Bureau currently undertakes policy monitoring, research and analysis and service delivery functions which seek to protect the interests of young people between the ages of 12 and 25. The strategies in its Draft Business Plan include research and analysis, the development of links with other agencies and the development of services and programs to assist young people to make successful transitions between home and independent living and between school, further education and employment.

6.52 Some of the policy analysis, research and liaison functions that we envisage OFC performing are presently carried out by the Youth Bureau. The Bureau also co-ordinates a number of programs which are relevant to OFC. The Bureau and OFC cater for different age groups. The Bureau caters for young people between 12 and 25. OFC would cater for children, that is, those under 18. Some of the Bureau's policy and research work is also portfolio-related. Accordingly, functions relating to the 18 to 25 age group and portfolio responsibilities of education and employment will remain with the Bureau.

6.53 As well as general policy and research functions, the Bureau also co-ordinates a number of programs, part of which could be transferred to OFC. These include

- the NYARS which undertakes research into current social, political and economic issues relating to young people and provides federal, State and Territory Governments with information to assist in the development of youth policy
- the National Clearinghouse for Youth Studies based at the University of Tasmania, which collects and disseminates data on research, publications and conferences on youth issues and

- the Rural Youth Information Service within the program administration section of DEETYA which is designed to improve the access of young people in rural areas to information and advice on issues, with an emphasis on employment, education and training.

6.54 The Bureau employs approximately 17 staff in policy areas, eight of whom are engaged in whole of government co-ordination and nine in policy work relating to portfolio responsibilities.⁷⁶⁹ Expenditure in 1995–96 on programs covering co-ordination, research and consultation functions amounted to \$1.3 million — the Rural Youth Information Service (\$500 000), the National Youth Affairs Research Scheme (\$100 000), the production of youth publications (\$500 000) and the National Clearinghouse for Youth Studies (\$200 000).⁷⁷⁰

6.55 The Office of Status of Women within PM&C provides policy advice to the Prime Minister and the Minister Assisting the Prime Minister for the Status of Women. In developing policy, it has regular contact with federal, State and Territory Ministers and their advisers, stakeholders and specific interest networks. It conducts research, produces publications and helps disseminate information about the federal Government's decisions in these areas.⁷⁷¹ The Office of Status of Women with 27 staff is larger than OFC would be. Its expenditure in 1995–96 was approximately \$4 664 000.⁷⁷²

6.56 The NSW Ethnic Affairs Commission is also a comparable body. The primary functions of the Ethnic Affairs Commission are to provide advice to the NSW Government on ethnic affairs, create a link between government and community and provide relevant services to the community. The Ethnic Affairs Commission is a permanent, statutorily-based government authority. In addition to the Commission itself, it has three regional advisory committees, a customer council and a grants advisory committee. Its activities include significant program delivery, particularly the provision of a 24-hour interpreting service.⁷⁷³ It has 94 staff, including 14 part-time Commissioners and a full-time Chairperson. Expenditure on operating expenses in 1995–96 was \$8 445 000.⁷⁷⁴ Once again, this body is considerably larger than OFC would be and it has significant additional service delivery functions.

Resources and infrastructure

6.57 We envisage OFC operating in two stages. In the first stage (2 years) its functions will be divided between servicing the Taskforce and undertaking general policy co-ordination of agencies across the whole of government. In relation to the Taskforce, OFC would be responsible for meetings and conferences, building networks, research and writing for the Taskforce and commissioning research from other bodies. During this period it should have approximately 8 expert and experienced staff members. OFC and the Taskforce together would cost around \$2.4 million a year.⁷⁷⁵

6.58 In the second stage, OFC would assume responsibility for the full range of implementing, monitoring and co-ordinating functions recommended.⁷⁷⁶ At full capacity, it would have a staff of approximately 13 people. It would cost around \$3.3 million a year.⁷⁷⁷

6.59 Government agencies currently undertaking functions relating to children could transfer funds as off-sets to OFC and the Taskforce. The DEETYA Youth Bureau has been discussed already. The Human Rights Branch in the Attorney-General's Department is responsible for preparing reports under various international human rights instruments, including CROC.⁷⁷⁸ Those functions relating to CROC would be carried out by OFC.

6.60 The Social Policy Division within PM&C provides advice to the Prime Minister and develops policy in relation to youth affairs. In 1995–96 it provided support for the Review of the Australian National Training Authority Agreement and for the development of the Youth Homeless Pilot Program. It also has responsibility for co-ordinating and monitoring a pilot project for young offenders announced in the 1997–98 budget. ATSIC and the Youth Bureau are to run the program.⁷⁷⁹ Research and policy co-ordination tasks performed by the Social Policy Division in relation to children would move to the OFC.

6.61 The Inquiry recommends that any costs of the Summit, Taskforce and establishment of the OFC and its State and Territory counterparts be a charge against the Constitutional Centenary Foundation Fund. Prominence might be given by Heads of Government to announce this as an investment in Australia's future.

Recommendation 2. A small Taskforce on Children and the Legal Process should be established on the conclusion of the National Summit, comprising representatives from relevant federal, State and Territory departments nominated by the Summit, representatives from non-government organisations, specialist academics, practitioners, young people and parents.

Implementation. The Prime Minister should convene the Taskforce, with the Chair to be nominated and agreed upon during the Summit.

Recommendation 3. An Office for Children (OFC) should be established within PM&C. In the first two years of its operation, OFC's responsibilities should focus on the provision of secretariat services to the Summit and the Taskforce on Children and the Legal Process. Upon completion of the Taskforce, an expanded OFC should assume continuing co-ordination and monitoring responsibilities. In particular, it should

- provide an annual report to Parliament on the status of children in Australia
- monitor performance of international obligations to children, particularly CROC, and co-ordinate the preparation of reports under article 44 of CROC to the United Nations Committee on the Rights of the Child
- provide leadership and co-ordination in the preparation and implementation of national standards in areas of law recommended in this report, in consultation with the States and Territories
- monitor new legislation, programs and initiatives for compliance with CROC and national standards
- encourage and assist federal departments to incorporate the principles of CROC into their policies, programs and practice
- co-ordinate the development of models of best practice for dealing with child consumers of government services or programs, including best practice guidelines for grievance and complaints handling procedures for young people
- advise governments on the most effective use of funds appropriated by Parliament for expenditure in relation to children
- undertake research, in conjunction with State and Territory agencies and the ABS, on children's involvement in legal and administrative processes and the effects of those processes on children
- liaise with federal complaint handling bodies relevant to children, particularly HREOC and the Commonwealth Ombudsman
- liaise with HREOC and State and Territory children's advocacy and complaints bodies throughout Australia
- provide reports on its own initiative to federal Ministers, Ministerial Councils and Parliament dealing with matters of concern for children as and when they arise
- assist in the development of a network of grassroots advocates for children by accrediting, training and providing information to advocates
- encourage and facilitate public debate and community awareness on matters relating to children
- consult with relevant interest and community groups and with children and young people to determine the most appropriate strategies for improving conditions for children.

Implementation. The Prime Minister should take the necessary steps to establish OFC within PM&C.

7. Advocacy

Introduction

7.1 Chapter 6 recommended the establishment of processes and agencies to co-ordinate policy development and service delivery for children. However, adequate protection of children's interests also requires effective advocacy.⁷⁸⁰ Submissions to this Inquiry have called repeatedly for more advocacy of the rights of children and young people in the legal process. This chapter considers a range of advocacy models and suggests a rationalisation of existing advocacy arrangements at the federal, State and Territory levels.

7.2 The Inquiry recommends an approach that can work effectively in a federal system. As both the National Children's and Youth Law Centre⁷⁸¹ and the NSW Legislative Council Standing Committee on Social Issues⁷⁸² have recognised, an integrated system spanning federal and State and Territory levels of government is required. It should provide both individual advocacy and broad systemic advocacy and different levels and types of intervention. Advocacy mechanisms should work with existing structures. In particular, OFC would develop close links with these advocacy bodies.

Advocacy: functions and options

Introduction

7.3 There have been many recommendations, both to this Inquiry and elsewhere, about the desirable arrangement of functions for an agency charged with providing advocacy for children.⁷⁸³ Advocacy incorporates a number of discrete functions:

- promoting the interests of children generally to ensure government and agency accountability
- monitoring compliance with international obligations
- scrutiny of legislation, programs and initiatives
- conducting and/or co-ordinating research to promote best practice in relation to children
- resolving complaints and conducting inquiries into individual concerns
- supporting and assisting particular children to access services or obtain redress for complaints and problems
- encouraging the development of structures to enable children and young people to be active participants in the decision making processes affecting their lives.

7.4 A number of models may provide this independent advocacy, including a Children's Commissioner, a Children's Ombudsman, a National Office for Children and a Ministry for Children. Indeed, national and international advocacy agencies currently exercise many of these functions in different ways.

Human Rights and Equal Opportunity Commission

7.5 HREOC has statutory responsibility for promoting CROC in Australia.⁷⁸⁴ It examines existing and proposed laws to ascertain their consistency with children's rights, advises governments by preparing guidelines for the avoidance of acts or practices which may be inconsistent with children's rights and has a research and public education role. It also investigates complaints about practices of the Commonwealth that may be inconsistent with children's rights and may intervene in relevant court proceedings.⁷⁸⁵

Commonwealth, State and Territory Ombudsman's Offices

7.6 The Commonwealth and all the States and Territories have Ombudsman's Offices whose role includes investigating children's complaints about government authorities. The role of the Ombudsman has

traditionally been focused on individual complaints rather than systemic issues. However, some Ombudsman's offices, such as the NSW Ombudsman's Office, have become involved in broader policy issues.⁷⁸⁶ Nevertheless, the central focus of an Ombudsman's role tends to be individual complaint investigation and resolution.

State and Territory children's advocacy bodies

7.7 A number of States and Territories have agencies which focus on specific children's issues, provide policy advice to government, conduct education and awareness programs, research children's issues and provide advocacy and support to individual children.⁷⁸⁷ Most combine monitoring and co-ordination roles with complaints investigation and review. Some also provide a degree of individual advocacy for children.

7.8 In South Australia the Children's Interest Bureau undertakes public education and provides policy advice to the Office for Families and Children. It is a unit of the Department of Family and Community Services and reports to the Minister.⁷⁸⁸ The Bureau was established to monitor and assist in the resolution of problems children have with government authorities. It originally undertook individual and general advocacy for children in a wide range of areas.⁷⁸⁹ However, these functions have been curtailed through the removal of specialist child advocacy and the incorporation of the Bureau into the generalist Office for Families and Children.⁷⁹⁰ The Bureau is generally acknowledged as having played an important and positive role as an advocate for children in South Australia. Its ability to monitor the Department of Family and Community Services has been hampered by its location within the department it is designed to monitor.⁷⁹¹ The Child Health Council of South Australia also provides a mechanism for systems advocacy on behalf of the best interests of children.⁷⁹²

7.9 In the ACT the Community Advocate has specific responsibility to promote the protection of children from abuse and exploitation, to protect their rights and to represent their best interests in relation to government services and before courts and tribunals.⁷⁹³ The Advocate has the capacity to intervene in departmental decision-making processes. This includes seeking reviews of decisions by the Director of the Family Services Branch and recommending that orders be continued or changed as appropriate. The Advocate has a range of powers including the capacity to access departmental files, investigate complaints and appear before courts and tribunals.⁷⁹⁴

7.10 A Children's Commission and a Children's Services Appeals Tribunal were established in 1996 in Queensland.⁷⁹⁵ A major part of the Commissioner's role is to refer information about suspected child abuse to the police and other relevant bodies.⁷⁹⁶ Other functions include dealing with complaints about children's services, promoting best practice in alternate care for children, liaising with other investigative and complaint handling bodies and conducting relevant research.⁷⁹⁷ The Children's Commissioner convenes an Appeals Tribunal to hear complaints from children and adults complaining on their behalf.⁷⁹⁸

7.11 In NSW the Community Services Commission was established under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*.⁷⁹⁹ Its functions include handling complaints from or on behalf of children in care, reviewing the circumstances of individual children in care, co-ordinating a Community Visitors scheme for children in care, advising government about systemic problems, educating children and service providers about relevant matters and advising children of their right to complain.⁸⁰⁰

7.12 In Tasmania a Children's Commissioner is proposed in the Children, Young Persons and Their Families Bill 1997 (Tas). The primary focus of the Bill is the care and protection system. The functions of the Commissioner include promoting the health, welfare, care, protection and development of children, increasing public awareness of such matters, inquiring generally into and reporting on any matter including any enactment practice or procedure relating to those issues when requested to do so by the Minister, and advising the Minister on these matters.⁸⁰¹ The Bill also provides for the establishment of a Children's Consultative Council to encourage the active participation of children and young people, reducing the likelihood that the Office of the Children's Commissioner will be primarily an adult forum.⁸⁰²

Individual or non-government advocates

7.13 A number of non-government organisations provide advocacy for children's interests. The National Children's and Youth Law Centre provides a national advocacy service for children and publishes discussion

papers on various children's issues. The Youth Advocacy Centre in Queensland, established in 1981, also performs a broad advocacy role. In addition to providing legal advice and representation to young people it has an educative function, assists families and communities to help young people at risk, provides policy advice and lobbies for policy and law reform on behalf of children.⁸⁰³ The 1995 federal Government *Justice Statement* provided funding for four specialist children's legal advocates to provide advice, assistance and representation for children.⁸⁰⁴

7.14 Peer advocacy is young people advocating for and on behalf of each other.⁸⁰⁵ AAYPIC is one peer advocacy organisation.⁸⁰⁶ AAYPIC, which was established in 1993, is a consumer movement for and by young people who are or have recently been in care. Most of those active in the organisation are aged 10 to 25 years. The national AAYPIC body is supplemented by State branches and regional and local service based groups of young people in care run by young people themselves. This movement of young people has undertaken a wide range of activities to advocate at the systemic and individual level for young people in care. Systemic advocacy has included presentations by young people at national conferences dealing with issues relevant to children in care, contribution to government inquiries such as the Senate Inquiry into Truancy and School Exclusion, participation in national campaigns such as the national child abuse campaign co-ordinated by the National Child Protection Council, contribution to government initiatives such as the Commonwealth Youth Suicide Prevention Strategy and lobbying for government funding. Individual advocacy has included training and skills development programs, organisation of forums for young people to share individual and common experiences of the care system, counselling and advice.⁸⁰⁷

International children's advocacy bodies

7.15 Sweden has a Children's Ombudsman with a broad policy, educative and advice role and the power to investigate individual complaints.⁸⁰⁸ The Children's Ombudsman is located in the Social Department, although it relates to government as a whole.⁸⁰⁹

7.16 Denmark has a Children's Council of three government representatives and five members from non-government organisations. The Council undertakes policy and advocacy work on matters affecting children and operates in a manner similar in many respects to the Children's Ombudsman in Sweden.

7.17 Norway has a Children's Ombudsman whose functions include investigating individual complaints, recommending changes to legislation or government policy on matters affecting children and providing information and advice on children's rights issues. In investigating complaints, the Ombudsman has statutory rights of access to records and of entry to children's institutions. The Ombudsman is supported by an advisory panel of six people with expertise in children's issues. The Office of the Ombudsman is independent from the Government although its funding is provided by the Ministry of Children and Family Affairs.⁸¹⁰

7.18 The New Zealand Commissioner for Children combines the Ombudsman role of investigating individual complaints with a broad policy and advocacy role on issues relevant to the rights of children. The functions of the Commissioner include research, education and policy development and the investigation, monitoring, and review of matters relevant to the *Children, Young Persons and their Families Act 1989* (NZ)⁸¹¹ The Office of the Children's Commissioner is located within the Department of Social Welfare and reports annually to the Minister of Social Welfare and the Parliament.⁸¹²

7.19 England and the USA have very few formal mechanisms for children's advocacy at a government level. However, in each country, active non-government organisations provide advocacy for children at both the individual and the systemic level.⁸¹³

An integrated system of advocacy: federal arrangements

Introduction

7.20 The issues and problems examined in this Inquiry highlight the need for an integrated national system of advocacy with leadership at the federal level.

The Commonwealth Government must accept its moral and political obligation to children and take the lead in developing a framework for the provision of community services which have the interests of children at their heart. It

may not be necessary for the Commonwealth to provide these services, but it must develop the frameworks, set the minimum standards and provide adequate resources.⁸¹⁴

7.21 The Inquiry has examined existing Australian and overseas models. It sees useful elements in many, although none is entirely suited to Australia's conditions at a national level and particular federal arrangements.

A federal commissioner for children

7.22 The most common proposal for advocacy for children is for a Commissioner for Children. Numerous members of Parliament, judges, welfare agencies and other commentators in Australia have called for the establishment of a federal Commissioner for Children.⁸¹⁵ A substantial number of submissions to the Inquiry endorsed this proposal.⁸¹⁶ In particular, key organisations such as the National Children's and Youth Law Centre,⁸¹⁷ Burnside⁸¹⁸ and Defence for Children International⁸¹⁹ have advocated this position strongly.⁸²⁰ This proposal has been mirrored in other countries, with similar calls recently in countries such as the UK.⁸²¹

7.23 In suggesting the establishment of a Commissioner for Children, a number of submissions emphasised the need for an independent, statute-based advocacy body rather than an office placed squarely within government. The National Children's and Youth Law Centre considered this a better option than the establishment of a Ministry or a National Office for Children because

[a]n independent Commissioner for Children, not bound by party political considerations, would be able to speak out freely on behalf of children without the constraints on a Minister or a government agency.⁸²²

7.24 The Inquiry considers that the most pressing need at this stage is a national body located within government to co-ordinate policy development and service delivery for children. This is the basis of the Inquiry's recommendation for OFC.⁸²³ However, the Inquiry also agrees with submissions that an independent body to provide broad based national advocacy for children is needed.

7.25 A number of commentators and several submissions to the Inquiry have suggested that a Commissioner for Children or similar office would be best placed in an existing Commonwealth structure such as HREOC.⁸²⁴

Role of HREOC

7.26 HREOC has responsibility for the promotion and protection of children's rights under CROC. It was given this responsibility in 1992 but it was not given any particular resources for this work.

7.27 HREOC's limited and decreasing resources and its other areas of responsibility hamper its advocacy functions for children: a submission to this Inquiry described HREOC as overworked and under-resourced.⁸²⁵ The federal Government has proposed a restructure of HREOC that would result in a lesser number of Commissioners each responsible for a number of different constituent groups and portfolio areas⁸²⁶ This proposal would not allow for the addition of a specialist Commissioner for Children located within HREOC.

7.28 Nonetheless, HREOC already undertakes the functions that would be expected of a Commissioner for Children. HREOC is well-suited to the advocacy role because it

- is independent in law
- has both monitoring and advocacy roles
- uses CROC as a basis for its work
- has a strong human rights focus and a broad-range view of issues.

HREOC liaises with government and non-government bodies, speaks out in defence of children's interests, scrutinises legislation and policy to ensure that it accords with CROC and makes submissions to relevant government committees and inquiries. It has a range of 'tools' fundamental for an organisation devoted to

strong advocacy, such as a public affairs section and an inquiries unit. It also has a strong background in research, publications and policy and has developed contacts and networks with a wide range of government and non-government agencies. Notwithstanding the obstacles, the Inquiry considers HREOC the appropriate federal body to provide broad based systemic advocacy for children, provided that it is properly resourced and able to arrange its structure appropriately, for example by establishing a specialist children's rights unit.

7.29 There is also a strong economic argument in favour of HREOC fulfilling the role of a broad based national advocate. While some additional funding and staff would be required, locating the role in an existing organisation avoids additional layers of bureaucracy and the administrative and infrastructure costs associated with the establishment of a new organisation. As indicated throughout this report, the Inquiry's recommendations wherever possible build on, rather than duplicate, the efforts of existing agencies and institutions working for children.

7.30 HREOC should form close ties with OFC, strengthening the advocacy and co-ordination functions undertaken by each body.⁸²⁷ The advocacy functions undertaken by HREOC would also be complemented by the complaint handling role of the Commonwealth Ombudsman, systemic advocacy at the State and Territory level and a network of grassroots advocates catering for individual children.⁸²⁸

Recommendation 4. HREOC should be resourced to establish a specialist children's rights unit to undertake broad, national systemic advocacy on behalf of children.

Implementation. The Attorney-General should provide the necessary funds.

Commonwealth Ombudsman

7.31 Complaints processes are an important means for children to make their voice heard in the legal system and to seek redress for wrongs.⁸²⁹ Complaints processes should be accessible to children. The Commonwealth Ombudsman, HREOC and OFC should also develop close information-sharing links to inform their respective complaints-handling, advocacy and co-ordination functions.

7.32 In DRP 3 the Inquiry proposed that the Commonwealth Ombudsman collect and provide to the OFC regular information concerning the numbers and types of complaints by children, to assist in the development of complaints processes for children.⁸³⁰ However, a submission to the Inquiry doubted whether this information could be a basis for improving the system, particularly when children tend not to make complaints.⁸³¹ The submission pointed out that information from inadequate statistics will not necessarily indicate whether children's interests are being addressed. However, information about complaints would not be provided to OFC and HREOC on this basis but rather as a means of identifying systemic problems.

Recommendation 5. The Commonwealth Ombudsman should ensure complaints processes are suitably adapted for children. It should incorporate the principles enumerated in recommendation 13. The Ombudsman, HREOC and OFC should develop links to ensure the co-operative exchange of information to promote best practice for administrative processes in relation to children.

Implementation. The Commonwealth Ombudsman should provide information to HREOC and OFC in relation to any systemic problems for children that become apparent. Information should be collected and provided to HREOC and OFC on a regular basis concerning the numbers of child complainants, types of complaints and results. HREOC and OFC should consult regularly with, and provide information and advice about research and systemic issues to, the Commonwealth Ombudsman.

State and Territory advocacy and complaint bodies

Functions of advocacy and complaint bodies

7.33 The States and Territories are responsible for law, policy and service delivery in significant areas of children's lives. Federal advocacy, complaints and co-ordination bodies therefore must be complemented by State and Territory agencies closer to children's services and issues at regional and local levels. States and Territories are best placed to perform many complaint handling, co-ordination and broad systemic advocacy functions for children.

7.34 Existing State and Territory agencies that perform these functions vary greatly. Some State and Territory bodies have wide investigatory powers⁸³² and others have more of an advocacy and co-ordination role.⁸³³ However, all the agencies tend to focus on care and protection rather than more broad-ranging issues.⁸³⁴ All States and Territories also have general complaint handling bodies, usually in the form of Ombudsman's Offices, which accept complaints by or on behalf of children about State and Territory services and authorities. However, these agencies are of limited assistance to children. They receive complaints from all members of the public, not just from or about children, and the number of complaints from or about children is very small.

7.35 The differences between State and Territory bodies are not necessarily undesirable or incompatible with the objectives of clear national standards and equity for children. Uniform standards do not require precise uniformity in the government structures responsible for maintaining those standards, but a consistent set of standards is important to ensure proper protection of children's rights.

7.36 The key issue then is the adequacy of the responses by the institutions within each State and Territory in meeting the national standards, whatever their structures and functions might be. A number of elements are fundamental to effective co-ordination and advocacy, both individual and systemic. The characteristics of a good advocacy mechanism include

- statutory independence
- adequate resources
- investigative powers
- active participation by children
- accessibility to all children
- a good relationship with decision-making bodies concerned with issues affecting children
- regional and local representation
- access to research and statistics relevant to children.

7.37 The emphasis should be on best practice rather than on prescribing rigidly defined institutional arrangements. Existing bodies have clear advantages in funding. The OFC can have an important role in assisting States and Territories in this. In particular, the OFC should assist States and Territories to develop appropriate processes and best practice for handling complaints by children. Additionally, OFC will assist the development of uniform standards in a number of areas to apply across jurisdictions.

Structure of State and Territory agencies

7.38 State and Territory agencies should be structured in a way that best equips them to perform the advocacy functions. In particular, they should be able to provide broad government-wide advocacy, although they may be supplemented by agencies focusing on specific areas.

7.39 Some commentators see problems in locating within the one body different roles in relation to children — complaint handling, advocacy and policy co-ordination. Complaint handling and advocacy are sometimes regarded as incompatible and open to conflict of interest if combined. These are valid concerns. Locating functions in separate organisations is clearly one way of dealing with them. However, the two roles may be played by the one organisation without undue conflict provided appropriate functional divisions and procedural safe-guards are observed.⁸³⁵ There should be a clear distinction and separation between the complaint handling and systemic advocacy roles within the organisational structure. This separation should be reflected in personnel and in the formal decision making arrangements. The organisation should be bound by rules of due process and natural justice, which should be reflected in its governing legislation or regulations and in procedural guidelines. In particular, decisions should be open to review.

7.40 Resource issues are very important. Organisations which perform more than one role should be adequately resourced to do so. Clearly, there is a risk that the accumulation of a heavy complaint load and the greater sense of urgency and immediacy that sometimes attaches to individual complaints may result in resources being diverted from the systemic advocacy area. This can undermine significantly the broader policy work of the organisation. Particular care is needed in relation to reviews of children in care. While this role may be appropriate in some cases, placing all reviews within advocacy agencies could prove very unwieldy, effectively rendering the agency an alternative child protection agency and reducing its scope considerably.

7.41 The State and Territory advocacy bodies should maintain links with HREOC and OFC to ensure they have access to information about systemic problems revealed by individual complaints. Complaints involving federal human rights issues could be referred to the appropriate federal agency (Ombudsman, HREOC or OFC) if lodged at the State or Territory level. The State and Territory agencies would then provide information to the appropriate federal bodies at suitable intervals. In particular, this can help to ensure benchmarks are met and to provide information about systemic issues which should be addressed. Consideration needs to be given to privacy issues in developing the liaison and reporting processes.

7.42 A focus of these State and Territory advocacy bodies should be on assisting children with particular needs including children in care, children in or at risk of entering detention and children who have been excluded from school or are at risk of exclusion. Because children lack knowledge of their rights and responsibilities,⁸³⁶ associated access and awareness campaigns directed to young people need to be undertaken by these State and Territory bodies. In a submission to this Inquiry, the NSW Government stressed the importance of State and Territory bodies becoming accessible and child-focused. The submission outlined some access and awareness initiatives undertaken by the NSW Ombudsman.

The NSW Ombudsman has done substantial work to increase awareness and access...This has largely been the result of funding for a youth liaison officer.⁸³⁷

Part of the NSW Ombudsman's access and awareness program for young people is an ongoing review of complaint handling procedures, including the use of frequent telephone contact, simplified written correspondence and the development of an easy to use complaint form, which requires minimal information.⁸³⁸

7.43 Children's participation in and access to these agencies is crucial.

We are still a long way from a model of Children's Commissioner in Australia which is independent, broad in focus, and fully involves children and young people as a statutory function. Above all we need a model that does not cringe from the rights of children — a notion that is politically unpopular in the current climate. Until this changes, Offices of Commissioners for Children, as constructed in the Australian context, are in danger of becoming welfare dominated adult forums which regard children as objects of concern, and not as citizens with enforceable rights.⁸³⁹

Recommendation 6. Each State and Territory should ensure that there are appropriate mechanisms, vested in either newly established or existing bodies, to

- handle complaints by or on behalf of children concerning the conduct of that State's or Territory's authorities including conduct of employees and omissions or failures to act by authorities

- advocate children's, or particular groups of children's, interests at a policy level within government
- plan and co-ordinate children's policies and initiatives at State and Territory level
- liaise with OFC, HREOC, the Commonwealth Ombudsman and individual advocates for children, as well as relevant non-government organisations
- provide OFC with an annual report on outcome indicators of programs and initiatives for children that receive federal funding
- provide OFC with information on systemic matters of concern for children as necessary.

Implementation. States and Territories should be encouraged through COAG to establish such bodies or units. The relevant bodies should establish links with other similar bodies.

Recommendation 7. State and Territory children's advocacy and complaints bodies should operate on the basis of principles enumerated at recommendation 13.

Recommendation 8. State and Territory children's advocacy and complaints bodies should undertake access and awareness campaigns directed to young people, particularly those young people who are most likely to require assistance including children who have English language or literacy difficulties, who are outside the education system or who are in the juvenile justice or care and protection systems.

A network of individual advocates

Introduction

7.44 Systemic, broad based advocacy for children should be supplemented by advocates who intervene on behalf of individual children in a range of processes and decisions. Generally, the best advocates for children are parents and families but for children most in need of advocates parental support is very often either inappropriate or unavailable. Additional or alternative advocacy assistance is often needed. This is particularly so for vulnerable children, such as children with disabilities who

...require the skills of a specialist advocate in a range of situations where vital, life determining, decisions are made. For example, contentious matters such as sterilisation, termination of pregnancy, entering State Care and providing evidence in criminal proceedings.⁸⁴⁰

7.45 The ability of children to access an individual advocate to assist them with administrative difficulties and concerns is as important as the establishment of co-ordinating and accountability agencies. Without access to this assistance Australia's obligation under Article 12 of CROC to allow children an appropriate degree of participation in decisions that affect them is not fully implemented. There is a pressing need for a network of individual advocates to assist children to access services and deal with government and non-government bodies.⁸⁴¹

7.46 Community advocates could also assist children in non-legal processes, for example, negotiating on their behalf in disciplinary procedures in schools and assisting with income support applications.

7.47 There are a number of programs in Australia to support children involved in court proceedings.⁸⁴² Some of these programs have been criticised for not allowing a focus on the 'whole person' as their focus is often limited to court proceedings.⁸⁴³

7.48 The New South Wales Legislative Council Standing Committee on Social Issues has recommended that a network of 20 community advocates be established in NSW based in non-government agencies and operating under the auspices of the Office of the Status of Children and Young People.⁸⁴⁴ The Inquiry supports this proposal and recommends a more extensive national network of children's advocates. We favour a broad-based scheme of child advocates affiliated with the network. The advocates would not be employed by OFC. Indeed many would be already employed in non-government organisations. OFC would play a co-ordinating role in accreditation, facilitating exchange of information and support for the network.

Who should act as children's advocates?

7.49 Children are best supported by those with whom they have a relationship and in whom they trust. They relate with a person they know rather than with a person who has the requisite position or status. The formal 'labels' which adults consider important are often irrelevant or meaningless to children and young people. Children's advocates should be the people to whom children relate and who are accessible to children. First, they are their parents. They are youth and community workers and school welfare officers. Many of these advocates are already there, in homes, in non-government organisations, community centres or legal centres. Many are providing informal advocacy for children. Often this is made more difficult by the lack of recognition and accreditation for these advocates. A network of advocates would provide support, recognition, contacts and information for them.

7.50 Professional advocates would have qualifications in the social sciences or experience in areas involving children's issues. Membership of the network should not affect the current employment arrangements of the advocates with federal, State or community agencies.

7.51 The Inquiry is not proposing a scheme for the recruitment of child advocates into new, funded positions. It is proposing the formation of a network for existing advocates to enhance their effectiveness in providing individual advocacy for children through training, information exchange and other forms of support. The network will also help increase public awareness of the role of child advocates. The network will be co-ordinated by OFC.

7.52 Child advocates within this network will not provide specialist legal advice, although a certain number of them may have some expertise in this area. For the most part, they will be informal advocates, support people and contact points for young people, functions already being performed by many child advocates. Access to a network of child advocates will assist them with information and referral and access to and assistance from complaint handling authorities at government level.

7.53 The network of advocates should be accessible to all children, particularly those in rural areas for whom distance is a barrier in accessing services or obtaining redress. Publicity about the existence and role of the network will be needed.

7.54 The Inquiry is mindful of the problems of overwork and 'burnout' experienced by many youth advocates working under difficult circumstances and with limited resources. Consultations for this Inquiry highlighted the seriousness of these problems.⁸⁴⁵ For that reason, the Inquiry is hesitant about any proposal that may add to the pressures currently faced by youth workers. This is reflected in the proposal for a network of grassroots advocates. It is not intended that accreditation will set additional onerous standards which must be met or further qualifications that must be obtained by people working in the areas of children's and youth advocacy. Rather it is intended primarily as a means of giving greater recognition to their work. The mutual support, information exchange and training provided by the network will alleviate rather than add to the problem of burnout. It will facilitate the process of referral, enhance the development of skills and make it easier for advocates to keep up with legislative and policy changes in this area. The network will not in itself be a service. It will not attract clients or increase the caseloads of its members.

7.55 Peer advocacy will play a role in the network of grassroots advocates. Surveys of young people undertaken for this Inquiry indicated that a certain amount of informal peer advocacy already occurs. The survey asked

Who would you turn to if you got in trouble with police? If you were ripped off?
If you need more information about the law and rights?⁸⁴⁶

7.56 Significant numbers of respondents to these questions said they would turn to their friends for assistance.⁸⁴⁷ There are also formal mechanisms for peer advocacy, such as AAYPIC.⁸⁴⁸ Peer advocacy models should be included in the development of the network of grassroots advocates.

Recommendation 9. A network of grassroots, community or peer advocates for children, drawn from

existing informal advocates in all cities and major regional centres of Australia, should be established and a system of accreditation for child advocates developed by OFC. OFC should ensure communication and liaison within this network at national, State and Territory levels. OFC should co-ordinate training programs on legal issues, communication with children and negotiation skills. OFC should provide advocates with information on the network and regularly updated regional contact lists.

Implementation. OFC should co-ordinate the development of this network, initially by inviting applications for accreditation as advocates and developing training programs and information.

Recommendation 10. The existence and role of the network of advocates should be publicised particularly to those who are most likely to need the assistance of an advocate, including children who have English language or literacy difficulties, those who are outside the education system and those who are in the juvenile justice or care and protection systems.

Implementation. OFC should co-ordinate this publicity.

Advocacy advice line

7.57 Sweden provides a model for an advocacy advice line. Barnen Ratt I Samhället (BRIS) or 'Children's Rights in Society' operates a telephone helpline for parents and children. The service consists of approximately 220 trained volunteers who provide telephone advice on a range of issues. BRIS maintains close links with other services and organisations and refers children to appropriate agencies. This is a useful model upon which to base an Australian national telephone advice line for children.

7.58 Kids Help Line currently offers a national free 24 hour telephone counselling service for 5 to 18 year olds. It also collects data from its callers on issues about which young people are concerned. Approximately 12% of all problem calls are ultimately referred to other agencies.⁸⁴⁹ This service is funded primarily by charitable donations.

7.59 A national advice line, with federal Government support, is required as an integral part of the advocacy network. A number of submissions supported this proposal.⁸⁵⁰

Recommendation 11. A national toll-free telephone advice line for children should be provided. This may involve utilisation of existing telephone advice services for children. It may best be established as a national network with offices in each capital city. The advice line should form an integral part of the advocacy network and provide suitable referrals to the network wherever it appears a child is in need of advocacy.

Implementation. OFC should commission the establishment of such an advice line to be funded by the Department of Health and Family Services.

8. Introduction to Part B

8.1 Like adults, children function within the legal system. Their involvement in administrative processes, whether as citizens, students or users of government services, is defined by law. Even processes that may appear to be purely administrative interact with legal processes in significant ways for children.

8.2 Children's contact with administrative and legal processes often operates along a continuum. Consultations confirmed that for many children there are clear links between their treatment when seeking income support, in school and as consumers and their developmental difficulties. The outcome for many is involvement in care and protection and juvenile justice processes. Empirical data, anecdotal evidence and individual submissions revealed a high degree of correlation, for example, between school exclusion and involvement in the juvenile justice system.⁸⁵¹ It may be possible to prevent many children from coming into adverse contact with this more punitive aspect of the legal system if suitable administrative procedures and support mechanisms are in place.

8.3 Part B opens with Chapter 9, Administrative decision making — service delivery for children. The Inquiry makes recommendations that federal government departments have appropriate procedures for dealing effectively with young clients. The difficulties children face when using income support and immigration processes and review mechanisms are used as case studies to illustrate the importance of appropriate service delivery standards.

8.4 Chapter 10, Children in education, looks at the education system where children can build on the understanding of their rights and responsibilities that they first develop in their families. School is generally also the first time that children experience formal disciplinary procedures. The way these disciplinary processes work can have significant implications for the way children interact with other legal processes.

8.5 The Inquiry's terms of reference require us to consider the appropriateness and effectiveness of the legal process in protecting children and young people as consumers. Chapter 11, Children as consumers, evaluates and makes recommendations to improve the regulatory and legislative mechanisms designed to protect children as consumers of products, financial services, media services and advertising.

9. Administrative decision making — service delivery for children

Introduction

9.1 Young people generally find it difficult to deal with government departments.⁸⁵² Few agencies have processes, forms or information brochures that are adapted to children's needs and level of comprehension. Evidence to the Inquiry suggests that poor inter-governmental and inter-departmental co-ordination and delays in decision making often impact adversely on vulnerable children. This chapter begins with general recommendations for service delivery standards for government agencies when administering programs that impact on or involve children in administrative or legal processes.

9.2 Income support and immigration services are presented as case studies to illustrate the need for appropriate service delivery standards. The Inquiry is concerned not with the substantive laws in these areas but with the legal processes associated with service delivery. We are concerned with issues relating to the co-ordination of services within and between governments, the protection of children at risk, young people's ability to access services and their capacity to challenge administrative decisions that affect them.

Service delivery to children

Introduction

9.3 Children are an important client group of government agencies. This is too little recognised even in areas such as care and protection where they are the predominant clients. There is limited information available specifically for them concerning federal, State or Territory government services, again even where the services are expressly designed for children.⁸⁵³

9.4 During consultations the Inquiry heard repeatedly of government agencies treating children involved in administrative or legal processes inappropriately.⁸⁵⁴ Concerns included the lack of a clear complaints avenue in many departments.⁸⁵⁵ The Inquiry was left in no doubt that there is an urgent need for government agencies to develop appropriate standards for effective service delivery to children.⁸⁵⁶

Children living in rural and remote communities

9.5 Children in rural and remote communities have particular difficulties accessing government services and challenging associated administrative decisions simply because the nearest government office is not within easy travelling distance.⁸⁵⁷ A number of respondents to the survey highlighted the disparity between services available in urban and rural areas.

In the country we don't get as many opportunities as city kids.⁸⁵⁸

9.6 The federal Government has given a general commitment to improve service delivery in regional areas.⁸⁵⁹ The Rural Youth Information Scheme, administered by DEETYA, provides young people aged 15 to 25 living in rural and remote communities with access to information, advice and referral services concerning education, training, employment, income support, accommodation and health. The Rural Youth Information Scheme has offices in regional centres throughout each State and Territory, for example, in Kingaroy in Queensland and in Jabiru in the Northern Territory.

9.7 Initiatives in regional centres, such as the Rural Youth Information Scheme, should be supplemented by greater use of technology to get information about government services to children living in remote communities. All government agencies should work towards making their advice and complaints services available to children through facilities such as freecall telephone hotlines advertised in schools and youth centres, on local radio and the Internet.

Recommendation 12. All government agencies should ensure that their advice and complaints services are accessible by children in rural and remote areas through facilities such as freecall telephone hotlines advertised in schools and youth centres, on local radio and the Internet.

Service charters

9.8 Service charters first emerged as accountability mechanisms in contemporary Westminster style governments under the Major Government in Britain. The Citizens' Charter was designed in the context of privatisation to make the providers of public services accountable to their users.⁸⁶⁰

9.9 In July 1997 the then Minister for Small Business and Consumer Affairs announced that by 1999 every federal government body providing services to the public will be required to develop a service charter.⁸⁶¹ The charters are to accord with certain principles and must guarantee specific standards for service delivery.⁸⁶² They will contain performance criteria for each government agency and provide consumers with information on the level of service they can expect from these bodies. Compliance with the charters is to be monitored internally and the results included in each agency's annual report. Charters should be externally reviewed at least every three years.⁸⁶³

For the public sector this is a significant move toward a proactive approach and away from the passive even reactive style traditionally applied in dealings with consumers...⁸⁶⁴

9.10 A number of Australian federal government service providers already have charters in place. For example, the Commissioner of Taxation recently released a Taxpayers' Charter outlining customers' rights and obligations and the complaints mechanisms available. The Child Support Agency has a separate Child Support Clients' Charter.⁸⁶⁵

9.11 Most young people have little experience in dealing with authority outside the home or school. Approaching a government agency can be an intimidating experience. It requires considerable fortitude for a child to make a complaint about agency staff or service delivery. A child will quickly lose the confidence necessary to pursue a claim or make a complaint if agency processes are lengthy or complicated or if staff are dismissive of the child's claim.⁸⁶⁶ The Inquiry considers that, in developing and implementing service charters, agencies should have regard to the particular needs of young people. Agencies should consult widely with the youth sector before settling the terms of service charters and should submit charters to OFC in draft form for comment. The proposal for standards of agency best practice in this regard is supported by a number of submissions.⁸⁶⁷

9.12 When developing service charters, agencies should give particular attention to the most child friendly way of publicising their services and the most effective means of distributing that material. Attention should also be given to staff training and developing an agency culture that takes child clients and their concerns seriously. This would include adapting internal processes as appropriate and providing support persons for children during interviews.⁸⁶⁸ The Inquiry considers that very young children should only be interviewed by government officials where this is necessary for their protection or well being, not merely, for example, to obtain evidence adverse to a parent's claim to entitlements.⁸⁶⁹

9.13 When developing service charters agencies should also take into account the essential elements of an effective complaints handling process as enunciated by Standards Australia.⁸⁷⁰ These elements include ensuring that the process is accessible to all, that complainants are assisted in formulating complaints and that complaints are dealt with quickly and courteously.⁸⁷¹ The NSW Government and NSW Ombudsman submitted that agencies that deal with young people should advertise appeal and complaints mechanisms to relevant adult advocates as well as to the children themselves.⁸⁷² The Inquiry supports this suggestion.

9.14 State and Territory government agencies should also ensure that service charters take account of child clients' particular needs.

Recommendation 13. In developing service delivery standards and implementing its service charter, each federal government agency should have regard to the following principles.

- The agency should consult as appropriate with its child clients and with relevant non-government organisations to determine the most effective ways of informing children about available services.
- Publicity and information about services and review mechanisms should be directed specifically at young people. This material may be most effective if it is in the form of stickers, comics, posters and specifically designed brochures for distribution through schools and youth centres. The information should also be available by telephone and on the Internet.
- Staff should be trained to deal sympathetically with young people and to communicate in age appropriate language. A culture of listening to children should be cultivated. Information and evidence provided by children should be treated with the same degree of seriousness as that provided by adults.
- It will often be inappropriate for agencies to rely on written material alone as a means of communicating with children. Wherever possible communication with children should be in person rather than in writing.
- Most young people cannot deal with complicated forms and elaborate bureaucratic requirements. Where these processes cannot be avoided or adapted for children, the relevant agency should ensure that children are provided with a support person to assist them to negotiate the process.
- Administrative decisions concerning children should be made in a timely manner. Where children are dependent on the provision of services, delay in providing them can put the child at risk. Further, children's perception of time is such that they may interpret any delay as an indication that their application has been rejected. Where delays in decision making are unavoidable, agencies should contact children to explain the reasons for the delay.
- Children should be entitled to have a support person of their choice, such as a parent or community worker, present whenever they are interviewed by a government department or give evidence to a review body concerning an administrative decision.
- Except where it is necessary for the protection or well being of the child, government agencies generally should not interview young children. Where younger children are interviewed, including where they are interviewed on a matter relating to their parents, the process should be carefully explained to the child.

Income support

Introduction

9.15 The legal processes for the administration of income support affect many children. For some, income support is a major point of direct contact with federal administration. Challenges to decisions about income support are a common reason for the appearance of young people before federal tribunals.⁸⁷³

9.16 Difficulties in negotiating these legal processes can have serious consequences for young people from low socio-economic backgrounds or for those who have inadequate family support. There is a connection between children's poverty and their adverse involvement with legal processes. The more effective the income support regime is in supporting eligible young people, the less likely they are to become enmeshed in the care and protection and/or juvenile justice systems.⁸⁷⁴ Longitudinal research conducted to determine what individual, environmental and social factors increase the risk of juvenile offending suggests that socio-economic deprivation and unemployment are major factors.⁸⁷⁵

Lack of income, homelessness and abuse and exploitation all have detrimental effects on children. To ignore their association with crime is to engage in the process of victim-blaming.⁸⁷⁶

9.17 The discussion in this Report is limited to income support that the Commonwealth provides directly to young people who are unemployed, studying or homeless.⁸⁷⁷ In administering these benefits the

Commonwealth implements its obligation under CROC to ensure that children have the right to benefit from social security.⁸⁷⁸

Current system

9.18 The main forms of income support currently paid to people under 18 are Youth Training Allowance (YTA) and Austudy or Abstudy. These benefits are administered by DSS and DEETYA.

9.19 YTA is available to Australian residents living in Australia aged between 16 and 18 years who are registered as unemployed.⁸⁷⁹ YTA is paid at two levels: a lower rate for recipients living in the parental home and a higher rate for those qualifying for the independent, homeless or 'living away from home' rates.⁸⁸⁰

9.20 Austudy provides financial assistance to full time students 16 years of age and over. Eligibility requirements include meeting academic standards and income and assets tests. Income and assets tests also apply to the student's parents unless the student meets the independent criteria. For students under 18 years of age, Austudy is paid to the carers unless payment is at the independent or homeless rate.⁸⁸¹ Abstudy is a similar benefit for Indigenous students.

9.21 Submissions from community groups and evidence from young people participating in focus groups indicate that children find the administrative processes associated with income support applications bewildering and intimidating.⁸⁸² Many young people told the Inquiry that government departments are unhelpful, the level of co-ordination between them is poor, there is insufficient information available about entitlements and application forms are difficult to fill out without assistance.⁸⁸³ In addition, some young people indicated that waiting periods for benefits are unreasonably long.⁸⁸⁴ They also claimed that clerical errors often mean that benefits are incorrectly reduced or stopped.⁸⁸⁵ These frustrations with income support processes were reiterated by respondents to our survey.⁸⁸⁶

The government needs to get more kids into schools and off the streets.⁸⁸⁷
Kids on the streets don't receive any government benefits.⁸⁸⁸

Centrelink

9.22 The federal Government recently established a new statutory authority, Centrelink, to take over a number of federal government services including the administration of all income support payments.⁸⁸⁹ It has a dedicated youth segment. Hopefully this administrative reform will overcome some of the problems experienced by young people when applying for benefits. Lack of communication and co-ordination between DSS and DEETYA was identified as a major problem by young people during consultations.⁸⁹⁰

9.23 Having to deal with only one administrative body, however, will not overcome all the difficulties young people currently experience when applying for income support. Centrelink should adopt the proposed service delivery standards when dealing with child clients.⁸⁹¹

9.24 Centrelink, DEETYA and DSS are reviewing the local services currently provided to young people to determine which of them should be delivered by Centrelink, whether any additional or modified services are required and the manner in which those services should be delivered. This review will examine whether service delivery to young people should differ from that to others. The review is to be conducted in consultation with the community sector and young people with a final report due by December 1997.

Common Youth Allowance

9.25 On 20 August 1996 the federal Government announced a proposal to replace YTA and Austudy with a single youth allowance.⁸⁹² On 17 June 1997 the Minister for Social Security and the Minister for Employment, Education, Training and Youth Affairs revealed further details of the proposed changes to take effect from 1 July 1998. The Common Youth Allowance (CYA) will be the policy responsibility of DSS and will be administered by Centrelink.⁸⁹³

9.26 The CYA is designed to streamline youth benefits and 'create real incentives to complete schooling or partake in training or other educational opportunities prior to looking for work'.⁸⁹⁴ It will replace YTA,

Austudy for students under 25, the Sickness Allowance for 16 to 20 year olds and the more-than-minimum rate of Family Payment for secondary students aged 16 to 18 not receiving Austudy.

9.27 CYA will not incorporate Abstudy although the Government will review the scheme to consider the most appropriate way to pay the means tested living allowance component of it. The range of supplementary benefits will also be reviewed 'to ensure that Indigenous educational disadvantages are properly addressed'.⁸⁹⁵

9.28 CYA will be paid at two levels. Those eligible for the at-home rate will receive a maximum of \$145 a fortnight. Young people who qualify for the away from home rate will receive a maximum of \$265 a fortnight regardless of whether they are classified as dependent or independent.⁸⁹⁶ A CYA recipient will qualify as independent if he or she is married, in a *de facto* relationship of at least two years' duration,⁸⁹⁷ has a dependent child or is homeless. Independent young people will be exempt from the parental means test.⁸⁹⁸

9.29 Unemployed under 18 year olds will be required to have had more extensive work experience to qualify for income support at the independent rate. For example, they will now have to have supported themselves since leaving school by 18 months' full time employment over a two year period, instead of 13 weeks' employment within a period of 18 weeks. That means a wait of 18 to 24 months instead of the present 3 to 4 months.

9.30 Only those at school or in full time training will receive the CYA.⁸⁹⁹ Unemployed young people aged between 16 and 18 will no longer be eligible for income support unless they are specifically exempted from this training requirement. Temporary exemptions will be available for young people who are ill, substance abusers or homeless and those who have lost their job or who cannot secure an appropriate education place. Young people who leave school at the end of year 10 will generally have to rely on their families to support them until they find full time work.⁹⁰⁰

9.31 Young income support applicants and recipients experience major administrative problems with the current structure of benefits and allowances. For example, eligibility criteria are frequently so complex and confusing that it is difficult for young people to work out the difference between benefits and programs, let alone access them.⁹⁰¹ Having one youth benefit should overcome this problem.

9.32 In addition, the Government has given a commitment that recipients will no longer have their payments cancelled and have to reapply for a different benefit due to minor changes in circumstances.⁹⁰² This will implement the Inquiry's draft recommendation 4.2 and should overcome the difficulties experienced by many young people who move between education and employment.⁹⁰³

9.33 The temporary exemptions from the training requirement applicable to under 18 recipients of CYA must not be administered so stringently that young people at risk are deprived of support by unrealistic administrative requirements. For example, Centrelink officers should ensure that homeless young people are put in contact with an appropriate youth centre so that they have an address for receiving official correspondence. Also, officers should investigate the reason for a young person missing an appointment rather than automatically recording it as a breach and suspending the benefit.⁹⁰⁴ Administrators should take account of the greater scarcity of employment and training facilities in rural and remote areas.

Recommendation 14. The temporary exemptions from the training requirement applicable to under 18 recipients of CYA should not be administered so stringently that young people at risk are deprived of income support by unrealistic administrative requirements

Implementation. Centrelink should ensure that all relevant staff are given training in administering these exemptions.

Youth Service Units

9.34 In 1994 DSS established 10 Youth Service Units nationally to provide specialised support and assistance for young clients. An evaluation of the program in August 1996 found that the initiative had been

successful in enhancing services to this group. Two of the most effective aspects of the program were found to be intensive personal support and the establishment of youth support networks with workers in the government and community sectors.⁹⁰⁵ It is proposed to retain the Youth Units as part of Centrelink although the age range of the clients may change with the introduction of the CYA.⁹⁰⁶

9.35 In evidence to the Inquiry, young people stressed the importance of a designated officer or unit to explain income support entitlements and administrative requirements to young people.⁹⁰⁷ Indigenous young people indicated that they would prefer to deal with an Indigenous staff member.⁹⁰⁸

9.36 Youth Service Units are essential to ensuring that the particular needs of young income support applicants and recipients are met.⁹⁰⁹ In addition, contested administrative decisions in this area should be reduced if consumers are fully informed of their entitlements at the earliest possible stage in the application process.

Recommendation 15. Youth Service Units should be established in each region.

Implementation. Centrelink should ensure these units are established as a matter of priority.

Indigenous children and children from non-English speaking backgrounds

9.37 A 1994 ABS survey of Indigenous peoples found that over 85% of those aged between 15 and 19 earn less than \$12 000 a year.⁹¹⁰ Income support payments were the main source of income for over 40% of the same age group.⁹¹¹ Indigenous young people are an important client group for Centrelink.

9.38 Indigenous communities can have substantially different family structures and child rearing practices from those in the non-Indigenous community. The emphasis on the extended family means that parents do not necessarily have such a defined or dominant role in their children's lives.

In Aboriginal societies, the role of the extended family, based on kinship relationships and obligations, is of fundamental importance in bringing up children. A child growing up in an Aboriginal community is surrounded by relatives who have responsibilities towards that child and play a meaningful role in child rearing.⁹¹²

It may be that for periods of time often extending over a number of years primary responsibility for a child's upbringing may rest with an aunt or grandmother.⁹¹³

9.39 Centrelink should develop administrative processes that accommodate Indigenous child care practices on a case by case basis so that the disadvantage, in particular poverty, already suffered by Indigenous young people is not compounded.⁹¹⁴ For example, it may not be fair to assess the income of an Indigenous girl's parents for the purposes of CYA if she lives with her grandparents permanently despite not being officially adopted by them.⁹¹⁵

Many grandmothers also referred to the fact that they are caring for grandchildren full-time but are not receiving Social Security income support for the child. One woman said she was looking after many children and getting no extra money at all. There is clearly a dilemma between taking on the care of children who are neglected and declaring publicly that this is a permanent arrangement...⁹¹⁶

9.40 Administrative processes associated with income support should also be flexible enough to take account of the family circumstances of young applicants from non-English speaking backgrounds.

Laws and policies based on one view or one set of assumptions about family relationships which do not take into account the diversity of family arrangements in Australian society may impact harshly on communities or individuals whose family relationships are differently defined...Families may...be more broadly defined and composed of different elements. The significance placed on the various relationships may differ as may the role each member of the family takes.⁹¹⁷

Recommendation 16. Models of income support service delivery should be designed specifically for young Indigenous people and young people from non-English speaking backgrounds to take account of

cultural differences in family structures and relationships.

Implementation. Centrelink should develop these models in consultation with appropriate community groups and OFC.

Children in rural and remote communities

9.41 The Assistance for Isolated Children Scheme (the Scheme) assists the families of primary, secondary and under 16 tertiary students who do not have reasonable daily access to a government school offering tuition at their level because of geographic isolation, disability, health condition, special education need or frequent moves (necessitated by the family's occupation).

9.42 The benefits under this scheme are not income or assets tested. They provide basic board allowance or second home allowance and correspondence allowance. The government has stated that the Scheme will not be affected by the CYA reforms.⁹¹⁸

9.43 Homeless children living in rural and remote areas face particular difficulties due to scarce services. In its report on youth homelessness, the House of Representatives Standing Committee on Community Affairs recommended that all major Commonwealth departments providing specific services to young people and families should develop an integrated model of service delivery for rural and remote communities.⁹¹⁹ The Inquiry supports a more co-ordinated approach and hopes that the establishment of Centrelink will facilitate this change. The proposition that particular attention should be given to the provision of income support to children living in rural and remote areas is supported by several submissions.⁹²⁰

Recommendation 17. Models of income support service delivery should be designed specifically for young people living in rural and remote communities.

Implementation. The Minister for Social Security should co-ordinate a federal strategy for service delivery to young people living in rural and remote communities.

Homeless children

9.44 Homeless children are among the most vulnerable of all Australian young people.

'Homelessness' describes a lifestyle which includes insecurity and transiency of shelter. It is not confined to a total lack of shelter. For many children and young people it signifies a state of detachment from family and vulnerability to dangers, including exploitation and abuse broadly defined, from which the family normally protects the child.⁹²¹

Homeless children are at particular risk of adverse contact with the juvenile justice system and are more likely to have been involved in care and protection processes.⁹²² They are one of the groups of children most in need of government support. However, it is often difficult for them to gain access to benefits because their lifestyle is transient and therefore an anathema to official processes.⁹²³

In view of the circumstances surrounding young homeless people, for instance their lack of stability, mobility and other additional problems which may have caused them to leave home in the first instance...it is difficult for young people to receive a payment. There need to be more youth outreach services for young people who are homeless [because they] generally do not have the wherewithal to deal with all the paper work.⁹²⁴

9.45 A number of young people who participated in focus groups expressed frustration at the administrative requirements associated with applying for income support at the homeless rate. One girl had to provide three statutory declarations including one from her parents and one from a counsellor.⁹²⁵ Another 13 year old girl was forced to return to a violent home after 6 months of attempting to get income support because the refuge she was staying in could no longer afford to support her.⁹²⁶ A Tasmanian boy told the Inquiry that it had taken 6 months from his application for homeless rate benefits until his first payment. In the interim he sold drugs to survive.⁹²⁷ In Queensland the story was the same: each time a young homeless girl's application for support was refused she had to stay with friends and steal food to survive.⁹²⁸

9.46 Homeless young people aged 16 to 18 will be eligible for the independent rate of the CYA and will be exempt from the training requirement. Homeless children aged 15 and under will continue to rely on a discretionary Special Benefit.⁹²⁹ To be eligible young people must qualify as 'SPB homeless persons'.⁹³⁰

9.47 The Inquiry considers that evidential requirements, particularly those concerning identification, should be interpreted flexibly for young homeless applicants and should not of themselves bar them from receiving income support.⁹³¹ In addition to the information on sex and age already collected, demographic data and data concerning young homeless clients' race and sexual orientation should be collected anonymously and by consent to support a better informed and targeted response to youth homelessness.⁹³² Indigenous families are 20 times more likely to be homeless than non-Indigenous families.⁹³³

9.48 While the quantum of income support paid to homeless young people is not a legal process issue, the Inquiry considers it important to stress the link between poverty and crime. To ensure that already vulnerable children are not effectively forced into a criminal lifestyle, the adequacy of the homeless rate of benefits paid to young people should be assessed regularly to ensure appropriate minimum benefit and rent assistance rates are maintained.⁹³⁴

9.49 Providing income support to homeless young people is one means of ensuring they do not need to resort to criminal activity to survive. However, it needs to be supplemented by other support programs to break the cycle of homelessness.⁹³⁵ The federal Government has recently undertaken a number of initiatives in this area.

9.50 The Youth Homelessness Pilot Program administered by Department of Health and Family Services began in May 1996. The Program is testing early intervention strategies to assist young people at risk of homelessness to re-engage in family, work, education, training and life in the community. The emphasis is on family mediation and counselling to assist the reconciliation process.⁹³⁶

9.51 In addition, the Government has re-established the JPET Program to assist students and unemployed people aged under 21 years (with priority for 15 to 19 year olds) who are homeless or at risk of homelessness. Assistance can also be provided to state wards, refugees and young people who have been in detention. JPET services are provided by community organisations under contract to DEETYA.

9.52 The federal Government has recently announced a homeless youth project as part of its NCAVAC.⁹³⁷ The project will provide an overview of current service delivery to homeless and disadvantaged young people and develop and monitor strategies to reduce victimisation and offending rates.

Homelessness is a particular form of disadvantage and the very public profile of 'street kids' has contributed to the commonly held assumption that homeless young people are engaged in chronic offending to support themselves and their assumed drug use, and that many are involved in prostitution.⁹³⁸

9.53 Positive initiatives such as JPET and the Youth Homelessness Pilot Program should be publicised extensively in the youth sector and community. The more young people who have access to them the better the chances of reducing the youth homeless population and the youth crime rate.

Recommendation 18. Evidential requirements, particularly those concerning identification, should be interpreted flexibly for young homeless applicants and should not of themselves bar them from receiving income support.

Implementation. DSS should ensure that eligibility requirements for young homeless applicants comply with this recommendation.

Recommendation 19. Demographic data and data concerning young homeless clients' race and sexual orientation should be collected by consent to support a better informed and targeted response to youth homelessness. The data should be recorded in a way that preserves young people's anonymity.

Implementation. All federal, State and Territory departments that provide services to young homeless people should collect this data. The data should be collated by Centrelink.

Recommendation 20. The adequacy of the homeless rate of benefits paid to young people should be assessed regularly to ensure appropriate minimum benefit and rent assistance rates are maintained.

Implementation. The Minister for Social Security should commission surveys on a regular basis to ensure that appropriate minimum rates are fixed.

Recommendation 21. Support programs for homeless young people should be publicised extensively in the youth sector and community.

Implementation. All federal government agencies administering these programs should review the effectiveness of their publicity campaigns.

Commonwealth/State Youth Protocol

9.54 The Commonwealth/State Youth Protocol for the case management of homeless children (the Protocol) has been in operation in all States and Territories since January 1995.⁹³⁹ The Protocol sets out a procedure for the assessment of applicants for income support at the homeless rate by the relevant State or Territory family services department. Centrelink has taken on DSS's responsibilities under the Protocol.

9.55 The Protocol was designed to clarify responsibilities for assisting and supporting homeless young people and to improve co-ordination between levels of government.

Australia's homeless young people would...appear to be the ones to suffer most from the effects of federalism's shortcomings.⁹⁴⁰

The Protocol requires certain children seeking income support at the homeless rate to be referred to the relevant State or Territory family services department for an assessment of need. The young people affected are those under 15, 15 to 17 year olds who are considered to be at risk of harm and all under 18 year olds who are State wards.

9.56 The State or Territory department makes an assessment of the young person's care and protection needs, contacts parents and offers assistance as appropriate. Where it has not been possible for the State department to reach some resolution of the young person's circumstances, a case discussion is held with a Centrelink social worker to decide on the next step. This discussion may lead to Centrelink providing long term income support for the young person if the circumstances are exceptional.

9.57 Four States have recently announced a trial project to promote contact between homeless 15 year olds and their families with the view to reintegrating the child into the family.⁹⁴¹ Under the scheme, benefit recipients will be obliged to meet fortnightly with a family member or friend agreed to by the carers and the young person. This project is intended to complement the Protocol.

9.58 During consultations the Inquiry heard evidence that the Protocol may not appropriately support gay and lesbian young people who are reluctant to approach family services departments to justify their need for income support. Often these young people are homeless because their families refuse to accept their sexual orientation. These young people resent being made to feel as if they have to justify their sexual identity to welfare workers.⁹⁴² All family services department officers who conduct these assessments should be briefed on how to interview young gay and lesbian applicants appropriately. This is particularly urgent given the over-representation of young gay men and lesbians among the homeless.⁹⁴³

9.59 The Protocol currently provides for assessment within 28 days.⁹⁴⁴ This is a long time when a young person is homeless. Young homeless people are particularly vulnerable and their applications for income support should be dealt with as expeditiously as possible. In its 1996 report evaluating the Protocol the Standing Committee of Community Services and Income Security Administrators found that almost a quarter of all assessments completed during a 12 month period took longer than 28 days.⁹⁴⁵ The Committee recommended that each jurisdiction identify reasons why time frames had not been met and take appropriate action.⁹⁴⁶

9.60 While the Protocol is not legally binding, it is a guide to best practice and should be given significant weight. State and Territory governments should ensure that family services departments have the resources to assess homeless young people within seven days of their application for support.⁹⁴⁷

Recommendation 22. All family services department officers who conduct assessments under the Commonwealth/State Protocol for the case management of homeless children should be briefed on how to interview young gay and lesbian applicants appropriately.

Implementation. All parties to the Protocol should ensure staff are appropriately briefed.

Recommendation 23. The Commonwealth/State Protocol for the case management of homeless children should be amended to provide that homeless children must be assessed by the relevant State or Territory family services department within seven days of making an application for income support.

Implementation. All parties to the Protocol should expedite this change.

Immigration and citizenship

Introduction

9.61 Children are processed through the Australian immigration system as refugees, migrants⁹⁴⁸ and temporary entrants such as students.⁹⁴⁹ Children apply to enter or stay in Australia independently or as part of a family group. They may come into contact with the federal tribunals reviewing migrations and refugee decisions as well as the federal court system. Children also use legal processes to obtain Australian citizenship.

9.62 The Inquiry's focus in this section is on procedural issues not the visa or citizenship entitlements for child immigrants and refugees. Much of the evidence given to the inquiry concerned substantive matters.⁹⁵⁰ Although the Inquiry acknowledges the importance of these matters, they are outside our terms of reference.

9.63 The visa processing discussion in this section is also limited to children as primary visa applicants, that is, children applying for visas in their own right not as family members attached to an adult visa application.⁹⁵¹ Given the Inquiry's central premise concerning the family and state in protecting children, the Inquiry has also considered the arrangements for immigrant children in the care and protection system.

Citizenship

9.64 Children sometimes have difficulty proving their entitlement to be registered as Australian citizens. For example, the relationship between their parents can end acrimoniously and their citizen parent refuse to co-operate with the certification process. There is provision for people under 18 to apply for citizenship in their own right.⁹⁵² However, these arrangements are little known or understood, are not explicitly set down in the *Australian Citizenship Act 1948* (Cth) and are rarely used by young people in their own right.

9.65 A Citizenship Information Kit aimed specifically at young people and their guardians should be developed to explain the procedures by which children can obtain certificates of Australian citizenship. The Kit should include information on the evidence needed to establish a claim to citizenship, particularly where parental conflict may impede a child's capacity to do so.⁹⁵³

Recommendation 24. A Citizenship Information Kit aimed specifically at young people and their guardians should be developed to explain the procedures by which children can obtain certificates of Australian citizenship.

Implementation. DIMA should develop the Kit and advertise it appropriately, targeting Australian communities with high immigrant populations.

Processing issues — child visas

9.66 During 1996–97 1622 off-shore child visas, 265 on-shore child visas and 297 adoption visas were granted to children by the Minister for Immigration and Multicultural Affairs.⁹⁵⁴ Average processing times for visa applications lodged in Australia was 28 weeks.⁹⁵⁵ Overseas posts showed considerable variation. Taking those posts which had relatively low numbers of child applications, the time differences varied between 8 weeks taken to process 75% of child visa applications in Manchester, 50 weeks to process 75% of the 7 such applications in Beirut or 83 weeks for the same percentage of 18 visa claims in Islamabad. The table below illustrates these variations.

Table 9.1 Time in weeks for grants made in the period 96/97 — 101 Child Visa⁹⁵⁶

POST	CASES	Weeks to process 25%	Weeks to process 50%	Weeks to process 75%
Ankara	16	13	20	32
Athens	10	9	11	16
Beirut	7	10	45	50
Belgrade	22	27	47	64
Islamabad	18	19	37	83
Jakarta	23	14	25	34
Kuala Lumpur	32	10	19	30
London	42	3	5	11
Los Angeles	13	2	5	7
Manchester	36	3	6	8
Mexico City	7	21	25	57
New Delhi	21	15	23	46
Pretoria	51	2	4	11
Seoul	11	11	52	65

When the posts with high volume child visa applications are examined similar variations in processing times are shown as evidenced by the table below.

Table 9.2 Time in weeks for grants made in the period 96/97 — 101 Child Visa⁹⁵⁷

POST	CASES	Weeks to process 25%	Weeks to process 50%	Weeks to process 75%
Ho Chi Minh/Hanoi	202	55	66	86
Manila	150	32	47	73
Nairobi	66	56	72	100
Shanghai	139	9	14	22
Suva	72	21	34	51

9.67 These time differences are significant. All child subclass 101 visa applicants are waiting to join families in Australia. In these circumstances delays of one or two years can mean real family suffering.

9.68 In addition to processing delays, the Inquiry has been struck by the limited mentions of child visa applicants in the various guidelines that DIMA publishes for its staff. This omission is particularly marked with respect to guidelines pertaining to interviews and questioning of non-citizens.⁹⁵⁸

9.69 The *Migration Act 1958* (Cth) gives authorised officers certain investigative powers. For example, non-citizens who have not been immigration cleared can be searched for weapons or documents by an authorised officer of the same sex.⁹⁵⁹ To determine whether a person in immigration detention is an unlawful non-citizen, a removee or a deportee, that person can be required to answer questions put by authorities.⁹⁶⁰ There is a penalty of six months imprisonment for anyone who refuses to answer or who is untruthful.⁹⁶¹ In contrast

to the *Crimes Act 1914* (Cth) there are no special provisions for questioning or searching children.⁹⁶² This is an important oversight.

Recommendation 25. The Minister for Immigration and Multicultural Affairs should investigate the reasons for the significant variations in child visa application processing times as between overseas posts, with a view to ensuring effective, speedy processing of all child visa claims.

Recommendation 26. Provisions in the *Migration Act 1958* (Cth) relating to questioning and searching child visa applicants should give them the same protection as the federal *Crimes Act 1914* (Cth).

Implementation. The Minister for Immigration and Multicultural Affairs should ensure that the necessary amendments are made as soon as possible.

Welfare needs of non-citizen children

9.70 The Minister for Immigration and Multicultural Affairs, or his or her delegate, is the guardian of every non-citizen child who arrives in Australia as a potential resident and who is not accompanied by parents or relatives.⁹⁶³ Guardianship of this sort is usually exercised in relation to unaccompanied child refugee applicants and, in the past, for children brought to Australia for adoption.⁹⁶⁴

9.71 Sometimes non-citizen children who are in Australia are subject to exploitation, abuse or neglect.⁹⁶⁵ Some of these children may be short term entrants, here with their parents on a temporary visa, or they may be unlawful non-citizens, having overstayed their visas and living here with or without family support. Where non-citizen children come to the attention of welfare authorities, it may be necessary to extend or regularise the child's immigration status as an ancillary measure to provide protection for the child. The Migration Regulations do not currently make provision for these cases.⁹⁶⁶ Indeed, it is often not clear which level of government has primary responsibility for these children.

State government departments of community services argue that such children are outside their mandate, not being permanent residents, but add that consideration on a case by case basis will be given to taking on guardianship if requested to by the Minister for Immigration. Irrespective of whether this formal relationship is established, there is no effective provision for any active support of the minor or monitoring of any care relationship that exists.⁹⁶⁷

9.72 A protocol should be developed to resolve immigration problems for children whom a community services department or court has determined are in need of care.⁹⁶⁸ In some cases this may mean enabling a child to change or acquire lawful immigration status to allow appropriate supervision of him or her or an alternative family placement.

Recommendation 27. A protocol should be developed to resolve immigration problems for children whom a community services department or court has determined are in need of care. In some cases this may mean enabling a child to change or acquire lawful immigration status to allow appropriate supervision of him or her or an alternative family placement.

Implementation. DIMA and State and Territory family services departments should develop this protocol. The Minister for Immigration and Multicultural Affairs should ensure any consequential legislative or regulatory changes are made.

Intra-family overseas adoptions

9.73 To qualify for an adoption visa under subclass 102, a young person must have been legally adopted overseas by an Australian citizen or permanent resident who had been resident in the child's home country for more than 12 months at the time of the visa application. The Minister must be satisfied that the residence overseas by the adoptive parent was not contrived to circumvent Australian immigration requirements.⁹⁶⁹

9.74 A child may also qualify for an adoption visa if an Australian citizen or permanent resident undertakes to adopt the child once he or she arrives in Australia and the proposed adoption has been approved by the

relevant authorities in Australia and in the child's country of residence.⁹⁷⁰ In both instances, the child must be sponsored by an Australian citizen or resident.⁹⁷¹

9.75 DIMA and State and Territory community services agencies co-operate in granting approvals for intercountry adoptions. Certain cases reviewed by the Immigration Review Tribunal (IRT) indicate that State and Territory welfare agencies have sometimes not provided evaluations for private, overseas intra-family adoptions.⁹⁷² In certain instances this has resulted in children being denied visas even though the children were apparently genuine adoptions.

9.76 The 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, which the Ministerial Council on Community Services has recently agreed should be ratified,⁹⁷³ will provide important safeguards for intercountry adoptions, including intra-family adoptions. Specifically, the Convention includes measures designed to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of or traffic in children. Immediately prior to the Convention coming into force all relevant DIMA staff should be given training in applying its principles to decision making.

Recommendation 28. Guidelines for overseeing and evaluating overseas intra-family adoptions should be developed.

Implementation DIMA should develop these guidelines in co-operation with State and Territory community services departments and take steps to implement them in legislation or policy as appropriate.

Recommendation 29. The Commonwealth should give priority to ratifying the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. Immediately prior to the Convention coming into force all relevant DIMA staff should be given training in applying its principles to decision making.

Implementation. The Attorney-General should pursue this issue as a matter of priority.

Parental rights and child visa applicants

9.77 All visa subclasses have a provision stating that before granting any permanent visa to a child applicant the Minister must be satisfied that granting the visa would not prejudice the rights and interests of any other person who has custody or guardianship of or access to the child.⁹⁷⁴

9.78 The provision is designed as a double check to ensure that children coming to Australia without their parents, or in the company of only one parent, have permission from all their legal guardians to do so. It is a laudable safeguard against child abductions but it can lead to injustice.⁹⁷⁵ The way the provision is currently drafted, a child may be refused entry to Australia because a person in his or her country of origin has a right of access to the child even though a court in that country has authorised the removal of the child from the jurisdiction to come to Australia.

9.79 The language of the provision does not reflect the language and presumptions in the *Family Law Act 1975* (Cth) that give parents responsibilities for children rather than rights in them. The provision should be recast to be consistent with the Family Law Act while requiring appropriate proof of parental, guardian or court consent to the child's departure for Australia.

Recommendation 30. Provisions stating that before granting a visa to a child applicant, the Minister must be satisfied that granting the visa would not prejudice the rights and interests of any other person who has custody or guardianship of, or access to, the child should be redrafted to be consistent with the principles underlying the *Family Law Act 1975* (Cth).

Implementation. The Minister for Immigration and Multicultural Affairs should develop legislation to this effect.

Refugee children

9.80 Under the 1951 UN Convention Relating to the Status of Refugees, a person is a refugee if he or she is outside his or her country of origin and has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.⁹⁷⁶ Approximately half of the world's refugees are children.⁹⁷⁷ They are refugees because their parents have been the victims of persecution or because they themselves have been subjected to persecution. Australia has few child refugee applications and fewer unaccompanied child refugees because of the visa system and the absence of a land border with any other country.

9.81 Refugees can apply for protection in Australia from overseas or from within Australia. Offshore refugees are those who enter Australia as part of the refugee and special humanitarian migration programs administered by DIMA. People are selected for these programs by Australian immigration officials in overseas posts according to particular visa criteria.⁹⁷⁸ Offshore refugee children who are unaccompanied by parents or relatives enter Australia under the guardianship of the Minister for Immigration and Multicultural Affairs.⁹⁷⁹ Onshore refugees are those who apply for a protection visa while in Australia. These people may have arrived in Australia on a temporary visa or without a visa.⁹⁸⁰

9.82 Applicants for protection visas are often interviewed personally. Particular efforts should be made to ensure that unaccompanied child protection visa applicants have an independent support person present during any interview.⁹⁸¹ The Refugee Council of Australia has submitted that some child protection visa applicants have difficulties accessing the public health system.⁹⁸² While this matter is marginal to our terms of reference, the Inquiry agrees that the federal Government should ensure that all children in Australia who are awaiting determination of an application for asylum should have access to free basic medical care.

Children in immigration detention

9.83 All non-citizens in Australia who do not have valid visas are required to be detained.⁹⁸³ A considerable number of children are placed in immigration detention each year. Between 1989 and 1993 there were 168 children, including asylum seekers, in immigration detention centres. During that period 32 children were born in detention.⁹⁸⁴ On 23 September 1997 there were 395 people in immigration detention in Australia 28 of whom were children.⁹⁸⁵

9.84 There are procedures for releasing children from detention on bridging visas pending a final determination of their visa application including applications for residence.⁹⁸⁶ This arrangement as it applies to children arriving in Australia without a visa can allow for the temporary release of children but not their parents. The effect of the legislation is that most children remain in immigration detention with their parents, on occasion for substantial periods.⁹⁸⁷ Children are generally detained at the Immigration Processing and Reception Centre at Port Hedland in Western Australia.

9.85 The Inquiry received limited evidence on these matters although several submissions expressed concern about our failure to include any proposals specific to the detention of refugee children in DRP 3.⁹⁸⁸ We understand their concern about the vulnerability of many of these children. HREOC has undertaken an extensive investigation into the detention of asylum seekers including children. The Inquiry reserves recommendations regarding the detention of children to that investigation.

Review mechanisms

Internal review

9.86 Young people who wish to challenge administrative decisions about income support must first apply for internal review.⁹⁸⁹ The reviewing officer is obliged to notify the applicant of any decision to affirm, vary or set aside the initial decision. The notification must give reasons for the decision and make the applicant aware of his or her right to take the matter further by applying for review to the Social Security Appeals Tribunal (SSAT) and, if still unsatisfied, to the Administrative Appeals Tribunal (AAT).⁹⁹⁰

9.87 The current process is protracted. Elaborate review arrangements particularly disadvantage child complainants notably those who are homeless.⁹⁹¹ The Inquiry has received evidence of young people who have been left without income for weeks, sometimes months, while the internal review process is completed despite DSS's timeliness performance standard indicating that such reviews should ideally be completed within 14 days.⁹⁹²

9.88 Internal review applications by child income support applicants should be taken also to be applications for SSAT review. If internal review is not completed within two weeks, SSAT review should be activated automatically, the case given priority and the review completed within a short time frame.

Recommendation 31. Internal review applications by child income support applicants should be taken also to be applications for SSAT review. If internal review is not completed within two weeks, SSAT review should be activated automatically, the case given priority and the review completed within a short time frame.

Implementation. The Minister for Social Security and the Minister for Employment, Education, Training and Youth Affairs should develop legislation to this effect.

Merits review

9.89 Currently, if a child income support applicant is not satisfied with the result of an internal review, he or she can apply for review of the original decision by the SSAT.⁹⁹³ Certain visa applicants can currently apply for merits review by the Immigration Review Tribunal (IRT) or the Refugee Review Tribunal (RRT) depending on the visa subclass.⁹⁹⁴

9.90 In its 1995 report, *Better Decisions*, the Administrative Review Council recommended the amalgamation of federal merits review tribunals into a single body, the Administrative Review Tribunal.⁹⁹⁵ On 20 March 1997 the Attorney-General announced Cabinet's in principle decision to implement this proposal.⁹⁹⁶

9.91 *Better Decisions* proposed that applicants would apply for review by a specialist division of the Administrative Review Tribunal rather than by the IRT, RRT, SSAT, Veteran's Review Board or the AAT. In effect, this would expand and recast the AAT's current jurisdictions. To date there is no decision by government concerning the Administrative Review Council's further proposal that decisions of the divisions would be reviewable by a Review Panel with leave of the Administrative Review Tribunal President.⁹⁹⁷ The Government proposes to insert a privative clause in the *Migration Act 1958* (Cth) to limit judicial review by the Federal Court and High Court to the grounds of jurisdictional error and bad faith.⁹⁹⁸

9.92 It is still not clear how the Government intends to restructure the federal merits review system.⁹⁹⁹ Whatever the alternative design, the proposed Administrative Review Tribunal should maintain initiatives taken by existing merits review tribunals, particularly the SSAT, to adapt their processes to children. For the purposes of children's matters, the Inquiry favours the informal processes of the SSAT rather than the formality of the AAT.¹⁰⁰⁰

From a legal aid perspective, the costs of any dispute resolution involving children could be minimised by a less formal and children specific approach to merits review.¹⁰⁰¹

9.93 To ensure that external review is accessible to young people, the proposed Administrative Review Tribunal should conduct matters involving child applicants or witnesses expeditiously and flexibly. For example, there should be scope for young people to make applications orally, either in person or by telephone.¹⁰⁰² In addition, government departments and review bodies should ensure that young people are given appropriate material explaining merits review procedures including how to prepare a case for hearing, the sorts of evidence that will be required and how to present it.¹⁰⁰³ This does not mean that all young people should represent themselves in review hearings but rather that agencies should attempt to ensure that children fully understand the processes and can participate in them if they wish.¹⁰⁰⁴

9.94 The Inquiry considers that a flexible approach to processes is essential when dealing with child review applicants. For example, an advocate with continuing instructions should be able to pursue an external review application on behalf of a homeless child applicant with whom the advocate has lost contact. Similarly, to ensure that young people in rural and remote areas have greater access to merits review, community centres should be used to hear such matters where appropriate.

Recommendation 32. An access and equity strategy should be developed to ensure that children can participate properly in merits review. Publicity material should be prepared specifically for young people explaining merits review procedures.

Implementation. The proposed Administrative Review Tribunal should develop a young people's access and equity strategy and publicity material aimed specifically at young clients.

Recommendation 33. Directions hearings and preliminary conferences for matters involving young people should include the provision of information directly to young people on tribunal practice, procedure and any evidentiary requirements.

Implementation. The proposed Administrative Review Tribunal should develop practice guidelines to this effect.

Recommendation 34. Merits review procedures should accommodate child applicants and witnesses appropriately. Hearings should be run in an informal and flexible manner. To this end, guidelines should be developed for handling applications by children.

Implementation. The proposed Administrative Review Tribunal should develop these guidelines in consultation with relevant interest groups.

Recommendation 35. The AAT program of using community centres in rural areas as venues for matters involving Indigenous applicants should be extended. These venues could also be used for matters involving child applicants in those areas.

Implementation. The proposed Administrative Review Tribunal should oversee the extension of this program.

Recommendation 36. An advocate with continuing instructions (or ones that have not been countermanded) should be able to pursue an external review application on behalf of a homeless child applicant with whom the advocate has lost contact.

Implementation. The proposed Administrative Review Tribunal should develop a practice direction to this effect.

10. Children in education

Introduction

10.1 The fundamental right of children to be educated is reflected in article 28¹⁰⁰⁵ of CROC. In particular it requires that primary education be compulsory and free to all and that different forms of secondary education, including general and vocational education, be available and accessible to every child.⁽¹⁾ These principles are reflected in Australian requirements for compulsory education for children between 6 and 15 years of age (16 years in Tasmania).¹⁰⁰⁶

10.2 Most Australian children spend a significant percentage of their time in the formal education system. Approximately 70% of Australian children attend government schools. Of the children enrolled in independent schools, the majority (66%) attend Catholic schools.¹⁰⁰⁷

10.3 The education system and legal processes intersect in a number of significant ways.¹⁰⁰⁸ At school young people often have their first exposure to information about rights and responsibilities outside the family. Educating young people about the legal system can assist them to participate effectively in society and should have a positive effect on the relationship they have with legal bodies as adults.

For the majority of children, the school is the first and most important social institution with which young people have contact outside the family. At school, the child learns how to interact with others and the rules of social behaviour, and education plays a vital role in establishing for the individual a permanent, healthy membership of society. When a student fails in this process or is failed by it, the consequences for the individual and society are often damaging and expensive.¹⁰⁰⁹

10.4 In addition to providing education on rights and responsibilities, schools give families and appropriate professionals the opportunity to address learning, behavioural and social problems as soon as they appear so as to greatly reduce the risk of children coming into adverse contact with the legal system. While schools should not be the only site for early intervention they have a critical role because of the amount of time children spend there.¹⁰¹⁰

10.5 Apart from whatever families may themselves inculcate, one of the more important ways that children first learn about the concept of formal legal processes is through their experiences of school discipline. The way school rules are set and enforced, particularly the processes associated with discipline and exclusion, may affect the way young people react to and interact with authorities and legal processes throughout their adult lives.

Civics education and participation

Introduction

10.6 Children are often disadvantaged in their dealings with institutions and adults because they have little understanding of their rights and responsibilities, of the government services or complaints mechanisms available and of the roles and functions of different participants in the legal system.¹⁰¹¹

10.7 In partnership with families, schools should play a central role in teaching children about their rights and responsibilities in a liberal democratic society. This should assist in the development of a politically aware population and make children more effective in dealing with legal processes as juveniles and as adults.

10.8 Young people participating in focus groups repeatedly commented on the need for schools to place more emphasis on teaching life skills. This was seen as a way of enabling children to deal with their problems effectively rather than resorting to anti-social or offending behaviour.¹⁰¹²

Civics, citizenship and participation

10.9 In May 1997 the federal Government announced that from 1999 all school students in years 4 to 10 will take compulsory lessons in civics and citizenship. The national civics program, *Discovering Democracy*, will

include material on principles of democracy, the development of the Constitution and the responsibilities of different levels of government.¹⁰¹³ This is an important initiative.¹⁰¹⁴

10.10 Information about the Australian political system should be complemented by material on human rights, particularly on children's rights and responsibilities.¹⁰¹⁵ This includes their rights and responsibilities in relation to education and under CROC.¹⁰¹⁶ The majority of respondents to our survey stated that young people are not given enough opportunity to learn about their rights. Almost 65% said this information should be conveyed through school courses.¹⁰¹⁷

Some people can learn the basics from movies and books but others don't learn anything.¹⁰¹⁸

10.11 As the NSW Ombudsman has stated, 'the best way to learn is to do'.¹⁰¹⁹ Children should be encouraged to participate appropriately in school decision making processes and in school dispute resolution such as peer mediation programs.¹⁰²⁰ Obviously this does not mean relieving schools of responsibility for students but simply recognising the benefits of involving children in decisions and problems that affect them. Practical experience of mediation and negotiation should be excellent preparation for dealing with formal legal processes.

10.12 Some submissions to the Inquiry oppose schools educating children about their rights because they fear young people will use the information against their parents.¹⁰²¹ Similar trepidation was demonstrated by a number of schools when they banned distribution of the National Children's and Youth Law Centre's community education package for students, 'Know your rights at school'.¹⁰²²

10.13 Teaching children about their rights and responsibilities in school and in the wider community is probably more likely to bolster parents' and teachers' authority than undermine it. Like most adults, children will generally be more willing to follow rules they understand and can see the need for.

10.14 The Inquiry considers that guidelines on national best practice for student participation in school decision making should be developed. A handbook for teachers and students explaining the guidelines should be prepared and distributed to all schools in Australia.¹⁰²³

Recommendation 37. Guidelines on national best practice for student participation in school decision making should be developed. The guidelines should include material that assists students to understand their rights and responsibilities in the context of school decisions affecting them. A handbook for teachers and students explaining the guidelines should be prepared and distributed to all schools in Australia.

Implementation. DEETYA should prepare the guidelines and handbook in conjunction with State and Territory education departments, peak groups from the independent schools sector, relevant community groups, school students and in consultation with the OFC. DEETYA should co-ordinate distribution of the handbook.

Teaching tolerance and combatting violence

10.15 Formal education provides an opportunity for children to develop social skills and learn about religions and cultures different from those of their own family. This aspect of schooling is highlighted in article 29(1)(d) of CROC which provides that education shall be directed to the

... preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

10.16 School violence, between students or involving teachers, can impede the development of these social skills, interferes with scholastic achievement and is of considerable concern to the community.¹⁰²⁴ A 1994 House of Representatives Standing Committee on Employment, Education and Training report confirmed the serious consequences of school violence.

School violence deprives all who fall victim to it of their right to an education. Children who were seriously victimised suffered greatly, often not only physically but also psychologically through a generalised fear of others, low self esteem and depression. The damage persisted in some cases into adult years...Violence resulted in low self esteem, truancy, illness, stress, tiredness, disruptive behaviour, lack of concentration and an inability to form relationships. It also reduced a student's ability to achieve academically and socially.¹⁰²⁵

Responsibility for ensuring that school violence does not impede children's development lies with families, educational institutions and students themselves.¹⁰²⁶ To combat playground bullying, harassment and violence students must be taught respect for difference and given dispute resolution skills.¹⁰²⁷

10.17 Students who are the target of violence often leave school altogether. This seriously compromises their employment prospects.¹⁰²⁸

[R]esearch... indicates that violence against lesbian and gay students has consequences such as truancy and dropping out of school.¹⁰²⁹

Often these children then spend the majority of their time on the streets where they are at increased risk of contact with the care and protection and/or juvenile justice systems.¹⁰³⁰ Playground intimidation can also have serious health consequences. New research on the effects of harassment at school confirms that bullied students are at greater risk of suicide than their peers even where they have strong family support.¹⁰³¹

[A] social environment which engenders or for that matter does very little to stop the miserable practice of bullying is one in which the mental health of many vulnerable children must be greatly at risk.¹⁰³²

10.18 School violence can be dealt with through existing external legal processes to some extent. Serious assaults can be referred to the police and students may be able to pursue civil actions against schools that fail to protect them from harassment.¹⁰³³ Preventive programs and school-based anti-bullying policies are necessary to address the problem and may be more effective in diverting students from adverse contact with formal legal processes.¹⁰³⁴ They are also an effective means of instilling a sense of responsibility in students.

10.19 NCAVAC recently announced by the Prime Minister will fund 10 pilot projects aimed at reducing and preventing crime.¹⁰³⁵ Several of the projects will focus on youth crime prevention although none will specifically address playground violence.¹⁰³⁶ The information kit released for the launch of the campaign acknowledges the fact that aggressive children tend to become aggressive adolescents: '[a]nti-bullying programs in schools can help prevent subsequent offending.'¹⁰³⁷

10.20 Many schools have introduced initiatives to reduce the incidence of harassment and assault on school premises. These include teaching students about the hurtful effects of harassment and encouraging peer mediation of disputes.¹⁰³⁸ In 1995 the NSW Standing Committee on Social Issues recommended that the Minister for Education ensure that sufficient resources are available to schools to enable them to function as models of co-operative, tolerant and non-violent communities. In achieving these goals it recommended that schools

- provide programs which foster tolerance and acceptance
- offer integrated programs which provide skills in acceptable problem solving behaviour
- work to eliminate the destructive practices of bullying
- support students exhibiting problem behaviours through appropriate means and environments with the well-being of all students being paramount.¹⁰³⁹

The Inquiry endorses these principles. NCAVAC should conduct a specific project aimed at reducing school violence. The Campaign should evaluate the benefits for youth crime prevention of antibullying policies, anti-harassment policies, peer mediation and peer support schemes and establish benchmarks in each of these areas.

Recommendation 38. NCAVAC should conduct a specific project aimed at reducing school violence. The Campaign should evaluate the benefits for youth crime prevention of anti-bullying policies, anti-harassment policies, peer mediation and peer support schemes and establish benchmarks in each of these areas.

Children at risk in the education system

Introduction

10.21 For the majority of children, school builds on and complements the emotional and financial resources that their families provide for their development. However, for a number of students family support is inadequate. Other children may require particular support as a result of behavioural or learning difficulties. These children are often at risk of dropping out of education and consequently becoming enmeshed in the care and protection and/or juvenile justice systems.¹⁰⁴⁰ The information kit released for the launch of NCAVAC acknowledges the link between poor school attendance and performance and involvement in juvenile justice processes.

Pre-school enrichment programs for children at risk, remedial education programs for poor school performers and truancy reduction programs are all likely to yield crime prevention benefits.¹⁰⁴¹

Appropriate intervention at the right point in the school life of these children at risk can greatly increase their chances of completing and succeeding in secondary education.¹⁰⁴²

10.22 The federal Minister for Schools has reported publicly that 30% of young Australian teenagers cannot read properly and that there has been no improvement in literacy standards in the past 20 years.¹⁰⁴³ One young woman participating in the Newcastle Focus Group told us that she left primary school without being able to read.¹⁰⁴⁴ Longitudinal research conducted to determine what individual, environmental and social factors increase the risk of juvenile offending suggests that school failure is a major factor.¹⁰⁴⁵ Improving children's literacy also improves their confidence and their later employment opportunities.¹⁰⁴⁶

10.23 Children have no legal right to ensure that they are given an adequate education. For example, they are unable to sue the state or their education provider if they leave school with inadequate literacy or numeracy. However, recent policy initiatives seek to ensure suitable education outcomes for each student.

10.24 In March 1997 MCEETYA agreed to a national literacy and numeracy plan to ensure children can read, write, count and spell adequately by their fourth year of school.¹⁰⁴⁷ As part of the plan all students at risk will be identified and their literacy and numeracy needs met by extra support. The Commissions support this initiative as a means of ensuring all children are better educated, more employable and less likely to turn to crime out of necessity or boredom.

10.25 Like students with poor literacy, homeless young people are at a high risk of dropping out of school.¹⁰⁴⁸ Again, this can mean they are more likely to become involved in criminal activity.

The link between inadequate education and offending and homelessness is obvious to those who work in the Children's Court.¹⁰⁴⁹

10.26 Most teachers are highly professional and committed to their students. However, the demands of the contemporary classroom may make it difficult for them to identify all students at risk without specialised training. While teachers are primarily educators not welfare workers, they are best placed to identify and provide initial support to these students. Teachers require appropriate professional development training in identifying students at risk and referring them to appropriate government and non-government services.¹⁰⁵⁰ This will also benefit other students whose learning is less likely to be interrupted if those at risk are receiving the appropriate support. Teachers in non-government schools should be able to access this training on a fee for service basis.¹⁰⁵¹

Recommendation 39. All teachers and school counsellors should receive professional development training in identifying children at risk of dropping out of school and referring them to appropriate government and non-government support services and programs. Particular attention should be given to recognising this risk at the end of primary school and the beginning of secondary school.

Implementation. State and Territory education departments should provide this training.

Family support programs

10.27 The Students at Risk or STAR Program, which was administered by DEETYA, aimed to identify and support children at risk of dropping out of education. The program was wound up in December 1996 even though the Standing Committee on Employment, Education and Training recently recommended that, subject to evaluation, it be extended until 2000.¹⁰⁵²

10.28 There are a number of programs in schools throughout Australia designed to address some of the health and nutrition needs of children from poorer families. Addressing these needs helps children to concentrate in class and means they are less likely to be excluded from school because of hunger-related behavioural problems or easily treated contagious conditions such as lice. Early intervention is essential.

[T]here are links between early childhood experiences and later offending and there is increasing evidence that interventions can be successful.¹⁰⁵³

Intervention and welfare programs are far less effective once children have reached high school and are already in a lifestyle of offending.¹⁰⁵⁴

10.29 One example of an effective local family support program described to the Inquiry is the school welfare program aimed at reducing truancy and absenteeism which has been running for four years in Kalgoorlie, Western Australia. The program employs a full time nurse who tries to ensure all children are well enough to participate properly in school. This can involve showering them, treating them for lice or scabies and providing meals.¹⁰⁵⁵ The children in the Kalgoorlie community who are identified as being most at risk are placed together in one school. 98% of the 70 children participating in 1996 were Indigenous. Once children are healthy and have gained confidence they are transferred to other schools and their progress monitored. The school attendance rates of children generally improve dramatically once they are participating in the program.¹⁰⁵⁶ The program has funding from the WA Education Department, donations and the STAR Program until the end of 1997.

10.30 Another example of an effective intervention program is the Schools as Community Centres Project being trialled in four NSW primary schools. The \$300 000 program is funded jointly by the Departments of School Education, Community Services and Health and aims to prevent disadvantage for children starting school. A facilitator is placed in each participating school to work with the local community and agencies to improve service delivery to families with children from birth to five years.¹⁰⁵⁷

10.31 An interim evaluation of the Schools as Community Centres Project found high community involvement in and support for local projects and improved interagency co-ordination.¹⁰⁵⁸ It is anticipated that the Project will be extended throughout NSW. Family support programs of this nature are relatively inexpensive and the long term 'savings' to society in terms of diverting offending behaviour and reliance on income support are likely to more than cover the cost.¹⁰⁵⁹

Ultimately the cost effectiveness of the [Schools as Community Centres] Project will rest on whether it does prevent disadvantage for children entering school and whether this in turn results in fewer learning and behavioural problems in school, less delinquency, higher workforce participation and so on.¹⁰⁶⁰

10.32 Family support and early intervention programs are a fundamental means of protecting against later juvenile offending. They are relatively inexpensive and have additional long term benefits in terms of children's physical and social development. The federal Government should re-establish the STAR program as a matter of priority.

10.33 Additional local programs to identify and support at-risk and disadvantaged students and encourage their continued participation in education should also be developed through community initiatives. In particular, these programs should include providing transport to schools, assistance with meals and primary health care and homework support. Education advice services would also be useful. Overseas examples of successful programs in this area include the Advisory Centre for Education in London which has been operating for over 35 years. It provides free, independent advice on education matters to students and their parents. The Centre for Studies in Integration in Bristol specialises in information and advice on exclusion.

10.34 In addition to these programs, the Inquiry considers it important for all schools to provide appropriate counselling services to support students at risk and to ensure as far as possible that others do not move into an at-risk group. National standards for student support services in primary and secondary schools should be developed.¹⁰⁶¹ The standards should provide guidance on matters such as the ratio of counsellors to students, identifying schools that require specialist services to support disadvantaged families and young people, and intervention programs aimed at meeting the needs of children who are homeless or at risk of homelessness.¹⁰⁶²

Recommendation 40. In recognition of the relationship between effective early intervention and diverting involvement with the juvenile justice system, the STAR program should be re-established.

Implementation. The Minister for Employment, Education, Training and Youth Affairs should give effect to this recommendation in the next budget allocation.

Recommendation 41. For the same reason, additional local programs to identify and support at-risk and disadvantaged students and encourage their continued participation in education should be developed.

Implementation. These programs should be developed and implemented by State and Territory education departments in conjunction with DEETYA, peak bodies from the independent school sector and relevant community groups.

Recommendation 42. National standards for student support services in primary and secondary schools should be developed. These standards should take appropriate account of the nexus between access to primary and secondary education and involvement with the juvenile justice system.

Implementation. DEETYA should develop these standards in conjunction with State and Territory education departments and in consultation with OFC.

Children with disabilities

10.35 Article 23(3) of CROC sets out the particular rights of children with a disability. The article specifically provides that children must have effective access to education in a manner conducive to achieving the fullest possible social integration and individual development.

10.36 Some Australian children with a disability face difficulty in receiving education.¹⁰⁶³ For example, the Inquiry received several submissions on the difficulties experienced by children with behavioural disabilities such as Attention Deficit Hyper-Activity Disorder.¹⁰⁶⁴ Legislation at both federal and State and Territory level prohibits discrimination against people with a disability in the provision of education services.¹⁰⁶⁵ Discrimination in education is the third most common ground of complaint to the Disability Discrimination Commissioner.¹⁰⁶⁶

10.37 A number of education advisory services in the UK provide information specifically on special education issues.¹⁰⁶⁷ For example, the Enfield Parents Centre was established as a parent partnership scheme to deal with special educational needs although it now deals with the full range of education matters. The Independent Panel of Special Education Advisors provides free second opinions, free representation and lay advocates. The Inquiry commends these initiatives.

10.38 During a recent review of services for people with a disability, the ALRC received evidence about the particular difficulties faced by children under the age of 14, particularly in relation to education services.¹⁰⁶⁸ The ALRC recommended the collection of data and information to allow the identification of people with particular access problems.¹⁰⁶⁹ The Inquiry supports this proposal as it would give service providers in the States and Territories a better idea of the scope and extent of the support services required.

10.39 In 1995 MCEETYA established a taskforce to consider the development of disability standards in education.¹⁰⁷⁰ The Inquiry considers that this project should be given priority. Young people with a disability must have equitable access to appropriate education to maximise their employment opportunities thus reducing the likelihood of them coming into adverse contact with legal processes.¹⁰⁷¹

10.40 In addition, the Inquiry supports the National Children's and Youth Law Centre's recommendation that school principals should facilitate the training of all their staff in disability, disability discrimination laws and obligations, and how to meet the educational and social development needs of students with a disability.¹⁰⁷²

Recommendation 43. Each State and Territory education department should ensure that all teaching staff and school administrators are trained in disability, disability discrimination laws and obligations, and how to meet the educational and social development needs of students with a disability.

Indigenous children

10.41 A number of submissions to the National Inquiry into the Removal of Aboriginal and Torres Strait Islander Children From Their Families drew attention to the relationship between past racist policies and practices in education that excluded or marginalised Indigenous children and contemporary low secondary school retention rates and low participation in tertiary education.

Truanting and early school leaving are intimately connected with the likelihood of child welfare and juvenile justice intervention.¹⁰⁷³

10.42 Health problems can have a significant impact on Indigenous students. Recent research has suggested that the high incidence of hearing loss as a consequence of middle ear disease, affecting between 20% and 40% of Indigenous people, may be a contributory factor in the development of social problems leading to criminal behaviour.¹⁰⁷⁴ If students cannot hear properly in the classroom they will quickly fall behind and may develop behavioural problems as a result that lead to dropping out of or being excluded from school. This then increases the risk of coming into contact with juvenile justice processes.¹⁰⁷⁵

10.43 The Australian Reconciliation Convention recently expressed support for the adoption by all school systems across Australia of measures to achieve equitable educational outcomes for Indigenous students.¹⁰⁷⁶ The Inquiry supports a national approach to improving the education standard and experience of Indigenous young people.

10.44 The National Aboriginal and Torres Strait Islander Education Policy was endorsed by all governments in 1989 and came into effect from 1 January 1990.¹⁰⁷⁷ The policy sets out 21 long-term goals for Indigenous education under four themes: involvement, access, equity of participation and outcomes. In 1994 the National Review of Education for Aboriginal and Torres Strait Islander Peoples found that the Policy is having a significant effect on improving education outcomes for Indigenous people.¹⁰⁷⁸ The Inquiry is particularly supportive of the Policy goals aimed at improving school retention rates and literacy rates for Indigenous students.

Fees and charges in government schools

10.45 Tuition in Australian government schools is supposed to be free. CROC also recognises that every child has a right to free education at least in primary school.¹⁰⁷⁹ Increasingly, however, primary and secondary schools are inviting voluntary contributions to the general support of the school. In addition, most schools have subject levies that parents are asked to pay to defray certain costs associated with particular subjects or activities.¹⁰⁸⁰

10.46 Many in the community are concerned that these contributions and levies leave children from economically disadvantaged families with an inferior standard of education.¹⁰⁸¹ In its recently released report on private and commercial funding in government schools the Senate Employment, Education and Training Reference Committee found

... for many parents, the pressure to contribute financially to schools exacerbates difficulties they already face in meeting the growing costs of schooling.¹⁰⁸²

Most State and Territory education policies explicitly preclude practices that would punish or humiliate students of families unable to pay their voluntary contributions. Despite this the Committee found that in many instances considerable pressure is brought to bear on families to pay these contributions and other levies and charges. Unacceptable measures used by some schools to encourage payment of fees and charges include withholding academic reports, seating students whose voluntary contributions have not been paid in a special row and denying them the use of books and marking students as absent so that Austudy or Abstudy payments cease.¹⁰⁸³

10.47 There may be some circumstances in which it is reasonable to request the families of students who can afford it to contribute to the cost of their education in public schools.¹⁰⁸⁴ However, children from poorer families must not receive a lesser standard of education as a result of the fees and charges regime and inadequate government funding. Again, the Inquiry is concerned to reduce the likelihood of young people coming into adverse contact with legal processes as a result of poor education leading to inadequate employment opportunities.

Those young people who are least likely to continue in post-compulsory education and who are most likely to be unemployed are the poor and disadvantaged — the very same young people who are most likely to have contact with the criminal justice system.¹⁰⁸⁵

10.48 The Senate Employment, Education and Training References Committee has stressed the importance of government policy on voluntary contributions or the levying on any other charges in public schools being clearly delineated. The Committee recommended that this information be provided to all parents at the start of each school year in the form of a Charter of School Education.¹⁰⁸⁶ The Inquiry supports this recommendation and considers that, when a Charter is being developed, careful consideration should be given to ensuring that 'voluntary' school fees and charges do not impact on certain children in a discriminatory manner.¹⁰⁸⁷

Recommendation 44. Government schools should distribute a Charter of School Education to each family at the start of each school year. The Charter should set out

- the nature and extent of the education that will be provided in government schools at no cost to parents
- government policy on voluntary contributions and any subject levies and charges and the rights and obligations of parents and students in relation to each
- information on any financial assistance provided by government agencies, community groups and the school itself to assist families experiencing financial hardship with the costs of schooling.

Implementation. The Minister for Employment, Education, Training and Youth Affairs should seek the agreement of MCEETYA to the development of this Charter.

Truancy

Introduction

10.49 There is no uniform, aggregated data on the extent of school truancy.¹⁰⁸⁸ Evidence received from young people during focus groups suggests that some students are absent from school more often than they attend.¹⁰⁸⁹ Reasons for truancy include boredom at school, embarrassment and frustration at poor performance, fear of bullying or harassment,¹⁰⁹⁰ drug dependency,¹⁰⁹¹ family stress or conflict, homelessness and defiance of authority.¹⁰⁹²

10.50 Some students truant a few times during their school career in response to peer pressure or to see what they can get away with. Provided there are no other major problems these students can generally be dealt with effectively by their families and/or schools on a case by case basis. Other children are chronically absent from school.¹⁰⁹³ Their situation requires a co-ordinated government response to truancy.

Truancy is the result of multiple negative and cumulative influences originating from the individual, the family, the school and the community and is therefore a broad social issue which needs to be addressed by comprehensive social policies.¹⁰⁹⁴

10.51 Young people in care and Indigenous children are particularly at risk of truancy and subsequently dropping out of the school system altogether.¹⁰⁹⁵ School retention rates are significantly lower for Indigenous children than non-Indigenous students.¹⁰⁹⁶

Link between truancy and offending

10.52 Repeated truancy is a common ground for suspension or expulsion. Truancy or being excluded from school substantially increases the risk of young people becoming enmeshed in the juvenile justice system.¹⁰⁹⁷ A survey of 461 young people in detention in South Australia found that 73% truanted regularly when attending school and that 79% had been suspended or expelled from school.¹⁰⁹⁸ Only 21% were attending an educational institution at the time they were placed in detention. 80% of the detainees were under 16 when they left school.¹⁰⁹⁹

Dropping out of school is a very strong predictor of delinquency and reduced adult employment prospects.¹¹⁰⁰

Truancy is a stepping stone to delinquency and criminal activity. A report compiled by the Los Angeles County Office of Education on factors contributing to juvenile delinquency concluded that chronic absenteeism is the most powerful predictor of delinquent behaviour.¹¹⁰¹

10.53 Truancy can compound the problems of children who are already behind in class as a result of behavioural, emotional or learning difficulties. They fall further and further behind thus jeopardising their chance of achieving formal qualifications and seriously reducing their employment opportunities.¹¹⁰²

In Australian society, poverty is generally related to unemployment and subsequent reliance on welfare. The relationship between educational achievement and employment status has been well documented. People with a lower level of educational achievement are more likely to be unemployed than those with a higher level of attainment.¹¹⁰³

Reducing truancy

10.54 Some jurisdictions have introduced legal mechanisms aimed at reducing truancy. For example, in a number of States police have the power to stop and question school-aged children who should apparently be at school and, if necessary, escort them to school or home.¹¹⁰⁴

10.55 The Western Australian Government recently released a School Education Bill for public consultation. The Bill allows for the imposition of a fine on parents who do not ensure that their children attend school.¹¹⁰⁵ Under the proposal the student can also be fined \$100 for non-attendance.¹¹⁰⁶ Certain steps must be followed before a prosecution under these provisions can be commenced.¹¹⁰⁷ School Attendance Panels may be established to consider matters related to absenteeism and to facilitate the return of children to normal attendance.¹¹⁰⁸ The proposed legislation will also allow for the appointment of school attendance officers who will be empowered to stop and detain absentee students and escort them to school or home.¹¹⁰⁹

10.56 The proposed WA provisions have attracted considerable media attention.¹¹¹⁰ They may well be a counter-productive approach to truancy. Students who are chronically truant are often from poorer families experiencing the second or third generation of unemployment. Fining them is unrealistic. It imposes an additional financial burden on the family.¹¹¹¹ It would be better to address the causes of truancy through early intervention and family support programs such as those discussed in paragraphs 10.27-34.¹¹¹² In addition, research suggests that punishing parents for the acts of their children does not decrease delinquency.¹¹¹³ It would also be better to stress the positive by having schools convince students and their families of the benefits that can flow from secondary qualifications. Given the clear link between truancy and juvenile offending, the Inquiry considers that there should be a national strategy to reduce truancy. The strategy should provide best practice principles but be flexible enough to address idiosyncratic local concerns.

Recommendation 45. In light of the link between chronic truancy and exposure to the juvenile justice system, the federal Government should co-ordinate the development and implementation of a national strategy to reduce truancy.

Implementation. DEETYA should lead the development of the strategy in consultation with State and Territory education departments, peak groups from the independent schools sector, relevant community groups and the Australian Council for Education Research.

Disciplinary measures

Introduction

10.57 The standard set by CROC requires that school discipline be administered in a manner consistent with children's human dignity and other rights, such as children's right to be heard on matters that affect them.¹¹¹⁴ These rights apply to all children whether in government or independent schools.¹¹¹⁵

10.58 Disciplinary measures range from informal arrangements such as additional homework, withdrawal of privileges and detention after class to formal sanctions such as exclusion from school and corporal punishment. The Inquiry is concerned with this latter, formal end of the discipline spectrum as these processes can have a serious impact on children's education and interact with criminal justice processes.

10.59 Different jurisdictions use a variety of terms to describe restrictions or prohibitions on school attendance. Traditionally, the term suspension has been used to refer to temporary exclusions from school for a finite period and expulsion to refer to the permanent exclusion of a student. The term 'exclusion' is now commonly used to refer to a long term suspension or an expulsion. For the purposes of this Report, it will be used in this way.

10.60 In most States and Territories, statutory provisions relating to discipline only apply to government schools.¹¹¹⁶ Independent schools are largely self regulating: a written or implied contract between the parents and the school defines the terms of the services provided by the school.¹¹¹⁷ However, much of the material in this section of the Report regarding due process and best practice applies equally to private institutions, particularly in light of CROC.

Consequences of exclusion

10.61 Excluding children from school, on a short or long term basis, can have a serious effect on their education and life chances.¹¹¹⁸

A child disrupted from school suffers a number of detriments, including disruption to education and a blow to that child's self-esteem. Expulsion is also likely to be felt as a rejection. The language used by students — 'kicked out of school' or 'thrown out' — is an indication that exclusion is seen and felt as a hostile and aggressive act, and many children give up on the education system after being excluded from school.¹¹¹⁹

10.62 There is strong anecdotal evidence to suggest that a substantial proportion of youth offending starts with exclusion from school.

While no hard statistical data is available regarding the long-term effects of alienation and exclusion on the lives of young people who leave school before the legal leaving age, there is little doubt that there is a strong correlation between early leaving and criminal activity, poverty, unemployment and homelessness.¹¹²⁰

The full implications of exclusion from school may not be clear to the student affected until many years later. One young man who participated in the Brisbane Focus Group told the Inquiry that when he was expelled from all Queensland schools he 'thought it was cool not to go to school. But I was only 13 then. Now I realise I needed school. It's too late now.'¹¹²¹

Importance of clear, consistent procedures

10.63 Schools need to discipline certain students to ensure the safety of the school environment or to ensure that the child's behaviour does not jeopardise the learning opportunities of other students. It can be an important means of teaching children about their responsibilities to others and to the community. However, disciplinary processes must be consistent, clear and fair. Arbitrary punishment sends inappropriate messages to children about adult authority and the credibility of legal processes in general.

10.64 The Inquiry has heard evidence that discipline is imposed in an ad hoc manner in some schools. Young people regarded as difficult have been paid by teachers not to attend classes¹¹²² and others, not formally excluded, are sometimes simply told not to bother coming back to the school.¹¹²³ This kind of informal discipline is inappropriate and unfair.¹¹²⁴ The Inquiry considers that research should be conducted nationally to determine the extent to which young people are excluded from school by informal processes and the extent of the connection between school exclusion and criminal behaviour.¹¹²⁵

10.65 The serious consequences of exclusion make it essential that these decisions are made according to clearly laid out procedures. The grounds for and processes governing exclusion differ between jurisdictions. In some jurisdictions the process is set out in policy documents. In others it is contained in legislation.¹¹²⁶ These policies and provisions are often interpreted differently from school to school.

Students, parents and even teachers are likely to find exclusion procedures very confusing. Even within States and Territories there may be variations in terminology.¹¹²⁷

10.66 The House of Representatives Standing Committee on Employment, Education and Training recently recommended that

Each State and Territory ensure that

- a) school disciplinary legislation, policy and procedures include a precise and consistent statement of the grounds and procedures for each category of exclusion of students from school and
- b) that clear and accurate information be developed for students and parents, and training materials for schools on procedures for school suspensions, exclusion and expulsion, including mechanisms of appeal.¹¹²⁸

The Inquiry supports this recommendation and made a similar proposal in DRP 3 for the development of national standards on school discipline.¹¹²⁹ Governments need to ensure that there is an agreed procedure for teachers and principals to follow when making serious disciplinary decisions in government schools. The Inquiry's proposal for nationally consistent grounds and processes for exclusion received support in submissions.¹¹³⁰

10.67 The national standards for school discipline should be incorporated into legislation in each jurisdiction, making them enforceable in government schools.¹¹³¹ The standards should be incorporated into independent schools' discipline policies. They should be well publicised to students and their carers as well as to the teaching profession. In addition, each State or Territory department of education should establish a unit with responsibility for ensuring that appropriate arrangements are made for each child excluded from a government school, including counselling or other support and alternative schooling or education.¹¹³² The National Children's and Youth Law Centre supported this proposal.¹¹³³ These units may also be of use to students permanently excluded from an independent school who are entering the government school system.

Recommendation 46. Research should be conducted nationally to determine the extent to which young people are excluded from school by informal processes and the extent of the connection between school exclusion and criminal behaviour.

Implementation. This research should be co-ordinated by OFC in consultation with the Australian Council for Education Research and the AIC.

Recommendation 47. National standards for school discipline should be developed setting out the permissible grounds for exclusion and the processes to be followed when a government school

proposes to exclude a student. The standards should require that

- the legislative provisions regarding discipline be widely publicised to students and their carers in readily understandable language, including community languages where appropriate
- each State and Territory collect and publish annual statistics on truancy and on excluded students including age, sex, race, length of exclusion, reasons for exclusion and the support provided to excluded children
- each State or Territory department of education establish a unit with responsibility for ensuring appropriate arrangements are made for each excluded child, including counselling or other support and alternative schooling or education.

Implementation. In consultation with OFC, DEETYA should convene a working group comprising representatives of State and Territory education departments, peak bodies in the independent schools sector and relevant community groups to develop the national standards mechanisms for obtaining national education statistics. Each State and Territory government should incorporate the standards into legislation and strongly encourage independent schools to incorporate the standards into their discipline policies.

Natural justice and procedural fairness

10.68 Due process is supposed to be followed in exclusion processes. This is often not the case.¹¹³⁴ Students enrolled in public institutions may be able to invoke natural justice claims under statutory judicial review provisions and the common law.¹¹³⁵ Students in independent schools are limited to common law remedies. Expulsion or suspension of a private school student without due cause may be an actionable breach of contract. The Victorian Supreme Court decision in *Dage v Baptist Union of Victoria* suggests that students may also have an administrative remedy if natural justice has been denied.¹¹³⁶

10.69 It is difficult for students to exercise rights to administrative review without family support and resources. It would be preferable if schools incorporated the principles of natural justice into their decision making processes to ensure best practice in this area.¹¹³⁷ A national survey of 66 young people suspended or expelled from school, conducted by the National Children's and Youth Law Centre, suggests that many students are not told their rights during the disciplinary process or made aware of ways to challenge the decision.¹¹³⁸

10.70 As a matter of best practice a person adversely affected by an administrative decision should be given an opportunity to challenge that decision.¹¹³⁹ This presumption is no less appropriate for students and parents who should be given the opportunity to challenge any decision to exclude a child from a government school for more than 14 days or permanently.¹¹⁴⁰

10.71 To ensure that reviews of exclusion decisions are impartial, they should be conducted by a panel of school and community representatives at least one of whom is from outside the particular school community.¹¹⁴¹

It is felt that exclusion has such a detrimental effect on the educational opportunities of young people that the process should be subject to independent review.¹¹⁴²

Some jurisdictions are moving towards this model. For example, the School Education Bill 1997 (WA) provides for the appointment of School Discipline Advisory Panels of not less than three members one of whom must be an independent person not employed by the Education Department.¹¹⁴³ These Panels will be required to consider the case of any child for whom exclusion is recommended.

10.72 In addition, the Inquiry considers that students subject to exclusion should be entitled to an advocate during any interviews related to the disciplinary process and review proceedings. The advocate may be a parent, family friend or community or legal advocate.¹¹⁴⁴

Recommendation 48. The national standards for school discipline should provide that

- students facing exclusion and their carers should be informed in writing of the reasons why exclusion is being considered and be given sufficient time and opportunity to respond to the allegations
- reviews of serious exclusions, being exclusions for longer than 14 days, repeat exclusions totalling more than 14 days in a year and permanent exclusions, should be heard by a panel of school and community representatives at least one of whom is from outside the particular school community
- an advocate for the child should be permitted and encouraged to be involved in the disciplinary process where a serious exclusion is proposed.

Alternative dispute resolution in schools

10.73 Between April 1995 and April 1996 community accountability conferencing was trialled as a means of dealing with serious harm, such as bullying or possession of drugs, in two education regions of Queensland. The conferences were modelled on those used in the juvenile justice system and brought together the victim, the offender and their supporters to discuss the effects of the incident and agree on ways to repair the harm.¹¹⁴⁵ The model is restorative rather than punitive.¹¹⁴⁶

10.74 An evaluation of the Queensland trial found that there was a high level of participant satisfaction, that relationships between participants improved, that recidivism was low and that nearly all schools in the trial had changed their thinking about behaviour management as a result of their involvement.¹¹⁴⁷ The review recommended that community accountability conferencing continue to be used as a means of dealing with serious school disciplinary matters subject to the appropriate training and supervision of conference co-ordinators and school administrators.¹¹⁴⁸

10.75 A number of submissions raised the need for a neutral mediation process to resolve serious school disputes. Too often, problems are dealt with in the principal's office. This is highly intimidating to the student and can be quite unjust.¹¹⁴⁹ The Inquiry considers that community accountability conferencing has considerable potential as a means of dealing effectively with school disputes and of reducing exclusion rates. It promotes a contextual approach to problem solving and may help to stop behavioural difficulties from escalating.

Recommendation 49. The national standards for school discipline should provide conferencing models appropriate for use in schools.

Indigenous students

10.76 Indigenous children are significantly over-represented in exclusion statistics.¹¹⁵⁰ This is particularly problematic given their already high school drop out rate.¹¹⁵¹ The National Children's and Youth Law Centre is currently undertaking a project entitled 'Keeping our Kids in School' in conjunction with the National Aboriginal Youth Law Centre and the Australian Centre for Equity through Education.¹¹⁵² The project aims to determine why Indigenous children are more frequently excluded than non-Indigenous children and to provide educators with strategies to address the problem.¹¹⁵³

The National Aboriginal Youth Law Centre is...concerned about the direct link between early school leaving and participation in the juvenile justice system.¹¹⁵⁴

In light of this important project, the Inquiry is not making recommendations specific to the exclusion of Indigenous students.

Corporal punishment

10.77 Historically the law has permitted teachers to administer corporal punishment to students as 'lawful correction'.¹¹⁵⁵ Corporal punishment remains lawful in some Australian jurisdictions although most States and Territories have limited the practice by legislation, regulation or policy. For example, NSW and the ACT have a statutory ban on corporal punishment in all schools and Victoria has banned it in government schools.¹¹⁵⁶ There are often no administrative processes available to children or their carers to challenge a decision to administer corporal punishment. There is limited legal redress unless the correction was excessive and can be characterised as unlawful assault for which the child may be awarded damages by a court.

10.78 Children deserve the same level of protection from assault as adults. Corporal punishment conveys unfortunate signals to children about the way legal processes work and fits poorly with the principle that school discipline should be administered in a manner consistent with the child's dignity.¹¹⁵⁷ The Australian College of Paediatrics' policy statement on corporal punishment in schools states that

[t]here is increasing evidence from psychologic, psychiatric, human rights and educational literature that corporal punishment has adverse long term effects on some children, teaches some that problems are best resolved by violence and that it does not lead to improved discipline compared with alternative methods of implementing self-control and responsible behaviour.¹¹⁵⁸

The Inquiry considers that corporal punishment should be banned in all Australian schools. This proposal had broad support in submissions.¹¹⁵⁹

Recommendation 50. Corporal punishment should be banned in all Australian schools (including independent schools).

Implementation. Through MCEETYA the Minister for Employment, Education, Training and Youth Affairs should seek agreement to the passage of uniform legislation to that effect. In the meantime, the Minister should take all available measures, including attaching conditions to financial grants, to eliminate corporal punishment in Australian schools.

11. Children as consumers

Introduction

Scope of chapter

11.1 Children are significant consumers of goods and services. Markets in toys, fast food, entertainment and clothes are directed explicitly at children. Young people often have direct spending power from pocket money and their own earnings.¹¹⁶⁰ In addition, children have an indirect effect on the marketplace through the influence they have on the way their parents and other adults spend money.

11.2 Some young people are relatively sophisticated consumers. However, many children, especially those of primary school age, may make uninformed purchases or be particularly susceptible to aggressive selling techniques. Of the 73% of respondents to our survey who considered that young people are more likely to be ripped off than adults, the majority gave young people's inexperience as the reason for this.

Young people are more gullible than most adults, they fall for scams.¹¹⁶¹

Kids can be ripped off without them knowing.¹¹⁶²

It's not a matter of young people or adults, it's a matter of experience.¹¹⁶³

11.3 The terms of reference require the Inquiry to consider the appropriateness and effectiveness of the legal process in protecting children and young people as consumers. The key legal processes that affect children as consumers are those relating to trade practices and consumer protection, financial services, advertising and the media.

11.4 Consumers are generally defined as those who purchase goods and services for personal or household use. Individuals using government services are also regarded as consumers. The legal processes in relation to children's dealings with certain federal government service providers are examined in Chapter 9.

11.5 The most common complaint about consumer issues expressed in focus groups was that young people are routinely followed or hassled by shopkeepers who seem to think that their age makes them inherently suspicious.¹¹⁶⁴ Respondents to the survey nominated poor service as their most common problem when buying products.¹¹⁶⁵

Shop assistants stare at you as if you can't afford things and are just wasting their time.¹¹⁶⁶

A legal process can do little to address these issues but they reflect many children's perceptions of disadvantage when dealing with adult institutions.

Protecting and informing child consumers

11.6 The major barrier to children taking advantage of their consumer rights is that they generally do not know they have those rights.¹¹⁶⁷ Even if they do know they have rights, children may not understand how to enforce them or may not feel confident about pursuing a remedy. Young people told us that it is very difficult to seek redress for poor treatment by service providers because no-one listens to their complaints.¹¹⁶⁸

11.7 Children do not often make complaints about consumer services or follow them through. The Inquiry therefore considers it essential that complaints mechanisms are complemented by regulatory requirements and educational initiatives that effectively safeguard child consumers' well-being. These educational initiatives should begin as soon as children enter compulsory school years.

11.8 Departments in various States have distributed students' guides to consumer affairs.¹¹⁶⁹ In addition, the National Primary School Consumer Education Working Party has produced resources, directed at different age groups, that provide consumer information to children.¹¹⁷⁰ These are positive initiatives. National co-ordination of approaches of this kind would ensure the greatest number of children are well informed consumers. National child consumer education strategies for implementation in all Australian infants,

primary and secondary schools and in TAFEs should be developed.¹¹⁷¹ The strategies should include information on consumer services and remedies, where to find these services and good consumer practices such as reading and understanding labelling.¹¹⁷²

Recommendation 51. National child consumer education strategies should be developed for implementation in all Australian infants, primary and secondary schools and in TAFEs.

Implementation. The Australian Competition and Consumer Commission (ACCC), the Consumer Affairs Division of the Department of Industry, Science and Tourism and DEETYA should develop these strategies in conjunction with the relevant State and Territory consumer affairs and education authorities.

Enforcing children's contracts

11.9 Commerce often involves consumers in contractual arrangements. At common law contracts are not binding on people under the age of 18.¹¹⁷³ A child can enforce a contract against the other party but the contract cannot be enforced against the child. This is one of the consequences of children's historical classification as persons under a legal disability.¹¹⁷⁴ The main exception to this rule is that young people are liable on contracts for necessities.¹¹⁷⁵ There are other statutory exceptions in some jurisdictions.¹¹⁷⁶ These rules can make service providers reluctant to contract with young people.

11.10 Some 16 and 17 year olds are in full time employment and living independently. These young people in particular should have greater contractual capacity, including the ability to enter credit contracts. The *Minors (Property and Contracts) Act 1970* (NSW) reverses the general principle that a contract is not binding on a minor. It provides that where a minor participates in a civil act (including a contract) for his or her own benefit that act is presumptively binding on the child provided he or she has the necessary understanding to participate in it.¹¹⁷⁷ The Inquiry considers that legislation based on this model should be adopted nationally for young people aged 16 and 17.¹¹⁷⁸

Recommendation 52. Legislation similar to the *Minors (Property and Contracts) Act 1970* (NSW) should be adopted on a national basis for young people aged 16 and 17.

Implementation. The Attorney-General through SCAG should encourage the States and Territories to enact legislation to this effect.

Children as consumers of professional services

11.11 The Inquiry received a number of submissions on the difficulties faced by young people as consumers of professional services, particularly health services.¹¹⁷⁹ Complaints about professionals are generally dealt with by professional associations and specialist disciplinary bodies or by civil litigation.¹¹⁸⁰ While we acknowledge that children must be able to have their complaints about professional services resolved, further exploration of this matter is beyond the scope of this Inquiry.

Children as consumers of accommodation services

11.12 Accommodation services were not addressed in IP 18. However, they emerged as a serious concern during consultations.

11.13 Safe, appropriate accommodation is essential for the well-being of young people. Those who cannot live with their family can face significant difficulties as consumers. Private landowners often stereotype teenagers as high risk tenants and are reluctant to lease properties to them even where they can demonstrate a capacity to pay.¹¹⁸¹ In addition, public housing can be very difficult for people under 18 to access.¹¹⁸²

11.14 Once young people have secured accommodation they may face additional problems having essential services, such as electricity, connected. Many power providers insist on a large bond or guarantee from

customers under 18.¹¹⁸³ These conditions do not apply to adult clients. While acknowledging the significant impact this discrimination can have on the ability of young people to live independently and the potential benefits of national uniform age discrimination laws, the Inquiry considers that these matters fall outside our terms of reference.

Trade practices and consumer protection

Introduction

11.15 Australia has federal and State and Territory consumer protection regimes. Parts IV and V of the *Trade Practices Act 1974* (Cth) (Trade Practices Act) provides protections for consumers who conduct transactions with corporations or the Commonwealth.¹¹⁸⁴ All States and Territories have mirrored many of the consumer protection provisions in the Trade Practices Act in their fair trading legislation.¹¹⁸⁵

11.16 A person who suffers loss or damage as a result of a breach of the consumer protection provisions of the Trade Practices Act may recover damages for that loss.¹¹⁸⁶ In certain circumstances where a breach of the legislation is established, the ACCC may negotiate with a corporation on behalf of a consumer to resolve a dispute.¹¹⁸⁷ If the ACCC declines to pursue a complaint on behalf of a child consumer, he or she has the option of pursuing a private action under the Trade Practices Act by way of a guardian *ad litem* in the Federal Court.¹¹⁸⁸

11.17 Several submissions considered that the consumer remedies available under the Trade Practices Act need to be better publicised so that children and parents understand their rights under the Act.¹¹⁸⁹ The significance of this lack of awareness of consumer rights was noted by the ALRC in its 1994 inquiry into compliance with the Trade Practices Act.

A fundamental obstacle to private enforcement of the [Trade Practices Act] is the lack of knowledge and understanding by consumers...of their rights under Pts IVA and V of the TPA and how they may be enforced.¹¹⁹⁰

Many older teenagers are aware of their rights to return faulty goods but would be unlikely to know how to take the matter further if the vendor was unwilling to replace the item or refund the purchase price.¹¹⁹¹ Basic information about Trade Practices Act remedies should be included in the national child consumer education strategies proposed at recommendation 51.

11.18 Each State and Territory has an office that administers its consumer legislation and provides advice and other services to consumers.¹¹⁹² Consumers can take action under this legislation in specialist tribunals or small claims divisions of local courts.¹¹⁹³ There are some differences in the remedies available in each jurisdiction. Again, these remedies must be publicised to young consumers.

11.19 The variety of consumer protection systems may itself constitute a barrier to young people accessing complaints mechanisms. The Consumer Affairs Division of the Department of Industry, Science and Tourism is auditing Australian consumer protection laws as part of a commitment by the Ministerial Council on Consumer Affairs to seek consistent legislation wherever useful and practicable.¹¹⁹⁴ The Inquiry leaves recommendations in this area to the audit.

Recommendation 53. Information about remedies available under the Trade Practices Act and fair trading legislation should be included in the national child consumer education strategies proposed at recommendation 51.

Time limits on actions under the Trade Practices Act

11.20 At common law and by statute there are time limits for the commencement of civil actions.¹¹⁹⁵ These limitations generally do not apply to those under a legal disability, including children, for the period of the disability. However, the Federal Court has held that State limitations statutes have no application to actions for damages under s 82 of the Trade Practices Act which sets a three year time limit on commencing

proceedings.¹¹⁹⁶ This means, for instance, that a child who is injured by a defective product must commence any action for damages within three years of the date on which the cause of action accrued.¹¹⁹⁷ The Inquiry considers that child litigants under the Trade Practices Act should be in the same position as other child civil litigants.¹¹⁹⁸

Recommendation 54. The same exception to time limitations should apply to child litigants under the Trade Practices Act as to other child civil litigants.

Implementation. Section 82(2) of the Trade Practices Act should be amended to enable a person who suffers damage or loss as a child to commence an action at any time within the three years following his or her eighteenth birthday.

Product liability and safety standards

11.21 The Trade Practices Act has provisions designed to ensure that certain goods meet particular standards and that dangerous goods are not sold. The Act requires that minimum conditions and warranties are met in transactions.¹¹⁹⁹ A person who is injured or whose property is damaged by a defective product has a right to claim compensation against the manufacturer of the product.¹²⁰⁰ Legislation in each State and Territory prescribes product information and safety standards that complement the product liability provisions in the Trade Practices Act.¹²⁰¹

11.22 Subject to their inability to litigate directly, children have access to the same remedies under the Trade Practices Act for defective goods as adult consumers. Safety standards that are effective in protecting child consumers from harm are equally as important as this statutory remedy for loss. The Consumer Affairs Division of the Department of Industry, Science and Tourism oversees the enforcement of safety standards declared under the Trade Practices Act. Mandatory safety standards can only be introduced when a product has been shown to be dangerous. Currently, there are mandatory safety standards for toys for children aged under 3 years,¹²⁰² flotation toys, swimming aids¹²⁰³ and children's nightclothes.¹²⁰⁴ This regime has been criticised for being reactive rather than proactive.

11.23 The European Union product safety model is cited as appropriate to adopt because it requires manufacturers to ensure that all children's toys meet essential safety requirements before being placed on the market.¹²⁰⁵ The European Union system is one of presumed compliance. It involves manufacturers certifying that their product complies with the law by placing a 'Communaut Europeene' (CE) label on the toy.¹²⁰⁶ The European Union Directive establishes safety standards for all toys designed for use by children under 14 years of age.¹²⁰⁷ It stipulates general principles and particular risks as criteria against which a toy's safety is measured. For example, toys and their parts and the packaging in which they are contained for retail sale must not present a risk of strangulation or suffocation.¹²⁰⁸

11.24 The European Union model has been in force since 1990 and is reportedly working well.¹²⁰⁹ It should be evaluated to determine whether it would provide more effective protection for children from injury from defective or dangerous products than the current Australian regime.¹²¹⁰

Recommendation 55. The European Union product safety model for children's toys should be examined to determine whether it would provide more effective protection for children from injury from defective or dangerous products than the current Australian regime.

Implementation. The Minister for Customs and Consumer Affairs should commission this investigation.

Private complaint schemes

11.25 In addition to consumer remedies provided by legislation, there are private complaint schemes in a number of industries. These schemes are funded by industry members but operate independently of them.

Examples include the Australian Banking Industry Ombudsman and the Telecommunications Industry Ombudsman.¹²¹¹

11.26 The Minister for Customs and Consumer Affairs has released benchmarks for industry-based customer dispute resolution schemes to guide industry in developing and improving these schemes.¹²¹² The benchmarks suggest key practices that should be adopted by an industry when developing a dispute resolution scheme such as observing the principles of procedural fairness and making determinations publicly available.

11.27 Codes of conduct, such as the Supermarket Scanning Code and the Electronic Funds Transfer Code, are another self-regulation mechanism. These codes set out the respective rights and obligations of consumers and traders, provide a process for the investigation and resolution of complaints and, where a complaint is proved, suggest appropriate sanctions.

11.28 There is a move away from codes of conduct to consumer charters. While codes of conduct aim to establish minimum general standards of service, charters are more detailed performance criteria focusing on the outcome for the consumer.¹²¹³ Consumer charters are intended to be a formal accountability mechanism and may impose penalties on organisations for non-compliance. They will be mirrored by the Service Charters being developed in the federal public sector.¹²¹⁴

11.29 Private complaint schemes are inexpensive and informal and thus readily accessible to consumers, including young people. The proliferation of these schemes is potentially confusing for consumers who may not be able to identify the appropriate avenue for a particular complaint. However, this problem can be avoided if organisations ensure that their schemes are widely and appropriately publicised. They are a useful adjunct to consumer protection laws. However, they should not be seen as a complete alternative to statutory safeguards as any recommendations they make are unenforceable at law. The schemes should be tailored to meet the needs of young clients.

Recommendation 56. Organisations should take the needs of children into account when developing complaints schemes, codes of conduct and consumer charters.

Implementation. The ACCC, the Office for Small Business and the Consumer Affairs Division of the Department of Industry, Science and Tourism should develop and promote guidelines to ensure these schemes are responsive to children.

Financial services

11.30 While children generally do not have access to large amounts of money, many teenagers earn wages from part time employment. A significant number of young people aged over 16 are in full time employment and need access to the full range of banking services. Young people participating in the focus groups told us of difficulties in opening bank accounts because of identification requirements. In some cases parents had to open an account on the child's behalf.¹²¹⁵ In addition, independent young people often have difficulty obtaining credit.

11.31 The Inquiry considers it important that the national child consumer strategies include general information on the way banks operate and how to access their services.¹²¹⁶ This material should also include information about available complaints mechanisms.

11.32 Various 'watchdog' or regulatory bodies have been established to oversee consumer banking and finance services. For example, the Australian Banking Industry Ombudsman Scheme was set up in 1990 to help individual customers resolve complaints with their banks, usually through processes of investigation, discussions with the bank and conciliation.¹²¹⁷

11.33 The Banking Industry Ombudsman does not keep statistics on the number of complaints made by or on behalf of people under 18 years of age. Anecdotal evidence suggests they are under-represented as complainants. Given the level of concern about financial services expressed by young people in our focus

groups, the Inquiry considers that information about the services offered by the Banking Industry Ombudsman should be included in the national child consumer education strategies proposed at recommendation 51.

11.34 The Consumer Affairs Division of the Department of Industry, Science and Tourism administers a Financial Counselling Program that provides free financial advice to people who may be disadvantaged by socio-economic status or geographic location.¹²¹⁸ Internal research indicates that approximately 10–15% of the Program's clients are under 25 years of age although few are under 18. The program should be publicised through the national child consumer education strategies proposed at recommendation 51.

11.35 The Wallis Inquiry into the Australian Financial System recently recommended the creation of a new agency, the Australian Corporations and Financial Services Commission, to provide federal regulation of the finance sector including consumer protection.¹²¹⁹ The federal Government is committed to this reform.¹²²⁰ When it is established, the Australian Corporations and Financial Services Commission should have regard to the specific needs of child consumers in the banking industry when developing complaints lodging and handling procedures.

Recommendation 57. General information about banking services should be included in the national child consumer education strategies proposed at recommendation 51.

Recommendation 58. Information about the services provided by the Australian Banking Industry Ombudsman should be included in the national child consumer education strategies proposed at recommendation 51.

Recommendation 59. Information about the Financial Counselling Program administered by the Consumer Affairs Division of the Department of Industry, Science and Tourism should be included in the national child consumer education strategies proposed at recommendation 51.

Recommendation 60. The proposed Australian Corporations and Financial Services Commission should have regard to the specific needs of child consumers in the banking industry when developing complaints lodging and handling procedures.

Media regulation

Introduction

11.36 Children are avid consumers of media and information services, including television, radio, magazines and the Internet. Children aged between 5 and 12 years, for example, watch an average of 17 hours 27 minutes of television each week.¹²²¹

11.37 Article 17 of CROC requires States Parties to recognise '... the important function performed by the mass media...' and encourage the dissemination of information that is of social and cultural benefit to children. It also requires parties to protect children from harmful material.¹²²²

Television broadcasts

11.38 In general, the content of programs shown on Australian commercial television is co-regulated by the Australian Broadcasting Authority (ABA) and the broadcasters through industry codes of practice. However, regulation is stricter in regard to children's television.

11.39 Each year, commercial television stations must broadcast a certain number of hours of program material specifically for children. This program material is classified by the ABA prior to broadcast under criteria set out in the children's television standards (CTS) established under the *Broadcasting Services Act 1992* (Cth).¹²²³ The CTS apply only to these quota programs and are designed to ensure the availability of

quality material that adds to children's experience and understanding.¹²²⁴ The Australian content standard ensures that a certain percentage of the programs broadcast are produced in Australia.¹²²⁵

11.40 One of the objects of the *Broadcasting Services Act 1992* (Cth) is to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material that may be harmful to them.¹²²⁶ The Act does not define the term 'harm'. It is generally interpreted to mean an adverse psychological impact on children. For example, the CTS provide that no quota program may present images or events in a way that is unduly frightening or unduly distressing to children or present images that depict unsafe uses of a product or unsafe situations that may encourage children to engage in activities dangerous to them.¹²²⁷ The ABA is currently reviewing results of research on the television viewing behaviour of preschool aged children.¹²²⁸

11.41 In addition to complying with the CTS, the *Broadcasting Services Act 1992* (Cth) requires the various sectors of the electronic broadcasting industry, including commercial television stations, to develop a code of practice.¹²²⁹ In 1993 the ABA registered the Federation of Australian Commercial Television Stations code of practice that includes sections regulating the handling of complaints¹²³⁰ and the classification of programs.¹²³¹ The code of practice also requires all advertisements directed to children to 'exercise special care and judgement' and comply with the relevant CTS.¹²³²

11.42 The national broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS), have particular responsibilities under their respective enabling statutes. Both the ABC and SBS must develop codes of practice relating to programming matters and complaints handling and notify them to the ABA.¹²³³ The main focus is on protecting children from inappropriate material. For example, section 3.1 of the ABC code of practice states

[w]hile the real world should not be concealed from children, special care will be taken to ensure programs children are likely to watch unsupervised will not cause alarm or distress.¹²³⁴

11.43 Pay TV is less regulated than commercial free-to-air television. All Pay TV operators have channels for child viewers but there is no legislative requirement for this and no regulation of when certain programs are shown. The Pay TV sector has submitted a code of practice for registration by the ABA.

11.44 There is growing community concern, both in Australia and internationally, about the effect of violence portrayed on television, video and computer on viewers' behaviour, particularly the effect on the behaviour and development of children.¹²³⁵ In response to this concern, legislation in the USA and Canada requires that a v-chip (a technological blocking device) be installed in all new television sets over a certain size.¹²³⁶ The chip enables consumers to block the reception of programs in nominated ratings categories.

11.45 In the wake of the Port Arthur massacre, a federal Ministerial Committee looking at the portrayal of violence in various forms of the electronic media recommended that v-chips be included in all new televisions sold in Australia.¹²³⁷ All the recommendations of the committee have been endorsed by federal Cabinet.¹²³⁸ Legislation to this effect has yet to be introduced.

Radio broadcasts

11.46 Like commercial television stations, commercial radio broadcasters are required to comply with a code of practice.¹²³⁹ The code developed by the Federation of Australian Radio Broadcasters, registered by the ABA in May 1993, does not include any provisions directed specifically at child listeners although it does prohibit the broadcasting of unsuitable programs such as those that incite violence or that present as desirable the misuse of drugs.¹²⁴⁰ The radio code of practice is to be reviewed in the coming year.

On-line services

11.47 The Internet is becoming a popular source of information and entertainment for children. Increasing numbers of schools are coming on-line and material on the Internet targeted at children is burgeoning. As with television, there is increasing community concern that young people are being exposed to pornographic and other inappropriate material such as aggressive marketing on the Internet.¹²⁴¹ Placing or possessing material on the Internet that infringes existing legislation regulating, for example, racial vilification or

defamation may be a criminal offence. These laws are difficult to enforce as the originators of Internet material can rarely be identified.

11.48 There is currently no specific government regulation or classification system for Internet material, including advertisements, accessible to children. Some commercially developed programs that allow parents to restrict children's access to on-line services are available. The federal Government has announced plans to amend the *Broadcasting Services Act 1992* (Cth) to introduce codes of practice for Internet service providers. The legislative principles on which the regulatory regime will be based were released for comment in July 1997.¹²⁴²

11.49 The Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies recently suggested that on-line service providers should establish procedures to ensure that prospective account holders are over the age of 18.¹²⁴³ Shortly afterwards the Wood Royal Commission made a number of recommendations designed to prevent material exploitative of children from being placed on the Internet and to protect young Internet users from other harmful material that may be available on-line.¹²⁴⁴ The Royal Commission recommended that support be given to the development of labelling technology that can be combined with appropriate software to limit the material that can be accessed by minors.¹²⁴⁵ It considered this necessary in light of the sheer scale of the Internet and the inability to regulate effectively what is available on it.¹²⁴⁶

11.50 The 1996 investigation into the content of on-line services by the ABA recommended a self-regulatory framework for the Internet. The main features of this framework would be the development of codes of practice for service providers and the development of voluntary content labelling schemes to enable parents and providers to identify material potentially harmful to children.¹²⁴⁷ The review considered that the regulatory framework for on-line services should recognise that the majority of parents will accept responsibility for managing their children's use of on-line services in the home.¹²⁴⁸ The Inquiry endorses this position.

Printed material

11.51 The Classification Board within the federal Office of Film and Literature Classification classifies print media on behalf of the ACT, NSW, Victoria, South Australia and the Northern Territory. Other States operate their own schemes. Material is classified in accordance with the national classification code.¹²⁴⁹ One of the principles of the code is that minors should be protected from material likely to harm or disturb them.¹²⁵⁰ No statutory definition of harm is provided.

11.52 Classified publications are divided into restricted and unrestricted material.¹²⁵¹ Restricted material is divided into two categories both of which are considered unsuitable for children to see or read. There are no other provisions specific to children. The classification scheme administered by the Board is voluntary and not all publications are submitted for classification.

Complaints and review mechanisms

11.53 Children tend not to make complaints about media services on their own behalf.¹²⁵² The *Broadcasting Services Act 1992* (Cth) lays down a general procedure for making complaints related to radio and television codes of practice that requires consumers to approach the service provider first. If the consumer is not satisfied with the provider's response or does not receive one within 60 days, he or she can refer the matter to the ABA for investigation.¹²⁵³ Complaints about possible breaches of program standards, including CTS, can be made directly to the ABA.

11.54 Any person aggrieved by a decision of the Classification Board about a publication can apply for review of that decision by the Classification Review Board.¹²⁵⁴ The application must be in writing and accompanied by the prescribed fee.¹²⁵⁵

11.55 These complaints mechanisms must be made accessible to child consumers through targeted publicity campaigns and appropriately modified procedures.

It cannot be assumed that the methods which work for adults in terms of formal complaints are also accessible to children. This requires imagination and sensitivity to the developmental stages of childhood in relation to various approaches which might enable children to participate in the processes of critical evaluation of the media.¹²⁵⁶

Recommendation 61. Information about media complaints mechanisms should be included in the national child consumer education strategies proposed at recommendation 51.

Recommendation 62. Media service providers, the ABA and the Classification Board should ensure that their complaints procedures are appropriately modified for child consumers.

Reducing potential for adverse impact

11.56 Children need to be protected from the potentially adverse impact of the media until they are mature enough to treat material critically. A graphic illustration of the media's potential influence on young people's behaviour is provided by recently released material concerning youth suicide. Medical research has found that media reports of individual youth suicides leads to an increase averaging 13.5% in these deaths.¹²⁵⁷ Mandatory controls on the reporting of suicide are now being considered as part of the National Youth Suicide Prevention Strategy.¹²⁵⁸

11.57 One of the principal objects of the *Broadcasting Services Act 1992* (Cth) is to protect children from potentially harmful program material.¹²⁵⁹ For regulatory systems to be effective, regulators must be able to identify accurately and specifically the harm they seek to avoid. This can be difficult in the media industry because its products are open to diverse interpretations. Child consumers cover a wide range of ages and developmental stages. What is distressing to one child consumer may be amusing or informative to another. Neither CROC nor the federal legislation regulating the media offer guidance on the meaning of harm in this context.¹²⁶⁰

11.58 International and available Australian research on the effects of media on children at different ages and stages of development should be comprehensively reviewed.¹²⁶¹ A summary of the results should be distributed to legislators, regulators, media providers and schools.

11.59 In a recent report, the Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies recommended that State and Territory education ministers encourage schools to offer a compulsory course on a critical evaluation of the media at some stage during the later primary school years.¹²⁶² The Inquiry supports this suggestion and considers that this material should be incorporated in the national child consumer education strategies proposed at recommendation 51.¹²⁶³

Providing children with some basic skills of critical analysis, particularly of the mass media and electronic services is probably as important as understanding Australia's political institutions.¹²⁶⁴

Recommendation 63. International and Australian research on the effects of the media on children at different ages and stages of development should be comprehensively reviewed to determine more clearly what is harmful to the variety of child consumers. A summary of the results should be distributed to legislators, regulators, media providers and schools.

Implementation. The Department of Communications and the Arts, the Consumer Affairs Division of the Department of Industry, Science and Tourism and the ABA should conduct this review in consultation with relevant community groups. The review results should be distributed by OFC.

Recommendation 64. The national child consumer education strategies proposed at recommendation 51 should strongly encourage all States and Territories that have not already done so to include compulsory units on critical evaluation of the media, including advertising, in primary and secondary school syllabuses.

Advertising

Introduction

11.60 Children have high levels of consumption and considerable influence on family spending. Advertising and marketing targets them directly from an increasingly young age. There is considerable community concern about the effects of advertising on children.¹²⁶⁵ Young people themselves consider that advertisements should be more accurate and honest. 84% of respondents to our survey stated that advertisements are truthful either only sometimes or never.¹²⁶⁶

They shouldn't make the products seem heaps better than they are. The good and bad or not so good points of the item should be told too.¹²⁶⁷

Some research has been done on the effects of advertising on children. The Federal Bureau of Consumer Affairs has reported that children below the age of five years are unable to discriminate consistently between programs and advertisements, especially when they are similar in style. Further, children below seven or eight years are said to possess little or no ability to recognise the persuasive intent of television advertising.¹²⁶⁸ However, there is continuing debate about the level of regulation needed to protect children at different ages and stages of development from inappropriate marketing techniques.¹²⁶⁹

Regulatory and complaints mechanisms

11.61 The CTS set out restrictions on advertisements on commercial television during quota programs.¹²⁷⁰ No advertisements may be broadcast during nominated pre-schoolers' viewing periods.¹²⁷¹ At other times, broadcasters are required to ensure that commercials and sponsorship announcements are clearly distinguishable from programs to child viewers.¹²⁷² In addition, stations may not broadcast advertisements designed to put undue pressure on children to ask their parents or other people to purchase an advertised product or service.¹²⁷³ Advertisements may not state or imply that a product makes children who own it superior to their peers or that a person who buys an advertised product for a child is more generous than a person who does not.¹²⁷⁴ CTS 17 provides that advertisements may not mislead or deceive children.¹²⁷⁵

11.62 Where children or carers consider a commercial to be deceptive or misleading within the meaning of section 52 of the Trade Practices Act, they can approach the ACCC.¹²⁷⁶ In principle the Trade Practices Act protects child consumers from misleading trade practices to the same extent as adults. However, in practice courts may have difficulty establishing what is misleading to a child consumer particularly in regard to advertising.

11.63 The Advertising Standards Council ceased operation on 31 December 1996. This left children and their carers without access to an independent complaints mechanism for concerns about many advertisements. The Australian Association of National Advertisers has recently announced that it will fund the establishment of an Advertising Standards Board to hear grievances about all forms of advertising before the end of 1997.¹²⁷⁷ The Board will be composed of members from the media industry and the community and will have recommendatory powers only. The Inquiry supports the establishment of the Advertising Standards Board.¹²⁷⁸ It should take into account the particular needs of child consumers when considering complaints about advertising.¹²⁷⁹

Recommendation 65. The proposed Advertising Standards Board should take into account the particular needs of child consumers when considering complaints about advertising.

Reducing potential for adverse impact

11.64 Concern about the potentially harmful effects of advertising on children is not restricted to the Australian community. Tight controls on advertising during television programs directed at children have been introduced in a number of overseas jurisdictions.

11.65 In Quebec advertisements directed at children and adults can only be broadcast when the 2 to 11 year old age group represents less than 15% of the audience. Advertisement directed exclusively at children may only be broadcast during programs where the audience is less than 5% children. This ensures that children have adult supervision during peak times of advertising to children.¹²⁸⁰

11.66 Sweden, Norway, Greece, Germany, Belgium, France and Austria ban advertising during children's TV programs.¹²⁸¹ Danish regulation of advertising directed at children is relatively similar to that in Australia and provides, for example, that advertisements must not contain a direct appeal to children to persuade others to buy the product being promoted and must not give the children the impression that they will have physical or psychological advantages if they buy the product.¹²⁸² In addition, children under the age of 14 cannot give recommendations or testimonies about any product or service.¹²⁸³

11.67 Research on the effects of advertising on children at different ages and stages of development should be reviewed to enable the preparation of guidelines for all advertisers to protect children at different ages and stages of development from harm. The review should look at international material in the area such as the Scandinavian reports that lead to the banning of advertising during children's television programs.¹²⁸⁴ It should consider what effect exposure to advertising has on young people who are introduced to it at a later age. The advertising guidelines should include information on what constitutes misleading practices in relation to young media consumers. Consumer Affairs Queensland suggested that the following questions should also be considered during the course of the research review.

- To what extent do 'misleading practices' and all child directed advertising impact on the buying habits of child consumers?
- What degree of regulation is required?
- How successful are current overseas attempts at regulation?
- Do 'safe' forms of advertising exist which can be used to promote children's products?¹²⁸⁵

Recommendation 66. Research on the effects of advertising on children at different ages and stages of development should be reviewed to enable the preparation of best practice guidelines for all advertisers to protect children at different ages and stages of development from harm.

Implementation. The Department of Communications and the Arts, the ABA and the Consumer Affairs Division of the Department of Industry, Science and Tourism should conduct this review in consultation with the relevant community groups, provide the results to OFC and assist OFC to develop appropriate best practice guidelines for distribution to advertisers.

12. Introduction to Part C

12.1 In this Part, the Inquiry addresses children's involvement in formal legal processes, that is, those legal processes that relate to litigation. Part C focuses on children's involvement in legal proceedings either as the subjects of applications, as parties or as witnesses. However, it is the Inquiry's view that much of this interaction is closely related to the administrative processes discussed in Part B. For many children contact with formal legal processes is a culmination of contact with administrative processes, particularly where these administrative processes fail to heed early warning signs or to adequately support or assist the children involved.¹²⁸⁶ Therefore, the recommendations in this Part should not be considered in isolation from the recommendations in Part B.

12.2 In addition, some children may be involved in more than one litigation process, often stemming from a single incident. A child may be involved in Family Court proceedings or children's court proceedings as the subject of a care and protection application and also in criminal court proceedings as a witness. A child may also take civil action and/or apply for criminal injuries compensation. The drift of some children in care to juvenile justice systems means that these children are involved simultaneously in both legal processes.¹²⁸⁷ The chapters in Part C address children's participation in the different legal proceedings and where appropriate draw attention to the links between these legal processes.

12.3 Chapter 13, Legal representation and the litigation status of children, addresses children's litigation status and the provision of legal representation to those children who are directly involved in legal processes. During the course of the Inquiry, significant concern was expressed about the models of representation available to children who were subjects of care and protection and private family law proceedings. This chapter focuses on the representation of children in these jurisdictions. Recommendations are also made in relation to civil proceedings. The recommendations in this chapter attempt to ensure that children are represented by appropriately trained legal advocates, a vital element for children's effective participation in formal legal processes.

12.4 Chapter 14, Children's evidence, makes recommendations regarding the investigative, judicial and administrative processes through which children participate in a number of different legal processes as witnesses. Although the discussion in this chapter often focuses on child witnesses in criminal proceedings, interactions between legal processes — and particularly between the criminal jurisdiction and both private and public family law — mean that many recommendations concerning children's evidence cross jurisdictional boundaries and are applicable to a variety of federal, State and Territory legal processes.

12.5 Chapter 15, Jurisdictional arrangements in family law and care and protection, details the interaction between two specific areas of law — private and public family law — and the problems that current jurisdictional divisions between the Family Court of Australia and State and Territory children's courts create for children involved in these legal processes. Often matters relating to essentially the same circumstances must be litigated in more than one court or in an inappropriate court as a result of the current jurisdictional arrangements. The Inquiry presents a number of options for reform, including an extended cross-vesting scheme.

12.6 Chapter 16, Children's involvement in family law, and Chapter 17, Children's involvement in the care and protection system, then make detailed recommendations to improve processes for children involved in private family disputes and those involved in care and protection systems. As the experience of being in care is not restricted to court processes, Chapter 17 includes discussion of investigation and pre-court processes involving child welfare departments and post-court administrative processes for children in care.

12.7 The terms of reference required consideration of the treatment of children and young people convicted of federal offences. In Chapter 18, Children's involvement in criminal processes, Chapter 19, Sentencing, and Chapter 20, Detention, the Inquiry makes recommendations regarding children's involvement in criminal law processes and the juvenile justice system as the accused. However, the discussions in these chapters are not restricted to children's involvement in federal offences. As a party to CROC, the Commonwealth has made a commitment that all children involved in juvenile justice systems, including those in State and Territory systems, will be treated fairly and in accordance with international law.

13. Legal representation and the litigation status of children

Introduction

13.1 Article 12 of CROC is of great significance. It states

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

13.2 Most legal problems children face are not dealt with by children directly but by their parents or other adults acting on their behalf. Parents are often the most effective advocates for children. However, there are occasions when children are directly affected by and involved in legal processes. The extent to which children are able to express views freely in those processes depends in part on the age of the child, the nature of the decision and the forum in which it is made. It also depends on the form and quality of representation available and accessible to the child. This chapter reviews the various models of representation available for children. It recommends changes to the form of representation of children in family law and care and protection jurisdictions and the adoption of standards of representation for all lawyers acting for children. Quality representation of children is of crucial importance for effective decision making concerning children and for assuring children a say in decisions that affect them.

13.3 A general rule of legal advocacy is that the client sets the goals of representation. Lawyers are instructed by the client and, subject to their professional judgment and their duty to the court, advance the case in accordance with the wishes and directions of the client.¹²⁸⁸ A lawyer acts as adviser and advocate — ensuring that the client is informed of relevant considerations and is assisted, through discussion of those considerations, to provide informed instructions. However, the decisions concerning the case are ultimately those of the client and the representative may be required to advocate a position with which he or she disagrees. Lawyers are encouraged to exercise their forensic judgment concerning their advocacy but are not required to critically assess the soundness of the judgment of the client.

13.4 In many cases involving children this general obligation of a representative to act upon instructions is modified. Children traditionally lack the legal capacity to instruct. The law presumes that a child cannot assert rights or form a judgment.¹²⁸⁹ Younger children lack the developmental capacity to provide direction. However, as a matter of practice, many children are involved in litigation. A child can be charged with a criminal offence, have a civil cause of action that should be pursued during the child's minority or be the subject of proceedings in the family law or care and protection jurisdictions. Lawyers are often seen to have a protective, rather than a representational function. In many cases this means that the representative determines and advocates for the child's best interests rather than acts on instructions. This best interests model of advocacy has strongly influenced all representation for children, even where the child is taken at law to be a full party to proceedings.

13.5 The standard model of representation is most common in juvenile justice matters where the child is taken to have the competence to instruct a representative directly. The model may not be fully implemented in practice, however, because some children, particularly younger children, may have difficulty providing satisfactory instructions to their lawyers. Many lawyers may have difficulty accepting instructions from children.¹²⁹⁰ The following is an example of a young person's experience of being represented by a duty solicitor in a children's court in a regional Queensland town.

He was being represented by the duty solicitor on this particular day and Carlos wanted to have his own solicitor represent him. He asked the duty solicitor to request bail for him. The duty solicitor refused and replied that he did not have a chance of getting it. Halfway through the solicitor's submission to the court, Carlos stood up and said "Excuse me, your Highness, if it pleases the court I would like to speak". The Magistrate granted Carlos' request. Carlos said, "If it pleases the court I would like to sack my lawyer as I not [sic] think that he is acting in my best interests, actually I do not think he is doing me any good at all. If it pleases the court, I would like to ask for bail

myself." If Carlos had been an adult client would the solicitor have ignored his instructions for a bail application? I should think not.¹²⁹¹

There are problems in ensuring children have access to legal advice and representation in juvenile justice matters soon enough following coming to police attention to enable them to be advised and represented properly. These issues are dealt with in Chapter 18. The Inquiry heard no major criticism of the direct representation model of children in juvenile justice beyond these issues and representation in juvenile justice matters will not be discussed further in this chapter.

Representation in civil proceedings

The next friend and the guardian ad litem

13.6 Civil litigation is instituted not by a child but on behalf of a child by a next friend or a guardian *ad litem*.¹²⁹² The High Court Rules provide

(1) An infant may sue as plaintiff by his next friend.

(2) An infant may defend in a proceeding by his guardian appointed for that purpose.¹²⁹³

The High Court Rules also provide

[a]n infant shall not enter an appearance except by his guardian *ad litem*.¹²⁹⁴

13.7 These rules are mirrored in the Federal Court and in State and Territory Supreme Courts and district courts.¹²⁹⁵ In the civil jurisdictions of State and Territory courts, children are most frequently involved in personal injury matters.¹²⁹⁶ In federal civil courts children sometimes appear in relation to consumer issues or in public law matters concerning income support or immigration decisions.¹²⁹⁷

13.8 In civil proceedings the next friend or guardian *ad litem* acts in the place of the child and is responsible for the conduct of the proceedings. This includes, in the case of the next friend, incurring liability for litigation costs.¹²⁹⁸ The next friend or guardian *ad litem* is not a party to proceedings and is not entitled to appear in person.¹²⁹⁹ The High Court Rules and Federal Court Rules state that a person must give written consent before being appointed as the next friend or guardian *ad litem*.¹³⁰⁰ The court may appoint a guardian *ad litem* where there is no other person available.¹³⁰¹ The next friend or guardian *ad litem* may be removed by order of the court.¹³⁰²

13.9 The child's next friend or guardian *ad litem* is generally the legal guardian of that child.¹³⁰³ The guardian *ad litem* and the next friend do not receive remuneration for acting in the position.

13.10 Common law recognises that the next friend or guardian *ad litem* should act in the best interests of the child.¹³⁰⁴ Legislation does not place the same responsibility on the next friend or guardian *ad litem* although the Federal Court Rules state that a person may not act as a next friend or guardian *ad litem* for a child if he or she has an interest adverse to that of the child.¹³⁰⁵ The High Court Rules require that an affidavit be filed by the solicitor on the record stating that the guardian *ad litem* or next friend is a fit and proper person to act and has no interest adverse to that of the child.¹³⁰⁶

13.11 Of those submissions to the Inquiry that discussed the matter, a majority approved the next friend model.¹³⁰⁷ The Law Reform Committee of Judges suggested that the next friend and guardian *ad litem* procedure generally works well and

... has the advantage of flexibility and low cost, as the guardian is invariably a parent or close relative who provides his or her assistance free of charge and has an intimate knowledge of the circumstances of the child.¹³⁰⁸

However, there is room for improvement in the model in at least two areas, one relating to the best interests of the child and the other to the role of the mature minor in litigation.

Ensuring the outcome promotes the best interests of the child

13.12 Legislation does not provide specifically that the next friend or guardian should conduct the litigation in the best interests of the child. No Australian legislation gives guidance on how to determine what the child's best interests are in civil matters.

13.13 The Law Reform Committee of Judges suggested that there may be problems on occasion in ensuring that the child's best interests are served by the litigation conducted by the next friend or guardian *ad litem*, particularly in relation to settlements and money held on behalf of the child.

Judges have...encountered situations where the litigation guardian has applied for payment out of monies held pursuant to a compromise in circumstances where one may have a reasonable suspicion that the orders sought are predominantly for the benefit of the guardian...¹³⁰⁹

That submission noted that the court's ability to remove the guardian in such cases is a sufficient safeguard against any misconduct on the part of a next friend or guardian *ad litem*.¹³¹⁰ The Federal Court Rules also provide that settlements involving the next friend or guardian *ad litem* are not binding upon the child without the approval of the court.¹³¹¹

13.14 Other submissions suggested that court rules should explicitly require the next friend or guardian *ad litem* to conduct the proceedings in the best interests of the child.¹³¹² This could be particularly relevant where the guardian *ad litem* or next friend is not the parent of the child.¹³¹³

13.15 Neither common law nor legislation recognises that children's best interests may be served by allowing their direct participation in the proceedings. A child participates in litigation only to the extent that the next friend or guardian *ad litem* allows the child to be involved in decision making. The next friend or guardian *ad litem* has no obligation to present evidence of the child's wishes.¹³¹⁴ One submission to the Inquiry suggested

[i]n order to fulfil the requirements of CROC and to serve the interests of justice, the next friend model would have to have incorporated into it some requirement that the child's own opinions and wishes were heard by the decision maker, rather than merely assuming that the next friend reflected those views.¹³¹⁵

The Inquiry does not accept this suggestion because the child's wishes may not be relevant to the determination of issues in some cases.

Recommendation 67. All court rules should require the guardian *ad litem* or next friend of a child to regard the best interests of the child as the paramount consideration in conducting proceedings on behalf of that child. The rules should stipulate that failure to consider the child's best interests constitutes grounds for removal of the next friend or guardian *ad litem* by the court.

Implementation. The Federal and High Courts, along with State and Territory courts, are encouraged to amend their rules to this effect.

The mature minor in civil proceedings

13.16 Civil proceedings initiated by a child without the intervention of a next friend may be dismissed by the court and the solicitor on the record ordered to pay costs.¹³¹⁶ However, these proceedings may continue where there is no objection from another party.¹³¹⁷ This liability for costs is a disincentive for any representative whom a child may consult to represent him or her directly.

13.17 Some young people may have a cause of action they wish to pursue independently and many are sufficiently mature to do so. Many young people live independently. Some of these young people have causes of action but no suitable family member to act as next friend. The mature minor test was developed in British and Australian courts initially in relation to the ability of a child to make informed decisions concerning medical treatment independent of parents. It may be useful in this broader context.¹³¹⁸

13.18 DRP 3 suggested that competent children living independently should be able to initiate civil proceedings directly or defend these proceedings directly. National Legal Aid disagreed with this proposal, noting that

...there should be no special rules in relation to civil litigation in comparison to other jurisdictions. It is believed this will only complicate the legal system. The age of responsibility should stand.¹³¹⁹

The Inquiry sought comments from the Chief Justices of the Supreme Court of each State and Territory, the Federal Court and the High Court. Chief Justice Cox of the Supreme Court of Tasmania doubted

...the capacity of most teenagers of that age to make the most appropriate decision in that regard. Indeed, there are too many who would too readily take the 'bird in the hand'. The interposition of a next friend and the retention of Court approval of infants' compromises are, in my view, necessary safeguards against youthful impetuosity.¹³²⁰

However, Chief Justice Malcolm of the Supreme Court of Western Australia¹³²¹ and Chief Justice Doyle of the Supreme Court of South Australia both supported the proposal.¹³²² Recommendation 52 concerning the ability of children living independently to enter contracts should be accompanied by an ability to litigate in those circumstances.

13.19 Permitting mature minors to litigate directly should not prevent the court from scrutinising settlements and compromises.¹³²³ It should be accompanied by a provision allowing the court to appoint a next friend or guardian *ad litem* for a child where that child is litigating directly but, in the opinion of the court, is not sufficiently mature or capable of doing so. This would bring civil proceedings into line with family law proceedings. Such a decision may be appropriate where the court considers that '[u]nscrupulous advisers...run up unreasonably high bills which a mature next friend would never countenance'.¹³²⁴ The Inquiry recommends that a provision should be inserted into the Federal Court Rules and High Court Rules similar to that contained in Family Law Rules O 23 r 3(1).

13.20 Amendments to the Rules would be required to ensure that the minor would be bound by the judgment. The amendment would not affect the right of plaintiffs to initiate proceedings upon attaining majority under limitations restrictions in civil jurisdictions.¹³²⁵ That is, time should not run during the period of the child's minority so that any proceedings commenced by a child under the mature minor test are within time and those who do not litigate during their minority are not prejudiced.¹³²⁶

13.21 The High Court Rules¹³²⁷ and the *Federal Court of Australia Act 1976* (Cth)¹³²⁸ provide a broad discretion to order security for costs. In DRP 3, we suggested that the child may be required to lodge security for costs when litigating directly. The Chief Justice of the Supreme Court of Tasmania pointed out that at common law a litigant should not be denied access to court by virtue of impecuniosity.¹³²⁹ He suggested that it would be inappropriate to use the device of requiring security for costs to restrict the possibility of '...unmeritorious litigation by youths...'¹³³⁰ The Inquiry is persuaded that it is inappropriate to provide specifically for lodgement of security for costs by child litigants. However, the court may use its general discretion to order security for costs to be lodged by the child in the usual circumstances.

Recommendation 68. There should be a rebuttable presumption that a child over the age of 16 years living independently is competent to initiate or defend litigation.

Implementation. The Attorney-General should introduce legislation to this effect to apply to the Federal and High Courts and the rules of those courts should be amended to reflect that legislation. The Attorney-General through SCAG should encourage the States and Territories to enact similar legislation in State and Territory courts.

Recommendation 69. Court rules should be amended by the insertion of a subrule similar to that contained in the Family Law Rules O 23 r 3(1) whereby the court may require the appointment of a next friend for a child where the child has initiated proceedings directly but the court is satisfied that the child does not understand the nature and possible consequences of the proceedings or is not capable of conducting proceedings directly.

Implementation. The Federal and High Courts, along with State and Territory courts, are encouraged

to amend their rules to this effect.

Representation of children in family law and care and protection

Representation in the Family Court

13.22 The *Family Law Act 1975* (Cth) (Family Law Act) allows children to commence proceedings in the Family Court.¹³³¹ Even where the child has commenced proceedings in this way, the Family Law Rules allow the court to appoint a next friend where it is satisfied the child does not understand the nature and possible consequences of the proceedings or is not capable of conducting the proceedings directly.¹³³² In practice, children rarely litigate in family law either directly or by a next friend.¹³³³ More commonly, children the subject of disputes in the Family Court are separately represented by a child's representative, if they are represented at all.¹³³⁴ The Family Court can appoint a child's representative wherever it appears to the court that a child ought to be separately represented.¹³³⁵ The court may make an order on its own initiative or on the application of any other person including the child.¹³³⁶ Representatives are required to advocate in accordance with their assessment of the child's best interests and do not act upon the child's instructions or advocate their wishes. The particular roles and functions of best interests representatives in the Family Court are discussed in more detail from para 13.33.

Representation in care and protection jurisdictions in Australia

13.23 Australian care and protection systems have differing models of representation including the direct instructions model and the best interests model. Generally, children in care and protection proceedings are represented by legal practitioners rather than by lay or social science trained representatives.

13.24 In South Australia a child must be represented unless the court is satisfied the child has made an informed and independent decision not to be represented.¹³³⁷ The representative acts on the instructions of the child unless the child is not capable of properly instructing the representative, in which case the practitioner must act according to his or her own view of the child's best interests.¹³³⁸ The child the subject of the application is considered to be a party to that application.¹³³⁹

13.25 Victorian legislation similarly requires children to be represented in any care and protection matters¹³⁴⁰ where they are mature enough to provide instructions.¹³⁴¹ Representatives are required to act upon the instructions of the child.¹³⁴² The Victorian Government noted that '...children of the age of seven years and over are normally considered mature enough to give instructions...' but the relevant protocol emphasises maturity rather than the specific age of the child.¹³⁴³ Children who are not considered competent are not represented. Children the subject of the application must be served with a copy of the application.¹³⁴⁴

13.26 The *Children's Services Act 1986* (ACT) provides that proceedings should be adjourned to allow a child to obtain representation wherever it appears to the court that the child should be represented.¹³⁴⁵ The legislation provides no guidance on the model of representation for children but in practice the best interests model is followed by practitioners. A child the subject of an application is considered to be a respondent to the application.¹³⁴⁶

13.27 In NSW representation of children is arranged in all cases and is provided through a roster of duty solicitors drawn from private practice.¹³⁴⁷ The role and functions of the representative have not been defined in legislation but in practice the representative functions in a similar manner to the child's representative in the Family Court, representing the child's best interests.¹³⁴⁸ One submission to the Inquiry described the representation of children in the NSW care and protection system as '...rarely satisfactory...' ¹³⁴⁹ A child the subject of an application has a right of appearance in relation to that application.¹³⁵⁰

13.28 The *Community Welfare Act 1983* (NT) provides that the court may make such provision for the legal representation of the child as it thinks fit.¹³⁵¹ In the 1996–97 financial year, there were two grants of aid for the representation of children by the Legal Aid Commission but generally the Department of Health and Community Services provides a child representative.¹³⁵² Once again, the legislation provides no guidance on

the model of representation. The Act provides that children over 10 years old who are the subject of an application should be provided with written notice of the application.¹³⁵³

13.29 The *Children's Court of Western Australia Act 1986* (WA) makes no specific provision for the representation of children in care and protection applications. The *Legal Representation of Infants Act 1977* (WA), however, allows a court to appoint a guardian *ad litem* for a child where it appears the interests of the child may be affected. In practice children are generally represented on the basis of their instructions. Where there is concern about such a course of action, the court may order the representative to represent the best interests of the child.¹³⁵⁴

13.30 In Queensland there is no statutory provision for representation of children in care and protection matters and at present children are rarely represented.¹³⁵⁵

13.31 The proposed Tasmanian care and protection legislation, the Children, Young Persons and Their Families Bill 1997, provides that all children the subject of a care and protection application should be represented unless the child has made an informed decision not to be represented.¹³⁵⁶ The representative is to take instructions from the child and act on those instructions unless the representative considers the child unable or unwilling to give instructions. In those cases, the representative will represent the child's best interests, which are to be assessed by a social scientist.¹³⁵⁷ The Bill provides that the child is a party to the application.¹³⁵⁸

13.32 In those care and protection jurisdictions where children are parties to the proceedings or are entitled to appear or be given notice of an application, those children able to give instructions generally are represented on the basis of those instructions.¹³⁵⁹ The ACT and NSW are exceptions.¹³⁶⁰ Where children are not parties to the litigation, representation is generally provided on their best interests.

The best interests model of representation in Australian practice

13.33 In Australia a representative acting on the basis of the best interests model is commonly known as a separate or a child's representative.¹³⁶¹ Neither the Family Law Act nor State and Territory care and protection legislation determines the functions, rights, responsibilities, obligations and duties of these best interests representatives. The ethical and professional rules of legal practitioners in Australia are similarly silent. Guidance on these matters derives from the common law. This is almost invariably from cases heard in the Family Court as State and Territory children's courts generate very little precedent even on appeal.¹³⁶²

13.34 The best interests representative is not the legal representative or advocate for the child and does not act upon the instructions of the child. The court, rather than the child, may best be considered the client of the best interests representative.¹³⁶³ The child cannot dismiss the representative if he or she is unhappy with the performance or conclusions reached by the representative.¹³⁶⁴ The representative's focus is on the court and is intended to assist the court.

13.35 The appointment of a best interests representative does not make the child a party to the relevant proceedings.¹³⁶⁵ However, the representative acquires all the privileges and obligations of a representative for a party.¹³⁶⁶ The role of the best interests representative may be compared to that of an *amicus curiae* or counsel assisting a court or royal commission.¹³⁶⁷ However, there are differences between the best interests representative and each of those. The *amicus curiae* calls attention to matters that the court may otherwise overlook but does not take a position on the issues before the court,¹³⁶⁸ whereas usually the best interests representative does, at least by the end of the case.¹³⁶⁹

13.36 The Family Court has established some general guidelines concerning the function of the best interests representative.¹³⁷⁰

- The separate representative is entitled to ask questions which are relevant to the welfare of the child and otherwise permissible, irrespective of whether the effect is to adduce evidence which could have been led by a party.
- The separate representative is entitled to the same rights and subject to the same obligations as an advocate for a party both at general law and under the *Evidence Act 1995* (Cth)...

- The separate representative may, depending on the circumstances, make an opening address to the court.
- The separate representative may, depending on the circumstances, indicate to the court the orders which the separate representative proposes either at the commencement of the hearing or in final address. The separate representative is not obliged to do this at the commencement of the hearing. This is because the role which the separate representative plays is such that he or she may be unable to indicate what orders are sought until after the examination of the parties and/or their witnesses is completed.¹³⁷¹

13.37 Another Full Family Court decision listed the following functions of the representative.

1. Act in an independent and unfettered way in the best interests of the child.
2. Act impartially, but if thought appropriate, make submissions suggesting the adoption by the Court of a particular course of action if he or she considers the adoption of such a course is in the best interests of the child.
3. Inform the Court by proper means of the children's wishes in relation to any matter in the proceedings. In this regard, the separate representative is not bound to make submissions on the instructions of a child or otherwise but is bound to bring the child's expressed wishes to the attention of the Court.
4. Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the welfare of the child is before the Court.
5. Test by cross examination where appropriate the evidence of the parties and their witnesses.
6. Ensure that the views and aptitudes brought to bear on the issues before the Court are drawn from the evidence and not from a personal view or opinion of the case.
7. Minimise the trauma to the child associated with the proceedings.
8. Facilitate an agreed resolution to the proceedings.¹³⁷²

13.38 The best interests representative is required to collect evidence, including by talking to the child, family members, school teachers or other relevant people and looking at relevant departmental or court files.¹³⁷³ The representative may muster material for cross-examination and engage expert witnesses.¹³⁷⁴

13.39 The best interests representative has a duty to act impartially and to make submissions to the court on behalf of the child when in the best interests of the child.¹³⁷⁵ The best interests representative must tell the court what wishes the child has expressed¹³⁷⁶ but does not have a duty to make submissions to the court which represent the wishes of the child or to argue for an outcome in line with the wishes of the child.¹³⁷⁷ The credibility and weight given to children's wishes are matters for the court and will vary from case to case. In many cases involving children the representative for a child may discount, editorialise or reject the child's wishes and argue the case in accordance with his or her own views of the child's best interests.

A report on the representation of children in the Family Court concluded

[t]he Child's Representative should seek to build up a relationship of trust with the child as they will have an ongoing relationship during the course of the matter. The Child's Representative will meet with the child on a number of occasions and must be aware of the special skills necessary when talking to children...Only in exceptional cases, such as where a child has been severely traumatised by abuse and has already seen a number of professionals from whom the Child's Representative can get a clear picture of the child and the issues involved, should the Child's Representative consider not meeting his/her client.¹³⁷⁸

13.40 The Inquiry was told that, based on anecdotal evidence, about 70% of children over about 12 with a best interests representative in family law matters express wishes as to the outcome of a matter.¹³⁷⁹ In most cases those wishes are sufficiently developed for them to form the basis of submissions on the best interests of the child.¹³⁸⁰

13.41 A major role of the best interests representative is to keep the child informed of the progress of the litigation.¹³⁸¹ The representative also should act to minimise the trauma to the child associated with the proceedings.¹³⁸²

International models of representation in family law and care and protection

13.42 In the US the *Child Abuse Prevention and Treatment Act* requires that a guardian *ad litem*, who may be a lawyer, a social worker or a lay person including a court appointed volunteer, be appointed to represent the child in every case involving allegations of abuse or neglect.¹³⁸³ Debate continues in the US as to the role

ascribed to and qualifications needed for a guardian *ad litem*.¹³⁸⁴ Generally, the role is filled by a legal representative and/or a court appointed volunteer.

13.43 The US model of representation of children in many states relies heavily upon the participation of volunteers in a Court Appointed Special Advocate (CASA) system. CASA schemes provide a form of guardian *ad litem* for children in care and protection matters. The role of the advocate is to conduct an independent investigation of the best interests of the child by speaking to the child and collecting relevant information to assist the court and promote settlement of the litigation. He or she appears in court to represent and make submissions on the child's best interests and monitors the implementation of the orders. He or she must also explain the proceedings to the child in appropriate language.¹³⁸⁵ Analysis of the system indicates that CASA volunteers can provide useful advice and support to the child.¹³⁸⁶

13.44 Some American studies suggest that a mixed system where children are represented by both lay and legal representatives results in more effective child advocacy.¹³⁸⁷ Legal representatives have access to important information and advice in consulting with lay advocates or working as part of a multidisciplinary team. 'The lawyer who represents a child without such consultation and support must make difficult evaluations in each case...for which he or she may be ill-trained.'¹³⁸⁸ In a team environment the lay advocate or social scientist is said to be able to

...focus on fact finding, relationship building, communication and monitoring. The attorney can provide the vehicle to ensure that the lay advocate has access to necessary information, is appropriately informed of changes to the child's or family's circumstances, is provided with notice of all hearings and administrative reviews, and is recognised by the court as a key player in the decision making process.¹³⁸⁹

13.45 On the other hand, there is potential for personal or professional conflicts between the two advocates.¹³⁹⁰ The model is resource intensive and introduces another layer of possibly paternalistic interpretation of a child's needs and interests between the child and the decision maker, the court.

13.46 The various states differ in their approach where there is a conflict between the child's wishes and the guardian *ad litem*'s assessment of his or her best interests. Wisconsin requires that children over twelve be represented upon the basis of their instructions but the best interests model applies for children under twelve. In Hawaii, the guardian *ad litem* is required to represent both the child's best interests and his or her instructions.¹³⁹¹

13.47 In the UK there are different arrangements for representation of children in private family law disputes and public care and protection proceedings although the model of advocacy is substantially the same in each. A social science trained guardian *ad litem*, who represents the child's best interests, is generally appointed in care and protection matters.¹³⁹² The guardian is required to instruct a solicitor as necessary. The court may appoint a separate solicitor to act directly on the instructions of the child as well as or instead of a guardian *ad litem* in some circumstances.¹³⁹³ In the lower courts, guardians *ad litem* are chosen from panels established by the local authority, which is also responsible for initiating care and protection applications.¹³⁹⁴

13.48 In private family law disputes, the Probation Service provides court welfare officers who act as officers of the Family Court and are directly responsible to the Court.¹³⁹⁵ In family law matters where a guardian *ad litem* is appointed, it is generally considered unnecessary to involve a separate court welfare officer as well.¹³⁹⁶ The guardian *ad litem* in this jurisdiction may also be a solicitor.¹³⁹⁷

Evaluating best interests representation

Introduction

13.49 The notion of best interests has three different applications. It is the principle upon which decisions concerning children are made and which requires decision makers to prefer the interests of children over any other competing interests. Prior to the 1995 amendments to the Family Law Act, the best interests principle also applied to procedural matters in the Family Court.¹³⁹⁸ The third use presents the principle as the basis of advocacy for children.

13.50 The best interests model of representation is often regarded very positively and some of the benefits are described in this section. However, there are a number of concerns deriving from the position of the child in the litigation and the representative's relationships with the child and the court.

Protecting the child

13.51 Best interests representation is claimed to allow children to express an opinion without feeling responsible for the ultimate decision. For this reason, it can help to minimise the tension between parents and children involved in family law or care and protection litigation. Several submissions to the Inquiry advised that encouraging and facilitating children's participation should not be confused with burdening children with decision making.¹³⁹⁹ The Law Council of Australia argued that any other form of representation by children in proceedings between disputing parents

...would only add to the stresses and emotions experienced by the children at that time in their lives. Children's rights include the opportunity to have an ongoing relationship with each of their parents after the litigation has concluded and to be protected from the effects of parental disputation as far as possible.¹⁴⁰⁰

Another submission suggested

[t]he many matters which lead family arrangements to break down are in most instances beyond the responsibility of a child and participation in dispute resolution risks giving a message to children that belies this fact.¹⁴⁰¹

Participation by the child

13.52 In *Re K* the Family Court declared itself satisfied that the guidelines it established in that case¹⁴⁰² were '...not only consistent with the requirements of Articles 9 and 12 of the Convention on the Rights of the Child, but further these objects'.¹⁴⁰³ Some submissions to the Inquiry considered that the best interests principle as the basis of advocacy is appropriate so long as the wishes of the child form one part of the advocate's assessment of those interests. For example one submission accepted the value of the model on the basis that the provision of the representative '...does not preclude consideration of the child voicing their concerns directly to the Court'.¹⁴⁰⁴ It noted

...representatives need to present to the Court the wishes of the child in conjunction with... aspects or issues relevant to the best interests of the child.¹⁴⁰⁵

13.53 However, the major criticism of the model is that it effectively denies competent children the right to instruct their advocates even where they are directly involved in a case.¹⁴⁰⁶ The best interests model of advocacy for children is based on the assumption that children lack the judgment of adults. It is generally considered that adolescents, even those who are cognitively mature, are more influenced by others in their decision making, more impulsive and less averse to risk taking than adults.¹⁴⁰⁷ As a consequence, the social and personal costs to the development of the child of allowing adolescents to exercise this limited judgment are said to be too great.¹⁴⁰⁸ These assumptions are now being challenged.¹⁴⁰⁹ Many children have the maturity and judgment to direct their lawyer just as many adults have limited maturity and poor judgment but instruct legal representatives. The fact that a child's views may be editorialised or discounted for no reason other than that the representative disagrees with those views effectively holds children to a higher standard than adults.¹⁴¹⁰

13.54 One submission noted

I am of the view that children are entitled to be represented before the Courts by a properly qualified legal practitioner acting as the child's advocate in the traditional sense. There are certainly advantages to be gained by having a next friend or guardian ad litem appointed to represent the "interests of" the child rather than the child per se, however, I think it presumptuous and paternalistic to suggest that the child should have no independent "mouthpiece" through which to put his or her own views.¹⁴¹¹

13.55 Children may better accept decisions that they understand and have participated in making.¹⁴¹² In the young people's survey conducted during the Inquiry 85% of 623 child respondents indicated that children should have a greater say in family law decisions, many stating children should be able to choose where they are to live.¹⁴¹³ The inclusion in the Family Law Act of the wishes of the child as one of the primary determining factors in deciding the best interests of a child gives some voice to children in the process.¹⁴¹⁴

However, providing effective representation for children is crucial to assisting them to participate in the decision-making process. As one commentator noted,

[b]eing heard, even though an official or professional considers that one is wrong, is a necessary aspect of justice; a right to a hearing in a decision-making process may of itself fulfil a psychological need, regardless of the practical conclusion reached.¹⁴¹⁵

There is evidence that the increased sense of control by effective participation in these processes is strongly related to the health, both psychological and physical, of the child.¹⁴¹⁶

13.56 Many children feel marginalised by the imposition of best interests advocacy. One study quoted a 9 year old child.

Why is it that everyone is talking about my future and what's going to happen to me and I'm the only one who doesn't get to have a say in it?¹⁴¹⁷

13.57 Children expect the best interests representative to advocate for their wishes and act as their lawyer. Children in a study of the NSW care and protection jurisdiction generally expected their lawyer to act as an advocate or interpreter of their views. Few of the lawyers who contributed to the study perceived that to be their role.¹⁴¹⁸ Many submissions to the Inquiry referred to children's disappointment and frustration at what they perceived to be the failure of the best interests representative to advocate according to their wishes.¹⁴¹⁹ One submission referred to the '...feeling of helplessness by the young people in that they didn't feel they were being listened to or believed...'¹⁴²⁰ Another quoted a child who said

...I knew I could have my say, and not being able to have my say was really frustrating. I worried the wrong decision would be made. The lawyer did not say what I wanted in Court.¹⁴²¹

A 12 year old girl in Queensland indicated that her representative would not speak to her despite her and her mother's requests that he do so. She told the Inquiry that she desperately wanted someone to tell the judge her wishes for the outcome of her parents' long running dispute about parental responsibility. She suggested that a child should be provided with either a psychologist who could be appointed by the court to be the child's 'defender' or a solicitor who could advocate for the child as '...a solicitor, not a sep rep, just like the adults...' She commented that she knows what she wants, and why, and she should be the one to decide where she should live.¹⁴²²

13.58 The Inquiry received many complaints about lawyers who did not speak to the child and who did not convey all relevant information from or concerning the child to the court. Some submissions maintained that many best interests representatives do not meet or interview the child but rely solely on the assessment of their chosen social scientists to determine the best interests of the child.¹⁴²³ One submission stated that '[o]ften the separate representative for the child has never met the child let alone attempted to understand the child's point of view'.¹⁴²⁴ Another problem is illustrated by the following account.

Recently in Alice Springs a Separate Representative was appointed in regard to two aboriginal children aged 13 and 10 years respectively. The children resided with their mother in a community in far north Western Australia. The paternal grandparents, Arrente people from the Centre were seeking contact with the children. The Separate Representative sought the children's wishes over the telephone. The Separate Representative then presented those discussions to the Court as being the true wishes of the children. The Separate Representative had little experience with aboriginal children. And it is remarkable that the Separate Representative believed that it was appropriate or possible to obtain instructions over the telephone with such young children.¹⁴²⁵

In each of these circumstances the value for the child of having a representative at all is doubtful.

Role confusion

13.59 Lawyers have different perceptions of their role as the best interests representative. A submission to the Inquiry pointed out

[i]n practice, private solicitors are appointed as child representatives and there has been some confusion as to the extent of the role, the duty to "follow instructions", the duty to assist the court and the duty to co-ordinate. The practice in each state and territory differs as a result of the evolution of the role in the various registries and among practitioners.¹⁴²⁶

A study in the Canberra and Melbourne registries of the Family Court indicated that practitioners had a number of different approaches to the role as best interests representatives. These were

...the legal advocate model, in which they advocated for the child's best interests, the settler of the dispute model, in which they advocated for the child and saw the settling of the dispute as a high priority, and the social worker model, in which they advocated for the child and monitored for the child's welfare¹⁴²⁷

13.60 Best interests advocacy can present the representative with a confusion of roles.¹⁴²⁸ The representative is asked to conduct investigations and make assessments that are properly within the area of expertise of social scientists. The representative advocates the case on the basis of his or her assessment, in effect making '...legal decisions that are properly in the province of the judiciary'.¹⁴²⁹ The Family Court has cited an English case as providing a useful summary of the role of the best interests representative in Australia.¹⁴³⁰ That English case noted that the role requires '...a multiple function...' since the advocate

...acted not only as the child's solicitor and spokesman but also as an officer of the court with an independent brief to investigate issues of fact or divergent expert opinion and address the court as to the requirements of the best interests of the child. Instances would be bound to occur when the reconciliation of all those functions would be impossible...¹⁴³¹

One of the difficulties with the model has been expressed

...to be that a significant amount of discretion is left to the practitioner to carry out appropriate/proper investigations (often there are no available instructions); evaluate such results (in both instances does the practitioner have the skills/education/training necessary); and then make a decision as to what materials to be put before the court (in the best interests of the child). The separate representative is being asked to act impartially but non-neutrally...¹⁴³²

13.61 The Family Court in *E and E* confirmed that legal representatives should not accept a role that is outside the area of their expertise.¹⁴³³ In that case, the representative interviewed the parties and grandparents, visited their respective homes and observed the relationship between the parties and the child and made her own assessments of the reliability and maturity of the child and of the relevant adults. The court commented that the representative had misunderstood the role.¹⁴³⁴ Best interests representatives, the court held, may collect material for cross-examination and employ the services of expert witnesses. However, they should not leave themselves open to being called as a witness and should not make statements they are not qualified to make.¹⁴³⁵ Even so, several submissions to the Inquiry confirmed that

[a]t present the role of the separate representative is confused and at times may be more akin to the role of psychologist or social worker than that of a legal advocate.¹⁴³⁶

Locating the representative's instructions

13.62 As noted above, the child is not the client of the best interests representative.¹⁴³⁷ In the absence of a client the lawyer has no instructions and is not bound by any directions given by the child. In the absence of a separate guardian *ad litem* to provide instructions, the representative is required to conduct the case according to his or her assessment of the matter.

13.63 The representative is not required to present to the court all relevant evidence, as would an *amicus curiae*. He or she is required to present to the court only evidence that supports the particular submission to be made by the representative. Assessments and decisions are necessarily made by the representative in this process. The best interests representative chooses evidence to be collected, appoints an expert and supplies information on the case to the expert. In making submissions on the child's best interests, the representative is guided by his or her own view of the child's best interests. In *E and E*, Strauss J commented that the representative '...made a number of inferences a judge might draw from facts, but which themselves were not facts'.¹⁴³⁸ The functions required of best interests advocates run the risk that a representative may unconsciously introduce personal and inappropriate judgments into the investigation and presentation of information to experts and the court. These judgments intrude on part of the judicial function. None of the decisions made by the representative in this regard is open to the scrutiny of the court. Best interests advocacy gives an unexaminable discretion to legal representatives.¹⁴³⁹

13.64 In some cases, particularly in relation to very young children or those who are unwilling to participate, the representative may add nothing of substance to assist the court to determine the issues. In other cases the

conclusions reached and the submissions made by the representative may add to the rancour of the litigation by simply supporting one party, creating a perception of 'two against one' that does not assist in the resolution of the dispute.

Alternatives to best interests advocacy

Introduction

13.65 These concerns about best interests representation prompted a variety of suggestions for reform from children, parents and professional participants in the system. The alternatives to the model of best interests advocacy as developed in Australia and internationally are the team approach and the provision of representation to children on the basis of their instructions.

Two representatives acting as a team

13.66 The team approach seeks to separate the different functions asked of the representative in the best interests model. In the team approach, the lawyer is not required to investigate directly and assess the best interests of the child or to reach conclusions that it is argued he or she may not be equipped to make. The representative takes instructions in the usual manner from an appropriately trained and qualified social scientist who is responsible for the assessment of the child's circumstances and the determination of the child's best interests.

13.67 This option received considerable support in submissions to the Inquiry.¹⁴⁴⁰

We recommend greater adoption in the Family Court, care and protection and juvenile justice proceedings, of "cross-profession" or "conjoint" advocacy since these would appear to provide greater opportunities for the advancement of children's interests in the context of legal proceedings as opposed to the traditional "direct instruction with supplementary Court Report" model.¹⁴⁴¹

It is submitted that a team approach consisting of a solicitor and a child counsellor or social worker is a more appropriate approach than simply a solicitor, particularly where the child is likely to be interviewed and "advised" by the solicitor.¹⁴⁴²

There is a strong argument for an approach to separate representation of children which utilises the different but complementary skills of lawyers and social service professionals working as a team.¹⁴⁴³

One commentator suggested that the team approach should be '...an indispensable part of the process'. It '...would soften the apparent role conflict/confusion which in turn appears to place a heavy responsibility and burden on the separate representative.'¹⁴⁴⁴

13.68 The team approach is commonly taken in the US and the UK.¹⁴⁴⁵ A US commentator has suggested that the team approach frees the lay advocate or social scientist to

...focus on fact finding, relationship building, communication and monitoring. The attorney can provide the vehicle to ensure that the lay advocate has access to necessary information, is appropriately informed of changes to the child's or family's circumstances, is provided with notice of all hearings and administrative reviews, and is recognised by the court as a key player in the decision making process.¹⁴⁴⁶

13.69 There have been a number of significant recommendations for the introduction of a team approach to representation of children in the Family Court. In a 1989 report *Representation of Children in Family Law Proceedings*, the Family Law Council recommended that the role of the best interests representative should be undertaken by a team comprising a solicitor and a social worker.¹⁴⁴⁷

13.70 More recently the Family Law Council report *Involving and Representing Children in Family Law* proposed the introduction of a co-ordinator in addition to a separate representative in family law proceedings.¹⁴⁴⁸ Under this model the representative's role would be broadly the same as it is at present and the representative would retain control over the conduct of the child's case in the court. The co-ordinator, on the other hand, would perform such functions as producing a report on the child's best interests, interposing the child's interests in discussions between the relevant parties, working with the representative and explaining some of the processes to the child.¹⁴⁴⁹ The Council argued that early and co-operative

involvement of an appropriate social science professional may well reduce the need for a representative, and for litigated solutions, in some cases.¹⁴⁵⁰ The proposal aims at an efficient, co-ordinated response to the child's needs.

13.71 The ALRC, in its report *For the Sake of the Kids: Complex Contact Cases and the Family Court*, recommended that the Family Court trial both a case team and a co-ordinator approach and reconsider the effectiveness of each after the trial period.¹⁴⁵¹ The co-ordinator option is considered in more detail below.¹⁴⁵²

13.72 Legal representatives and the Family Court Counselling Service operate independently of one another. In *Demetriou and Demetriou* the Family Court proposed little contact between the representative and the court counsellor.¹⁴⁵³ However, more recently the Chief Justice has written that he considers this position to be wrong in principle and '...antithetical to the interests of the child or children in question'.¹⁴⁵⁴ In September 1996 a committee headed by Judicial Registrar Smith in *Representing the Child's Interests in the Family Court of Australia* recommended closer ties between the representative and the Family Court counselling service.¹⁴⁵⁵ It suggested that the counsellor should discuss some issues arising from confidential counselling with the representative.¹⁴⁵⁶ However, the committee did not recommend that the representative and the counsellor work as a team as it was considered that this may fetter the independence of the representative.¹⁴⁵⁷

13.73 A team approach has substantial benefits. The role confusion of a best interests legal representative is reduced and the intervention of a social scientist allows the representative to advocate according to the instructions or advice of the social scientist. However, it still suffers from many of the problems that beset best interests advocacy in Australian jurisdictions. It retains the problem of paternalism and does not provide children with advocacy of their instructions or wishes. In fact, it adds an extra participant between the child and the decision-maker, the court. This may lead to greater editorialisation of the views and wishes of the child.¹⁴⁵⁸ It is also particularly resource intensive. The Inquiry has not recommended the introduction of a team approach as a solution to the problems posed by best interests advocacy.

Direct representation of children

13.74 The second alternative to best interests representation is direct representation of children's wishes. This allows the child to direct the litigation. This model operates in several care and protection jurisdictions.¹⁴⁵⁹ Several submissions to the Inquiry supported its more general application in family law and care and protection proceedings. One submission noted

...children and young people need to appear as parties with an entitlement to legal representation to act on their instructions. Without this there is not full participation in court proceedings as envisaged by Article 12 [of CROC].¹⁴⁶⁰

Another suggested

[i]n cases that involve older children, they often want to be heard directly in the proceedings....Such young people should be given the opportunity to use the standard representation model.¹⁴⁶¹

13.75 This model of representation provides the child with a direct voice in the decision making process. However, some submissions to the Inquiry expressed concern that direct representation of children on their instructions in family law or care and protection litigation may not be in their objective best interests in that children could manipulate parents or other parties for their own short term or other inappropriate ends. Direct representation, it was argued, also may encourage parents to impose their wishes on the child and overbear the child's real wishes.¹⁴⁶² The Queensland Law Society suggested that the direct representational model of advocacy is not appropriate.

- It would increase the pressure upon a child to express a wish.
- It may unnecessarily align children with one parent against the other parent.
- It may damage the long term relationship of the child with one parent.

- It may inappropriately empower children enabling them to play one parent off against the other in a way that may not be in the child's interests.
- It would increase rewards to a parent who was prepared to inappropriately pressure a child.¹⁴⁶³

An American commentator has noted

[t]he knowledge that the lawyer will advocate the point of view expressed by the child can encourage parents to engage in direct or indirect pressure on the child. Competition for the child's preference can profoundly distort family life and is damaging to children.¹⁴⁶⁴

13.76 However, advocating for children's wishes and assisting them to direct litigation, if performed well, does not require children to make a bald choice between two parents. Discussion with a child allows the child's preference to be framed while minimising any damage to relationships and reducing the pressure on the child. A representative

...can reduce the burden on a child to favour one parent over another. A child may have a wish to maintain relationships with both parents, to enjoy a particular activity or some time alone with one parent, to continue in a particular school, or not to be separated from a sibling.¹⁴⁶⁵

While it is inappropriate to ask children involved in custody disputes which parent they prefer to live with, it is appropriate to ask them about specific aspects of their daily lives that are of immediate concern to them and which may be more affected by living with one parent rather than the other. Children often ask, for example, 'Will I be able to stay at the same school? When will I be able to see my friends? Will I still be able to play soccer? And so on.'¹⁴⁶⁶

13.77 It has been argued that

[c]oncern with the effects of asking the child to choose between parents is misplaced in that usually children already have been exposed to the trauma of parental discord. Moreover, not to explore this would be to join in their denial and in the broader conspiracy of silence around them.¹⁴⁶⁷

13.78 Some submissions argued that a child's instructions may not only be contrary to the best interests of the child but may actually place the child in a situation of risk or danger. A scenario that is often raised in this context is a child's desire to return home to face the apparent certainty of serious abuse. For example, in a Canadian case of *In re AW*, a child wanted overnight unsupervised access with her father who had been released from prison after a four year sentence for sexually assaulting her.¹⁴⁶⁸ Again, acting on the directions of a child does not mean that the representative is prevented from discussing the decision with the child and negotiating a course of action that conforms with the child's directions while protecting the safety and well-being of the child. It does not mean that the court has to decide the case on the basis of the child's wishes. On the contrary, it leaves the determination of the child's best interests where it should be, as the paramount responsibility of the court.

13.79 Direct legal representation avoids the role confusion associated with best interests advocacy by establishing a lawyer-client relationship between the representative and the child. It allows children to participate directly in proceedings if they are able and willing to do so.

Standards for representatives acting for children

Introduction

13.80 The Inquiry has wrestled with the various models of advocacy for children and is not convinced that any one model is appropriate to all circumstances. Ultimately the needs of children differ to such an extent that there can be no single model appropriate for all children. Children vary greatly in their capacities, maturity and desire for involvement in litigation concerning themselves and their families. A form of representation suitable for an articulate child of fourteen may not be appropriate for a younger or pre-verbal child. One writer has pointed out that representation of children '...requires thoughtful improvisation rather than adherence to a script'.¹⁴⁶⁹ The role of a child's representative should remain fluid. The Inquiry agrees with the American Bar Association's rejection of

...the concept that any disability must be globally determined. Rather, disability is contextual, incremental, and may be intermittent... [A] child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct a lawyer with respect to a particular issue at one time but not at another.¹⁴⁷⁰

13.81 However, the basis of the representation and the roles and functions of the representative should be clear to the court, the representative and the child concerned. This requires clear ethical and practical standards for all representatives to ensure that there is appropriate participation of and engagement with the child.

The need for standards

13.82 The best interests model of advocacy developed as a mechanism to assist the court and the role has largely been determined by the courts. Traditionally, the legal profession has been responsible for developing standards for practice. Many of the problems associated with the model of best interests advocacy¹⁴⁷¹ arise from the fact that the legal profession has not determined the ethical and practical parameters of the representation of children in family law and care and protection proceedings. A US conference that developed practice standards for representatives of children noted that

[c]hildren's lawyers confront ethical questions that are immediate, frequent and palpable. Such quandaries are not an academic matter...Where professional standards give clear guidance as to appropriate professional practices, lawyers will strive to uphold them even in the face of pressure to do otherwise.¹⁴⁷²

13.83 No detailed standards have been developed by the profession for representation of children in Australian jurisdictions.¹⁴⁷³ The Federation of Community Legal Centres noted that '...there appears to be an ad hoc approach which...is not good enough and does not promote the best interests of the child.'¹⁴⁷⁴

13.84 Differences are already emerging between jurisdictions in the roles and functions of representatives. They present many practical and logical concerns that must be addressed by the legal profession. The Inquiry heard evidence of different advocacy approaches in the various jurisdictions.

13.85 The legal profession needs to determine the ethical basis and corresponding rules and standards for the representation of children in the family law and care and protection jurisdictions. During 1996 a training program for child's representatives in the Family Court was developed by the Law Council of Australia, National Legal Aid and the Family Court.¹⁴⁷⁵ It was the first step towards comprehensive standards for the representation of children directly developed by the legal profession.

13.86 The practice guidelines developed by the US Conference on Ethical Issues on the Legal Representation of Children¹⁴⁷⁶ and the American Bar Association's 1996 *Standards of Practice of Lawyers Who Represent Children in Abuse and Neglect Cases*¹⁴⁷⁷ could provide a valuable starting point for the development of standards for Australian representatives. Decisions of the Family Court also provide some useful approaches for these standards.¹⁴⁷⁸

13.87 The legal profession, particularly practitioners in the family law and care and protection jurisdictions but also legal representatives of children in other jurisdictions notably juvenile justice, should be centrally involved in the preparation of these guidelines. The perspectives of children, the judiciary and magistracy and social scientists must also be included in the development of the guidelines.

Standards to assist in determining the basis for representation

13.88 Much of the confusion arising from best interests advocacy lies in determining whether a particular child's level of competence justifies giving the child direction of the litigation, particularly where the representative may not agree with that direction. Representatives should not be responsible for determining the competence of a child. To avoid this, the standards should provide that, wherever a child is willing and developmentally able to express a view as to the direction of the litigation, the representative should accept that direction and advocate for the child's wishes. The first duty of the representative is to represent the child and the standard lawyer-client relationship should apply in those cases. This relationship allows for negotiation and discussion between the client and the representative to reach the most appropriate instructions. This negotiation process is discussed at para 13.3. All representatives in these cases also owe the general duty to the court referred to at para 13.3.¹⁴⁷⁹

13.89 This approach of introducing the standard lawyer-client relationship wherever possible addresses the problems of best interests advocacy.¹⁴⁸⁰ Most importantly it ensures proper representation of children. As the US conference noted,

[a] lawyer appointed...to serve a child in legal proceedings should serve as the child's lawyer. The lawyer should assume the obligations of a lawyer, regardless of how the lawyer's role is labelled...¹⁴⁸¹

13.90 Where a representative appears for a child who is too young or not willing to present a view to the representative, the lawyer has additional responsibilities and many of the elements of best interests advocacy will apply.¹⁴⁸²

Standards for all legal representatives of children

13.91 The ability to communicate effectively is an essential skill for all representatives of children. The child's capacity to give instructions is greatly affected by the lawyer's skill in communicating with him or her. Representatives should be aware of the need to communicate at a pace and level suitable for the particular child client and should use methods of communication with which the child is comfortable. Standards for lawyers should include guidelines to give effect to this obligation.¹⁴⁸³

- Every child should be seen except in those rare instances where it is physically impossible for the representative to see the child. The representative should see the child as soon as possible and, in most instances, well before the first hearing.
- The representative should meet with a verbal child at least prior to any substantive proceeding or event at which important decisions are being made regarding the child or which are relevant to the lawyer's representation of the child.
- Contact with the child should occur where and when it is comfortable for the child, not merely where and when convenient for the representative.
- Even where the child is non-verbal, the representative should at least see the child, preferably in the child's living environment.
- The lawyer should use language appropriate to the child's age and maturity.
- The representative should employ appropriate listening techniques and provide non-judgmental support.
- Preference should be given to face to face communication with the child rather than communication by telephone or in writing.

Standards when the child wishes to participate

13.92 Where the child is able to communicate and expresses wishes about the direction of the litigation, legal representation of children should be comprehensive. A representative should assist the child to understand the proceedings and provide appropriate referrals to organisations for assistance to the child for non-legal problems.¹⁴⁸⁴

- Where necessary representatives should seek the assistance of qualified professionals skilled in communicating with children to provide advice in determining the instructions of a younger child. However, this assistance should not supplant the lawyer's obligation to communicate and interact with the child.
- Sufficient time should be devoted to each child to ensure that the child understands the nature of the proceedings and that the representative has established the child's directions.
- The representative should meet with the child often enough to maintain and develop the lawyer-client relationship.

- When discussing the case with the child, the representative should use concrete examples and provide the client with a 'road map' of the interview and the legal process.
- Younger children who wish to direct the litigation may be clear about their views on one or more issues but be unwilling to express a view on other matters. In these cases, the representative should make procedural decisions with a view to advancing the child's stated position and should elicit whatever information and assistance the child is willing to provide. Representatives should seek the assistance of appropriate social scientists to assist them to ascertain the wishes and directions of younger children where necessary.

Standards when children are not able or willing to participate

13.93 If a child is unable or unwilling to provide instructions or express an opinion, the lawyer should be clear about that fact and about the alternative basis for representation. In those cases, many of the elements of the best interests approach should be used, but with caution. The lawyer should seek expert advice and assistance and should ensure that the court is aware of the advocacy approach being taken by the representative.

13.94 Representatives acting for pre-verbal children should focus on specific, well defined tasks including the following.

- (1) To investigate all relevant facts, parties and people;
- (2) To subpoena all documents;
- (3) To retain experts as needed;
- (4) To observe the child in the caretaker's setting and formulate optional plans;
- (5) To advocate zealously for the legal rights of the child including safety, visitation and sibling contact;
- ...
- (11) To challenge the basis for experts and agency conclusions in order to ensure accuracy;
- (12) To ensure that all relevant and material facts are put before the court...¹⁴⁸⁵

13.95 Representatives for pre-verbal children should be able to reach a conclusion, where appropriate, about the preferred course of action in the best interests of the child. However, this should be done on the basis of all relevant evidence and the representative should be obliged to ensure that all relevant evidence is placed before the court.

Recommendation 70. Clear standards for the representation of children in all family law and care and protection proceedings should be developed. Among other matters, these standards should require the following.

- In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child.
- Every child should be seen except in those rare instances where it is physically impossible for the representative to see the child. The representative should see the child as soon as possible and, in most instances, well before the first hearing.
- The representative should meet with a verbal child at least before any substantive proceeding or event at which important decisions are being made regarding the child or which are relevant to the representation of the child.
- Contact with the child should occur where and when it is comfortable for the child not merely where and when it is convenient for the representative.
- Even where the child is non-verbal, the representative should at least see the child, preferably in the child's living environment.
- The lawyer should use language appropriate to the age and maturity of the child.
- The representative should employ appropriate listening techniques and provide non-judgmental support.
- Preference should be given to face to face communication with the child rather than

communication by telephone or in writing.

Implementation. Legal professional bodies, including the Law Council of Australia, law societies or institutes, bar associations and legal aid commissions should convene a working group to develop appropriate standards in consultation with young people and relevant youth agencies. The Family Court, children's courts and OFC should be consulted in the development of these standards.

Recommendation 71. The standards should make the following provisions where the child is able to communicate and expresses wishes about the direction of the litigation.

- Sufficient time should be devoted to each child to ensure that the child understands the nature of the proceedings and that the representative has established the child's directions.
- The representative should meet with the child often enough to maintain and develop the lawyer-client relationship.
- When discussing the case with the child, the representative should use concrete examples and provide the client with a 'road map' of the interview and the legal process.
- Younger children who wish to direct the litigation may be clear about their views on one or more issues to be decided but be unwilling to express a view on other matters. In such cases, the representative should make procedural decisions with a view to advancing the child's stated position and should elicit whatever information and assistance the child is willing to provide. Representatives should seek the assistance of appropriate social scientists to assist them to ascertain the wishes and directions of younger children where necessary.

Recommendation 72. The standards should make the following provisions where the child is unable or unwilling to provide direction on the litigation.

- Where a child is unable or unwilling to set the goals of the litigation, the representative should ensure that the court is aware of the fact and understands that the representation is to be on the basis of the best interests of the child.
- Under no circumstances should the representative proceed if he or she is uncertain of the basis of representing the child.
- Standards should specify functions of a representative acting in the best interests of a child. They should include
 - to ensure that all relevant evidence, including any evidence that may contradict the assessment of the representative, is placed before the court
 - to investigate all relevant facts, parties and people
 - to subpoena all documents
 - to retain experts as needed
 - to observe the child in the caretaker's setting and formulate optional plans
 - to advocate zealously for the legal rights of the child including safety, visitation and sibling contact
 - to challenge the basis for experts and agency conclusions to ensure accuracy
 - to ensure that all relevant and material facts are put before the court.

Duties of disclosure and confidentiality

13.96 Some practitioners asserted that there is no legal professional privilege between the child and the best interests representative since the child is not the client of the representative. If this is the case representatives fear that they may be liable to cross-examination on discussions with the child.¹⁴⁸⁶ This was cited as the reason many practitioners do not meet with the children they represent.¹⁴⁸⁷

13.97 All representatives, as officers of the court, have a duty to avoid misleading the court about any material fact. The Family Court has established that in cases relating to children a higher duty applies. In *Re Bell; Ex parte Lees* the High Court held that legal professional privilege between a lawyer and a party does not apply where the welfare of the child is affected.¹⁴⁸⁸ An interesting early case on this point is *Clarkson v Clarkson* in the Supreme Court of NSW which indicated that legal representatives for all parties have particular obligations in matters relating to responsibility for children.¹⁴⁸⁹ Selby J held that in those cases

[t]he task of counsel is a difficult one, for whilst owing a duty to his client...he must always remain aware that the child's interests come before those of his client. It is therefore necessary to adduce all available evidence which might have a bearing on the matter.¹⁴⁹⁰

13.98 The position of children's representatives is slightly different. To develop trust between the representative and the child, the child must be assured that discussions will remain generally confidential. Legal professional privilege should apply to the communications between the child and the representative.¹⁴⁹¹ However, representatives for all parties in children's matters should be aware that privilege does not apply to communications where maintaining confidentiality may compromise the best interests of the child. The duty on children's representatives to disclose information should be expressed in positive terms. It should require disclosure of information that the representative considers crucial to a determination of the child's best interests. The DPP guidelines requiring fairness on the part of the prosecutor and disclosure of relevant information in criminal proceedings could apply in appropriately modified form to the representation of children in family law and care and protection matters.¹⁴⁹²

13.99 This duty should not extend to requiring the representative to present all relevant evidence to the court where the representative is advocating for the stated wishes or at the direction of the child. In those cases, the representative is entitled to limit his or her investigations to the directions given by the child. However, disclosure is required where information comes to the attention of the representative during the course of those investigations that the court would otherwise not have access to and that would be likely to affect materially the court's deliberations, for example where the child has disclosed abuse by a party. Where a report is being prepared the duty could be discharged by the representative bringing the concerns to the attention of the report writer.

13.100 This requirement may raise concerns about a breach of the confidentiality of the relationship between the child and the representative. One submission to the Inquiry asserted

...the correct course of action is to report those matters to the relevant community service department in that state. In the normal course of investigation an appropriate court will be called upon to determine the child's placement...¹⁴⁹³

This submission goes on to assert that a requirement to disclose '...will spawn a series of tactical ploys by mischievous parties. Many children may not trust their legal representatives...' ¹⁴⁹⁴ However, the overriding duty of the representative as an officer of the court must be to ensure that the child's long term best interests are served by the decision of the court. For children able and willing to participate in the decision making process, those interests in most cases are best served by allowing the child to participate in that process. However, participation should not be at the expense of the court's ability to make a decision on the basis of all material facts. Participation should not result in a risk to the child's safety.

13.101 The representative has an obligation to the child to ensure that the child is aware of the confidentiality of their discussions and of the limits to that confidentiality. This should be discussed with the child at the first meeting. Where it subsequently becomes clear that the representative will have to disclose a communication with the child, the representative should meet with the child and formulate a strategy for that disclosure.

Recommendation 73. Legislation should ensure that legal professional privilege applies to communications between the representative and the child in family law and care and protection matters even where the child is not the client of the representative. This privilege should be subject to the obligation of the representative to notify the court of matters

- that may place at risk the safety or best interests of the child
- that the court would otherwise not have access to and
- that would be likely materially to affect the court's deliberations.

Implementation. O 23 of the Family Law Rules and relevant State and Territory care and protection legislation should be amended accordingly.

Recommendation 74. The standards at recommendation 70 should require the representative to explain to the child at the first meeting the limits of the confidentiality that applies to their

communications. Where it subsequently becomes clear that it will be necessary for the representative to disclose a communication with the child, the representative should meet with the child and formulate a strategy for that disclosure.

Implementation. The standards referred to at recommendation 70 should include a provision to that effect.

Representation of siblings

13.102 Siblings are often represented by the one advocate in private family law matters. In many cases this is appropriate but there will be cases in which the children's instructions or interests do not coincide. A submission to the Inquiry noted

...legal representatives give more emphasis to the wishes or directions of older siblings in the family, spending most time with the eldest child and little with younger, less verbal, children. This is particularly problematic when the children have differing views or needs.¹⁴⁹⁵

13.103 Representatives for siblings should remain alert to divergence in instructions or interests of the children. They should ensure that appropriate steps are taken where the divergence constitutes a conflict of interests. In these cases, the representative should approach the court and seek the appointment of a second representative.

Recommendation 75. In cases where a representative is acting for more than one child the representative should carefully ascertain the views and instructions of each child. Where any divergence in instructions amounts to a conflict of interests for the representative, the representative should not represent all the children.

Implementation. Standards in recommendation 70 should make provision to that effect.

Terminating the appointment of the representative

13.104 As the child is not the client of the best interests representative, he or she is not permitted to dismiss the representative.¹⁴⁹⁶ This is justified by the requirement that the best interests representative should act in an unfettered manner and should not be compromised by the ability of the child to terminate the appointment.¹⁴⁹⁷ The Inquiry agrees that the court should decide whether to discharge a best interests representative. However, where a child is willing and able to participate in proceedings and has lost confidence in the representative, this fact, in the absence of significant arguments to the contrary, ought to constitute grounds for the court to remove the representative. The representative should generally be removed on such an application if the child can show that the representative has failed to consult.

13.105 In some cases in both family law and care and protection jurisdictions the representative makes little contribution to the resolution of the matter. This may be because the representative wholly supports the arguments of one of the parties and the child chooses not to express any wish or to participate in the process. The child may not need the assistance or support of a representative. In those cases, the representative adds little to the proceedings but may add to any marginalisation felt by the child and ill-feeling between the parties.

13.106 DRP 3 suggested that in those circumstances the representative for the child should approach the court and seek to be discharged.¹⁴⁹⁸ One submission noted that this recommendation is unrealistic as '...practitioners have rarely demonstrated a propensity to discharge themselves as being unnecessary'.¹⁴⁹⁹ Standards requiring representatives to seek to be discharged where they add nothing of substance to the resolution of the matter may assist to address this problem.¹⁵⁰⁰

Recommendation 76. Where it appears to the representative that the child is unwilling or unable to express a view about the litigation and

- the representative considers that the best interests of the child do not require that evidence be tested or adduced or
- the representative is merely confirming the submissions of one party and is calling no independent evidence

the representative should apply, as early in the proceedings as possible, to be discharged.

Implementation. Standards for representatives of children in care and protection and family law litigation should make appropriate provision to this effect. Inclusion of a rule to this effect in O 23 of the Family Law Rules may assist as could express provision in relevant care and protection legislation.

Recommendation 77. A child who has been provided with a representative in family law or care and protection proceedings should be able to apply for the representative to be dismissed and request a second representative be engaged where the child has no confidence in the representative. The court should generally make such an order on application if the child can show the representative has failed to consult.

Implementation. Standards for representatives of children in care and protection and family law litigation should make appropriate provision to this effect. Inclusion of a rule to this effect in O 23 of the Family Law Rules and in relevant care and protection legislation may assist.

Specific issues for family law proceedings

Appointment of the representative

13.107 The Family Court stated the general rule for the appointment of a representative for a child in *Re K*.¹⁵⁰¹ It held that a representative should be appointed when the court decides that the child's interests require independent representation. Subject to this broad general rule the court established thirteen specific situations where a representative should be appointed. These are cases where

- there are allegations of child abuse whether physical, sexual or psychological
- there is an apparently intractable conflict between the parents
- the child is apparently alienated from one or both parents
- there are real issues relating to cultural or religious differences affecting the child
- the sexual preference of either or both of the parents or some other person having significant contact with the child is likely to impinge upon the child's welfare
- the conduct of either or both of the parents or some other person having significant contact with the child is likely to impinge upon the child's welfare
- there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children
- on the material filed by the parents, neither seems a suitable custodian
- a child of mature years is expressing strong views, giving effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent
- one of the parties proposes that the child will be either permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child

- it is proposed to separate siblings
- none of the parties are legally represented and custody is at issue
- in applications to court's welfare jurisdiction relating in particular to the medical treatment of children the child's interests are not adequately represented by one of the parties.¹⁵⁰²

The court pointed out that full adherence to CROC may well require the representation of children in every case but it expressed no concluded view on the matter.¹⁵⁰³ New Zealand legislation provides that, in all custody or access matters which appear likely to proceed to a hearing, the court shall appoint a representative for the child unless the court is satisfied that '...the appointment would serve no useful purpose'.¹⁵⁰⁴ Several submissions to the Inquiry supported this approach.

It is submitted that any case involving parenting orders that are seriously contested, or where a child chooses to intervene or is a party, should involve...a child representative.¹⁵⁰⁵

Other submissions suggested that most contested matters would fall within one or the other of the categories in *Re K*.

The South Australian Office for Families and Children is encouraged by the comprehensive nature of the guidelines for the appointment of separate representatives...¹⁵⁰⁶

The court pointed out in *Re K* that the guidelines are not exhaustive.¹⁵⁰⁷

13.108 The circumstances identified by the Family Court in *Re K* for providing representation for children are clearly appropriate. However, even within those categories, where a child is unwilling or is too young to participate in the litigation, a representative should be appointed only where an expanded investigatory role for report writers¹⁵⁰⁸ would not provide the court with all relevant information concerning the best interests of the child or where there are other compelling reasons for the appointment. This may occur where evidence of the parties should be vigorously tested by a representative acting in the best interests of the child and where no other party is likely to test the evidence.

Making the appointment

13.109 In the Family Court the appointment of the representative could be made by the registrar at the first directions hearing on the basis of the counsellor's assessment.¹⁵⁰⁹ DRP 3 stressed the importance of representatives being appointed as early as possible in the litigation so that children's opinions may be advocated during the negotiation phase.¹⁵¹⁰

13.110 After conciliation counselling before the first directions hearing, the counsellor is required to complete a memorandum to assist at the directions hearing.¹⁵¹¹ The Family Law Council has recommended that the memorandum include a recommendation as to whether a child's representative should be appointed¹⁵¹² and information concerning

- a) whether the Court will need to appoint a counsellor or other person to offer clinical interventions or professional advice to the child or the family;
- b) whether relevant reports are available from someone outside the court system and how they can be obtained;
- c) what other professionals, agencies and persons are already working with the child;
- d) whether any of those professionals would be prepared to (i) maintain liaison with the Court with a view to ensuring that the services already being provided to the child are not disrupted by the legal process; (ii) to act as a contact point for any separate legal representative appointed to the case by the Court; and (iii) where appropriate assist the separate legal representative in the case and to help explain the court processes to the child;
- e) whether the child's interests are being adequately addressed by the parties; and
- f) whether or not a child should be assessed further.¹⁵¹³

13.111 The Inquiry endorses this recommendation and further recommends that the memorandum state whether the child has expressed any wishes as to the outcome of the proceedings and if so the substance of those wishes.

Recommendation 78. The memorandum filed by the court counsellor for the first directions hearing should contain information as to

- whether the court will need to appoint a counsellor or other person to offer clinical interventions or professional advice to the child or the family
- whether relevant reports are available from someone outside the court system and how they can be obtained
- what other professionals, agencies and persons are already working with the child
- whether any of those professionals would be prepared to
 - maintain liaison with the court with a view to ensuring that the services already being provided to the child are not disrupted by the legal process
 - act as a contact point for any legal representative appointed for the child by the court and
 - where appropriate assist the legal representative in the case and help explain the court processes to the child
- whether the child's interests are being adequately addressed by the parties
- whether or not a child should be assessed further
- the substance of any wishes expressed by the child as to the outcome of the matter.

Implementation. Case Management Guidelines should be drafted to this effect.

Recommendation 79. The appointment of a representative for a child under s 68L of the Family Law Act should be made as early as possible.

Implementation. Appointment of a representative should preferably be made at the first directions hearing by the registrar taking into account the assessment by the counsellor referred to at recommendation 78.

The role of the counsellor

13.112 Where children are represented in accordance with their wishes the court may require an additional mechanism to obtain all relevant evidence concerning the child's objective best interests. The recommendations in this chapter, insofar as they relate to the Family Court, require not only the maintenance but also the development of processes for providing information to the court about the best interests of the child.

13.113 At present in private family law disputes Family Court counsellors may be asked to prepare a family report about the child.¹⁵¹⁴ A family report is prepared in approximately 60% of matters which proceed to a hearing in the Family Court.¹⁵¹⁵ The report writer cannot call witnesses but presents the results of the investigation and is subject to cross examination. Other parties may call as witnesses those referred to in the report and subject them to cross examination.

13.114 The current role of the report writers should be expanded to include more detailed investigation and assessment of the best interests of the child and the presentation to the court of the evidence upon which that assessment is based. Where the child is represented on the basis of instructions or not represented at all, this should be the primary method for bringing before the court information concerning the best interests of the child. The report writer should be the 'eyes and ears of the court' and be charged with supporting the best interests of the child.

13.115 The Family Court pointed out that the proposal would mean the Counselling Service becoming a party to the proceedings to prosecute a best interests case. It expressed some concern about such a course because

...counsellors do not have the skills to prepare and run cases in Court...Furthermore we think it important to emphasise that the counsellor preparing the report has limited access to and limited ability to require other persons and agencies to provide information.¹⁵¹⁶

The Inquiry envisages the counsellor adopting much of the investigative role of the best interests representative. This would include conducting wider inquiries than are presently made by the counsellor preparing the family report. We do not expect, however, that counsellors should prepare and run cases in

court on the basis of their assessment of the child's best interests. Their role would remain restricted to giving evidence as witnesses in a case. The presiding judicial officer should be active in ensuring information presented by the counsellor is supported by appropriate evidence.¹⁵¹⁷

13.116 In *For the Sake of the Kids* the ALRC suggested that a children's interests co-ordinator approach be tried in some cases.¹⁵¹⁸ The report envisaged that the co-ordinator would perform many of the functions of the court counsellor including preparation of the report and also be asked to oversee and co-ordinate the management of those cases. The Inquiry reiterates that recommendation. The co-ordinator/report writer could appear whether or not there is a representative appointed for the child but would be particularly relevant where the child is not represented. The appointment of a co-ordinator/report writer would obviate the need to appoint a representative in many cases.

13.117 The child's representative may supplement information about the best interests of the child but should not be relied upon as the main source of it.

Recommendation 80. The role of the Family Court counsellor in providing family reports should be expanded and enhanced in appropriate cases, particularly where a child is unwilling or unable to engage with a representative. There should be more detailed early investigation and assessment of the best interests of the child in preparing family reports and the presentation to the court of the evidence upon which that assessment is based. This investigation should encompass many of the functions currently performed by the child's representative including interviewing relevant people such as family members, school teachers and professionals involved with the child. Where a child is not represented, a co-ordinator/report writer should be responsible, where appropriate, for keeping the child informed about the progress of the litigation and may be asked to oversee and co-ordinate the management of the case.

Implementation. The Family Court should draft an amendment to O 25 of the Family Law Rules to this effect.

Order of argument in family law matters

13.118 In Family Court matters where there are multiple issues, submissions and addresses proceed first in relation to property matters. Children's issues are determined thereafter. The report to the Chief Justice *Representing the Child's Interest in the Family Court of Australia* suggested that this order be reversed.¹⁵¹⁹ This would allow representatives to be excused following the determination of relevant parenting orders and other children's issues. The Inquiry agrees with this recommendation.

Recommendation 81. The order in which evidence is adduced at trial should be changed so that evidence relating to financial matters is heard after evidence concerning children's issues to enable the child's representative to be excused at the completion of the hearing of relevant evidence.

Implementation. The Family Court should amend the Family Law Rules and/or Case Management Guidelines, as appropriate, to this effect.

Specific issues for care and protection proceedings

13.119 Issues in the representation of children in family law and care and protection proceedings are similar. However, the requirements of children in the two jurisdictions differ. In particular, many care and protection orders require the continuing involvement of the court or of the department and continuing representation of the child may be needed. Extensions of orders and reviews of orders and case plans¹⁵²⁰ also point strongly to the need for a continuing relationship between the child and the representative.

13.120 For these reasons, all children in care and protection litigation should be provided with a legal representative. Once again, preference should be given to the representation of a child on the basis of the direction given by the child. Where the child is too young or is unwilling to express a view to a lawyer the

court may decide that representation is nevertheless necessary because of the position taken by the department or the likely need for continuing representation. In those cases the representative should advocate in accordance with an assessment of the best interests of the child.¹⁵²¹ The representative should take care to consult with a verbal child at each new contact to determine whether the child has become able or willing to express a view as to the direction of the proceedings.¹⁵²²

13.121 Generally care and protection jurisdictions have limited independent advice from social scientists to assist the court and the representatives in the assessment and determination of the best interests of a child. A Children's Clinic attached to the Melbourne Children's Court employs social scientists to assess the families and children who are the subject of care and protection applications. Initially the clinic was operated by the court but currently it is run by the care and protection department. This change has been the subject of some criticism on the basis that it may limit the independence of the clinic. Nevertheless, the clinic generally is well regarded and functions efficiently. One submission to the Inquiry noted

...in the Victorian Children's Court, clinicians work with the magistrates themselves, and not with the child's legal counsel (although there is communication with counsel and also, in protection matters, with the Department of Human Services). This follows a "direct instruction with supplementary Court Report" model and appears to work well. Therefore, different models may be appropriate for different courts...¹⁵²³

13.122 Each State and Territory children's court would benefit from a clinic. Clinics should be the responsibility of the courts and should have sufficient resources.

Recommendation 82. All children who are the subject of a care and protection application in the States and Territories should be provided with a lawyer as early as possible. The ethical principles and standards for representation are outlined at recommendations 70-76.

Implementation. The national care and protection standards proposed in recommendation 161 should include provisions to this effect.

Recommendation 83. Clinics similar to the Melbourne Children's Court Clinic should be attached to children's courts and adequately resourced to provide the court and legal representatives with expert advice on the best interests of the child.

Implementation. The Attorney-General through SCAG should encourage the States and Territories to introduce these clinics.

Skills and training

13.123 Interviewing and taking adequate instructions from children are important skills for any representative and advocate for children. The Inquiry received a number of submissions stressing the need for training for children's representatives in the Family Court. There was not the same concern for training of children's advocates in other courts. It was pointed out that representation of children is a speciality area and representatives should receive specific and substantial training.¹⁵²⁴ The National Children's and Youth Law Centre described reports of poor quality and inconsistency among privately funded duty solicitors.¹⁵²⁵ An overwhelming complaint children make is that neither the processes nor the outcomes of litigation are properly explained to them.¹⁵²⁶

13.124 The Inquiry was told that training for representatives should include

...factors related to children's memory and suggestibility, the development and use of language and an understanding of how children view and understand the world around them. They need to be able to communicate effectively with children and to be able to translate the child's needs and issues into the adult context of the world.¹⁵²⁷

13.125 The SA Department of Family and Community Services recommended

...that knowledge of child development be included as a core component of any training. The capacity to represent children continues to be compromised by lack of comprehensible (to the child) language during interviews and lack of understanding about the impact of certain experiences upon children's different ages.¹⁵²⁸

At the very least, legal representatives for children should be able to communicate effectively with their child clients.¹⁵²⁹

13.126 One submission noted that '[a] reliance on multi-disciplinary training expects too much of one person in a complex area ...'¹⁵³⁰ Referral is a particularly important skill for representatives for children. Training should address the need to ensure that lawyers realise the limits of their expertise and are aware of the need for referral.

13.127 The Law Council of Australia, National Legal Aid and the College of Law have developed and implemented during 1996 a training program for children's representatives in the Family Court. The training program covers technical procedural and legal issues and provides some understanding of family dynamics including domestic violence and sexual abuse allegations. It has a component on child development including techniques for ascertaining children's wishes.¹⁵³¹ This initiative is commendable and should be extended to provide more detailed training on a regular basis once all practising child's representatives have received initial training. The extension of the training program to include care and protection representatives should also be considered.

13.128 A multidisciplinary team from Monash University is researching the handling of matters in the Family Court in which allegations of child abuse had been made. This team told the Inquiry that it

...has made a proposal to Monash University that it establish a multi-disciplinary teaching and research centre to develop and transmit the knowledge which is urgently needed for the new services developing at the welfare/law interface around children and their families.¹⁵³²

13.129 There is also an undergraduate course offered at the School of Law at Flinders University in South Australia in relation to children and the law and interviewing children.¹⁵³³ The Inquiry strongly encourages the continued development of training courses for representatives for children. These programs should begin with undergraduate legal studies and should provide continuing legal education for practitioners.

13.130 Legal aid commissions now generally appoint as representatives for children only those who have undertaken the child's representatives training program.¹⁵³⁴ Representatives for children should be skilled in this area but in some cases restricting legal aid grants to accredited representatives could undermine children's right to choose representatives in whom they have confidence.¹⁵³⁵ One submission noted that '[e]xperience is often matched by enthusiasm and the role that young lawyers play around Australia in representing children is often unfairly ignored'.¹⁵³⁶ Representatives directly chosen by children should be eligible for legal aid grants.

13.131 In all jurisdictions solicitors employed within the legal aid commission provide legal assistance to children. Expertise in children's issues is developed as much by specialist units within legal aid commissions that set the standards for all practitioners as by training. Specialist units that provide representation for children across all jurisdictions — federal, State and Territory — may be hindered by funding arrangements.¹⁵³⁷ Nevertheless, the lack of specialist expertise in representing children makes it important to ensure that cross-jurisdictional units specialising in children's representation generally, rather than in representation within each jurisdiction, are developed.

13.132 There are two specialist children's community legal centres in Australia — the Youth Advocacy Centre in Brisbane and the Youth Legal Service in Perth.¹⁵³⁸ The National Children's and Youth Law Centre generates policy proposals and concentrates on providing advocacy for children on a systemic basis. Several other generalist legal centres have a specialist children's law position.¹⁵³⁹ The specialist centres and representatives are successful in providing assistance to individual children and raising the priority of children's issues on a systemic level out of proportion to their numbers and funding levels. One submission to the Inquiry provided the following case studies illustrative of the services provided.

An 11 year old boy with Attention Deficit Disorder rang a community legal centre in tears saying that he had been told that he had to do his work at home because of his behaviour. He had received no special assistance with his learning disability and was becoming more and more frustrated at school which exacerbated his behavioural problems. The community legal centre wrote to the Department of School Education to negotiate with them about the child returning to school and getting some support. A complaint was made to the Anti-Discrimination Board alleging discrimination on the basis of his disabilities and a resolution was finally reached.¹⁵⁴⁰

A former state ward has made allegations about being assaulted and neglected whilst in foster care. A community legal centre has commenced an action in the Supreme Court for negligence, for breach of statutory duty and breach of fiduciary duty.¹⁵⁴¹

These advocates provide significant services to children on a very cost-effective basis. A greater number of these positions, preferably located within specialist children's legal centres, should be funded.

Recommendation 84. Multi-disciplinary training for lawyers and social scientists working in the area of children and the law should be developed. This training should form part of tertiary studies in law at undergraduate and postgraduate level and professional training and education by existing continuing professional education and specialist accreditation processes.

Implementation. The Commonwealth should make grants available through DEETYA or the Attorney-General's Department to support the development of suitable training programs.

Recommendation 85. The practice of children's law in the Family Court and State and Territory children's courts should be developed as an area of specialisation. Children's representatives in all jurisdictions should receive appropriate training in children's development and cognition and in interviewing children. Legal aid grants should generally be restricted to lawyers accredited as qualified children's representatives. However, exceptions to this requirement should be made where there is good reason to do so.

Implementation. The Attorney-General through SCAG should seek agreement of the States and Territories to the development of specialist accreditation programs in children's law for practice in children's courts and the Family Court and to the introduction of appropriate legal aid guidelines.

Recommendation 86. Specialist children's units should be established within the legal aid commission of each State and Territory to work on children's issues in federal, State and Territory jurisdictions. The units should provide representation for children in family law, care and protection and juvenile justice matters, before tribunals and in pursuing complaints.

- These units should be staffed by lawyers experienced in representing children and skilled in working and communicating with children. Social workers trained and experienced in working with children should also be employed in these units.
- All legal and social work staff in the units should receive regular training on the law and social science practice in relation to children, child development and cognition, interviewing and communicating with children and cross-cultural awareness.

Implementation. The Attorney-General should negotiate with the States and Territories concerning the establishment, operation, staffing, training and funding of children's units to be operated by legal aid commissions.

Recommendation 87. In addition to these specialist units within legal aid commissions, legal advocates for children should be funded within specialist children's legal centres or generalist community legal centres. Initially, at least one legal advocate position should be funded in each State and Territory in addition to the existing positions. These advocates could form part of the advocacy network proposed at recommendation 9 and should be able to work on cases for individual children, matters of public interest and test cases. They should provide legal advice, information, assistance and representation to children and their families.

Implementation. The Attorney-General should take the necessary steps to fund these children's legal advocates.

Funding legal representatives

Introduction

13.133 Most children cannot afford to fund litigation themselves. Legal aid is important in ensuring that children have appropriate access to courts and tribunals in matters that affect them or in which they are a party. Presently children are assisted by lawyers based in community legal centres, by specialist in-house

lawyers in legal aid commissions or by private practitioners legally aided to represent children.¹⁵⁴² The increased number of appointments of representatives for children over the last several years has placed a significant financial burden on legal aid commissions.

13.134 This burden has arisen at a time of funding restrictions and the renegotiation of funding arrangements between the States and Territories and the Commonwealth.¹⁵⁴³ The Commonwealth has recently finalised agreements with most of the States and Territories in which policy for the expenditure of federal funds will be determined by the Commonwealth. Legal aid commissions are required to provide a budget to the Commonwealth setting out proposed expenditure patterns.¹⁵⁴⁴

Quarantining funds for representation of children in all jurisdictions

13.135 The Family Court considered the limits of its power to appoint a child's representative in *Heard v DeLaine*. The court held that, although the power to appoint a representative

gives the court wide powers in relation to the representation of children in proceedings before it, in our opinion, no power exists in this court to order the Legal Services Commission to continue to fund the separate representation of children, however desirable that may be.¹⁵⁴⁵

13.136 The Inquiry recognises that there are resource constraints on legal aid commissions. Nonetheless we consider that children must continue to be provided with adequate representation, particularly in family law, care and protection and juvenile justice matters.

13.137 Resource constraints cannot justify *ad hoc* refusals of aid. In a recent unreported case two siblings were refused legal aid to bring action directly in the Family Court. Mushin J stated

I can do no more than express my sheer amazement that Victoria Legal Aid has declined to aid these children. I was told that the reason for aid being declined was that Victoria Legal Aid was concerned that the floodgates would be opened with respect to applications by children...The merits of the matter appear to be that unless represented the children would have had to appear for themselves and personally criticise both their parents in Court. That is a totally unacceptable position in which to place them.¹⁵⁴⁶

13.138 The Legal Aid and Family Services Branch of the federal Attorney-General's Department noted that under the new agreements between the Commonwealth and the State and Territory legal aid commissions Commonwealth matters are quarantined from State and Territory issues and that as a result there should no longer be competition for funds between State and Territory and Commonwealth matters.¹⁵⁴⁷ Funding constraints faced by legal aid commissions may nevertheless lead to competing priorities between different legal aid assistance needs within the Commonwealth and State allocations of funds. There is merit in quarantining funds for representatives for children across all jurisdictions, including family law, care and protection and juvenile justice matters, to ensure that children are adequately represented in each of those jurisdictions. Certainly the close connection between family law and care and protection cases justifies separate allocations of funds. Quarantining funds was recommended by the NSW Legislative Council Standing Committee on Social Issues.¹⁵⁴⁸ The Family Court noted

...there is a strong case for a designated fund for separate representation being made available to Commissions, in that children should not have to compete with other litigants for representation.¹⁵⁴⁹

13.139 The submission from the Legal Aid and Family Services Branch of the federal Attorney-General's Department also pointed out that the Commonwealth has given priority to funding for family law and child representation.¹⁵⁵⁰ This positive decision should be reflected by each State and territory legal aid commission.

Funding caps for representatives in family law

13.140 One response to competing priorities is the introduction of funding caps. There is certainly a case to be made for the imposition of clear funding caps in many cases. Funding caps should not be applied comprehensively in all cases. However in public interest or test cases the finalisation of a matter by a representative may assist the determination of future matters.

13.141 A grant of aid extends to all appearances during the life of a matter including repeat applications. This may be particularly problematic in family law children's cases where parenting orders require continuing arrangements that may at times break down. It is generally not possible to predict or plan for repeat applications. For this reason, the effects of funding caps should be carefully monitored in children's matters.

13.142 Retrospective caps are particularly problematic as they undermine costs estimates by representatives when legal aid was granted and make the matter less likely to reach a satisfactory conclusion. In some recent cases representatives for children have withdrawn during the hearing stages or continued in the matter on a *pro bono* basis after initial grants of aid suggested funding would cover the hearing. In *Heard v De Laine* a representative was forced to withdraw from a matter some way into a lengthy hearing.¹⁵⁵¹

13.143 National Legal Aid submitted that '[w]hen proper levels of funding are provided by Government,...funding for children's legal representation should not be terminated in cases where costs have reached a capped funding limit'. It went on to say, however, that '[s]ufficient funding for all children's matters is unlikely to occur in the near future'.¹⁵⁵² The Inquiry cautions against the introduction of any further retrospective funding caps.

13.144 Recommendation 81 should reduce the time in which children's representatives should be required to appear in family law matters. They may be excused after the completion of the hearing relating to children and need not appear on the hearing of property matters to which they would generally contribute little.

Contributions by parties to family law proceedings

13.145 Contributions by parents to the cost of representation of children may be appropriate in some family law cases. The Family Law Council has commented that '[i]n general, the conduct of the parties is the reason why separate representatives are required ...'.¹⁵⁵³ However, there is concern about parental contributions, mainly relating to the possible or perceived prejudice to the independence of the representative arising from the influence of the party responsible for the costs. A number of different mechanisms by which costs may be recovered influence this concern.

13.146 One mechanism is that adopted in the agreements on family law funding signed between the Commonwealth and all States and Territories except NSW, Victoria and the ACT. Under these agreements parties to family law proceedings who are not legally aided must generally '...pay the amount or relevant portion of the anticipated costs of separate representation ...'.¹⁵⁵⁴ Victorian guidelines already include such a provision. This arrangement does not address, and may in fact exacerbate, the potential for problems such as that discussed above.

13.147 Under a scheme in New Zealand the court may order any party in a family law case to reimburse the Crown for fees and expenses paid for the representation of the child.¹⁵⁵⁵ The Family Law Council recommended such a scheme in Australia.¹⁵⁵⁶ It was also recommended in the ALRC report *Costs shifting — Who Pays for Litigation*.¹⁵⁵⁷ In New Zealand the parties are advised at the time of the appointment of the representative for the child that they may be called upon to reimburse some of the cost of the representation for the child but the order is made by the court at the conclusion of the matter. A New Zealand practitioner has commented that this does not in practice prejudice the independence of the representative nor create an inference on the part of the party or parties funding the representation that the representative should somehow act for them.¹⁵⁵⁸

13.148 DRP 3 suggested that parties may be liable for costs of the child's representation in family law proceedings but only on the basis of a court order at the conclusion of the matter. Parties should be advised at the outset that they could be liable for costs. National Legal Aid supported this proposal in its submission.¹⁵⁵⁹ However, it opposed the proposal that this option be available only to the court of its own motion. It argued that it should be open to any party to make an application for such a costs award. While the Inquiry still considers these applications should not be made by any party, we agree that the representative for the child should be able to seek such an order. In any event, the Family Court should remain alert to the funding restrictions on the legal aid commissions and ensure costs orders are made as appropriate. The Family Court of Australia has pointed out that the Family Court is not restricted to making costs orders only against parties.¹⁵⁶⁰

13.149 A submission to DRP 3 was provided by a practitioner in a matter in which two children had initiated proceedings directly in the Family Court. Their parents had become 'litigation weary'. Legal aid was denied the two applicants on the basis that '...the floodgates would be opened with respect to applications by children'.¹⁵⁶¹ The submission noted

...there are very rare circumstances, nonetheless important, where children of their own volition ought initiate proceedings therefore [I] consider there ought be some increased concentration on the right of the child to initiate proceedings.¹⁵⁶²

The Family Court also pointed out that legal aid guidelines should be drafted so as to take account of the possibility that children will initiate proceedings directly.¹⁵⁶³ In these cases, the child should be legally aided on the basis of the usual individual means and merits tests. The means test should be applied to the child's resources, not those of his or her parent/s.

13.150 Any such contribution scheme would be inappropriate in the care and protection jurisdictions. Parents generally are not responsible for the initiation of proceedings and the involvement of the state as an initiating party makes the application of any such scheme inappropriate.

Recommendation 88. Legal aid for the representation of children should be nominated by each jurisdiction as an area of priority for funding. The Commonwealth and the States and Territories should make separate appropriations of funds for the representation of children in all jurisdictions, particularly care and protection, family law and juvenile justice. These funds should be administered by State and Territory legal aid commissions.

Implementation. The Attorney-General should negotiate with the States and Territories to secure separate appropriations of funds for children's matters across all jurisdictions.

Recommendation 89. The effects of funding caps on children's cases, particularly on repeat applications in family law cases, should be closely monitored. Further retrospective funding caps should not be introduced for children's cases in any jurisdiction.

Implementation. State and Territory legal aid commissions should monitor the effects of caps on children's cases and seek adjustments to funding agreements with the Commonwealth as appropriate.

Recommendation 90. Children's eligibility for legal aid should not depend on the means of their parents in either family law or care and protection matters. However, the Family Court should have a discretion in appropriate cases to order the recovery of costs for representation of a child pursuant to s 68L of the Family Law Act from either or both of the parties. These orders should be made only where the parties are able to meet the costs and where it is appropriate to do so. They should be made only on the court's own motion or on the application of the child's representative. Children who are full parties to family law proceedings that involve a parent should be subject to an individual legal aid means test independent of the parents.

Implementation. Commonwealth legal aid guidelines for family law should be amended to this effect and the Attorney-General should propose an appropriate amendment of s 117 of the Family Law Act.

14. Children's evidence

Introduction

14.1 In Australia children appear as witnesses in courts most frequently in criminal proceedings.¹⁵⁶⁴ In these cases children are often the victim of the alleged crime or are witnesses to events that have happened to others.¹⁵⁶⁵ Children also appear as witnesses in a variety of other court and tribunal proceedings, such as in the Family Court and magistrates' courts exercising federal family law jurisdiction,¹⁵⁶⁶ State and Territory civil courts,¹⁵⁶⁷ care and protection proceedings,¹⁵⁶⁸ juvenile justice proceedings¹⁵⁶⁹ and before both federal and State or Territory tribunals.¹⁵⁷⁰

14.2 Evidence to the Inquiry indicated that, whatever the jurisdiction, the structures, procedures and attitudes to child witnesses within all these legal processes frequently discount, inhibit and silence children as witnesses. In cases where the child is very young or has or had a close relationship with one of the parties or where the subject of the evidence is particularly sensitive, children often become so intimidated or distressed by the process that they are unable to give evidence satisfactorily or at all.¹⁵⁷¹

14.3 The recommendations in this chapter focus on remedying this situation. We have attempted to develop processes that

- ensure that child witnesses are able to give reliable evidence
- enhance the status of children as witnesses so that their evidence is given appropriate weight
- minimise the stresses placed on child witnesses.

14.4 This approach is consistent with the provisions in CROC which require that children are heard and protected in all legal processes.¹⁵⁷² Protection of child witnesses is also covered by the Commonwealth's undertaking to

take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts. Such recovery and integration shall take place in an environment which fosters the health, self-respect and dignity of the child.¹⁵⁷³

In addition, States Parties to CROC are 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, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child...Such protective measures should, as appropriate, include... investigation, treatment and follow-up of instances of child maltreatment and, as appropriate,...judicial involvement.¹⁵⁷⁴

Taken together, these articles require the evidence of child witnesses to be taken in a way that promotes the physical and psychological recovery, health, self-respect and dignity of the children involved. Despite attempts by government and non-government agencies to assist and protect child witnesses, legal processes often fail to meet these standards.

14.5 Many of the recommendations in this chapter are applicable to all child witnesses. Where possible we have generalised recommendations to apply to all children who may give evidence in federal, State or Territory proceedings. The greatest proportion of evidence to the Inquiry, however, concerned children who give evidence in criminal proceedings about being sexually or physically abused. We encountered a tremendous outpouring of concern about the treatment of these children by the legal process. As child abuse is an issue handled by numerous government agencies across jurisdictional divides, the Inquiry also makes particular recommendations relating to child witnesses in criminal abuse cases, even though these recommendations may relate predominantly to State and Territory legal processes.

Child witnesses in Australian jurisdictions

Child witnesses in federal proceedings

14.6 In the federal jurisdiction children give evidence in family law proceedings, administrative tribunals, civil law matters and federal criminal proceedings. Detailed statistics on the numbers of children giving oral evidence in these jurisdictions are not often kept. However, it seems that the number of children appearing as witnesses in federal jurisdictions is quite small.

- **Family Court of Australia and State and Territory magistrates' courts exercising federal family law jurisdiction.** Children rarely give oral evidence in family law proceedings.¹⁵⁷⁵ Children may not be called as witnesses without prior leave of the court under the Family Law Act.¹⁵⁷⁶
- **RRT.** According to an informal survey of Tribunal members, 52 children appeared as witnesses in the RRT from July 1993 to December 1996. These children appeared before the 16 Tribunal members who responded to the survey, an average of about one child witness per member each year.¹⁵⁷⁷
- **IRT.** According to an informal survey of Tribunal members, two cases before the Tribunal from 1 January 1997 to 31 March 1997 involved children giving evidence. One case involved one child giving evidence and the other involved three children, although it is not clear whether all three children gave evidence.¹⁵⁷⁸
- **SSAT.** Very few children attend the SSAT as witnesses. Indeed, the tribunal has few witnesses of any sort.¹⁵⁷⁹ In 1996 three instances were recorded of children appearing as witnesses in relation to appeals involving YTA.¹⁵⁸⁰ However, a large number of children are listed as applicants for review of decisions concerning YTA or Austudy. It is safe to assume that some of these would have appeared and spoken in the Tribunal in connection with their appeals.¹⁵⁸¹
- **AAT.** Anecdotal evidence suggests that there are few child applicants and witnesses before the AAT, although the Tribunal does not keep an age profile of clients or witnesses so this is impossible to verify.¹⁵⁸²
- **Federal criminal proceedings.** Again, there were no statistics recording the numbers of child witnesses in federal criminal proceedings, although children could be witnesses to welfare fraud, drug offences, police corruption and customs breaches. In one recent case, two Cambodian children gave evidence in a federal prosecution under the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth).¹⁵⁸³ Children charged with a federal offence themselves may also give evidence in federal jurisdictions on their own behalf.

14.7 Although children may give evidence infrequently in these jurisdictions, this is not to say that children do not participate in proceedings in federal courts and tribunals. Their participation in legal processes other than as witnesses — for example as applicants or subjects of the proceeding — is discussed in Chapters 9, 13 and 16.

14.8 The *Evidence Act 1995* (Cth) (Evidence Act) contains most of the rules of evidence applicable to witnesses, including child witnesses, in federal courts.¹⁵⁸⁴ A federal court is defined in the Evidence Act as 'a person or body...that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence'.¹⁵⁸⁵ This definition includes the Family Court of Australia, the Federal Court of Australia and certain State and Territory courts exercising federal jurisdiction but excludes the SSAT, the AAT, the IRT and the RRT which are not bound by the rules of evidence.¹⁵⁸⁶ However, as children also appear as witnesses in these tribunals, the Inquiry recommends that child witnesses in tribunals should be afforded protections and considerations similar to those recommended for federal courts.

Child witnesses in State and Territory proceedings

14.9 In State and Territory jurisdictions child witnesses are most likely to appear and give evidence in criminal proceedings. Many of these children are the victims of the alleged crime. Others are bystanders who

have witnessed violence or crime perpetrated on other people. One study of domestic violence in Victoria found that, of 217 inquiries to one Clerk of Court that concerned domestic violence incidents, children were reported as being present during the incident in 45% of the cases. Further, the study reviewed Victorian police reports of domestic violence incidents and found that 79% of disputes involving a weapon and 65% of disputes involving a firearm were reported from households that contained children under the age of 5.¹⁵⁸⁷ Studies from other countries confirm that children can be frequent witnesses of criminal activities.¹⁵⁸⁸

14.10 There are no comprehensive statistics on the level of children's involvement as witnesses in criminal proceedings. Annual reports and other publications by State and Territory agencies and courts and statistics provided to the Inquiry by these agencies give an indication of the extent of this involvement.

- **Victoria.** In 1995–96 the Witness Assistance Service of the Victorian Office of Public Prosecutions assisted victim witnesses in approximately 73 matters that involved child sexual assault.¹⁵⁸⁹
- **Queensland.** During the period from 1 February 1994 to 1 January 1997, 1 216 children gave evidence in criminal proceedings involving sexual assault charges in Queensland.¹⁵⁹⁰
- **Western Australia.** From 1 January 1996 to 14 November 1996, 31 children gave oral evidence through Closed Circuit Television (CCTV) and 25 children gave evidence using a screen in criminal proceedings in Western Australian district and Supreme Court trials and preliminary hearings. Another 8 children had their evidence in chief taken prior to trial and videotaped for subsequent presentation in the trial.¹⁵⁹¹ The Western Australian Child Victim Witness Service, in the two years since its establishment, has received 363 referrals for assistance.¹⁵⁹²
- **ACT.** The ACT Supreme Court's CCTV facilities were used three times by children giving evidence in the criminal jurisdiction during 1995–96.¹⁵⁹³ The children's court CCTV facilities were also used, presumably by children, in an unknown number of criminal trials against adults during that year.¹⁵⁹⁴
- **Northern Territory.** The Supreme Court's CCTV facilities are used approximately five or six times a year by children and other 'vulnerable witnesses' in criminal trials.¹⁵⁹⁵ Similar facilities can be used by witnesses in some magistrates' courts, although no statistics on the extent of their use are available.¹⁵⁹⁶
- **South Australia.** In 1994 there were 18 criminal trials held in district courts and the Supreme Court in which the main charge was unlawful sexual intercourse — a crime in which the victim by definition is a child aged 16 or under.¹⁵⁹⁷ An additional 11 criminal trials were held in which the main charge was indecent assault of a person aged 16 or under.¹⁵⁹⁸ There is no data to show if and how many of the child victims gave evidence in these cases.
- **Tasmania.** In 1995–96, 58 children aged 17 and under were assisted by the Tasmanian Victims of Crime, Response and Referral Services.¹⁵⁹⁹
- **NSW.** In 1995 there were 630 victims of child sexual assault involved in cases against 501 alleged offenders. Only 190 cases went to trial.¹⁶⁰⁰ The child victims were likely to have appeared in these trials and given evidence regarding the assault.

14.11 Some child witnesses to criminal offences may alternatively, or additionally, give evidence in care and protection proceedings, in civil actions to recover damages or compensation for injuries sustained as a result of the crime and in other related legal processes.

14.12 In care and protection proceedings, the rules of evidence are generally relaxed and children's evidence is often heard indirectly with other witnesses telling the court what a child might have said or what injuries the child sustained. Therefore, children rarely appear in these proceedings to give evidence. In Western Australia only two or three children give evidence each year in care and protection proceedings.¹⁶⁰¹ In Tasmanian care and protection proceedings children generally do not give evidence at all in the south and north west of the State. However, in the Launceston area children aged 12 and over give oral evidence in approximately 20% of cases and affidavit evidence (on which they are often cross-examined) in 50% of

cases.¹⁶⁰² In approximately 25% of care and protection cases in the Launceston area, the evidence of children under 12 is presented by videotapes of their interviews.¹⁶⁰³

14.13 Children can also appear as witnesses in State and Territory civil proceedings, although most responses to the Inquiry's requests for statistics on child witnesses in the civil jurisdictions indicated that children rarely give evidence in these jurisdictions.¹⁶⁰⁴ Of particular concern, however, is the number of children who claim compensation for injuries resulting from crime.¹⁶⁰⁵ These compensation claims can be made in a variety of forums, depending on the jurisdiction, and may include children giving evidence concerning their injuries in courts or tribunals. Children may also give evidence in State or Territory tribunals for other reasons, for example in proceedings concerning the revocation of a doctor's licence to practise medicine or allegations of discrimination.¹⁶⁰⁶

14.14 Each State and Territory has its own rules of evidence, court procedures and investigation practices that can affect how child witnesses are handled both before and during their participation in the trial. The federal Evidence Act applies in ACT courts¹⁶⁰⁷ and NSW has passed legislation that mirrors the Evidence Act.¹⁶⁰⁸ Many State and Territory jurisdictions are reviewing or have recently reviewed their rules of evidence and court procedure in light of concerns about the way these processes affect children. This has resulted in important changes in procedural law and practices associated with child witnesses in these jurisdictions. There are still significant variations, however, such that child witnesses in similar situations will be treated differently depending on where they live. In the following sections, the various legislative and procedural requirements regarding children's evidence are discussed. We have pointed out changes that need to be made to meet a national standard of protection necessary for the well-being and effective participation of child witnesses in the legal process.

Children as reliable witnesses

Assumptions of unreliability

14.15 The common law in Australia has traditionally viewed children as unreliable witnesses. The perception has been that children are prone to fantasy, that they are suggestible and that their evidence is inaccurate. The following statement by a prominent legal scholar typifies the prejudices and assumptions about children's evidence.

First, a child's powers of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations.¹⁶⁰⁹

This view was reflected in rules of evidence that limited children's competence to give evidence and required corroboration and judicial warning in relation to children's evidence.

14.16 Traditionally, rules of competence required that a child possess sufficient understanding of the nature and consequences of an oath before being able to give sworn evidence.¹⁶¹⁰ The common law approach demanded that the child demonstrate a belief in God and divine vengeance, a formulation arising from eighteenth century cases.¹⁶¹¹ This approach effectively discriminated against children who did not have any particular religious beliefs or who adhered to religious beliefs that did not include a single deity or punishment for wrong-doers.

14.17 In addition, until recent amendments to the rules of evidence, the law in all States and Territories required that, where the child was incapable of giving sworn evidence, any unsworn evidence of the child had to be corroborated before a criminal conviction could be sustained.¹⁶¹² A child's unsworn testimony was

capable of corroborating another child's sworn testimony but the unsworn testimony of one child could not corroborate the unsworn testimony of another child.¹⁶¹³ This rule meant that several young children abused by one person could not give unsworn evidence to corroborate each other.

14.18 The law in all Australian jurisdictions until recently also required that judges warn juries that it was dangerous to convict on the uncorroborated evidence of a child, even when the child witness was deemed capable of giving evidence under oath.¹⁶¹⁴ Warnings of this kind had the effect of labelling children as an unreliable class of witnesses.¹⁶¹⁵ Juries were likely to take the warning as a hint from the judge to acquit where, as often happens when a child is the victim of abuse, the child was the only witness to the incident.¹⁶¹⁶

Children as witnesses: recent research

14.19 Recent research into children's memory and the sociology and psychology of disclosing remembered events has established that children's cognitive and recall skills have been undervalued.¹⁶¹⁷ At the same time other research has demonstrated that adult testimony is not always reliable, showing that mature witnesses' memories can be equally fragile and susceptible to the distorting influences of suggestion and misinformation.¹⁶¹⁸ The presumed gulf between the reliability of evidence from children and that from adults appears to have been exaggerated.¹⁶¹⁹

14.20 Children, including very young children, are able to remember and retrieve from memory large amounts of information, especially when the events are personally experienced and highly meaningful.¹⁶²⁰ However, children, and adults to a lesser degree, have significant memory loss after long delays. They recall less correct information over time while maintaining as a constant the inaccurate information.¹⁶²¹ Studies demonstrate that ability to remember and describe an event accurately, both at the time of questioning and at later dates, can be dependent on interviewing method.

14.21 Interviews, if skilfully conducted, can help both child and adult witnesses to consolidate and retain their memories.¹⁶²² However, using misleading and suggestive questioning techniques during an interview adversely affects young children's ability to recall an event accurately, just as to a somewhat lesser degree it adversely affects older children and adults.¹⁶²³ Repeating a question within a single interview session can also lead to young children changing their answer to that question, perhaps because they interpret the repetition of the question as an indication that their first answer was wrong.¹⁶²⁴ In addition, when young children are asked to recount, in a free recall narrative, everything they remember, they typically remember less detail than older children or adults, although the information they do recall is generally just as accurate.¹⁶²⁵ More details of the events can be recalled during questioning that provides non-leading cues to memory for those details not spontaneously supplied.¹⁶²⁶

14.22 Recent studies have also examined whether children are able to distinguish fact from fantasy or whether they have a propensity to lie deliberately about events that did not occur. This research has found that children are often as accurate as adults at discriminating the origins of their memories.¹⁶²⁷ In addition, there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings¹⁶²⁸ or that children are more likely to lie than adults.¹⁶²⁹ Indeed, research suggests that children may be actually more truthful than adults. Certainly, the research on children's beliefs about court proceedings implies that children may be more cautious about lying in the witness box than adult witnesses.¹⁶³⁰ When children do lie to an adult, the adult is usually well able to discern this, particularly with younger children.¹⁶³¹

14.23 Ironically, research indicates that the major problem with children's evidence is not the risk of a child making false allegations, although this is still a possibility. Rather the major problem is their significant level of false denials and retractions. While children can be encouraged to say that an event occurred knowing full well that it did not, this is difficult to do. When children do make false statements at the encouragement of others, the statements are often not very credible and these children rarely persist with their made up story.¹⁶³² On the other hand, to avoid punishment, to keep promises not to tell or to avoid revealing embarrassing information, most children will deny knowing information about an event that they know occurred.¹⁶³³

14.24 Difficulties can also arise when children are questioned about particular times and dates. This is particularly problematic for younger children who have not yet learned to tell time on a clock, who may

confuse calendar dates or who have trouble reporting events in exact chronological order.¹⁶³⁴ These children may report events out of order or be unable to give a particular date or time. However, this does not have any bearing on the accuracy of the description of the event reported.¹⁶³⁵

Implications for investigations and courtroom encounters with child witnesses

14.25 The research on children's memories and their reliability has important implications for the way in which child witnesses are interviewed during pre-trial investigations and questioned in court. The quality of a child witness' evidence can depend on the communication skills and expertise of the interviewer and/or the questioner in court. Legal processes can and should be modified to ensure that, as far as possible, child witnesses can give reliable, comprehensive information as required.

Investigations and pre-trial processes

Introduction

14.26 Although children can give reliable accounts of events that they have witnessed, they should not be treated as miniature adults when they become involved in the legal process. Children face significant pressures from the moment they become involved in the legal process as witnesses, such as multiple interviews and lengthy delays between the incident and trial.¹⁶³⁶ Investigatory and pre-hearing processes must be adjusted to the needs and capacities of the child to ensure that he or she can give the best evidence possible at the formal proceeding.

The initial interview of a child witness

14.27 Pre-trial investigations of cases involving children can require investigative interviews of potential child witnesses by police, social workers, court counsellors, doctors or lawyers. Some investigations involve interviews by a number of these professionals. For example, allegations of child abuse within the family can require investigation by family services department workers and police officers, health care providers and Family Court counsellors. The Inquiry received evidence that children in this situation are often subjected to multiple interviews over extended periods of time.¹⁶³⁷

14.28 Multiple interviews are potentially harmful to the child required to recount traumatic events and to the reliability of that child's evidence. Even when a repeatedly interviewed child is able to give accurate testimony, a belief that the child is giving over-rehearsed or contaminated evidence may diminish the child's credibility in the eyes of the court. Multiple interviews may also diminish the child's confidence and co-operation.¹⁶³⁸ In extreme cases, multiple interviews can amount to systems abuse.¹⁶³⁹

14.29 We have also been told that, even where there is a single interviewer, the questioning can be lengthy and insensitive and can involve multiple interviews conducted by a person with little experience in dealing with children.¹⁶⁴⁰ Children's evidence is important in many cases, particularly where the child's evidence is the only or the most significant evidence of alleged abuse or mistreatment. Many of these cases are strenuously contested. The investigation of abuse must be conducted so as to support the child's ability to give reliable accounts of the relevant events. The interests and the physical and emotional well-being of children must be protected during this process. All interviews of children who are potential witnesses should be conducted by people trained in questioning children, particularly when that questioning is likely to be about sensitive or traumatic subjects. In DRP 3, we proposed that national interview standards requiring this training be developed.¹⁶⁴¹ Most submissions agreed.¹⁶⁴²

14.30 Many submissions said that children should be allowed to have a support person of their choice present during any interviews, suggesting that a support person can safeguard the child from undue trauma during interviews.¹⁶⁴³ No Australian jurisdiction currently requires this, although many jurisdictions permit support persons at the discretion of the interviewing police officer or social worker.¹⁶⁴⁴ Some submissions and young people expressed concern, however, that children may be uncomfortable or unwilling to discuss sensitive issues in the presence of certain people, particularly their parents.¹⁶⁴⁵ Giving children the decision as to whether to have a support person present during some or all of the interview and the choice as to who that person should be could address this problem.

Recommendation 91. National interview standards should be developed and adopted for all interviews of potential child witnesses. These national standards should require that

- all professionals responsible for investigating and interviewing potential child witnesses have appropriate training in child psychology and development, non-misleading questioning techniques and the rules of evidence for the various proceedings in which children may be involved
- interviews with children be as short as possible and the number of interviews be kept to a minimum
- every child who is being interviewed as a potential witness, whether as a victim of abuse, assault or other criminal act or as a witness to any relevant event or occurrence, has the right to have an independent person of his or her choice present while being interviewed.

Implementation. OFC should co-ordinate the development of the national interview standards in consultation with child advocacy organisations, police, legal aid commissions, family services departments and experts in investigative interviewing of children.

Specialist investigation teams

14.31 One way of limiting multiple interviews of child witnesses is to establish appropriately trained teams of investigative interviewers to investigate abuse cases and interview children who would otherwise have to tell their stories to a number of different people. These teams would be particularly helpful where children are the alleged victims of or witnesses to actions that may result in several proceedings, such as criminal charges, care and protection proceedings and Family Court applications.

14.32 Existing initiatives internationally and in Australia could serve as a starting point for the development of these teams. In Australia, most of the initiatives have focused on joint interview teams, consisting of a police officer and a family services department worker, or on protocols between these two agencies that detail information sharing and interviewing requirements.

14.33 For example, the Northern Territory Police and the Territory Health Service have developed a protocol for a co-ordinated response to child maltreatment allegations, involving the establishment of an investigating team of a police officer and a family services department worker.¹⁶⁴⁶ The protocol's guidelines state that where the allegations concern both child protection and criminal matters the team should conduct a joint interview of the child whenever possible. The police officer has the primary responsibility for gaining evidence and the family services worker for providing a supporting or counselling role, although these roles should be determined on a case-by-case basis. This investigating team is also responsible for keeping the child and family informed about the actions proposed to be taken and for preparing the child for court should the child be required to give evidence.

14.34 In Queensland, Suspected Child Abuse and Neglect (SCAN) Teams consist of a family services department worker, a police officer, a medical representative and, if required, representatives from the Department of Education and Legal Aid. These teams co-ordinate the initial intervention in cases of alleged child maltreatment, including joint interviews of the child by the family services department worker and the police officer, and appoint a case manager to ensure that the legal requirements are met for all proceedings. Some of these teams are hospital-based and are limited to cases where the allegations are associated with medical intervention.

14.35 In 1994 NSW piloted the use of joint investigation teams (JIT) to interview child victims of sexual or physical abuse in two areas of the State. JIT include a family services department worker and a police officer, each of whom has been specially trained to deal with these cases. In April 1997 JIT were established in eight new localities.¹⁶⁴⁷ They handle only those cases where a criminal offence is alleged to have occurred.¹⁶⁴⁸ In August 1997 the Wood Royal Commission recommended that, in addition to these initiatives, NSW should trial an Expert Children's Centre, modelled on the Child Advocacy Centre in Dallas, for team-based investigation of child abuse in a single location.¹⁶⁴⁹

14.36 In Victoria, protocol arrangements between the family services department and the Victoria police allow joint interviews of children where there are reasonable grounds to believe that a child has been sexually assaulted or has incurred serious physical harm.¹⁶⁵⁰ However, co-ordination problems have been identified in the implementation of the protocols.¹⁶⁵¹ In 1995 a Victorian parliamentary committee recommended the establishment of Sexual Assault Response Teams, comprising police, 'protective advocate' (family services department worker), legal counsel and medical and counselling services, all in a single location.¹⁶⁵² It recommended that police and protective advocates have the primary responsibility for intervening to investigate allegations of child sexual assault and protect children, with the other team members having a secondary and supportive role.¹⁶⁵³ This system was essentially modelled on Stuart House, the Child Advocacy Centre in Santa Monica, California. This recommendation has not been implemented in Victoria.¹⁶⁵⁴

14.37 The Inquiry was impressed by the concept of Child Advocacy Centres as established in many jurisdictions in the United States. These centres aim to develop a comprehensive, multidisciplinary response to child abuse, to prevent or reduce trauma to children caused by multiple contacts with professionals and courts and to provide services to child victims and their families.¹⁶⁵⁵ They consist of representatives from the District Attorney, police and family services department as the core response team that investigates allegations of child abuse. They also employ a director and often additional persons are involved as trial co-ordinators or witness advocates, counsellors, doctors or nurses and mental health professionals.¹⁶⁵⁶ Child Advocacy Centres provide a single, child-friendly location for interviews and evidence collection away from hospitals and police stations, with all agencies sharing information and providing support and assistance to the individual child. They also provide continuing counselling and support for children and their families and most conduct witness support programs for child witnesses.¹⁶⁵⁷ Most Child Advocacy Centres have specially designed interview rooms with video-recording capabilities. Where possible, all interviews of the child are conducted at the centre and video-taped. Any medical examinations may also take place at the centre, with the physical evidence retained by police in the usual manner.¹⁶⁵⁸

14.38 Submissions to the Inquiry generally supported interview teams jointly investigating cases involving child abuse allegations.¹⁶⁵⁹ There was some concern, however, that team interviews could prove intimidating for children when the team included a number of people.¹⁶⁶⁰ Many of these submissions supported the method used in many Child Advocacy Centres, whereby a specially trained interviewer, employed by the centre, conducts the interview with the members of the investigation team behind a one-way mirror and able to communicate to this person the information required from the child.¹⁶⁶¹

Recommendation 92. Specialised interview teams comprising, as appropriate, a police officer and family services department worker or counsellor should deal with all allegations of child maltreatment in which multiple court proceedings are possible. These teams should have as their goal eliciting accurate and reliable information from children in a manner that allows the information to be used in a number of different proceedings (criminal, care and protection, family, civil etc). These teams should be modelled on the US Child Advocacy Centres.

Implementation. These Centres, or the appropriate interview teams, should be developed jointly by State and Territory police and family services departments, with the involvement of Victim's Services/Support organisations and other relevant agencies. OFC should co-ordinate the development of national standards for the staffing, skills and interview methods of Child Advocacy Centres or joint interview teams, in consultation with child advocacy organisations, police, DPP offices, legal aid commissions, family services departments, health and hospitals departments and experts in the field of investigative interviews of children.

Video or audio taped interviews and children's evidence

14.39 Video or audio taping of interviews with children by police or family services workers is undertaken in many jurisdictions in Australia.¹⁶⁶² This can reduce the need to conduct further interviews with the child¹⁶⁶³ and can be used to inform family services department workers, police, counsellors, legal representatives and even expert witnesses of the substance of the child's statements. In addition, taping is conclusive evidence of the manner in which the child was questioned and provides a better record of the interview than a written

account.¹⁶⁶⁴ Where a child cannot read, the tape can be used before trial to refresh the child's memory of his or her statement.¹⁶⁶⁵ A video-tape may also serve as the evidence of the child in a variety of legal forums, including in committal proceedings in criminal cases, reducing the need for the child to testify a number of times. Where there is a delay in bringing the case to trial, the video-tape can give a jury a more accurate understanding of the child at or near the time of the incident.¹⁶⁶⁶

14.40 The *Criminal Justice Act (1991)* (England and Wales) allows video-recorded interviews with children to be used as the child's evidence in chief in criminal prosecutions.¹⁶⁶⁷ An evaluation of 1199 trials involving a child witness from October 1992 to June 1994 has shown that in approximately 640 trials an application to show the video-taped interview was made and in 73% of these the application was granted. In 43% of the cases where the application was granted, that is, in 200 cases, the video was shown in court. There was no significant difference in jury verdicts between video-taped evidence and live examination in chief but children were much less anxious during the video-taped interviews than while giving live evidence at trial.¹⁶⁶⁸

14.41 In Australia video-taped interviews of child witnesses are admissible in some legal proceedings in most States and Territories but most legislation provides that, in criminal proceedings, the child witness must be available for cross-examination in court.¹⁶⁶⁹ Cross-examination is the most traumatic part of the trial for child witnesses.¹⁶⁷⁰ Where the video-tape substitutes only for the evidence in chief, the child may not have been eased into the process of giving evidence through a relatively gentle direct examination. In addition, where there is a considerable time gap between the time of the video-taped interview and the cross-examination, the cross-examiner may be able to exploit any lapses in memory that have occurred during that period.

14.42 Another problem is deciding which interview, or how many, should be taped for presentation in court as the child's evidence in chief. Children often do not disclose all relevant information at the initial interview or at any one interview.¹⁶⁷¹ Recording only those interviews in which disclosures are made can imply a bias in the maker of the tapes.¹⁶⁷² Questions also arise about the manner and procedure for recording, storing and producing the tapes¹⁶⁷³ and privacy issues for the children involved.

14.43 Many submissions to the Inquiry supported the recording of children's interviews by video-tape¹⁶⁷⁴ but others raised problems with the technology and its use.¹⁶⁷⁵ For example, one problem concerns the performance expectations of children during these video-taped interviews.

[T]he expectation is that all of a sudden [the child] is in a room with somebody [s/he] doesn't know, a child who might be 5, and he is expected to, without [preparation], tell us what happened. [The expectation is] that a child will talk about details of the most personal thing in their life right there in the next half hour or forget it...The child loses the right to have that other form of statement...[where] a police person may come in plain clothes into the child's room, may build up a relationship...[instead] they get sent to a place they've never seen before, somebody they've never met before and are expected to do it off pat.¹⁶⁷⁶

14.44 Notwithstanding the problems in using video-taped interviews as the child's evidence in chief, there are real advantages to the video or audio taping of interviews with children. The Inquiry supports the continuation of pilot interview taping programs and their evaluation. Evaluations of these programs should include research on in-court and out-of-court uses for such taped interviews, the means of interviewing children on tape and the maintenance and storage of tapes. One suggestion worth particular consideration is that each of the child's first and subsequent interviews should be video or audio taped and that video-taping a child's statement for use as the child's evidence be reserved for when the child is ready to make a full statement of the events.¹⁶⁷⁷

Recommendation 93. A multidisciplinary working group on video and audio taping of interviews with child witnesses should be convened to

- evaluate the advantages and disadvantages of various uses of taped interviews
- develop protocols to be used by interview teams in taping, storing and maintaining the audio and video tapes
- establish mechanisms to permit children to be further interviewed in relation to newly

remembered details

- propose evidentiary law reforms to allow the tapes to be used as evidence in court.

Implementation. The Attorney-General should recommend to SCAG that it convene such a multidisciplinary working group on taping interviews with child witnesses.

Video-taped pretrial hearings

14.45 Video-tape technology is also being used in other ways to reduce the traumas facing children who must give evidence in court. One option involves video-taping a child's entire evidence, including direct and cross-examination, during a pretrial hearing, deposition or other proceeding held specifically for this purpose. This video-tape is then presented at the trial as the entire evidence of the child. Some jurisdictions are currently exploring this option.

14.46 For example, Western Australia's *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) permits the video-recording of a child's evidence in chief and cross-examination before trial.¹⁶⁷⁸ Fourteen children were scheduled to give their evidence in this manner in the past eight months.¹⁶⁷⁹ The provisions recognise that some children may still be required to appear at the trial for further questioning if deemed necessary, though this has rarely occurred.¹⁶⁸⁰ This process has particular advantages for child witnesses, including better controls over the arrangements to prevent the child coming into contact with the accused or family or supporters of the accused¹⁶⁸¹ and as a means of capturing the child's evidence closer to the event.¹⁶⁸² It can also reduce the stress to a child witness by reducing the number of times he or she may come to court only to be told that the trial has been postponed. The video-tape could also be used in any retrials, rather than, or in addition to, having the child reappear to give evidence in the new trial.

14.47 Practitioners addressing the Inquiry were particularly interested in this system, seeing it as the future of children's evidence.¹⁶⁸³ We recommend that all jurisdictions permit the video recording of the entire evidence of a child witness prior to the trial. Pretrial hearings for these purposes should be conducted whenever the interests of justice require, but particularly when the child may be at risk of prejudice or trauma due to lengthy delays.

Recommendation 94. Legislation should permit the entire evidence of a child, including evidence in chief and cross-examination, to be taken prior to trial and video-taped for presentation at trial whenever the interests of justice so require.

Implementation. The Evidence Act should be amended to reflect the above provision. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The provisions in the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) are an appropriate model for this legislation.

Committal hearings

14.48 Committal hearings are meant to provide a filter in the criminal justice system, ensuring that no-one stands trial unnecessarily. Persons are required to stand trial before a jury only when a magistrate finds that there is a prima facie case against the accused.¹⁶⁸⁴

14.49 The committal also discloses to the accused the prosecution case, providing the opportunity to test the strength of the evidence of a prosecution witness,¹⁶⁸⁵ allowing a more informed decision whether to plead guilty¹⁶⁸⁶ and giving an advance view of the likely testimony at trial.¹⁶⁸⁷ Defence counsel often use the committal as a 'dress rehearsal' for the trial.¹⁶⁸⁸ The absence of a jury at committal can leave defence counsel free to pursue aggressive and intimidating tactics without concern about the effects these tactics may have on the jury's perception of their treatment of child witnesses.¹⁶⁸⁹ In addition, many defence counsel seem to proceed on the basis that the more intimidating and terrifying the committal is for a child witness, the less likely it is that a child witness will be willing or able to give evidence at the trial.¹⁶⁹⁰

14.50 Many Australian jurisdictions have attempted to address these problems by permitting or requiring paper committals,¹⁶⁹¹ by limiting the types of offences for which witnesses may be called at committal¹⁶⁹² and by permitting written or recorded statements of children to be used at committal instead of live evidence.¹⁶⁹³ However, children are still required to give evidence at committal hearings in some jurisdictions, whether because there is no legislative protection¹⁶⁹⁴ or because it is still common practice to require the attendance of child witnesses despite legislative provisions.¹⁶⁹⁵ The Inquiry heard extensive evidence that committal hearings were exceedingly traumatic for children.¹⁶⁹⁶

My children, at the time of the [committal] were 12 and 14...when my 14 year old daughter was put up to be cross-examined, she was up for 5 hours...when cross-examining her [the defence counsel] accused her of doing this for gain of money. He told her that he thought she reacted like she did because she was sleeping around. Mind you, at the time of the assault, she was 9 years old...he told her he believed something happened, he then accused her father and said her father had really done it but she was blaming this man instead...in two sentences he ruined my daughter... She came out of court, she was sick, she could not stop vomiting.¹⁶⁹⁷

I spent 3 days being examined and cross-examined [at the committal hearing] and the cross-examination was pretty brutal and the other people involved said it was one of the most brutal cross-examinations they've ever seen... I was prepared quite extensively for the committal hearing by the child care officer and a psychiatrist, but I do not think anything could have prepared me for what I went through. To this day I still tell Dr. H that if she ever asks me to recommend to a young girl to go on with the prosecution I would tell her to run south as fast as she can.¹⁶⁹⁸

DRP 3 proposed that children no longer be required to give evidence in person at committal hearings.¹⁶⁹⁹ Many submissions to the Inquiry supported this recommendation.¹⁷⁰⁰

Recommendation 95. Child witnesses should not give evidence in person at committal hearings. The rules of evidence should be amended to permit a child's written or audio or video taped statement to be produced instead of the live evidence of the child.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

Consequences of pretrial delays

14.51 There are frequently lengthy delays before matters involving child witnesses are brought to trial. A recent NSW study found that for criminal matters the average time from charge to committal was six months and from committal to trial was about 11 months.¹⁷⁰¹ Even where courts are required to give priority to criminal proceedings involving child victims, long delays are still common.¹⁷⁰² In addition to backlogs, a case may be listed for hearing on a number of occasions. In NSW approximately 30% of cases involving child witnesses are not heard on the first listing.¹⁷⁰³

14.52 Delays may be detrimental to children's evidence, prompting children to refuse to give evidence or be less impressive in the witness box than they would otherwise be.¹⁷⁰⁴ In addition, as psychological research has shown, young children's memories may be less reliable over long periods of time.¹⁷⁰⁵ All cases involving children as witnesses should be given priority in case listings and a fixed hearing date at which the child will give evidence. When delay cannot be avoided, measures such as the pre-recording of a child's entire evidence prior to trial should be arranged.¹⁷⁰⁶

Recommendation 96. When setting hearing dates, courts should give priority to cases involving child witnesses and set a fixed date for the evidence of the child. The prosecutor or legal representative for a party calling a child as a witness should be required to inform the court that a child is scheduled to appear so that the court can set an early pre-trial hearing for the video recording of the child's evidence or so that it can prioritise the matter and set the trial for a specified time rather than allocating it to a rolling list.

Implementation. The State and Territory courts, along with the federal courts, should amend their Rules and listing practices to this effect.

14.53 Delays often hamper attempts to treat children who give evidence of child abuse or other traumatic experiences. Victims of child abuse or witnesses to other traumatic events often need professional therapeutic counselling.¹⁷⁰⁷ However, it is argued that therapeutic counselling may contaminate a child's evidence and provide an opening for extensive cross-examination by defence counsel.¹⁷⁰⁸ Therapy is frequently postponed until after the trial to avoid accusations that the child's evidence has been contaminated. The longer the delay between the abuse and the trial, the longer the waiting time for these children who may need professional counselling.¹⁷⁰⁹

14.54 Many submissions to the Inquiry favoured children accessing counselling when they need it rather than when the trial dictates.¹⁷¹⁰ Several submissions were concerned, however, about trial results and cross-examination in these circumstances.¹⁷¹¹ The Inquiry considers that, consistent with CROC, the child's best interests should be paramount rather than 'winning' the trial at the expense of the child's mental health.

14.55 One solution adopted in many overseas jurisdictions is to confer a privilege on communications made for the purposes of therapeutic counselling, in recognition of the desirability of encouraging people with emotional, behavioral and psychological problems to seek assistance.¹⁷¹² NSW has recently circulated a draft bill that provides a privilege for communications made by an alleged victim of sexual assault to a sexual assault counsellor.¹⁷¹³ Evidence of the communications is not to be adduced in court unless the court gives leave. The court must not give leave unless the evidence has substantial probative value, other evidence of the matters in the communication is not available and the public interest in protecting the confidentiality of the communications or in protecting the alleged victim from harm is substantially outweighed by the public interest in admitting the evidence.¹⁷¹⁴ Should the court give leave to adduce the evidence, the court may make ancillary orders to limit the possible harm or the extent of the harm to the alleged victim.¹⁷¹⁵

14.56 Critics of a legal privilege for these communications argue that it '...deprives the judicial proceedings of information which would be relevant to the determination of the issues'.¹⁷¹⁶ However, the NSW approach permits the judge to determine the relevance and admissibility of this evidence. The legislation is not a panacea, but it does help to protect and provide counselling options for children who all too often have a real and pressing need for these services. The NSW option, when combined with early video-taping of children's evidence, can help to ameliorate some of the mischief caused to children by trial delays.

Recommendation 97. A legal privilege should be conferred on all communications between children and counsellors for therapeutic purposes.

- Evidence of the communications should only be able to be adduced in court where the court gives leave.
- The court should not be able to give leave unless the evidence has substantial probative value, other evidence of the matters in the communication is not available and the public interest in protecting the confidentiality of the communications or in protecting the alleged victim from harm is substantially outweighed by the public interest in admitting the evidence.

Implementation. The Evidence Act should be amended to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The Evidence Amendment (Confidential Communications) Bill 1997 (NSW) is an appropriate model for this legislation.

Rules of evidence

Introduction

14.57 In general, rules of evidence attempt to ensure that the trial process is fair for the parties. However, these same rules often prevent witnesses from fully explaining their evidence. They often interfere with the ability of the judge and/or jury to hear the words of a child witness and the special context in which they are spoken. Competency rules, judicial warnings regarding children's evidence, rules against hearsay and prohibitions on expert testimony and on tendency and coincidence evidence are significant ways in which children can be effectively silenced as witnesses.

14.58 The following recommendations attempt to address these problems. Some of the recommendations incorporate existing provisions of the Commonwealth Evidence Act and other State and Territory legislation. These recommendations are addressed to those jurisdictions in which the relevant amendments have not been made. Although the Evidence Act was designed to provide 'model' evidence legislation to permit a more coherent approach to the rules of evidence across jurisdictions, for a variety of reasons not all jurisdictions have followed the model. The recommendations are directed not so much to securing uniform, general evidence law as to encouraging a more appropriate approach to child witnesses across jurisdictions.

Competence

14.59 In most Australian jurisdictions the law considers certain children not competent to give sworn evidence. Most State and Territory legislatures have fixed a specific age below which children are presumed incompetent to give sworn evidence unless there is a judicial determination of a particular child's competency.¹⁷¹⁷

14.60 In making this determination, judges undertake different investigations in different jurisdictions. For example, Queensland and South Australia adhere to the traditional common law definition of competency to give sworn evidence.¹⁷¹⁸ The common law defines competency as a requirement that the child witness understand the nature of the oath. It defines this understanding as a belief in God and in divine vengeance, a formulation arising from eighteenth century cases.¹⁷¹⁹ On the other hand, Tasmania and Western Australia have followed the English approach which determines competency on the basis of a secular assessment of the witness' reliability.¹⁷²⁰ This approach requires proof of the witness' cognitive ability to distinguish between truth and falsity and an acknowledgement from the witness that he or she accepts a higher obligation to tell the truth in court than in everyday life.¹⁷²¹

14.61 The Evidence Act and the *Evidence Act 1995* (NSW) mark a clear change in the direction of the law in this area. Both Acts deal with competency without reference to children. They state that every person is *prima facie* presumed psychologically and physically competent to give sworn evidence in civil and criminal proceedings.¹⁷²² This presumption is rebutted if a person is 'incapable of understanding that in giving evidence he or she is under an obligation to give truthful evidence'.¹⁷²³

14.62 The Evidence Act recognises that a witness may be competent to give evidence about some but not all facts.¹⁷²⁴ This is particularly important for children who may have differing language skills, abilities to make inferences, conclusions or estimates or capacities to understand concepts such as time and spacial perspective.¹⁷²⁵ This approach to competency allows a young child to respond under oath to simple questions but not to questions beyond the child's capacity that cannot be reframed in simpler terms.

14.63 In all Australian jurisdictions a child who is incompetent to give evidence on oath may give unsworn evidence.¹⁷²⁶ In general terms, the law requires that the judge ascertain whether the child can understand and respond rationally to questions and give an intelligible account. Additionally, the child must promise to tell the truth. In some States there is also the additional requirement that the witness appreciate the duty or obligation that the promise entails.¹⁷²⁷ Under the Evidence Act a witness who is found incompetent may give unsworn evidence where

'...the court is satisfied that the person understands the difference between the truth and a lie; the court tells the person that it is important to tell the truth; and the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding'.¹⁷²⁸

14.64 Wherever a question regarding the competency of a witness arises, the trial judge is expected to undertake inquiries of the witness.¹⁷²⁹ The Evidence Act permits the court 'to inform itself as it thinks fit'.¹⁷³⁰ This provision allows a child's competency to be tested with the assistance of someone professionally qualified or with whom the child has a rapport. For example, expert evidence may assist the judge to determine whether a particular child is capable of understanding and responding to certain questions. As the formal surroundings of most courtrooms and the dress of the judge and counsel may be intimidating to a child and can make questioning children a difficult task,¹⁷³¹ this provision may also permit the child's competency to be tested out of court or in a modified courtroom setting.

Recommendation 98. All children should be presumed *prima facie* competent to give sworn evidence. Oaths and affirmations should be simple and in language that the particular child understands. Where questions regarding children's competency arise, courts should be able to take a flexible approach to competency testing, including obtaining expert opinion or reports.

Implementation. The Evidence Act is an appropriate model for these provisions. The Attorney-General through SCAG should encourage those jurisdictions that have not introduced legislation based on the Evidence Act to enact similar provisions.

Compellability

14.65 Subject to certain exceptions, such as the spouse of an accused in a criminal trial, every person competent to give evidence about a fact can be compelled to give that evidence.¹⁷³² Under the Evidence Act and the *Evidence Act 1995* (NSW) the child of a defendant may object to being required to give evidence in criminal proceedings, unless the proceeding involves an assault on a child or other domestic violence situations.¹⁷³³ In most other Australian jurisdictions it seems that a child who is competent to give evidence can be compelled to give evidence, regardless of the type of proceeding, just like any other person.¹⁷³⁴

14.66 The Evidence Act provides that judges may require an objecting child witness to give evidence where the nature and extent of any harm to the witness or to the relationship between the witness and the accused is outweighed by the desirability of having the evidence given.¹⁷³⁵ This test is appropriate for handling objecting child witnesses not only in criminal proceedings but also in civil proceedings and those criminal proceedings previously exempted from the right to object provisions.

Recommendation 99. The child of a party should have the right to object to being called to give evidence against that party in any criminal and civil proceeding. In deciding whether to require an objecting child to give evidence against a party, judges should apply a balancing test in which the judge looks to whether the harm to the child or to the child's relationship with a party outweighs the need for the evidence to be given.

Implementation. The Evidence Act should be amended to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

Corroboration and judicial warnings

14.67 In most Australian jurisdictions a child's sworn or unsworn evidence need not be corroborated before a person can be convicted of an offence.¹⁷³⁶ As a corollary to these provisions, a judge is not obliged to warn the jury that it is dangerous to convict a person based on the uncorroborated evidence of a child.¹⁷³⁷ However, although all jurisdictions have removed the common law's requirement that corroboration warnings be given, some jurisdictions still permit warnings about the unreliability of children's evidence. In addition, judges generally have a discretion to comment on a particular child's evidence considering the circumstances of the specific case, just as judges may comment on the evidence of any witness.¹⁷³⁸ Judges continue to give strong warnings about child witnesses, showing that children's evidence continues to be viewed with suspicion.

14.68 In Western Australia, Tasmania and the Northern Territory judges are prohibited from warning the jury that it is unsafe to convict on the uncorroborated evidence of a child by implying that children are an unreliable class of witness.¹⁷³⁹ In Victoria warnings that children are considered an unreliable class of witness are prohibited whether or not made in connection with any uncorroborated evidence of a child.¹⁷⁴⁰ In South Australia judges are not required to warn a jury of the dangers associated with children's uncorroborated evidence but there is no prohibition on doing so.¹⁷⁴¹

14.69 The NSW and federal Evidence Acts permit judges to warn juries about evidence that is 'of a kind that may be unreliable'.¹⁷⁴² In fact, a warning must be given where '...the reliability of the evidence may be affected by...the age of the witness' and a party requests that a warning be given.¹⁷⁴³ Under these provisions

the judge must state that the evidence may be unreliable, give the reasons why and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.¹⁷⁴⁴

14.70 Judicial warnings concerning the evidence of children continue to be standard practice in many jurisdictions despite these changes in the law.¹⁷⁴⁵ For example, Western Australia's Court of Criminal Appeal recently held that a seven year old girl should not have been allowed to give sworn evidence in a criminal trial about an incident of domestic violence. The court held that the trial judge should have permitted her to give unsworn evidence and then warned the jury about convicting on the uncorroborated evidence of the child given the circumstances of this case (the child had shown some hesitation about whether she really understood the difference between the truth and a lie).¹⁷⁴⁶ Parker J went further than the other two Justices, stating that the jury should have been warned about the '...dangers inherent in the evidence of a young child'. He based this on his assumption that the evidence was that of '...a seven year old child describing events that could only have been observed by her in circumstances of considerable emotional disturbance'.¹⁷⁴⁷ This was despite s 106D of the *Evidence Act 1906* (WA) that specifically prohibits judges from suggesting to the jury that children are classified as unreliable witnesses or that their evidence requires corroboration.

14.71 Submissions to the Inquiry deplored judicial warnings that effectively discriminate against child witnesses, particularly where those warnings are based on individual judges' assumptions and prejudices regarding the ability of children to give reliable evidence. It was repeatedly suggested that judges should be prohibited from giving these warnings.¹⁷⁴⁸

14.72 In *Murray v R*,¹⁷⁴⁹ the NSW Court of Criminal Appeal suggested that, in exercising a discretion to comment on the evidence of a complainant in a sexual offence case, judges should warn the jury that

...in all cases of serious crime it is customary for Judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in.¹⁷⁵⁰

14.73 This phrase has become a common form of comment for NSW judges in sexual assault cases.¹⁷⁵¹ A similar approach could be taken when judges comment on the evidence of child witnesses.¹⁷⁵² Where a judge decides to exercise a discretion to comment on the evidence given by a child, the *Murray* formula should be the only permissible form of comment.

Recommendation 100. Corroboration of the evidence of a child witness should not be required. Judges should be prohibited from warning or suggesting to the jury that children are an unreliable class of witness and that their evidence is suspect.

- Judicial warnings about the evidence of a particular child witness should be given only where (1) a party requests the warning and (2) that party can show that there are exceptional circumstances warranting the warning. Exceptional circumstances should not depend on the mere fact that the witness is a child, but on objective evidence that the particular child's evidence may be unreliable.
- Warnings should follow the *Murray* formula to reduce the effect of an individual judge's bias against, or general assumptions about, the abilities of children as witnesses.

Implementation. The Evidence Act should be amended to reflect these provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

Expert evidence

14.74 Expert witnesses often give evidence in cases involving children. In family law or care and protection cases, experts are regularly called upon to describe the effects of certain types of abuse and to correlate this with injuries to a particular child or to give their opinion about the child's psychological or physical health.

14.75 However, little use is currently made of expert opinion evidence regarding child victim witnesses in criminal proceedings,¹⁷⁵³ perhaps because the prosecution cannot generally call a witness solely for the purpose of bolstering the credibility of the complainant.¹⁷⁵⁴ Issues surrounding patterns of disclosure or behaviour in child victims may also be considered to be within the 'common knowledge' of a jury¹⁷⁵⁵ or not a

fit subject for expert evidence.¹⁷⁵⁶ In a number of recent cases in Australia expert evidence about such matters as child sexual abuse accommodation syndrome or the behaviour of child victims of sexual abuse has been excluded for these reasons.¹⁷⁵⁷

14.76 The Evidence Act has abolished the common knowledge rule,¹⁷⁵⁸ remedying the common law restrictions in this regard. This is particularly important for cases involving child victim witnesses, as a child's behaviour on the witness stand or during the investigation process may be contrary to a jury's expectations of an 'abused' child's behaviour.¹⁷⁵⁹ A US study suggests that expert testimony about the characteristics of sexually abused children does affect jurors' decision making in both civil and criminal cases.¹⁷⁶⁰ It is not entirely clear, however, that the Evidence Act permits the type of expert evidence that would be needed to explain a child victim witness' behaviour, such as evidence of patterns of children's disclosure in abuse cases and the effects of child abuse on children's behaviour or demeanour in and out of court.¹⁷⁶¹

14.77 This kind of evidence has been admitted occasionally to rehabilitate the credibility of a witness after significant impeachment during cross-examination.¹⁷⁶² However, the current wording of the Evidence Act may prevent the admission of rehabilitative evidence of this sort.¹⁷⁶³ There may also be occasions where this kind of expert evidence should be lead before the child is cross-examined or presented as a witness rather than waiting until the child witness is discredited during cross-examination.¹⁷⁶⁴ The rules of evidence should clearly indicate that expert evidence, on such issues as patterns of children's disclosures in abuse cases or the effects of child abuse on children's behaviour or demeanour in or out of court, is admissible to explain why general assumptions about the behaviour of a child witness or a certain line of cross-examination might not reflect adversely on a particular child witness' credibility.¹⁷⁶⁵

Recommendation 101. Expert opinion evidence on issues affecting the perceived reliability of a child witness should be admissible in any civil or criminal proceeding in which abuse of that child is alleged. In particular, evidence that may assist the decision maker in understanding patterns of children's disclosure in abuse cases or the effects of abuse on children's behaviour and demeanour in and out of court should be able to be admitted.

Implementation. The Evidence Act should be clarified to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. This legislation should in particular mirror the Evidence Act's abolition of the common knowledge and ultimate issue rules.

Hearsay and evidence of recent complaint

14.78 The rule against hearsay evidence provides that evidence of a previous statement or representation by a person is not admissible to prove the fact that the person intended to assert by the statement or representation.¹⁷⁶⁶ Out-of-court statements are considered unreliable evidence of the facts stated because of the lack of an oath, the absence of cross-examination and the possibility of fabrication.¹⁷⁶⁷ However, hearsay evidence is often relevant to proceedings. For example, evidence of prior complaints may be admissible because they could 'relate to a fact in issue', namely whether the event had occurred.¹⁷⁶⁸ Hearsay evidence may be particularly important in cases involving child complainants. Many allegations of criminal acts against children are not prosecuted or do not proceed because the child is presumed incompetent to give evidence or does not understand the duty to tell the truth in court, or because the trauma of testifying at trial prevents the child from giving evidence satisfactorily or at all.¹⁷⁶⁹ The ability to introduce the hearsay statements of the child, in addition to or instead of the evidence of the child, might address these problems.

14.79 Where a child witness' previous statement was made in certain circumstances, it may fall into an exception to the rule against hearsay. There are exceptions for contemporaneous and spontaneous statements about the maker's health, feelings, sensations, knowledge and state of mind¹⁷⁷⁰ or statements made when the asserted fact was fresh in the maker's mind.¹⁷⁷¹ In sexual assault cases, hearsay statements by a complainant are admissible under the common law as 'recent complaint' evidence, to support the complainant's credibility, if the complaint was made spontaneously at the first reasonable opportunity.¹⁷⁷² Some children's initial disclosures of abuse or descriptions of an event fall into these categories. However, as patterns of disclosure

among child victims of abuse often include disclosure of small pieces of information over periods of time, the current exceptions are not sufficient to get all relevant previous statements by children into evidence to prove the fact in issue at a trial.

14.80 Some jurisdictions provide additional exceptions to rules against hearsay when children are involved in particular proceedings. For example, in Queensland documentary evidence of statements by children aged under 12 that tend to establish a fact are admissible as evidence of that fact.¹⁷⁷³ Care and protection proceedings in all States and Territories are not bound by the rules of evidence.¹⁷⁷⁴ The Family Law Act also suspends the rule against hearsay in relation to children's evidence in Family Court proceedings.¹⁷⁷⁵

14.81 The Supreme Court of Canada in *R v Khan* developed a special exception to the rule against hearsay for children's statements.¹⁷⁷⁶ It held that hearsay statements by a child regarding the issue at trial may be admitted in evidence provided that admission of the statement is necessary and the hearsay statement is reasonably reliable. The admission is 'necessary' if the court decides that the child is incompetent to give either sworn or unsworn evidence, the child is unable or unavailable to testify or if the judge is satisfied, based on psychological assessments of the child, that giving evidence might be traumatic for the child or harm the child.¹⁷⁷⁷ In later cases, lower Canadian courts further explained the necessity requirement, holding that necessity could be established by the extreme youth of the child¹⁷⁷⁸ or by the inability of a young child, when appearing as a witness, to give a coherent or comprehensive account of the events.¹⁷⁷⁹

14.82 The Inquiry recommends an additional exception to the rule against hearsay similar to that in *R v Khan*.¹⁷⁸⁰ However, in the interests of fairness to the accused, no person should be convicted of an offence based solely on the evidence of one statement admitted under this exception. Some corroborating evidence, for example other statements by the child, medical evidence or expert psychological evidence, must also be required.

Recommendation 102. Evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any civil or criminal case involving child abuse allegations, where admission of the hearsay statement is necessary and the out-of-court statement is reasonably reliable. A person may not be convicted solely on the evidence of one hearsay statement admitted under this exception to the rule against hearsay.

Implementation. The Evidence Act should be amended to this effect. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

Tendency and coincidence evidence and joinder of trials

14.83 Rules restricting the use of tendency (propensity) evidence and coincidence (similar fact) evidence are designed to ensure that, particularly in criminal trials, a person accused of committing certain acts receives a fair trial. The Evidence Act has essentially restated the common law restrictions on the use of tendency and coincidence evidence.

14.84 The Evidence Act provides that evidence of a person's character, reputation or conduct is generally not admissible to prove that he or she has a tendency to act in a particular way.¹⁷⁸¹ However, the tendency evidence will be allowed if the party wishing to adduce it has given reasonable notice in writing to the other party of that intention or if the court considers that the evidence would have significant probative value.¹⁷⁸² Furthermore, in criminal trials tendency evidence about a defendant can be adduced by the prosecution only if its probative value substantially outweighs any prejudicial effect that it may have on the defendant.¹⁷⁸³ Such evidence was permitted in *Pfennig v R*.¹⁷⁸⁴ Evidence was permitted in the defendant's trial for the murder of a boy 'M' that the defendant had abducted and sexually abused another boy 'H' one year after M disappeared. H's abduction was described as evidence that the defendant had a propensity to abduct and sexually abuse young boys and showed a tendency in the defendant which fitted very closely with the requisite tendency of the murderer.¹⁷⁸⁵

14.85 The Evidence Act also provides that evidence that two or more related events occurred (similar fact or coincidence evidence) is generally not admissible to prove that, because of the improbability of the events

occurring coincidentally, one person must have acted in both cases.¹⁷⁸⁶ Again, the evidence will be allowed if the party wishing to adduce it has given reasonable notice in writing to the other party of that intention or if the court considers that the evidence would have significant probative value.¹⁷⁸⁷ Again, in criminal trials coincidence evidence about a defendant can be adduced by the prosecution only if its probative value substantially outweighs any prejudicial effect that it may have on the defendant.¹⁷⁸⁸

14.86 Coincidence evidence will be allowed, however, only if the party can demonstrate that the two or more events in question are 'substantially and relevantly similar' and that 'the circumstances in which they occurred are substantially similar'.¹⁷⁸⁹ At common law, phrases such as 'strikingly similar', 'underlying unity', 'unusual features', 'system' or 'pattern' have been used to describe the improbability of two events occurring by coincidence.¹⁷⁹⁰ The High Court has commented on these terms in a few cases, all with the result that these requirements combined to exclude evidence about abuse of more than one child and to prevent the joinder of charges in a single trial.¹⁷⁹¹ In addition, in *Hoch v The Queen*¹⁷⁹² the High Court stated that, where there is a sufficient relationship between the victims and a motivation for possible concoction of the charges, one explanation for the similarity of events described by the victims is joint concoction of the offences. In such cases the evidence of one charge should not be admitted as evidence in the trial of other charges.

14.87 Rules against tendency and coincidence evidence play a significant part in criminal trials involving child witnesses, particularly when an accused is charged with sexually assaulting several children.¹⁷⁹³ In *DeJesus v R*,¹⁷⁹⁴ the High Court held that sexual offences form a special class of offences that should almost always be tried separately except where evidence on one count is admissible upon the other count under the 'substantially and relevantly similar' test. In addition, a possibility of joint concoction based solely on a 'sufficient relationship between the victims' as described in *Hoch v R*¹⁷⁹⁵ necessarily arises when the child victims are siblings or friends and are abused by a parent, relative, family friend or teacher. Together, these rules mean that separate trials are usually necessary in these cases and that the children involved may have to give evidence numerous times: in their own trial they must give evidence about what happened to them and in the other trials they must give evidence about what they witnessed happening to other children.

14.88 Submissions to the Inquiry demonstrated the problems these rules cause for child witnesses, particularly for siblings who give evidence in their own and their sibling's trials regarding abuse by the same offender. One example was described by a mother of two children in this very situation.

The fact that there were two trials meant a duplicity [sic] of stress for my children. As it stands now, one daughter's trial has been completed with a Not Guilty verdict brought in...[it was] very distressing for the girls to go back once more for the second trial two days later — back to back. The second trial was mistrialed after two days...Now my children have to go back to court [on a specific date] to suffer this hell once again.¹⁷⁹⁶

14.89 In addition, these rules mean that when the complainant's credibility is attacked, evidence that would support his or her credibility is disallowed and the jury are kept in ignorance of the fact that there are multiple allegations of abuse against the accused.¹⁷⁹⁷ As one submission noted, '[this] is a situation which would appear to offend common sense and experience, and has the potential to cause real injustice'.¹⁷⁹⁸

Recommendation 103. Multiple proceedings involving more than one incident concerning the same child victim and accused or more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings over long periods of time and the problems associated with rules against tendency and coincidence evidence. To this end, joinder rules and rules against tendency and coincidence evidence should be reviewed in light of the hardship these rules cause to particular child victim witnesses.

Implementation. The Attorney-General should recommend to SCAG that it convene a working group to conduct this review.

The child witness in the courtroom

Introduction

14.90 The legal system has traditionally given little support and preparation to child witnesses. Within the courtroom children are often subject to harassing, intimidating, confusing and misleading questioning. In addition, court buildings do not provide privacy for the child or promote the safety of the child outside the courtroom. A significant amount of evidence was presented to the Inquiry that children are frequently traumatised by their court appearance due to these factors. The abuse many children suffer is compounded by the abuse perpetrated by the legal system itself.

Understanding the process

14.91 If witnesses are prepared for and understand the purpose and process of the trial, they are better able to give evidence.¹⁷⁹⁹ This is of particular concern in cases involving child witnesses where the child's evidence might be the only or the most substantial evidence against an accused person. However, children often appear in court knowing very little about the proceedings, the roles of the various professionals involved and their own role within this setting. For example, one young person spoke to the Inquiry about appearing as a witness in a criminal trial. He described the prosecutor as 'his' solicitor and was distressed that the prosecutor did not appear to protect his interests during the trial.¹⁸⁰⁰

14.92 Parents often have difficulties explaining the trial process to their child due to their own lack of knowledge. The Inquiry was told that, in criminal trials, prosecutors rarely have enough contact with children to brief or prepare them for the process of giving evidence.¹⁸⁰¹

Recommendation 104. Age appropriate literature and other forms of information should be developed for all child witnesses to explain various proceedings, possible parties to the proceedings, the roles of each person involved in the process, the types of questions that may be encountered and the reasons for them and the meaning of common terms, legal and otherwise, that may be encountered by the child while giving evidence.

Implementation. Courts should develop this information in conjunction with the relevant State and Territory authorities. This information should not be considered a substitute for the witnesses preparation and support programs discussed in Recommendation 106.

The role of the prosecutor

14.93 Children should always meet the person who will be calling them as witnesses. That person's role and the types of questions that will be asked once in court should be carefully explained to the child. The Inquiry was informed that child witnesses in criminal trials often do not meet the prosecutor until just before giving their evidence.¹⁸⁰² One submission suggested that this may be a result of prosecutors adhering to the view that the witness is not 'their' witness and that to meet with witnesses may be improper.¹⁸⁰³ In addition, the same person or prosecution team rarely handles the one criminal case from beginning to end. Both these factors add to the distress of child witnesses. Children can be reluctant to talk to yet another stranger.¹⁸⁰⁴ In addition, prosecutors who have no actual knowledge of a child and his or her circumstances can unknowingly be insensitive and cause upset, adversely affecting the child and the child's evidence.¹⁸⁰⁵

14.94 Western Australia has piloted a scheme whereby the DPP becomes involved in indictable offence cases at the election date, before the committal hearing. In these situations, the DPP has been able to meet and develop a rapport with child witnesses early in the case and to develop an understanding of the abilities of and protections needed by individual child witnesses at trial.¹⁸⁰⁶ Similarly, the Brisbane Central Committals Project piloted the assumption of responsibility by the DPP for prosecuting all matters listed for committal in the Brisbane Central Magistrates Court from 13 July 1995 to 31 August 1996.¹⁸⁰⁷ In NSW committals have been handled by the DPP rather than police prosecutors since 1990. Numerous reports have recommended that DPPs become involved in cases before committal and prosecute committal hearings in the place of police prosecutors.¹⁸⁰⁸ While the Inquiry envisions that child witnesses should not be required to

give evidence at committals, these proposals provide an appropriate method of facilitating better understanding between the child and the DPP.

Recommendation 105. Prosecutors or legal representatives for parties presenting the child as a witness should always meet the child prior to the court appearance and should attempt to establish a rapport. Wherever possible the same prosecution team should conduct the case at committal and trial in a way that minimises the number of people involved in the process of preparing and presenting the child witness.

Implementation. The Attorney-General through SCAG should encourage the development of practice directives for federal, State and Territory DPPs to this effect.

Witness preparation and support

14.95 In addition to these initiatives, there is a need for programs and particular arrangements to prepare children adequately for the experience of giving evidence. A few submissions to the Inquiry suggested that child witnesses should have a legal advisor appointed to assist the child through the process of proceeding with a criminal complaint and appearing as a witness.¹⁸⁰⁹ Certainly, a legal representative could help a child make an informed decision about whether to proceed with a complaint,¹⁸¹⁰ provide specific information to the child about what happens in court, advocate on the behalf of the child with prosecutors and others before the child goes to court and undertake related legal work on behalf of the child, for example in civil, family law and compensation proceedings.¹⁸¹¹ However, while these functions are appropriate for a lawyer, witness support is essentially a task for a counsellor.

14.96 Some jurisdictions have initiated specialised programs to prepare witnesses, including child witnesses, for giving evidence and to reduce anxiety and psychological trauma associated with trial proceedings. These support services are located in the courts or Departments of Justice, DPPs, family services departments or outside the legal system. They may be staffed by social workers, legal personnel or specially trained volunteers. The services offered include some or all of the following: trial preparation and counselling, court visits, liaising with prosecutors or courts to keep the child informed of the progress of the case, attendance in court as the child's court companion and assistance in the preparation of Victim Impact Statements. These programs are generally confined to assisting witnesses in criminal proceedings.

14.97 Some agencies, such as Protect All Children Today (PACT) in Queensland and the Victim Support Service in South Australia, train volunteers to assist child witnesses by providing information, preparation and support, including acting as in-court companion for the child.¹⁸¹² The witness support services in Victoria and NSW are similar, although operated by the DPP rather than volunteers. Other services, such as the Youth Advocacy Centre in Queensland, offer confidential legal advice and assistance as well as emotional support and practical court support.¹⁸¹³

14.98 The Inquiry was particularly impressed with the Child Victim Witness Service in Western Australia. This service provides individualised pre-trial preparation, trial assistance and post-trial debriefings for children who give evidence in court.¹⁸¹⁴ The preparation process includes keeping the child and family informed of the progress of the case and explaining the trial process to the child, including the meaning of 'reasonable doubt' and the roles of the judge, the lawyers and the court staff. The child is assisted in choosing a court companion to come to court with him or her (usually not the worker) and is debriefed after giving evidence. The worker does not provide 'therapeutic' counselling.¹⁸¹⁵

14.99 The Inquiry heard evidence that witness support workers who assist child witnesses are often viewed with suspicion, particularly by the defence. It is often alleged that they have 'coached' the child or contaminated the child's evidence.¹⁸¹⁶ To minimise these problems, witness support services should ensure that their workers do not discuss with the child the facts of the case or the child's evidence. The experience of Western Australia's Child Victim Witness Service is that in fact many children are quite relieved that they are not expected to talk about the allegations with the witness support worker.¹⁸¹⁷

14.100 Where Child Advocacy Centres, discussed at paragraph 14.37, are established to provide a multidisciplinary investigation of child abuse allegations, these centres can also provide the location for witness support and preparation. In the United States, many of these centres employ counsellors, trial co-ordinators or victim advocates who undertake many of the functions of the Western Australian Child Victim Witness Service. However, our recommendations concerning witness support and preparation ought to be implemented whether or not Child Advocacy Centres are established in Australian jurisdictions.

Recommendation 106. Child witnesses should have the right to assistance, support and preparation for the experience of giving evidence.

- Specialist child witness support units should be established to undertake these functions. These services should be staffed by trained counsellors, although this would not preclude the use of volunteers. They should provide individualised assistance to children appearing as witnesses in civil and criminal proceedings.
- The functions of support units should include
 - explaining the court process and preparing the child for the experience of giving evidence
 - keeping the child informed of the progress of the case and liaising with prosecutors, solicitors and police on behalf of the child
 - accompanying the child to court or arranging for a court companion of the child's choice
 - making necessary referrals for the child and his or her family to therapeutic counselling, medical care and other services necessary to assist the child.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to establish specialist child witness support units in all jurisdictions. The Western Australian Child Victim Witness Service is an appropriate model for these units. In light of current child witness support programs in some jurisdictions, OFC should co-ordinate the development of national standards for child witness support units in consultation with the relevant State and Territory agencies.

Court companions

14.101 Many children giving evidence in criminal trials may attend court with a court companion who comes into court with the child witness to provide emotional support. The court companion may be a parent, trusted family member, friend or counsellor with a witness support unit, although in some jurisdictions this person is someone unknown to the child and appointed by the court.¹⁸¹⁸ This person should always be someone the child trusts, who is able to comfort the child and reduce any anxiety that the child might experience while giving evidence. A court companion or 'support person' may attend court with a child witness in all States and Territories, generally at the discretion of the judge.¹⁸¹⁹ However, the Inquiry heard evidence that court companions are often required to sit at the back of courtrooms rather than close to the child while the child gives evidence.¹⁸²⁰ Provisions permitting court companions will not assist child witnesses effectively unless those court companions can sit close enough to the child to lend real and productive emotional support.

Recommendation 107. Children should be allowed to choose at least one person who may come into the courtroom with them while giving evidence. This person should be permitted to sit next to the child while the child gives evidence.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact legislation to this effect.

CCTV and screens

14.102 Child witnesses are particularly fearful of confronting the accused when they come to court.¹⁸²¹ For many child victim witnesses, this may be the first time they have seen this person since the disclosure of the alleged offences.¹⁸²² The Inquiry was told of instances where the accused attempted to intimidate the child witness by making threatening faces or gestures in court.¹⁸²³ Problems such as these are not limited to child victim witnesses in criminal trials. The same stresses can affect children who witness other criminal events and child witnesses in various civil proceedings.¹⁸²⁴

14.103 In recognition of these problems many States and Territories allow children and other vulnerable witnesses to give evidence by CCTV or from behind a screen. In NSW under the *Crimes Amendment (Children's Evidence) Act 1996* all child witnesses, including to a limited extent children giving evidence in trials in which they are also the accused, have the right to give their evidence in this manner in any criminal or civil proceeding relating to a 'personal assault offence', in complaints for apprehended violence orders or in proceedings before the Victims Compensation Tribunal arising from the commission of a personal assault offence.¹⁸²⁵ In Western Australia, Tasmania and the ACT, CCTV is the presumed method by which child victims give evidence in some criminal proceedings.¹⁸²⁶ Other jurisdictions allow CCTV or screens for child witnesses upon the application of a party if the child is shown to be a 'special witness'.¹⁸²⁷

14.104 The use of CCTV and screens has many benefits for child witnesses. The ALRC's evaluation of children's use of CCTV in the ACT revealed that children who used CCTV when they wanted to do so were less anxious and more effective than those who did not use the system even though they wished to.¹⁸²⁸ The professionals and parents of children in that study all said that CCTV reduced stress on children as they gave evidence and some believed that the use of CCTV permitted some cases to proceed that may not have proceeded without it.¹⁸²⁹

14.105 Despite these documented benefits, the use of screens and CCTV has been contentious. CCTV may not permit the jury to see the size of the child and so it may leave the jury unaware of the vulnerability of the child as against the accused.¹⁸³⁰ Some prosecutors say that a child's evidence will be seen by a jury as less credible if not adduced in the traditional manner.¹⁸³¹ In addition, some prosecutors are said to believe that the appearance of a visibly distressed child witness makes a jury more likely to convict.¹⁸³² If correct, these statements of prosecutors' views are of great concern. They reflect an attitude that gives greater priority to winning a conviction than to the well being of the child victim or witness.

14.106 On the defence side, a key argument against the use of CCTV is that it may cause the jury to prejudge the accused.¹⁸³³ However, judges can give a standard direction to juries at the commencement of any trial in which CCTV or a screen is used that this is standard procedure when children are giving evidence in a criminal court and that the jury cannot draw any inferences from the use of these devices. This is required in the ACT, NSW and Western Australia. Of course, CCTV and screens must be standard procedure if this direction is to be accurate.

14.107 A study of criminal trials in Western Australia found that most jurors understood the reasons why CCTV or screens were used for child witnesses and that the presence of this equipment did not make it more difficult to reach a verdict.¹⁸³⁴ Only 15% of jurors surveyed said that a verdict would have been easier to reach had the child given evidence in the courtroom. Approximately half the jurors surveyed said that they had trouble judging the size of a child witness who gave evidence by way of CCTV although most also said that seeing the child in the courtroom would not have made their deliberations easier. The CCTV equipment was particularly effective to amplify children's voices, however, making them easier to hear and understand.¹⁸³⁵

14.108 Evidence to the Inquiry indicated various problems in jurisdictions where use of CCTV is discretionary rather than presumptive. Children often qualify their willingness to give evidence, saying for example 'I'll do it, as long as he's not in the room'.¹⁸³⁶ But they may be pressured into going ahead with a complaint even though giving evidence by CCTV or from behind a screen is not guaranteed.¹⁸³⁷ Prosecutors often do not make applications to use CCTV or screens until the child is about to give evidence, leaving the child anxious and uncertain.¹⁸³⁸ Sometimes children are not even informed of the possibility that they can give evidence by CCTV and no application for its use is made.¹⁸³⁹

14.109 The ALRC's report on children's evidence and CCTV recommended that all child witnesses have the right to use CCTV or other screening facilities where CCTV is not available.¹⁸⁴⁰ This Inquiry reiterates that there should be a presumption for the use of CCTV in all cases involving child witnesses, with the child having the right to decide whether to use the facilities.

Recommendation 108. There should be a presumption in favour of the use of CCTV in all matters,

criminal and civil, involving child witnesses. Where CCTV is not available, use of a screen should be the standard procedure.

Implementation. The Evidence Act should be amended to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The provisions in the *Crimes Amendment (Children's Evidence) Act 1996* (NSW) are an appropriate model for this legislation.

Recommendation 109. The decision not to use CCTV or a screen is one for the child. Where a child does not wish to use these facilities, the prosecution or party calling the child as a witness should be required to apply to the court for leave to present the child in open court. The judge should ensure that the child has given informed consent to the application.

Implementation. The Evidence Act should be amended to this effect. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The provisions in the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) are an appropriate model for this legislation.

Legal language and questioning in court

14.110 The language and the formalities of the courtroom are alien and incomprehensible to most children and can intimidate and confuse many child witnesses.¹⁸⁴¹ These problems are particularly acute during cross-examination.¹⁸⁴² Lawyers often use confusing sentence structure deliberately during cross-examination to confuse the witness.¹⁸⁴³ Analyses of trials involving child witnesses show that cross-examination questions consistently include language that is well beyond the everyday experiences of most children.¹⁸⁴⁴ In addition, the highly structured interrogation used in cross-examination often calls for child witnesses to repeat certain answers and to focus on minute details.¹⁸⁴⁵ Questions are asked in such a way as to preclude all but a 'yes' or 'no' response and may address events out of time sequence.¹⁸⁴⁶ Lawyers also frequently interrupt witnesses to restrict their accounts and to retain tight control over their testimony. These techniques can have the effect not only of preventing a child witness from describing events in the order in which the child remembers them but also of maximising the possibility of confusing the child and of contaminating the child's memory.¹⁸⁴⁷ Indeed, these questioning techniques are used for this very purpose.¹⁸⁴⁸

14.111 The purpose of cross-examination in an adversarial system is properly an attempt to create reasonable doubt by revealing inconsistencies in testimony, ferreting out untruthful testimony and even discrediting the witness. However, the Inquiry heard significant and distressing evidence that child witnesses are often berated and harassed during cross-examination to the point of breakdown.¹⁸⁴⁹ As one commentator has said,

[c]ross-examination is that part of the proceedings where the interests and rights of the child are most likely to be ignored and sacrificed.¹⁸⁵⁰

For example, one young person described to the Inquiry her experiences as a witness in a criminal trial.

When I asked for clarification of questions, I was made to feel stupid. He [the defence barrister] would say to me 'But don't you do English at school? Don't you understand what these words mean?' And he would barrage me with so many questions and figures and dates and names I was just lost...[he] made me feel very small and intimidated. So by the end I just stopped asking for clarification and as a result of that gave answers to questions that I just didn't understand...[and] the questions that the defence was allowed to ask: the detail — the absolutely embarrassing detail that he proceeded to go into again and again — it just blew me away. It was just so embarrassing to be up there on the stand in front of 12 members of the jury who were staring at me and these detailed, embarrassing, sexual questions were being asked over and over again, and when I gave an answer, he would say 'I'm sorry, can you repeat that?' and I would say it again and he would say 'I'm sorry, I just didn't hear that. Could you repeat it again?' I know it's just a tactic, but it worked — it scared the hell out of me!¹⁸⁵¹

No child can be expected to give effective evidence under these circumstances. The contest between lawyer and child is an inherently unequal one. Child witnesses are often taken advantage of because they can be easily confused and intimidated, because they are unable to match the linguistic skills of experienced lawyers or because, unlike the lawyer, they are in a hostile, alien environment. These problems were consistently addressed in submissions to the Inquiry.¹⁸⁵² They are clear examples of the legal abuse of children.

14.112 Cross-examination is not the only problem facing children giving evidence. As one commentator has noted, 'magistrates, prosecutors and judges all use language which does not admit the world of the child and does not allow or enable the child to present her evidence in the most convincing way'.¹⁸⁵³ Some children find the experience of examination in chief and re-examination just as traumatic as that of cross-examination, particularly where the child misunderstands the role of the prosecutor.¹⁸⁵⁴ Most lawyers, magistrates and judges are not trained in talking to children and lack the necessary language, sensitivity and skills to elicit a coherent account from the child in courtroom interrogations.

14.113 Some jurisdictions have legislated for the appointment of 'child interpreters' who can interpret questions in language that a child can understand or who can interpret the child's answers for the court.¹⁸⁵⁵ These interpreters may be able to shield child witnesses from the confusion and intimidation caused by incomprehensible questions. However, many submissions to the Inquiry opposed them, considering them a poor substitute for requirements that judges and lawyers themselves have training in appropriate skills for dealing with children.¹⁸⁵⁶ Specialist pediatric workers in the medical profession receive such training and so too should those in the legal profession who have regular dealings with children. This training should include not only communication skills but education about the physical and emotional capacities of children to give evidence over long periods of time.

14.114 Some submissions suggested that allowing children to give evidence in a narrative format might reduce the problems.¹⁸⁵⁷ This would be helpful, but it would not solve the problems associated with cross-examination. Other submissions suggested that the adversarial system itself is the cause of the problems and as such is inappropriate in cases involving child abuse. They suggested that an informal tribunal conducting proceedings similar to a coronial inquiry should be used instead.¹⁸⁵⁸ However, because the rights of an accused could be decisively affected by the findings of such a tribunal, this type of system violates the doctrines of separation of powers and the right to a fair trial. In federal cases, it could be unconstitutional. There are several High Court authorities which stand firmly against such an initiative.¹⁸⁵⁹

14.115 Magistrates and judges are meant to be 'referees' for a fair trial. They therefore have particular responsibility to ensure that child witnesses understand the questions asked and are not harassed or intimidated by tone of voice, aggressive questioning, incomprehensible language and unfair or abusive treatment. Judicial officers should ensure children have appropriate breaks and are not questioned for excessive periods of time. Rules of evidence in each jurisdiction already contain provisions to prevent undue badgering or harassment of witnesses,¹⁸⁶⁰ as do many legal professional association rules and guidelines.¹⁸⁶¹ These can provide child witnesses with some protection against harsh, intimidating and confusing questioning. Most rules make no explicit recognition of the particular vulnerability of child witnesses, however. In addition, evidence to the Inquiry indicates that counsel, magistrates and judges rarely intervene to enforce these rules.¹⁸⁶² They tolerate, or even perpetuate, child abuse by the legal system.

Recommendation 110. Guidelines and training programs should be developed to assist judges and magistrates in dealing with child witnesses. The guidelines and training should include

- standard periods of time beyond which child witnesses of various ages should not be expected to give evidence in chief or to manage continuous cross-examination without a break
- standard length of breaks needed by child witnesses of various ages
- examples of aggressive or confusing examination tactics so as to enable judges and magistrates to recognise and prevent aggressive, intimidating and confusing questioning
- examples of language and grammar inappropriate to the age and comprehension of child witnesses so as to enable judges and magistrates to ensure questions are stated in language that is appropriate to the age and comprehension of the child witness.

Implementation. The Australian Institute of Judicial Administration (AIJA) should develop such guidelines and training programs for all relevant courts in consultation with experts in the area of child witnesses.

Recommendation 111. All prosecution staff who have contact with child witnesses should receive training in the use of age appropriate language for child witnesses, children's developmental stages and the possible effects of giving evidence on children of various ages.

Implementation. Federal, State and Territory DPPs should ensure appropriate training for all prosecution staff having contact with child witnesses. Where appropriate, child witness units should be developed in the office of each DPP.

Recommendation 112. The advocacy and professional conduct rules incorporated in barristers' and solicitors' rules should specifically proscribe intimidating and harassing questioning of child witnesses. Lawyers should be encouraged to use age appropriate language when questioning child witnesses.

Implementation. Law Societies and Bar Associations should be encouraged to amend their rules to this effect.

Physical aspects of the courtroom and its facilities

14.116 The appearance of court personnel and barristers in wigs and gowns may confuse and intimidate child witnesses, especially very young children.¹⁸⁶³ The presence of members of the public in court may also cause them distress, particularly while giving evidence about personal or embarrassing details.

14.117 In addition, the design of many court buildings can intimidate witnesses, particularly victims of crime and children.¹⁸⁶⁴ Long periods spent waiting in the court building, inappropriate waiting facilities and the crowding together of hostile parties, lawyers and the media can increase witnesses' anxiety.

14.118 Children waiting to appear as witnesses in criminal proceedings are particularly concerned about seeing the accused.¹⁸⁶⁵ Many courts lack separate waiting facilities. The Inquiry was told that in the public areas of the court children have been intimidated and harassed by the accused, his or her family, defence counsel and the media.¹⁸⁶⁶

[A]fter I had come out from giving evidence — I had come out and was so upset that I was taken to a small room where I could recover away from everybody looking at me, and [the defence solicitor] came and stood in the door with his arms up like that and both feet splayed out so that nobody could get in or out...and he just stood there and stared at me while I was trying to recover from this...I was saying 'Get out. Go away,' and he just stood there and stared at me through the whole break...Before the committal hearing, the first day, I walked into the room before I was supposed to go on [to the courtroom] and I was sitting on a wooden bench and [the defence solicitor] just came and sat two feet right in front of me and leant over on his knees and just stared.¹⁸⁶⁷

In-court measures such as CCTV and screens and controls on cross-examination are of little benefit if child witnesses are subject to these tactics outside the courtroom.

Recommendation 113. Child witnesses should be provided with appropriate waiting facilities in all court buildings where they are likely to appear as witnesses. These should ensure privacy and separation from the public and in particular from a defendant or hostile opposing party, that party's counsel and the media.

Implementation. All courts should designate an appropriate facility in or near the court building as a children's waiting room. Where facilities are not available in the court building, the prosecutor or legal representative for the party calling the child as a witness should be responsible for taking all necessary steps to ensure that the child is provided with appropriate facilities and protected from the risk of intimidation or harassment.

Recommendation 114. Upon the application of a party or on its own motion, a court should have the discretion to

- modify seating arrangements
 - require the removal of wigs and gowns
 - exclude from the court any or all members of the public
- if necessary to prevent undue distress to a particular child witness.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

The child's voice in sentencing

14.119 In criminal trials Victim Impact Statements can provide an opportunity for victims of crime to participate in the sentencing part of the criminal justice process.¹⁸⁶⁸ Where they are used, child victims may need assistance in preparing statements. Witness support units, the child's counsellor or a family member may be best suited to assist a child in this manner.

Recommendation 115. Where a court can consider a Victim Impact Statement in the sentencing process, a child victim should have assistance, where required, in preparing the Victim Impact Statement.

Implementation. The Attorney-General through SCAG should encourage those States and Territories in which a Victim Impact Statement is permitted to enact similar legislation.

Child witnesses with particular needs

Introduction

14.120 The recommendations in this chapter address issues affecting all child witnesses. Additional protections may be needed for child witnesses who are Indigenous or from non-English speaking backgrounds or who have certain disabilities.

Children from different cultural backgrounds

14.121 Child witnesses from different cultural backgrounds can have additional difficulties with communication, cultural restrictions about discussing certain topics with certain people, the formality of hearing processes and cultural characteristics that may detract from a particular child's ability to give the necessary information in court or that may affect the weight and credibility of a particular child's evidence.¹⁸⁶⁹

14.122 The problems for Indigenous witnesses, including children, are well documented. They include difficulties caused by the question-answer format of giving evidence, which is not the usual way that Indigenous people give important information,¹⁸⁷⁰ the use of silence as an important and positively valued part of many Indigenous conversations, 'either-or' questions that are rarely found in the linguistic structure of traditional Indigenous languages or Indigenous varieties of English, cultural differences in the use of eye contact and gratuitous concurrence — an Indigenous conversational pattern of agreeing with whatever is being asked.¹⁸⁷¹

14.123 Other problems may arise from the type of information being sought. For example, speakers of Indigenous languages or Indigenous varieties of English tend not to use expressions that specify quantity or number, tending to name or list rather than count.¹⁸⁷² There are often restrictions on certain kinds of knowledge to certain classifications of people or on speaking about certain things in public, which will deter or prevent a witness giving certain information in court.¹⁸⁷³

14.124 Similar problems may face child witnesses from non-English speaking backgrounds. Even where a person from a non-English speaking background has a good command of English, he or she can experience cultural and linguistic interference with the use of language and demeanour in court to the detriment of the evidence or the way that it is perceived.¹⁸⁷⁴ Although not all people from non-English speaking backgrounds experience the same barriers to giving evidence, other common problems may include cultural inhibitions about discussing certain topics, for example sexual assault, fears of police, courts and judges, inability to comprehend or communicate in English and lack of knowledge about the legal system and what is expected or possible through the legal process.¹⁸⁷⁵

14.125 Many reports have attempted to address these issues for adult witnesses.¹⁸⁷⁶ Their recommendations are equally important for the appropriate participation of child witnesses. Particular attention should focus on

the right of child witnesses who do not speak fluent and standard English to the assistance of an interpreter or communicator at their request, the possibility of giving evidence in narrative format and the admissibility of expert evidence of cultural or other language considerations that may assist in making a fairer assessment of a particular child witness' evidence. In addition, our recommendations regarding investigations, witness support and preparation, courtroom facilities and appropriate training and education of the participants should be implemented taking account of children from different cultural backgrounds.

Recommendation 116. Upon the application of a party or on its own motion, a court should have discretion to permit unconventional means of giving evidence for child witnesses from different cultural backgrounds. In addition, expert evidence explaining cultural behaviours or communication characteristics of a child from a particular cultural background should be admissible.

Implementation. The Evidence Act should be amended to reflect these provisions. The Attorney-General, through SCAG, should encourage all States and Territories to enact similar legislation.

Recommendation 117. Every child witness who requests or who appears to need the assistance of an interpreter should have the right to the assistance of such interpreter while being questioned, both during the investigation and trial stages of any legal proceeding.

Implementation. The national interview standards should require that all children questioned during investigations have the right to an interpreter. The Evidence Act should be amended to reflect that all child witnesses should have the right to an interpreter while giving evidence in court. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

Children with a disability

14.126 Children with certain disabilities may face particular problems in communication and perceptions of their competency to give evidence.¹⁸⁷⁷ Many of the recommendations in this chapter can address these difficulties, as they require the court and the parties to take account of the circumstances of the individual child witness. However, additional assistance may be required for child witnesses with disabilities, particularly in communicating their evidence to the court and ensuring that stereotypes of people with disabilities or unusual behavioral or physical manifestations of a disability do not characterise their evidence as unreliable.¹⁸⁷⁸

14.127 One United States case illustrates the special measures that can be adopted for such children. A three year old child was psychiatrically disturbed as a result of being abducted, sexually abused and dumped into a cesspit. She was able to give evidence about her experience by a video-taped deposition during which all questions were asked by her psychiatrist.¹⁸⁷⁹ The prosecutor, defence counsel and a representative of the judge were behind a one-way mirror and their questions were put to the child through the psychiatrist, who had a micro-receiver in his ear. The psychiatrist could then seek the desired information in a manner that did not further disturb the child.¹⁸⁸⁰

14.128 A submission to the Inquiry reported an Australian case concerning a young deaf and intellectually impaired woman sexually assaulted by an acquaintance.¹⁸⁸¹ She was unable to communicate her evidence in a conventional manner as she did not speak, could not understand conventional sign language and was able only to type out her words on a typewriter. A system was set up so that the young woman could be asked questions by computer and type her responses, with both projected on a screen for the jury to see. With the young woman able to tell her story to the court, the defendant changed his plea.¹⁸⁸²

14.129 The disadvantages suffered by witnesses with certain disabilities include perceptions that their evidence is unreliable. In exceptional circumstances, the question and answer format may be completely inappropriate for witnesses with certain disabilities. In other cases the disability may cause the witness to behave in court in a manner that might be perceived as an indication of unreliability.¹⁸⁸³ In these cases expert evidence should be admissible to explain a child witness' particular disability, the characteristics of the disability and likely physical responses of the child to the court environment and process.¹⁸⁸⁴

Recommendation 118. Upon the application of a party or on its own motion, a court should be able to permit unconventional means of giving evidence for child witnesses with disabilities. In addition, expert evidence explaining the disability of a child witness and its physical or behavioral characteristics should be admissible.

Implementation. The Evidence Act should be amended to reflect these provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

Protecting children's rights — legal representation for child witnesses?

14.130 Some submissions to the Inquiry suggested that child witnesses in criminal proceedings should be legally represented, with the legal representative appointed to assist child witnesses at the earliest possible time, for example when the allegations are first made.¹⁸⁸⁵ They argue that a legal representative should have standing in the criminal proceedings to ensure that appropriate applications are made for children who choose to proceed with a complaint or that objections are made to improper or harassing questions by either the prosecutor or the defence counsel.¹⁸⁸⁶ This argument presumes that prosecutors cannot always be counted upon to make applications for CCTV or screens, to intervene to prevent objectionable cross-examination or to exhibit appropriate sensitivity in their examination of a child witness.¹⁸⁸⁷ The recommendations in this chapter are more appropriate ways to address these problems.¹⁸⁸⁸

14.131 However, if the recommendations in this chapter are not implemented or prove unable to prevent the abuse of child witnesses described to the Inquiry, the drastic measure of providing all child witnesses with legal representatives who can protect their interests during the trial should be considered seriously. In any event, legal advice should be available to those children and their families who request it. The specialist children's legal services described in recommendation 86 should undertake these responsibilities.

Children's evidence in certain proceedings

14.132 Evidentiary matters are also discussed in other chapters of this Report in the context of children's participation in specific legal processes. Recommendations that touch upon the evidence of children have been made in the context of care and protection,¹⁸⁸⁹ family law¹⁸⁹⁰ and juvenile justice.¹⁸⁹¹

15. Jurisdictional arrangements in family law and care and protection

Introduction

Jurisdictional confusion

15.1 Jurisdiction over matters relating to children, including care and protection and family law, is divided between the States and Territories and the Commonwealth. The Commonwealth has family law jurisdiction in relation to private disputes between individuals, while the State and Territory care and protection jurisdictions concern public law issues involving intervention of the state. Yet the two types of proceedings, as far as children are concerned, are often related, both being aimed at determining their most appropriate living arrangements. Each jurisdiction deals with allegations of child abuse. These cases form a significant proportion of children's court work. A study tracking 200 Family Court matters in which child abuse allegations had been made found that, at the pre-hearing conference, half of all children's matters in the list involved allegations of child abuse.¹⁸⁹² The study concluded that the Family Court and State care and protection services have '...reached a position not only of mandated co-ordination, but of mutual resource dependence as well ...'¹⁸⁹³

15.2 Notwithstanding this dependency, the jurisdictional base for family law and care and protection cases presents a particularly complicated maze and '...the task of working out a coherent legislative approach is bedeviled by the awkward division of legislative responsibility between the Commonwealth and the States ...'¹⁸⁹⁴ A 1984 report noted

[t]he fragmentation of the law causes considerable practical difficulties. There are areas of overlap so that it is not clear in some circumstances which law applies or which court has jurisdiction. There are anomalous inconsistencies and gaps.¹⁸⁹⁵

The jurisdictional divisions have resulted in judicial decision-making being shared between federal Family Court judges and judicial registrars and State and Territory judicial officers. These State and Territory officers may be specialist children's court magistrates or judges exercising State or Territory care and protection jurisdiction or State and Territory generalist magistrates exercising both federal family law and State or Territory care and protection jurisdictions. The lack of co-ordination between the family law and care and protection jurisdictions and between the care and protection systems of each State and Territory was raised as a source of serious concern during the Inquiry. There was wide agreement that the current jurisdictional arrangements fail to serve the interests of many children in the family law and care and protection systems and may add to their disadvantage and distress. Chief Justice Nicholson of the Family Court has noted

[t]he problem really lies in the fact that family law in general is the province of the Commonwealth Government and child welfare, the province of the states and territories. It is more than time that this issue was addressed as it has been in countries like the United Kingdom and New Zealand where there is an integrated jurisdiction that enables courts to consider all welfare issues in relation to children. The situation in this country leaves open the very real possibility that some children's welfare will be jeopardised.¹⁸⁹⁶

15.3 Federal systems generate differences. This particular federal arrangement has inhibited the development of an integrated, expert family court system adjudicating on both private and public family law matters. Many of those with whom the Inquiry consulted argued for this situation to be remedied. This chapter explores the limits of federal power to legislate about children in family matters, discusses the difficulties associated with the division of jurisdiction between the Commonwealth and the States and Territories and suggests models for reform.

The jurisdictional division

15.4 The division of responsibility between the States and Territories and the Commonwealth arises from the constitutional limits on the Commonwealth's power to legislate. The States retain power to legislate in nearly all areas on which the Commonwealth is empowered to legislate under the Australian Constitution. The Constitution specifies, however, that where both the Commonwealth and the States and Territories have

legislative power, federal legislation will prevail to the extent of any inconsistency.¹⁸⁹⁷ In relation to the family law and care and protection jurisdictions, the Constitution specifies that the Commonwealth may legislate in the areas of

(xxi) Marriage;

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants...¹⁸⁹⁸

The resulting demarcation has been awkward. It has restricted federal focus to children of a marriage and to issues of private family law rather than public care and protection. These limitations have been a source of difficulty at least since the Family Law Act came into effect in 1976. Since then, substantial steps have been taken to overcome some of the difficulties but the jurisdictional division remains.

Attempts to deal with the problems

15.5 The Commonwealth and the States and Territories and the courts have recognised some of the problems with the jurisdictional arrangements and have attempted to rectify them as follows.

- The Family Court had adopted broad judicial interpretations of such terms as 'custody', 'guardianship' and 'child of a marriage'.¹⁸⁹⁹
- The Family Court, children's courts and State and Territory family services departments have introduced protocols for dealing with care and protection matters.
- The Family Court was given a statutory welfare jurisdiction in relation to children of a marriage in 1983.¹⁹⁰⁰
- The Commonwealth and all States and Territories introduced cross-vesting legislation.¹⁹⁰¹ This applies to the Federal and Family Courts and each of the Supreme Courts of the States and Territories. Any participating court may now exercise the jurisdiction of another participating court wherever it becomes relevant and is able to transfer a matter to another participating court where appropriate.¹⁹⁰² The scheme has indirect coverage of courts of the States and Territories in addition to Supreme Courts, in that the cross-vesting legislation allows matters to be removed from a lower court to the Supreme Court of the relevant State or Territory and from there to any other more appropriate participating court in the usual manner.¹⁹⁰³
- All States except WA have transferred to the Family Court legislative power in relation to 'custody and guardianship of, and access to ' ex-nuptial children.¹⁹⁰⁴ This specifically excluded a reference of powers that would affect the operation of the care and protection legislation of the States and Territories.¹⁹⁰⁵
- Legislative arrangements in some jurisdictions allow an order to be made under the Family Law Act while a child is under a care and protection order with the consent of the relevant State Minister.¹⁹⁰⁶ These legislative amendments reflect a policy agreement reached in SCAG to that effect.¹⁹⁰⁷
- The States and Territories and the Commonwealth have agreed to consider mechanisms to increase the portability of care and protection orders interstate. A discussion paper was prepared for the Standing Committee of Community Services and Income Security Administrators in September 1996 on the subject.¹⁹⁰⁸ The paper recommended that legislation be introduced to facilitate transfer of orders and applications interstate.¹⁹⁰⁹ While it did not recommend that the legislation introduce standard orders, terminology or procedures nationally¹⁹¹⁰ or allow for mutual recognition of interstate orders,¹⁹¹¹ the discussion paper encouraged the States and Territories to move towards a more consistent and uniform approach in these areas.¹⁹¹² It also recommended that protocols be drafted to facilitate the transfer of orders.¹⁹¹³ The discussion paper did not recommend national care and protection legislation because of the lack of consensus on the issue.¹⁹¹⁴

15.6 While each of these steps has been useful, they have failed collectively to resolve the difficulties with the complex jurisdictional arrangements that may harm many children each year. Some of these problems are discussed in the following sections.

Problems associated with the jurisdictional arrangements

Inappropriate choice of forum

15.7 The difficulties that can arise in determining the most appropriate forum for the hearing of a matter are best illustrated by a fairly typical example.¹⁹¹⁵ A State or Territory family services department commenced proceedings in the children's court in relation to a nine year old girl whose mother suffered from an intermittent psychiatric illness at a time when the mother was in a psychotic state and unable to care for the child. The mother accepted treatment, her condition stabilised and the child was returned to her mother under a supervision order. In the meantime, the father, who had not had consistent contact with the child, approached the family services department and the children's court either to have his daughter live with him or to have contact with her.

15.8 The decision as to the most suitable court to adjudicate on these issues depends in part on the State or Territory in which they arose. Care and protection legislation in some jurisdictions does not provide for contact orders to be made.¹⁹¹⁶ When a children's court order has been made as in this example, in almost all States and Territories, the Family Court is prevented from making an order to take effect during the life of the care and protection order.¹⁹¹⁷ If the father were to wait until the supervision order expires to take action privately in the Family Court, that court could conclude that neither parent is suitable and that there are real care and protection concerns. However, the Family Court is generally unable to make care and protection orders. It is able to invite the family services department to intervene in cases but co-operation is not always forthcoming from the department.¹⁹¹⁸

15.9 Other considerations in determining the most appropriate court to deal with these issues relate to the lengths of delays in each jurisdiction and the costs of litigation in each.

15.10 These factors make it difficult to obtain suitable orders from one court that both address care and protection concerns and ensure appropriate orders to implement family arrangements. The inability of a court to consider both family law and care and protection issues in the one proceeding where they are relevant may mean that an acceptable long-term solution is overlooked or not available.

Tandem or serial proceedings

15.11 Because care and protection and family law matters are heard in different jurisdictions, proceedings in a State or Territory children's court may run in tandem with or follow Family Court proceedings concerning the same child and essentially the same allegations.¹⁹¹⁹ A submission to the Inquiry asserted

...there remains no clear understanding of which jurisdiction takes precedence and that consequently, difficulties occur in dealing with matters in an expedient manner and in the best interests of the child.¹⁹²⁰

15.12 For example, a recent contested custody matter in relation to two siblings was listed for hearing in a rural registry of the Family Court on the day before a care and protection application was due to be heard in the magistrates court in relation to one of the children. Committal proceedings for criminal charges against the alleged abusing parent were listed for the same day as the care and protection proceedings at the magistrates court. There were numerous other appearances in relation to these matters during the course of the three proceedings and the Family Court appeal.¹⁹²¹ Anecdotal evidence indicates that these circumstances are not unusual. When it heard the appeal the Full Family Court did not comment adversely on the arrangements.

15.13 Generally no court may make orders under the Family Law Act to take effect during the life of a care and protection order.¹⁹²² This may cause other problems in some cases and require later litigation. For example it may preclude property being settled on a child while under a supervision order of the care and protection jurisdiction or it may prevent a representative being appointed for a child during Family Court

proceedings on an application for an order to take effect after the expiration of the care and protection order.¹⁹²³

The low priority given to Family Court notifications

15.14 The relationship between the different State and Territory family services departments and the Family Court varies around the country and different practices exist. Family Court officers are required to notify the family services department whenever they suspect a child has been abused or is at risk of being abused.¹⁹²⁴ Where a party to proceedings makes an allegation of child abuse during the course of those proceedings, the registrar of the Family Court is required to notify the family services department.¹⁹²⁵ Departments are under no obligation to investigate allegations of abuse.¹⁹²⁶ When they do, they may not give priority to investigation of Family Court notifications perhaps because of a perception that allegations are often fabricated in the Family Court. While evidence indicates that child abuse allegations originating in the Family Court are no more likely to be fabricated than other allegations notified to family services departments,¹⁹²⁷

...a common view is that the allegations are merely part of a parental war. "Mud slinging" is the term used widely to describe allegations within Family Court disputes...¹⁹²⁸

Another submission noted

[i]f a family law matter is in train or planned, child welfare investigators may be less willing than normal to intervene. This may occur because of the myth that exists that numerous false accusations occur in Family Law cases.¹⁹²⁹

15.15 The Family Court child abuse study found problems with the relationship between the family services departments it studied and the Family Court, in the investigations conducted by the departments and in the report back to the court. Reports from the relevant family services department '...permit only a cryptic response to the Court'.¹⁹³⁰ In 77.6% of the cases studied, no information was provided to the Family Court in response to the notification.¹⁹³¹ Some investigations conducted by the departments were seriously delayed, with the average investigation taking 42 days and the longest taking 180 days.¹⁹³² Where reports are provided to the Family Court, the Family Court child abuse study shows they are given considerable weight by the court. It indicates that reports are decisive or influential in 57% of cases.¹⁹³³

15.16 The study also indicated that '...child abuse cases spend a long time in the Family Court'.¹⁹³⁴ They took on average 17.5 months from the time an abuse allegation was made until resolution, '...but the average length increased as the child's age decreased. A number of cases stayed in the Court until the child took control themselves...'¹⁹³⁵

15.17 The lack of co-ordination between jurisdictions may often result in duplication between proceedings, delays in deciding a child's future, the possibility of repeat interviews for the child and a potential increase in the risk of abuse or the creation of situations of damaging uncertainty for the child. All of these were mentioned as relevant contributors to systems abuse in a study of the problem in the NSW care and protection system.¹⁹³⁶

Geographical limitations on care and protection orders

15.18 At present, the State based system of care and protection may lead to litigation in courts in more than one State or Territory or leave the child at risk of continuing abuse. Parents are able to move interstate to avoid proceedings or to escape orders. The Victorian Minister for Youth and Community Services has stated that this '...causes difficulties for the State responsible for supervising the order to exercise its obligations and may jeopardise the safety and welfare of the child'.¹⁹³⁷ State and Territory governments are presently seeking to overcome some of these problems.¹⁹³⁸

15.19 A submission to the Inquiry pointed out that State and Territory boundaries do not reflect the tribal and family geographies of Indigenous people.¹⁹³⁹ This makes the Aboriginal Child Placement Principle more difficult to operate in practice particularly for Indigenous families living in border areas.¹⁹⁴⁰ Indigenous people are greatly over-represented in care and protection systems nationally and this is a significant issue for them.¹⁹⁴¹

The family law and care and protection jurisdictions

Can we talk about 'family matters'?

15.20 The division of jurisdiction for family matters between the Commonwealth and the States and Territories reflects the division between the private and public spheres of law. The value of this divide is questionable and was frequently debated in evidence to the Inquiry. Some submissions to the Inquiry reiterated the following view.

It would be unfortunate if the Family Court were to take over a role for which it has not been designed...It would not be appropriate for a Court which basically adjudicates between individual citizens also to take over the executive role of the State.¹⁹⁴²

Others expressed the opinion that '...one court system dealing with these matters is better than two'.¹⁹⁴³ The Family Court has noted

...while it is true that the area of child protection and the normal area of jurisdiction of the Family Court of Australia emanate from different sources and from a different historical background, it is not possible to compartmentalise the two jurisdictions and indeed they overlap in the sense that both are concerned with the welfare of children...[T]he considerations to be brought to bear in the exercise of both jurisdictions are often the same or similar, and are particularly so in determining whether a child has been, or is likely to be subject to an unacceptable risk of abuse.¹⁹⁴⁴

15.21 The primary issue, however, is the ability of any one court hearing a matter to decide the range of relevant issues presented to it. Legal processes themselves should not exacerbate the disruption to the lives of families and children involved in litigation for procedural and jurisdictional convenience. If the interests of children are to be paramount then all remedies and solutions could be considered in the one forum.

How many children are affected by the jurisdictional arrangements?

15.22 The number of children adversely affected by Australia's jurisdictional arrangements is difficult to determine. The number of notifications of child abuse made by the Family Court or by a party to the proceedings through the court to the relevant State or Territory family services department gives some indication.¹⁹⁴⁵ There were 1 518 notifications made by court counselling staff of the Family Court of Australia in the financial year to July 1996.¹⁹⁴⁶

15.23 One suggestion to the Inquiry was that a 'rule of thumb' indicator may be the number of child's representative appointments made by the Family Court because in a significant proportion of cases where a child's representative is appointed there is some welfare issue relating to the child. This may be the case even where a risk or allegation of child abuse is not the court's stated reason for the appointment.¹⁹⁴⁷ There were 4 528 appointments of child's representatives by the Family Court of Australia between 1 July 1995 and 30 April 1996.¹⁹⁴⁸

15.24 The recent Family Court child abuse study found that matters in the Family Court that involved allegations of child abuse constituted 5% of all children's matters. However, these cases stayed in the Court and increased as a proportion of all cases in the system as other matters were resolved or finalised.¹⁹⁴⁹ The researchers concluded that child abuse cases have become part of the core business of the Family Court.¹⁹⁵⁰

...the Family Court is being used as a frontline institution to resolve family violence, without much understanding of the fact that this is the current nature of the Court's work in children's matters.¹⁹⁵¹

15.25 In addition, within the State-based system of care and protection it is difficult to ascertain how many children are affected by the geographical limits of the care and protection systems. Between 200 and 250 children under a care order may be living outside the jurisdiction in which the order was made.¹⁹⁵² Given the increasing mobility of the Australian population, these difficulties may become more common.

An extended cross-vesting scheme: an option for reform

Introduction

15.26 The above problems all centre on co-ordination between the jurisdictions and the relative responsibilities of the States and Territories and the Commonwealth. The question this poses for the Inquiry is how to re-orient responsibilities and enhance co-ordination so that care and protection and family law disputes are resolved more rationally, expeditiously, fairly and with least disruption to the lives of the children involved. There are a number of options to assist the rationalisation of the responsibilities of the various courts.

15.27 DRP 3 proposed an extended cross-vesting scheme to deal with these problems.¹⁹⁵³ This proposal is further discussed below. Also discussed is an alternative scheme that would see the transfer of power over care and protection matters to the Commonwealth by the States and Territories. A third option would be to refine the current arrangements further. These options are outlined from para 15.42.

15.28 While the extension of the cross-vesting scheme remains the preferred option, a pending High Court matter challenging the validity of cross-vesting schemes requires that other options be explored.¹⁹⁵⁴ The High Court challenge is based on the argument that the Constitution prohibits the vesting of judicial power by State legislation on federal courts. In the judgment appealed from, the Federal Court held that

[n]either Ch III of the Commonwealth Constitution nor s 51(xxxvii), permitting the Commonwealth to legislate with respect to matters referred to it by the parliaments of the States, prohibits or limits the conferral of State judicial power on federal courts although Ch III *is* exhaustive in relation to the definition of federal jurisdiction that may be vested by the Commonwealth Parliament in a federal court.¹⁹⁵⁵

In the event of the failure of the cross-vesting scheme, one of the alternatives proposed below should be introduced to ensure that the one court has the jurisdiction to deal with the range of related issues presented in care and protection and family law matters.

An extended cross-vesting scheme

15.29 Cross-vesting legislation has been used in many cases to

...end the barren jurisdictional disputes which have increasingly bedeviled litigation in Australia...and to ensure that no proceedings failed for want of jurisdiction.¹⁹⁵⁶

15.30 The cross-vesting arrangements have been hailed as a significant development that has assisted in overcoming the constitutional difficulties of the family law jurisdiction.¹⁹⁵⁷ Certainly, they have assisted in resolving some matters in which family law and care and protection issues are inextricably bound.¹⁹⁵⁸ However, in children's cases the current cross-vesting arrangements have not resolved all the jurisdictional difficulties. The cross-vesting scheme involves only superior courts of record in the States and Territories, whereas children's care and protection matters are dealt with at first instance in the lower courts. The Family Court can determine care and protection matters under the relevant State legislation only if an application is made to a State or Territory Supreme Court¹⁹⁵⁹ and is then transferred to the Family Court.¹⁹⁶⁰ The Supreme Courts may also transfer proceedings of their own motion.¹⁹⁶¹

15.31 Under a reformed scheme, the Family Court would be empowered to deal with care and protection issues under State or Territory legislation whenever they are relevant to matters already before it. State and Territory children's courts would be empowered reciprocally to deal with relevant family law matters when considering care and protection applications. In this way, all relevant issues could be dealt with in the one forum and in the one set of proceedings. This proposal would leave legislative power for care and protection with the States and Territories but would require the enactment of additional cross-vesting legislation to provide for the transfer and receipt of relevant jurisdiction between the Family Court and the children's courts of the States and Territories. It would also require the development of appropriate protocols and guidelines between the participating courts and departments.

15.32 The Family Law Council considered this issue in its report *Child Sexual Abuse*.¹⁹⁶² It recommended a scheme similar to that proposed here.¹⁹⁶³ The Australian Institute of Judicial Administration (AIJA) also

recommended that the cross-vesting scheme be extended at least to the level of the main civil trial courts.¹⁹⁶⁴ AIJA's discussion dealt mainly with areas of law other than family law but the principle was to apply generally. The proposal in DRP 3 received substantial support.¹⁹⁶⁵ Copelen Child and Family Services submitted

...delays in determining the best interests of the child could be avoided when one court is involved rather than shifting a case between different court jurisdictions. The latter simply increases legal costs to the parents and the State.¹⁹⁶⁶

A few submissions objected to the proposal. The Children's Interest Bureau Board submitted that '[t]o combine the two systems or worse to expect both systems to be able to undertake both roles simultaneously requires far greater debate and discussion'.¹⁹⁶⁷

15.33 The Family Law Council envisaged that the State and Territory children's courts should take precedence in hearing matters that involve allegations of child sexual abuse or care and protection issues.¹⁹⁶⁸ Given the need to deal with these cases expeditiously and to minimise disruption, we envisage the cross-vesting scheme operating so that the first court to acquire a matter would hear all the relevant issues under both jurisdictions. A court that has made orders in relation to a child should generally maintain carriage of that matter including later applications for rescission or variation of the original orders.¹⁹⁶⁹ If rescission or variation orders could be initiated in the Family Court, that Court could receive inappropriate applications for parenting orders in relation to children under care and protection orders in an attempt to obtain a rescission along with the Family Court parenting order. The Family Court may become an inappropriate alternative forum or de-facto appeal court. As the NSW Government submitted,

[c]are and protection orders are but a part of a holistic and detailed Department of Community Services plan for the care and protection of a child. It would be unproductive and against the interests of the child to subject such a plan to a formal review (by the Family Court) where a failure or shortcoming of the plan itself was not the reason for the review.¹⁹⁷⁰

Recommendation 119. The current cross-vesting arrangements should be extended to the relevant State and Territory children's courts and the Family Court in relation to the exercise of State and Territory care and protection and related federal family law matters. Under the cross-vesting scheme the first court to receive a matter relevant to the other jurisdiction should be able to deal with the full range of issues. The proceedings should be transferred to the other court only where considerations of justice so require or where proceedings are considered to have been instituted in the court as a result of inappropriate choice of forum. In considering a transfer, the court should prefer the court which will allow the most effective, expeditious and least expensive resolution of the matter.

Implementation. The Attorney-General through SCAG should seek the agreement of States and Territories to the implementation of this scheme. The relevant legislation, protocols and procedures should be amended accordingly.

Mechanics of the scheme

15.34 The proposed scheme would minimise the risk that the parties would seek to institute proceedings in the court with the most advantageous procedures and rules of confidentiality,¹⁹⁷¹ burdens of proof and the like. The possibility of forum shopping needs some examination and court rules would need to be amended to prevent it.¹⁹⁷² The rules of evidence to apply also need to be determined. The current cross-vesting legislation provides that the procedures of the court in which the matter is heard apply.¹⁹⁷³ The Evidence Act takes precedence over State or Territory rules of evidence where proceedings concern State or Territory as well as federal legislation.¹⁹⁷⁴ States and Territory children's courts are generally unconstrained by rules of evidence.¹⁹⁷⁵ The less rigorous evidentiary requirements in care and protection jurisdictions may assist in the proper resolution of cases where both care and protection and family law issues are involved.¹⁹⁷⁶ One submission suggested this examination should be conducted in consultation with relevant government and non-government agencies. The Inquiry agrees with this suggestion.¹⁹⁷⁷

15.35 The successful operation of the extended scheme for proceedings commenced in the Family Court would be dependent on the co-operation of State and Territory family services departments. The exercise of

State and Territory care and protection jurisdiction would remain dependent on the initiation of care and protection proceedings by the relevant family services department. Parties other than the department should not be able to initiate proceedings in the Family Court under the care and protection legislation.

15.36 Officers of the Family Court and court counsellors are required to report evidence or suspicions of child abuse to the relevant family services department.¹⁹⁷⁸ If a party makes an allegation of child abuse during the course of proceedings, the Registrar of the Court is required also to notify the family services department.¹⁹⁷⁹ The provisions that require the notification are relatively broad and are defined to include sexual assault or sexual activity involving the child.¹⁹⁸⁰ An officer of the court may, but is not required to, report to the department other forms of psychological harm to or ill-treatment of a child.¹⁹⁸¹ This conduct is not closely defined. States and Territories define abuse and neglect differently.¹⁹⁸² The conduct referred to in the Family Law Act may differ from the conduct which is accepted as a notification by the relevant family services department. The Inquiry considers that notifications under the proposed extended cross-vesting arrangements should more closely match the definitions of notifiable conduct under the State and Territory legislation to ensure that all relevant care and protection concerns may be dealt with in the one proceedings.¹⁹⁸³ The NSW Government supported more closely aligning matters to be notified to the legislative definitions of child abuse.¹⁹⁸⁴

15.37 If care and protection issues were raised during the course of proceedings in the Family Court but the department decided against intervening, the Family Court should not be able to make an order requiring the involvement of the department. It would be inappropriate for a court to require a department to take responsibility for a child over the objections of that department.¹⁹⁸⁵ However, the Family Court, where it had continuing concerns about the safety or welfare of the child, should be able to require the department to provide a report on the results of its investigations of the notification and the reasons for the decision not to pursue the case. The NSW Government objected to this proposal on the grounds that requiring appearances would have resource implications and divert caseworkers.¹⁹⁸⁶ The Inquiry envisages this provision would be used sparingly where matters were unable to proceed without advice from the department.

15.38 At present, courts of summary jurisdiction are able to determine matters relating to children under the Family Law Act only with the consent of the parties.¹⁹⁸⁷ Under the proposed extended cross-vesting scheme there would be no requirement for consent. The Family Law Council has also proposed this.¹⁹⁸⁸ North Queensland Women's Legal Service noted that giving State and Territory magistrates power to make final orders '...can only be a backward step...unless those magistrates have the necessary training and expertise'.¹⁹⁸⁹ National Legal Aid expressed concern at this proposal.

Natural justice principles must always be accorded by Courts. Magistrates/Local Courts do not always have the capacity to handle Family Court matters, certainly not with the level of expertise consistent with judicial officers in the Family Court of Australia.¹⁹⁹⁰

15.39 The Inquiry agrees with these concerns but not with the conclusions reached. The requirement for consent, if retained, would render the extended cross-vesting scheme unworkable or at least impractical. If a party considered a forum to be inappropriate, it would be open to that party to seek to transfer the matter to another more appropriate participating court. However, we recognise that extending the cross-vesting scheme must be accompanied by action to increase the expertise of the magistracy as recommended at 130.¹⁹⁹¹

15.40 Under the proposed scheme, Family Law Act s 69ZK, which allows orders to be made under the Act only in restricted circumstances where there is a current care and protection order, would become redundant.

15.41 The proposed scheme should not apply to certain kinds of proceedings and powers, for example those generally within the exclusive jurisdiction of superior courts such as injunctive or contempt powers.¹⁹⁹² It should also not extend to the statutory welfare jurisdiction of the Family Court.

Recommendation 120. The Attorney-General's Department, in conjunction with the Family Court, State and Territory children's courts and relevant family services departments, should examine and report on consequential amendments and practical changes required to ensure the smooth operation of

the extended cross-vesting scheme. In particular, it should examine the effect on the scheme of the differences in the procedures and rules of evidence, delays, costs of proceedings and issues of confidentiality of information in each jurisdiction.

Implementation. The federal Attorney-General's Department should seek the agreement of the relevant State and Territory agencies to this examination and to the implementation of the report. The Family Court should introduce any necessary amendments to the Family Law Rules.

Recommendation 121. The recommended extended cross-vesting scheme should operate in the following way.

- The provisions in s 67ZA of the Family Law Act requiring or allowing notifications of child abuse concerns by officers of the Family Court should refer to the definition of child abuse proposed at recommendation 172.
- Where care and protection concerns as defined in the relevant State or Territory legislation arise in the course of family law proceedings, the Family Court should notify the relevant family services department as at present and invite the department either to initiate care and protection proceedings under the cross-vesting arrangements or to intervene in the proceedings.
- Where protective concerns have been notified to the relevant family services department by the Family Court, the court should have the power, where it considers that care and protection orders may be necessary, to require the relevant officer from the department to appear before it to explain the reasons for any decision not to pursue the notification and/or provide information on the result of any investigation. This provision is directed to ensure appropriate co-operation and communication between the department and the Family Court and to obviate the need for litigation of a matter which would be more appropriately dealt with informally by the department. The Family Court could adjourn a matter and seek regular reports from the department on progress of informal work with the family.
- Section 69N of the Family Law Act should be amended to provide that, in care and protection matters heard in a State or Territory court of summary jurisdiction, including children's courts, in which relevant Family Law Act issues arise, the State or Territory court should be able to hear the family law issues without the consent of the parties.
- Under the recommended cross-vesting scheme section 69ZK of the Family Law Act should be repealed as it would become redundant.
- The scheme should not extend to the cross-vesting of all family law matters, particularly the statutory welfare jurisdiction of the Family Court and those powers which in general are restricted to superior courts.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the implementation of this scheme. The relevant legislation, protocols and procedures should be amended accordingly.

Alternatives to the cross-vesting scheme

A full transfer of powers to the Commonwealth

15.42 A frequent suggestion to the Inquiry to overcome the jurisdictional problems was that power to legislate in respect of the care and protection jurisdictions of the States and Territories should be transferred entirely to the Commonwealth.¹⁹⁹³ Barnardos Australia, for example, suggested that responsibility to legislate for care and protection, for portfolio management and for service delivery should be transferred to the Commonwealth.

There is little doubt that State Governments have a poor record in the area of child protection and provision of care...[T]here are important issues in child welfare which must be tackled at the Federal level, as the States have consistently failed. Child Welfare is closely associated with childcare policy, housing issues, income security and adolescent homelessness and health. All these policy issues need to be developed together.¹⁹⁹⁴

Other comments included the following.

The Family Court should have the power to deal with relevant matters within the child welfare jurisdiction which affect residence/contact proceedings.¹⁹⁹⁵

The Committee supports a referral of power to the Family Court in the interests of ensuring that all matters concerning children are dealt with within the one jurisdiction and to avoid the present difficulties.¹⁹⁹⁶

Merging of the jurisdictions would be a huge and difficult task but it deserves consideration.¹⁹⁹⁷

...the Family Court should be given this power. An examination of the English court system demonstrates the advantages of an integrated, uniform system which deals with all non-criminal matters relating to children.¹⁹⁹⁸

15.43 Some submissions and comments during public consultations suggested that the Family Court is particularly suited to dealing with care and protection because it is less adversarial in nature. The Family Court Counselling Service was considered to be a good illustration of the less adversarial nature of Family Court processes.¹⁹⁹⁹ Other comments to the Inquiry disputed these assertions, particularly suggesting that children's courts are directly child focused whereas the Family Court allows parents to consider their children in the same way as they do their property — as an asset to be fought over and divided.²⁰⁰⁰ The proposal for a transfer of the care and protection jurisdiction to the Family Court was also criticised because the Family Court generally experiences greater delays than do children's courts.²⁰⁰¹ Several submissions agreed with the proposition, that

I cannot see how the Family Court could function appropriately as a welfare body offering care and protection for children.²⁰⁰²

15.44 While a single court dealing with family law and care and protection proceedings is an attractive proposal, a transfer of legislative authority by the States and Territories is unlikely at present to attract the necessary political support in all jurisdictions. Effecting this reform would also carry significant difficulties in practice. Transferring all legislative power in the area, including service delivery responsibilities currently residing with States and Territories, would go much further than the transfer of the legislative power necessary to enable the Family Court to exercise the care and protection jurisdiction envisaged by the cross-vesting scheme. It would require a significant re-organisation of resourcing priorities between the levels of government. The federal Attorney-General's Department suggested that the Inquiry consider a transfer of power and a vesting back to State and Territory courts of jurisdiction to hear care and protection matters. This does not avoid the problem that the Commonwealth would then have the capacity to introduce legislation ousting State and Territory jurisdiction to the extent of the transfer of power.²⁰⁰³ Even a limited transfer of power as suggested would generate significant political sensitivities.

15.45 However, a transfer of power may become the only viable method of achieving a real resolution of these jurisdictional difficulties if the current High Court challenge to the cross-vesting scheme succeeds.²⁰⁰⁴ If the challenge is successful and the cross-vesting scheme is to be dismantled, the option of a transfer of power should be considered.

Limited transfer of power to the Commonwealth

15.46 A further alternative which could achieve a rationalisation of the care and protection and family law jurisdictions, at least in part, is a limited reference of power to the Commonwealth. It could be implemented if neither the proposed cross-vesting scheme nor the full transfer of power were pursued.

15.47 All jurisdictions agreed in 1990 through SCAG to make limited references of power to allow orders under the Family Law Act, such as contact orders, to be made concerning a child in care with the consent of the State or Territory family services minister.²⁰⁰⁵ Tasmania and NSW have already introduced this legislation. Other jurisdictions should implement this agreement as a limited alternative to the cross-vesting proposals and a fuller transfer of power. This would address some of the problems associated with the jurisdictional divisions but by no means all.

15.48 This mechanism could also be extended to allow the Family Court to exercise State and Territory jurisdiction under the care and protection legislation with the consent of the relevant State or Territory minister.²⁰⁰⁶ This would avoid the problem of a full transfer of power under section 51(xxxvii) of the

Constitution by transferring legislative power effectively only to the extent of allowing the Family Court to hear proceedings.

Consequential reforms of the system

15.49 Some submissions disagreed that any amendment to the jurisdictional arrangements is necessary, agreeing rather with the assertion that '[w]hat needs to be resolved once and for all is for the welfare authorities to enter into appropriate work practices to stop their forum shopping'.²⁰⁰⁷ There is room for improvement of the current arrangements.

15.50 Generalist magistrates are able to exercise federal family law jurisdiction under section 69J of the Family Law Act.²⁰⁰⁸ Generally, children's court magistrates are not able to do so. In principle, there should be no procedural reason why children's court magistrates in each State or Territory should not be able to exercise federal family law jurisdiction. This would be necessary to implement the cross-vesting proposals but it may also assist in the administration of the current arrangements if specialist children's court magistrates were able to exercise federal family law jurisdiction. Where necessary this would require children's courts to be proclaimed as courts of summary jurisdiction for the purposes of the *Judiciary Act 1903* (Cth) allowing them to be invested with federal family law jurisdiction. For those children's courts that have district court status, alternative arrangements should be developed to ensure they are able to exercise federal family law jurisdiction where appropriate.

15.51 Continuing confusion over the extent of the welfare and *parens patriae* jurisdictions should be addressed.²⁰⁰⁹ Much of this confusion was removed by the High Court decision in *P and P*.²⁰¹⁰ However, it did not address the issue of the extent of the statutory welfare jurisdiction over ex-nuptial children and it appears that this is excluded from the Family Court's jurisdiction. The statutory welfare jurisdiction of the Family Court should extend to ex-nuptial children.²⁰¹¹

15.52 Other reforms would assist in streamlining the current jurisdictional arrangements. In particular continuing development and training are required in relation to protocols. Priority should also be given to data collection and analysis.

Recommendation 122. Children's courts should be invested with federal family law jurisdiction under s 69J of the Family Law Act.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to this proposal.

Recommendation 123. Whether or not the proposed extended cross-vesting scheme is pursued, the States should refer power to the Commonwealth to legislate for the welfare of ex-nuptial children, excluding matters falling within the care and protection jurisdiction of the States.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to this referral of power.

Recommendation 124. Protocols for inter-agency co-operation between the Family Court, State and Territory family services departments and the relevant children's courts should be developed where they do not apply already. All protocols should be reviewed regularly to ensure that they enhance co-operation between the agencies concerned and their professionalism, promote the best interests of the child and continue to be relevant to workers in the field. In particular, protocols should ensure that action taken on notifications from the Family Court are reported fully. Family Court, children's and magistrate courts and family services department staff should receive regular training in the protocols. Protocols should be widely published, particularly when they are updated.

Implementation. The protocols committees established in each jurisdiction should pursue the development and regular review of protocols and associated training measures.

Recommendation 125. The Family Court should collect, analyse and publish data concerning child abuse notifications made by the court to State or Territory family services departments and about the

results of these notifications. In particular, all allegations of abuse should be recorded along with information about the type of proceedings in which the allegations were raised and the result of the Family Court matter and of any other departmental action including counselling, the provision of reports or the initiation of care and protection proceedings.

Implementation. The Family Court should establish an appropriate database for the collection of these statistics and introduce appropriate procedures and protocols to allow their collection. The statistics should be provided to the Australian Institute of Health and Welfare for publication along with national care and protection statistics.

Recommendation 126. Notifications of care and protection issues arising in family law proceedings should be tracked through the Family Court, family services departments and children's courts and reports provided to the Family Court on the results of investigations.

Implementation. In conjunction with the State and Territory children's courts and family services departments, the Family Court should develop mechanisms to ensure that these notifications are appropriately tracked and reported back to the Family Court.

Appeals

Introduction

15.53 Appeals from State and Territory courts of summary jurisdiction in family law matters are dealt with by the Family Court except in Western Australia and the Northern Territory where appeals may also be heard by the Family Court of Western Australia and the Northern Territory Supreme Court respectively.²⁰¹² Appeals from first instance decisions in care and protection matters in the States and Territories lie to the district or Supreme Courts except where an appeal lies from a children's court magistrate to a judge of that court.²⁰¹³

15.54 The proposed extended cross-vesting scheme raises the question of how appellate jurisdiction should be shared by the Family Court and the relevant State and Territory courts. In addition there is the question whether one court should deal with all care and protection appeals.

Appeals in matters involving cross-vested jurisdiction

15.55 The Family Law Council discussed the possibility of splitting appeals in cases with a cross-vested element. It observed that Supreme Courts might hear appeals arising from the care and protection jurisdiction and the Family Court appeals under the Family Law Act. The Council described this as '...undesirable, but possibly unavoidable as appeals on child welfare aspects may have to [remain] with the States'.²⁰¹⁴ The Inquiry, however, favours a single court of appeal on all issues dealt with under the proposed cross-vesting arrangements. Having regard to the desirability for national consistency and the developing expertise of the Family Court in child abuse matters, the appellate jurisdiction for all matters with a cross-vested element under the proposed scheme should be conferred on the Family Court alone. The Family Court of Australia supported this proposal.²⁰¹⁵

15.56 Where matters have been initially heard in a court of summary jurisdiction or by a magistrate in a children's court, both the care and protection and the family law issues should be dealt with by the Family Court *de novo* except in the case of Western Australia.²⁰¹⁶ In Western Australia, appeals from magistrates' decisions in matters with a cross-vested element should also be able to be heard by the Family Court of Western Australia. Where matters with a cross-vested element are heard originally by a judge of a children's court, appeals should lie to a single judge of the Family Court. These appeals should not be rehearings *de novo*. In the Family Court, where matters with a cross-vested element are heard by a judge, appeals should go to the Full Court of the Family Court. If a federal magistracy is introduced that deals with children's matters at first instance,²⁰¹⁷ appeals from decisions of those magistrates involving a cross-vested element should be heard by a judge of the Family Court. These arrangements would require amendment of Part X of the Family Law Act.

Recommendation 127. The Family Court should be the sole court of appeal from care and protection and family law matters that involve a cross-vested element. The appeal system should operate as follows.

- In all jurisdictions except Western Australia, where matters with a cross-vested element have been initially heard by a magistrate in either a court of summary jurisdiction or a children's court, appeals should lie directly to the Family Court *de novo* on all issues, irrespective of whether they relate exclusively to care and protection or family law matters alone or a combination of such matters.
- In Western Australia, appeals from magistrates' decisions in matters with a cross-vested element should also be able to be heard by the Family Court of Western Australia.
- Where matters with a cross-vested element are heard originally by a judge of a children's court, appeals should lie to a single judge of the Family Court. These appeals should not be rehearings *de novo*.
- In the Family Court, where matters with a cross-vested element are heard by a judge, appeals should lie only to the Full Court of the Family Court.
- If a federal magistracy is introduced that deals with children's matters at first instance, appeals from decisions of those magistrates involving a cross-vested element should be heard by a judge of the Family Court.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the proposal that appeals should lie to the Family Court from decisions made in matters in which the proposed cross-vested jurisdiction has been exercised. The relevant legislation including Part X of the Family Law Act, protocols and procedures should be amended accordingly.

A single national court of appeal for care and protection matters

15.57 The more radical step of a full transfer of appellate jurisdiction to the Family Court from all care and protection decisions by State or Territory children's courts would have the benefit of simplicity and was raised as an option for discussion in IP 18 in March 1996.²⁰¹⁸ Responses to this option were evenly and strongly divided.²⁰¹⁹ Given this response, the Inquiry invited further comment in DRP 3 as to whether appeals should lie to the Family Court from all State and Territory care and protection decisions. Once again support was divided but there was a significant level of approval in the context of the package of reforms suggested. One submission noted that this arrangement would provide '...a coherent body of law and jurisprudence, a pressing current lack'.²⁰²⁰ A 1993 report recommended that all appeals from care and protection decisions should be heard by the Family Court.²⁰²¹

The reasons for that do not involve any criticism of either the County Court or the Supreme Court which have performed these functions since the establishment of Children's Courts [in Victoria]. It is a recognition of the circumstance that child related matters are an increasing speciality. In that context, it is not the best model for appeals to go to Judges of the State courts who individually are likely to hear less than one of these cases per year and whose normal jurisdiction is different. On the other hand, the Family Court has developed an expertise which calls for the exercise of skills which are more akin to those required in Children's Court proceedings.²⁰²²

15.58 It could be argued that the lack of experience of intermediate and superior court judges hearing appeals in care and protection matters may be addressed by directing all care and protection appeals to one judge of the district court, as in NSW. However, this response would not take adequate account of the overlapping jurisdictions of the care and protection and family law systems or of the increasing expertise of the Family Court in determining similar matters in the best interests of children. The Inquiry recommends that, once internal children's court appeal processes have been exhausted, appeals should lie to the Family Court.

15.59 Appeals from State or Territory magistrates should be heard *de novo*, although the current procedural arrangement, under which the Family Court may accept as evidence in an appeal any evidence taken or tendered in the original hearing, should continue to apply.²⁰²³ Where there is an internal appeal structure in a children's court involving review of a magistrate's decision by a judge, this avenue should be exhausted before appeals are taken to the Family Court. In those cases, appeals should not be rehearings *de novo*, in recognition of the seniority and specialised skill of the children's court judges.

Recommendation 128. Appellate jurisdiction in matters relating exclusively to care and protection should be conferred on the Family Court. Where such matters arose in children's courts presided over by a magistrate the Family Court should hear appeals only after any internal avenues of appeal to a judge of that court have been exhausted. The appeal system should operate as follows.

- Appeals from care and protection matters originally heard by a magistrate in a court of summary jurisdiction or in a children's court where there is no internal avenue of appeal should be heard *de novo* by a single judge of the Family Court or, in Western Australia, by a single judge of the Family Court of Western Australia.
- Appeals from decisions of children's court magistrates in care and protection matters where there is an internal appeal to a judge of that court should be heard by that judge. Any further appeals from that judge's decision should be heard by a single judge of the Family Court. These appeals to the Family Court should not be rehearings *de novo*.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the proposal that appeals should lie to the Family Court from decisions made in all care and protection jurisdictions. The relevant legislation including Part X of the Family Law Act, protocols and procedures should be amended accordingly.

Appeals from decisions of courts of summary jurisdiction on family law matters

15.60 The Family Law Act allows appeals from decrees of courts of summary jurisdiction of a State or Territory exercising jurisdiction under the Family Law Act to be made to either the Family Court or to the Supreme Court of the State.²⁰²⁴ For those purposes, the Supreme Courts are invested with federal family jurisdiction.²⁰²⁵ However, this may be prevented by proclamation.²⁰²⁶ Appeals to the Supreme Courts of all States and Territories except the Northern Territory and Western Australia are currently the subject of proclamations.²⁰²⁷ In the Northern Territory appeals lie to the Supreme Court as well as the Family Court of Australia. Apart from Western Australia, which should retain an avenue of appeal through its State Family Court, all appeals against decisions of State and Territory courts exercising federal family law jurisdiction should also go to the Family Court alone. The Family Court should become the single court of appeal from all family law and care and protection matters.

Recommendation 129. Appeals from decisions of Northern Territory courts of summary jurisdiction exercising federal family law jurisdiction should lie to the Family Court alone.

Implementation. The Attorney-General should negotiate with the Northern Territory to effect agreement to this proposal and a proclamation should be made to that effect.

Specialisation and expertise of judicial officers

Introduction

15.61 Jurisdictional arrangements and the expertise of judicial officers must be considered together. Judicial officers must be able to deal effectively with any extension of jurisdictional arrangements between care and protection and family law systems. Issues relating to the development of expertise are different for the State and Territory systems and the federal system.

State and Territory magistrates' courts

15.62 To address some of the problems associated with access to the Family Court, the Commonwealth and the States and Territories have agreed that each State and Territory court of summary jurisdiction can exercise federal family law jurisdiction.²⁰²⁸ There are no detailed national statistics on the extent of the use of magistrates' courts for family law matters. Magistrates courts do not have any associated counselling services or primary dispute resolution processes and there are limited Family Court counselling services on circuit in rural areas.²⁰²⁹

15.63 Every State has a specialised children's court that hears juvenile justice and care and protection matters.²⁰³⁰ In non-metropolitan and remote areas and in the ACT and the Northern Territory, juvenile justice and care and protection matters are usually heard by the generalist magistracy sitting as a children's court for economic reasons and for convenience.

15.64 Generalist magistrates deal with a range of issues and generally provide an important service, particularly for rural and remote families. However, the level of specialist expertise among generalist State and Territory magistrates exercising federal family jurisdiction and dealing with care and protection matters was raised throughout the Inquiry as of serious concern.

Magistrates frequently do not have the training, experience or the time in a busy magistrates' court list to give proper consideration to all the family law issues, particularly the complex issues which relate to the determination of what is in a child's best interests.²⁰³¹

The typical magistrate is a 'jack of all trades' for whom children's matters are one of many areas he or she deals with. They generally do not regard children's work as a high priority. When they get a child's case they see it as the short end of the straw and try to get it over with as quickly as possible.²⁰³²

15.65 Generalist magistrates handle the vast majority of cases that come before Australian courts and already adjudicate on family law, care and protection matters and juvenile justice matters in rural areas. One submission noted that magistrates courts

...house a number of jurisdictions: criminal, juvenile justice, care and protection, coronial, criminal injuries compensation, family, domestic violence, industrial and civil. It is completely unreasonable to expect the Magistracy to be able to administer such a diversity of jurisdictions. The majority of magistrates are drawn from the criminal bar [in Victoria]. It is fair to say that few come to the bench with much familiarity or fondness for family law.²⁰³³

Another commented

[t]he traditional use of magistrates' courts has been for quick interim decisions, and here lie the greatest strength and the greatest weakness of these courts. They are generally widespread, relatively easily accessed in all but the most remote areas and exist to make summary decisions. The difficulty is that, while possessing these attributes, they lack the specialised knowledge and experience of the family law jurisdiction. Consequently, at least until new magistrates gain sufficient experience, they fall into traps such as granting far reaching *ex parte* orders without proper investigation.²⁰³⁴

15.66 In the longer term a specialist magistracy should be trained to handle family law and children's matters, including care and protection and juvenile justice, in all jurisdictions including on circuit in rural areas. There was a great deal of support for the development of such a specialised magistracy in submissions.²⁰³⁵ In areas where generalist magistrates presently operate on circuit, these specialist family and children's magistrates could operate on similar circuits. It may mean that each magistrate visits a centre less regularly or sits for a shorter period. A specialist magistracy would assist the development of expertise in family and children's matters and, in conjunction with the proposed cross-vesting arrangements or a transfer of powers, allow care and protection and family law issues to be dealt with in the one proceeding where necessary.

15.67 The NT Government pointed out that these arrangements may suit larger States. In the Territory, however, there are fewer magistrates and there is less capacity to become highly specialised.²⁰³⁶ The Inquiry recognises these problems but considers that attention should be given by the smaller jurisdictions to the introduction of a specialist magistrate in the future. The NSW Government submitted that the proposal needs greater consideration and has resource implications.²⁰³⁷ The proposal does have costs implications but it does not require a new infrastructure or an immediate increase in the number of magistrates.

Recommendation 130. States and Territories should develop a specialist magistracy to exercise federal family law jurisdiction and to handle care and protection and juvenile justice matters. All major population centres should have their own specialist family and children's magistrates, while in more remote areas specialist magistrates should operate on circuit.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and

Territories to the development of this magistracy.

Recommendation 131. States and Territories should produce uniform statistics on family law matters heard in magistrates' courts.

Implementation. The Attorney-General through SCAG should seek the agreement of States and Territories to a common approach to data collection.

A Family Court magistracy

15.68 The introduction of a federal magistracy that specialises in family matters would further streamline the jurisdictional arrangements for the determination of family law and care and protection matters, particularly under the proposed cross-vesting scheme or with a transfer of powers. It would allow matters dealt with by State and Territory magistrates exercising family law jurisdiction to be heard at a similar level in the Family Court. Further, a federal family magistracy would simplify the court's structure, increase its capacity and reduce litigation and court costs. It has several influential supporters, including the Family Law Council²⁰³⁸ and the Chief Justice of the Family Court.²⁰³⁹ It is currently being considered by the Attorney-General.²⁰⁴⁰

15.69 Federal magistrates should be specialists in family law. They must also have expertise in care and protection to enable them to deal with matters under the proposed cross-vesting arrangements or transfer of powers. If federal magistrates are to be generalists, they may well experience the same difficulties as State and Territory generalist magistrates discussed above.²⁰⁴¹

15.70 These magistrates must be judicial officers in their own right rather than exercising delegated jurisdiction as judicial registrars of the Family Court do at present. These magistrates will be able to hear disputed matters and to deal with a sufficient proportion of matters in the Family Court so as to ease the burden on judges and reduce delays only if they are judicial officers.

Recommendation 132. A specialist Family Court magistracy should be established. These magistrates should be judicial officers in their own right, empowered to hear and determine contested children's matters.

Implementation. The Attorney-General should introduce a specialist federal magistracy for family matters.

The development of expertise

15.71 At present, State and Territory magistrates receive limited training in family law and children's issues. For example in NSW magistrates receive two days pre-bench induction and a one week residential training course in their first year on the bench. There are also five days of continuing judicial training for all magistrates each year. However, this training covers a range of issues and is not directed specifically to care and protection or family law issues.²⁰⁴² Although the Family Court has been active in ensuring that its judges receive training in several areas, particularly in gender issues and cross-cultural awareness, it has not introduced a course specifically on children's issues.

15.72 The lack of training of judicial officers was raised as an issue of considerable concern in submissions.²⁰⁴³ One submission noted that '...the training needs of those who deal with children's issues have always been a relatively neglected area in the Australian legal system'.²⁰⁴⁴ Another noted '...the tendency of some magistrates to underestimate applicants' fears, trivialise complaints, adjourn cases repeatedly and lack sensitivity and training to adjudicate family issues'.²⁰⁴⁵

15.73 All judicial officers in both federal and State and Territory systems who hear family law and children's matters, including care and protection and juvenile justice matters, should receive specialised training in children's issues.

15.74 Whether or not a specialised magistracy is introduced in either the federal or State and Territory jurisdictions, there should be a core training program for judicial officers hearing family law and care and protection matters dealing particularly with communication with children, child development, family dynamics and the substantive areas of law. Given their developing experience in dealing with child abuse matters and in the light of the recommendations made in this chapter, it is important that Family Court judicial officers also develop expertise in issues relating to child abuse and in the substantive law of the care and protection jurisdictions. This training should include annual professional development conferences and more intensive training.²⁰⁴⁶

Recommendation 133. Judicial officers, including State and Territory magistrates, exercising federal family jurisdiction should receive training in children's matters. Training for State and Territory magistrates could be provided by members and staff of the Family Court during annual training conferences. Training should include material on

- child development
- communication skills and appropriate language for communicating with children
- family dynamics
- issues surrounding disclosure of and family dynamics concerning child abuse
- cross-cultural awareness.

Implementation. In conjunction with other judicial education bodies, AIJA should develop a national core syllabus for this training.

Recommendation 134. All magistrates and judges who hear care and protection matters should be trained in children's issues. Training should include simulated clinical exercises and feedback on the use of appropriate language and communication with children.

Implementation. In conjunction with other judicial education bodies, AIJA should establish minimum training requirements for the children's court magistracy and judiciary and set guidelines for training programs to be implemented in each jurisdiction.

16. Children's involvement in family law proceedings

Introduction

16.1 Many Australian children grow up in families where the parents divorce.²⁰⁴⁷ The experience and process of family breakdown and family disputes can be a disruptive and destructive time for families and children. While many aspects of the breakdown of parents' relationships affect children, they are particularly affected by disputes over parental responsibility. For many children, family law proceedings are the first contact they have with courts and formal legal processes.

16.2 The Family Court was established in 1976 by the Family Law Act. It is a federal court with power to make decisions about matters relating to marriage, divorce, spousal maintenance and parental responsibility for children.²⁰⁴⁸

16.3 The traditional adversarial model of litigation has been modified somewhat in the Family Court in matters involving children, in particular by the requirement that the best interests of the child be the paramount consideration.²⁰⁴⁹ The Family Court has also developed alternative dispute resolution processes such as counselling and mediation. There has been recognition recently of the need for the wishes of children to be heard in family law proceedings.²⁰⁵⁰ There is also growing recognition that the harmful effects of these proceedings on children can be reduced by giving them the opportunity to participate appropriately in decision making. However, the focus of family law litigation remains on the parental contest. The processes often do not serve the needs or interests of children or allow their effective participation.

16.4 These observations also apply to State and Territory generalist magistrates courts empowered to deal with family law matters.²⁰⁵¹ In addition, these magistrates generally have little specialist training in family matters and varying levels of interest in the jurisdiction. Family law litigants in magistrates' courts have limited access to the alternative dispute resolution processes of the Family Court or to expert assistance from court counsellors.²⁰⁵²

16.5 This chapter seeks to formulate better arrangements to promote children's appropriate participation in the resolution of family disputes by the Family Court.

The best interests principle

Introduction

16.6 The fundamental principle in international and Australian law concerning children is that all decisions made and actions taken should be in their 'best interests'. CROC requires that

in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.²⁰⁵³

16.7 The Family Law Act requires the court to have regard to 'the need to protect the rights of children and to promote their welfare' in any matter with which it deals under the Act.²⁰⁵⁴ The best interests of the child is to be the paramount consideration.²⁰⁵⁵ The aim of the Family Law Act with respect to children is

...to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.²⁰⁵⁶

The best interests principle as the basis of decisions

16.8 In Australia the meaning of the term 'best interests of the child' has been explored most comprehensively in the family law area. The Family Law Act lists the factors that the court must consider in determining the child's best interests, beginning with any wishes expressed by the child.²⁰⁵⁷ Care and protection legislation in most States and Territories also requires consideration of the child's best interests.²⁰⁵⁸

16.9 The principle has been criticised on the basis that it lacks certainty.²⁰⁵⁹

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge primarily be concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic productivity of the child when he grows up?...[I]f the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.²⁰⁶⁰

...the diversity of values and circumstances which would affect decisions...precludes any realistic expectation that decisions would not be made according to the idiosyncratic opinion of individual judges — that, in other words, using a 'principle' like 'best interests' in the exercise of a welfare power would mean there are no rules at all.²⁰⁶¹

It has been suggested that, even where legislation provides guidance as to the factors to consider in making a decision about a child's best interests, that guidance remains normative rather than objective.²⁰⁶² It is argued that the best interests principle '...has been used to affect a wide variety of preferences about children's custody'.²⁰⁶³

16.10 However, submissions to the Inquiry generally considered the principle to be a useful basis for decision making concerning children.²⁰⁶⁴ It is said to ensure that children's interests are preferred over those of any other party, an important consideration because children's participation in proceedings is so limited.²⁰⁶⁵ It also allows each matter to be considered and determined on its own particular merits and allows changing community expectations to be taken into account in determining cases.

The scope of the best interests principle

16.11 The Family Law Act specifically requires the court to regard the best interests of the child as the paramount consideration when making parenting orders²⁰⁶⁶ and some other orders.²⁰⁶⁷ The court must consider a number of matters in determining the best interests of the child in those cases.²⁰⁶⁸ In deciding whether to make consent orders the court may, but need not, consider those matters.²⁰⁶⁹

16.12 The scope of the current provisions requiring the consideration of the best interests of the child may be too narrow. Before the *Family Law Reform Act 1995* (Cth) came into force a single over-arching provision required the consideration of the welfare of the child in all proceedings with respect to the child.²⁰⁷⁰ This requirement had been interpreted to apply to procedural as well as substantive issues.²⁰⁷¹ Justice Chisholm has suggested that the ability of the court to consider the best interests of the child in determining procedural issues may be in doubt as a result of the 1995 amendments.²⁰⁷² He considered that '...the purpose of this...change...is far from clear'.²⁰⁷³

It may have been intended to give more force to the principle by repetition [in the separate sections rather than in a global statement]. But although repetition is a feature of the Act, it seems obvious that a single over-arching statement would be stronger and more compelling...Another possible explanation is that it may have been intended to limit the operation of the principle.²⁰⁷⁴

16.13 In addition, the current provisions may not go far enough to establish, consistent with CROC, that the child's best interests should be at least a primary consideration in all decisions concerning them.²⁰⁷⁵ The High Court has held that matters 'concerning children' should be interpreted very broadly.²⁰⁷⁶ Therefore, greater scope should be given to the consideration of children's best interests under the Family Law Act.

16.14 Both these concerns can be addressed by including in the Family Law Act a requirement that in all actions of the court concerning children, the best interests of the child shall be a primary consideration. This would allow a balancing of considerations where the child's best interests need not be considered paramount but merely one of a number of considerations. It would address the concern that the emphasis given to children's best interests may be read down following the 1995 amendments. It would also more appropriately reflect CROC's requirements.²⁰⁷⁷ Such a provision would not interfere with the requirement in the Family Law Act that a child's interests be the paramount consideration in determining applications that most directly affect the child such as applications for parenting orders.²⁰⁷⁸ This provision should not apply to matters relating to the maintenance of children.²⁰⁷⁹ The considerations to be taken into account in maintenance determinations are, appropriately, expressly limited under the Act.²⁰⁸⁰ For these reasons, we recommend that in all actions concerning children the child's best interests should be a primary consideration unless the legislation expressly states otherwise.

Recommendation 135. In all actions of a court under the Family Law Act concerning children, unless the Act expressly states otherwise, the best interests of the child should be a primary consideration.

Implementation. Section 43 of the Family Law Act should be amended to reflect the provisions of article 3(1) of CROC in relation to all areas of the Act not subject to the present best interests requirement.

Assessing the best interests of the child

16.15 The Family Law Act lists the factors the court must consider in determining a child's best interests as

- any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes
- the nature of the child's relationship with each parent and other persons
- the likely effect of any change in the child's circumstances including the likely effect on the child of any separation from either of his or her parents or any other person with whom he or she has been living
- the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis
- the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs
- the child's maturity, sex, background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks relevant
- the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour or by being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person
- the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents
- any family violence involving the child or a member of the child's family
- any family violence order that applies to the child or a member of the child's family
- whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child
- any other fact or circumstance that the court thinks relevant.²⁰⁸¹

16.16 Submissions to the Inquiry generally approved these factors.²⁰⁸² However the wording of the factors indicates that they were intended only for considering issues related to parenting orders. The list should be broadened to be relevant to all types of proceedings in which the best interests of the child are the paramount or a primary consideration.²⁰⁸³ Further guidance could be of particular use in relation to deliberations in the court's welfare jurisdiction.²⁰⁸⁴

Recommendation 136. The factors relevant to a consideration of the best interests of the child,

enumerated in the Family Law Act, should also include factors relevant to all areas of decision-making to which the best interests principle applies, and in particular to location and recovery of children, adoption and the welfare of children.

Implementation. Section 68F(2) of the Family Law Act should be redrafted accordingly.

Alternative dispute resolution

Introduction

16.17 In any proceedings involving children under the Family Law Act, a party or a child's representative can apply for court counselling assistance. The court can also order the parties to attend counselling with a family and child counsellor or welfare officer. In either case, the parties (with or without the child) are then interviewed by a family and child counsellor or welfare officer to discuss the welfare of the child and to try to resolve any differences.²⁰⁸⁵ As well as providing counselling services, the Family Court can divert parties from litigation by referring them to conciliation,²⁰⁸⁶ mediation²⁰⁸⁷ or arbitration.²⁰⁸⁸ Close to 75% of cases filed in the Family Court are at least partly resolved during the voluntary counselling stage of the proceedings.²⁰⁸⁹ Statistics are not kept on the numbers of children participating in these alternative dispute resolution processes.²⁰⁹⁰

Children's participation in alternative dispute resolution

16.18 The little research available suggests that children may benefit from involvement in Family Court mediation, conciliation and counselling processes.²⁰⁹¹ In a Scottish study of 28 children who had been involved in conciliation, 24 children indicated that they had benefitted from their attendance. Most of those children mentioned an improvement in communication and some also said that conciliation had allowed them to express their feelings to someone who knew how they felt.²⁰⁹² The federal Attorney-General's Department considered that children's needs

...can be considered more effectively in the mediation or counselling process and they will receive a positive image of their parents communicating, negotiating and reaching agreements. This involvement will also enhance the prospects of the agreement surviving in the future.²⁰⁹³

16.19 Some submissions to the Inquiry suggested that all children should be involved in these alternative dispute resolution programs following the separation of their parents.²⁰⁹⁴ On the other hand, the federal Attorney-General's Department submitted

[f]or some there is a reluctance to involve children directly because of a desire to protect them from the dispute as much as possible and in mediation, not to put responsibility for adult decision making on children.²⁰⁹⁵

The submission from Brenda House noted that some children

...have said that they do not want to make any decisions, that they want their parents to decide on what arrangements should exist...For some children the emotional burden of trying to 'balance' their parents is enormous.²⁰⁹⁶

The Australian Association of Social Workers told the Inquiry

[t]he outcome of counselling for many children is often for them to express a wish for the parents to leave them out of the dispute. The message may be salutary for the parents.²⁰⁹⁷

These points are well made. Children should not be required to become involved in alternative dispute resolution processes. Rather, the degree of children's involvement should be determined in each case on the basis of the wishes and needs of the child involved. Ensuring that in each case the child's participation in these processes is appropriate may be difficult but the challenge should not be avoided. Relationships Australia strongly endorsed

...the rights of children to be kept fully informed on what decisions are being made which affect them and who is making these decisions, at all stages of any proceedings, through mediation, child and family counselling, court

counselling and litigation. Children need to know what is going on, what their rights are. They need to have the opportunity to be heard and supported in this by people with expertise in working with children, and if possible, not to be put in a decision making role which draws them into the cross fire of their parents' conflicts.²⁰⁹⁸

16.20 DRP 3 proposed research to gather statistics to allow an assessment of the various alternative dispute resolution processes.²⁰⁹⁹ We suggested that research should assess the use made of counselling for, and conciliation and mediation involving, children and the origin of the applications for children to become involved. The research could also consider the results of those processes involving children compared to those where children were not involved.

16.21 Since the draft recommendation was made, the Attorney-General's Department has funded research, to be completed by March 1998, to recommend '...best practice approaches for counselling and mediation services to ensure that the needs of children are more effectively addressed'.²¹⁰⁰ In particular, the research is to report on the most effective interventions to assist parents and children to deal with children's experience of separation, to explore the experiences and perspectives of children and parents in the process and to recommend appropriate strategies to ensure a focus is maintained on the needs and perspectives of children.²¹⁰¹ As a result of this continuing research, the Attorney-General's Department 'takes a cautious approach' to the draft recommendation.²¹⁰² The Inquiry commends this research and we have, as a result, amended our recommendation. After the completion of this research, however, statistics should continue to be collected and published by the Family Court.

16.22 Relationships Australia has suggested that these statistics should also be collected from those services funded under the Attorney-General's Family Services Program but provided outside the Family Court.²¹⁰³ We agree. These statistics should also be collected and provided to the Family Court where these services have been used after the filing of a court application.

Recommendation 137. The Family Court should collect statistics on children's participation in counselling, mediation and conciliation processes, including the origin of applications in which children's involvement is requested, the number of matters in which children are involved and the results, including long-term outcomes, of those matters in which children participate in counselling or mediation compared with those where they do not. These statistics should be collected for all post-filing primary dispute resolution processes, including those funded under the Family Services Program.
Implementation. The Family Court should collect these statistics and publish them in its Annual Report.

The provision of alternative dispute resolution services

16.23 The Attorney-General is currently considering the most appropriate arrangements for the provision of alternative dispute resolution services in family disputes.²¹⁰⁴ A Discussion Paper, *Delivery of Primary Dispute Resolution Services in Family Law*, was released in August 1997 to evaluate the structure of the current service delivery in this area.²¹⁰⁵ The Attorney-General's Department has foreshadowed that '...a significant proportion of the counselling and mediation services now provided by the Family Court may be moved to the community sector'.²¹⁰⁶

16.24 Whatever structure is introduced for the provision of alternative dispute resolution processes, minimum criteria should apply for all service providers.²¹⁰⁷ Present recruitment criteria for Family Court counsellors includes the following.

- A recognised degree or diploma in Psychology, Social Work or related discipline is essential. Eligibility for membership of the APS or AASW would be an advantage.
- At least 5 years relevant post-graduate experience, including at least 2 years working with family relationships is essential.
- At least 2 years experience working with children, including the assessment of children and family relationships is essential.²¹⁰⁸

These same criteria should apply to all service providers.

16.25 Family Court counsellors, mediators, court report writers and private practitioners providing family and child counselling or other alternative dispute resolution services also require continuing training to ensure that their knowledge and skills are up-to-date.²¹⁰⁹ Training should focus on legal issues for children in family law, child development and communication with children. It should provide up-to-date information on issues surrounding disclosure of child abuse, family dynamics concerning abuse and best practice for dealing with such allegations.²¹¹⁰ Training is also important for all other staff dealing with family law matters who are likely to have contact with children.²¹¹¹

16.26 DRP 3 proposed that counselling and mediation services should be available to all courts, including State and Territory magistrates' courts, exercising federal family law jurisdiction.²¹¹² It suggested that these services could be supplied in part by extending telephone counselling services and counselling circuits and making use of video links and other new technologies in appropriate cases. Whatever the outcome of the Attorney-General's review of alternative dispute resolution services in family law,²¹¹³ the recommendation that services be available to all litigants involved in family disputes remains relevant.²¹¹⁴

Recommendation 138. All providers of primary dispute resolution services associated with family disputes, whether employed within or outside the Family Court, should have

- a recognised degree or diploma in psychology, social work or related discipline
- at least 5 years' relevant post-graduate experience, including at least 2 years' working with family relationships
- at least 2 years' experience working with children, including the assessment of children and family relationships.

Implementation. The Attorney-General should specify that these standards are the minimum training and experience requirements for external providers of primary dispute resolution services associated with family disputes.

Recommendation 139. All providers of primary dispute resolution services associated with family disputes should receive continuing training in children's matters. Training should include material on legal issues for children in the family law system, child development and communication and, particularly, issues surrounding the disclosure of, family dynamics concerning and best practice for dealing with allegations of child abuse.

Implementation. The Family Court should develop appropriate continuing training programs to ensure the currency of the skills of its counselling and mediation staff. The Attorney-General should specify that all external providers of primary dispute resolution services should receive similar training.

Recommendation 140. Counselling and mediation services should be available to all litigants involved in family disputes regardless of the court they are before. These services could be supplied in part by extending telephone counselling services or counselling circuits and by making use of video links and other new technologies in appropriate cases.

Implementation. Depending on the results of the Attorney-General's review of alternative dispute resolution services in family law, the Family Court should consider appropriate mechanisms to ensure the provision of these services and should be resourced adequately to put these mechanisms in place.

Family Court practice and procedure: the right of the child to be heard

Introduction

16.27 Children are often assumed to be unduly traumatised by being directly involved in litigation concerning the breakdown of their parents' relationship. They are said to be manipulated by parents into giving evidence or expressing wishes favourable to one parent or even to manipulate the parents themselves to achieve their own ends. It is argued that the court must be sensitive to the difference between what a child wants and what he or she needs and that, while a child may express a wish to participate, this may not be in his or her long term best interest.²¹¹⁵ One commentator has suggested that, by involving children in family

disputes, children are not being given the opportunity to participate but rather the responsibility to decide something their parents cannot agree upon themselves.²¹¹⁶ These remain factors for concern.

16.28 However, there is a difference between asking a child to participate directly or to give evidence in relation to disputes of fact (which should generally be avoided)²¹¹⁷ and allowing a child the opportunity to express his or her wishes on a particular matter. Children's participation in Family Court proceedings requires flexibility to ensure that the level and kind of participation is suitable for the needs and capacities of the individual child.

16.29 Children should not be required or pressured to do so but mature children should be able to participate appropriately, even to the extent of becoming witnesses or parties in litigation, where they freely indicate a desire to do so.²¹¹⁸ In those cases, the involvement of children in the family decision-making process can be of real benefit to the children, to the court and ultimately to achieving the best decision.²¹¹⁹ Failure to hear directly from children in proceedings in which they are the subject is said to be 'indicative of a conservatism'²¹²⁰ and to involve 'notions consistent with children being possessions rather than humans'.²¹²¹ CROC requires the child to be provided with the opportunity to be heard in any judicial or administrative proceedings affecting him or her either directly or through a representative.²¹²²

16.30 If children are not directly involved in family law proceedings as witnesses or parties the rule against hearsay must be, and is, relaxed.²¹²³ This reduces the potential for legal argument as to admissibility of evidence of children's views and provides flexibility to ensure that the best interests of children are promoted in each case.²¹²⁴ It has led to the introduction of a number of mechanisms for hearing from children without directly involving them. Children are commonly heard in family law litigation through expert witnesses, court counsellors' reports or through a child's representative appointed for that purpose.²¹²⁵

The role of the judge

16.31 Many submissions to the Inquiry suggested that the adversarial model of litigation is inappropriate for the Family Court and particularly for children's matters.²¹²⁶

The adversarial mode frequently sets the stage for the children to become the battleground and/or weapons in the parental conflict. As victims, their lives may become distorted permanently.²¹²⁷

When the Family Court was first established, it was intended that it avoid the problems associated with the traditional adversarial system. However, some early cases counselled against relaxation of the adversarial model.²¹²⁸ More recently, the court has held that '[p]roceedings in relation to the welfare of children are not strictly adversarial...'²¹²⁹

16.32 Considerable flexibility exists in children's cases²¹³⁰ and the available mechanisms ought to be appropriately utilised.²¹³¹ Family Court judges are given more latitude in children's matters than judges in most other courts to inquire into the issues to be determined.²¹³² The judges are also given more scope than those in other courts to ascertain the best interests of the child by asking questions of witnesses of their own motion.²¹³³ They are not limited to the material produced by the parties but can suggest that the parties call additional evidence or follow a particular line of questioning.²¹³⁴ However, a judge's decision may be overturned on appeal if the Full Court considers that the judge was too interventionist and interfered with counsels' conduct of the case.²¹³⁵ Activist judging is promoted in all jurisdictions and has been considered in ALRC Issues Paper 20, *Rethinking Federal Civil Proceedings*.²¹³⁶

Recommendation 141. Judges and magistrates deciding family law matters should be encouraged to intervene appropriately to assist the determination of the best interests of the child in Family Court children's matters.

Implementation. The Family Court should consider implementing a training program for judges and, with State and Territory agreement, magistrates exercising federal family jurisdiction on more inquisitorial approaches to determining the best interests of the child. The court should also consider preparing suitable guidelines to assist judicial officers in this regard.

Simplified procedures

16.33 In January 1996 the Family Court introduced simplified procedures.²¹³⁷ They were designed to reduce the complexity and cost of proceedings²¹³⁸ and to encourage an attitudinal shift from litigation to negotiation.²¹³⁹ They were adopted in recognition of the fact that only 5% of cases commenced in the Family Court proceed to trial.²¹⁴⁰

16.34 The procedures require that initiating applications contain minimal information such as the necessary details about the parties and the orders sought. This means that it can sometimes be difficult to determine what issues are in dispute even at the directions hearing.²¹⁴¹ This can be problematic if issues of child abuse are involved in the matter but are not disclosed to the registrar at the directions hearing or if there is a question of whether a legal representative should be appointed for the child for other reasons. It also makes it difficult to determine whether a family report should be prepared.²¹⁴² The procedures may therefore render children invisible at the early stages of the litigation. The Family Court has established a committee to monitor the workings of the procedures.²¹⁴³

Recommendation 142. Through consultation and research, the Family Court should determine how best to assess at the earliest possible time the need to appoint a legal representative for the child.

Implementation. The Family Court committee monitoring the simplified procedures should conduct such an investigation.

Family reports

16.35 If the care, welfare and development of a child is relevant to proceedings under the Family Law Act, the court may direct a family and child counsellor or welfare officer to prepare a family report on such matters as the court thinks desirable.²¹⁴⁴ Family reports are prepared in almost 60% of contested cases involving children that proceed to trial.²¹⁴⁵ They are commonly ordered where the age and maturity of the child suggests that he or she would be capable of articulating perceptions and wishes and also in cases where child abuse is alleged.²¹⁴⁶ The counsellor or welfare officer who prepared the report is generally required to be available for cross-examination on it.²¹⁴⁷

16.36 These reports are highly influential. They prompt settlement or are followed by judges in 76% of cases for which they are prepared.²¹⁴⁸ A current study in the Canberra and Melbourne registries of the Family Court indicates

...the most frequent reference of the judge and judicial registrar in reasons for the decision, apart from the individual's circumstance and credibility, was to the findings of the family report.²¹⁴⁹

Family reports were described to the Inquiry as

...one of the primary and purest ways in which a child may be heard in Family Law proceedings and their wishes ascertained without the need for the child to give direct evidence.²¹⁵⁰

DRP 3 suggested that family reports are a useful tool and that their use is integral to the increasing focus on children's participation in matters that affect them.²¹⁵¹ For many children, family reports provide a suitable vehicle for the expression of their wishes and opinions without burdening them with decision making responsibility.²¹⁵²

16.37 Submissions to the Inquiry suggested that some Family Court counsellors lack the expertise to prepare family reports in cases where allegations of child abuse have been made.²¹⁵³ In many cases where the State or Territory care and protection department does not investigate allegations of abuse adequately or at all the family report becomes, in effect, a child protection assessment.²¹⁵⁴ However, as family reporter preparers are attached to the court, they are generally aware of the legislative requirements of the decision makers and are able to be held accountable by the court.

16.38 DRP 3 suggested that the stage at which family reports are prepared should be reassessed.²¹⁵⁵ Generally, family reports are ordered at the prehearing conference no earlier than 14 weeks before the hearing to allow the report to be produced three weeks prior to the hearing.²¹⁵⁶ This may be 12 to 18 months after proceedings have begun. Many submissions agreed that reports should be prepared earlier in the process than they are at present²¹⁵⁷ and suggested that family reports can be useful in determining appropriate interim orders.²¹⁵⁸ Delays in reaching the final hearing in the court mean that interim orders are frequently decisive in the case. The provision of reports at this stage gives a sounder base for these decisions. It was also suggested that earlier reports will encourage earlier settlements.²¹⁵⁹ The Family Court has noted in this respect that reports '...are not prepared for the purpose of settlement, even though they may be used for such ends'.²¹⁶⁰

16.39 On the other hand, court resources were cited by some as a reason why family reports are not ordered earlier in the proceedings.²¹⁶¹ In addition, family reports are said to be intrusive and may be traumatic for children.²¹⁶² National Legal Aid summed up these concerns in noting

...there is currently up to a two year wait before a Hearing in some Registries so there exists a fine balance between issuing Family Reports too early. Early Reports may assist in bringing about early settlements, but if a matter does not settle and a Report then needs to be updated at a later time, the question of costs arise and possible systems abuse of children.²¹⁶³

16.40 On balance, the Inquiry considers that the Family Court should order family reports earlier in proceedings. An early report may be used as the basis for a later report if needed. It is particularly important that court counsellors become involved in the process earlier than they do at present if they are to play an expanded role in investigating and providing information to the court on the best interests of the child. At recommendation 80 we recommended that the role of court counsellors providing reports should be expanded to include greater investigative functions. This was made in the context of the recommendation that representatives for children should conduct the litigation, wherever possible, on the directions of the child.²¹⁶⁴ An expanded role for court counsellors as investigators of the child's objective best interests requires the early involvement of the report writer.

Recommendation 143. The Family Court should review the timing of ordering family reports to ensure that the report can be used to promote settlement while avoiding unnecessary procedures and distress for children and families.

Implementation. The Family Court should conduct a review of its family report procedures and amend the practice accordingly.

Experts

16.41 The court may also receive evidence of the views of children, without hearing from children directly, by the use of outside experts. Expert evidence may be introduced by a number of avenues. The court may appoint experts to inquire into and report on any issue of fact or opinion.²¹⁶⁵ These experts may be appointed on the application of any party or on the court's own motion. The expert is to be agreed upon by the parties or may be nominated by the court.²¹⁶⁶ The court also has the option of seeking the assistance of assessors.²¹⁶⁷

16.42 In its submission on DRP 3 the Family Court agreed that on occasions individual expert reports are requested and ordered under O 30A instead of family reports where a family report would be satisfactory. These orders may sometimes be made as a result of resource constraints and may be made in inappropriate circumstances.²¹⁶⁸ National Legal Aid pointed out that increasing the use of expert evidence has cost implications for legal aid as it is often required to fund these reports.²¹⁶⁹

16.43 Wherever the issues in contention are appropriately within the areas of expertise of court counsellors, family reports should be used to provide the court with evidence about family functioning and dynamics and the wishes of the children concerned.²¹⁷⁰ However, there will be many areas outside the discipline and training of court counsellors.²¹⁷¹ As the Family Court noted in its submission, the issues to be addressed will determine the appropriate professional for the task.²¹⁷² A Case Management Guideline could clarify these matters.

16.44 The Family Law Act provides for the appointment of an assessor to assist the court in hearing and determining proceedings or particular parts of proceedings.²¹⁷³ Assessors were intended to assist the court to resolve disputes quickly and efficiently. Matters were to be referred to assessors for examination and report back to the court.²¹⁷⁴ Assessors have not been widely used and there are no cases reporting their use. The court could benefit from exploring the greater use of assessors in children's cases.

16.45 Parties may also obtain independent expert evidence in limited circumstances and subject to direction from the court.²¹⁷⁵ A particular problem regarding these experts occurs in cases where child abuse is alleged by a party or the child. In these cases, children are often examined or interviewed by the different experts hired by the parties, in addition to court counsellors and court-approved expert witnesses. The Family Law Act provides that if, after the initial examination or interview of the child by an expert witness, a child is interviewed or examined by any other expert without prior leave of the court, evidence of the examination is not admissible in any proceedings under the Act.²¹⁷⁶ The Family Court suggested that this provision should be strengthened and that a recommendation be made to prevent interviews being carried out without the leave of the court. It suggested that merely rendering inadmissible evidence obtained from an unsanctioned examination does not sufficiently protect the child.²¹⁷⁷ Evidence to the Inquiry suggested that, despite the current provisions in the Family Law Act, children in this situation may be subject to systems abuse due to over-interviewing by numerous expert witnesses.²¹⁷⁸

16.46 Where an application has been made to have a child further examined or interviewed by more than one expert witness, the Family Law Act sets out the factors that the court must consider in deciding whether to grant leave to have the child further examined.²¹⁷⁹ These factors do not specifically include the opinion or wishes of the child although the court is able to consider '...any other matter that the court thinks is relevant'.²¹⁸⁰ DRP 3 proposed that the section be amended to include a specific consideration of the wishes of the child in deciding whether or not to allow the child to be examined by an expert.²¹⁸¹ The Family Law Reform and Assistance Association supported that draft recommendation.²¹⁸²

16.47 National Legal Aid pointed out that the court already has power to consider any other matter it thinks relevant in deciding whether to have the child further examined.²¹⁸³ Section 68F of the Family Law Act already specifically states that the wishes of the child should be taken into account in considering the best interests of the child. National Legal Aid considered that this allows the court to take the wishes of the child into account when considering whether to have the child interviewed. However, section 68F does not specifically require the court to have regard to the best interests of the child in considering whether to grant leave to have the child interviewed. Therefore, there is some uncertainty as to whether the requirement to have regard to the wishes of the child is implicitly imported on that ground.²¹⁸⁴ Where a child is to be interviewed more than once, the child is necessarily involved in the proceedings and has the right to have his or her views taken into account.

Recommendation 144. More effective use should be made of the power under O 30A of the Family Law Rules to appoint experts to assist the court by inquiring into and reporting on issues concerning children.

Implementation. The Family Court should give consideration to the present and potential use of these rules and consult with the legal profession and expert witnesses concerning effective use of experts.

Recommendation 145. The greater use of assessors in children's matters in the Family Court should be explored and, if appropriate, encouraged.

Implementation. The Family Court should consider making more use of this procedure and preparing suitable case management guidelines.

Recommendation 146. The Family Court should collect and maintain statistics concerning the number of times experts, including Family Court counsellors, interview each child in each litigated matter in the Family Court. These statistics should be used to conduct a regular assessment of whether children are over-interviewed during family law proceedings.

Implementation. The Family Court should establish a database, collect these statistics and publish

them in its Annual Report.

Recommendation 147. In deciding whether to grant an application that a child be interviewed or examined by an expert, the court should consider any wishes expressed by the child as well as the other specified considerations.

Implementation. Section 102A(3) of the Family Law Act should be amended to this effect.

Parenting plans

16.48 Parenting plans are written agreements between parents on matters concerning their children.²¹⁸⁵ They are intended to encourage co-operation between the parties in preference to litigation. They may deal with residence, contact, maintenance or any other aspect of parental responsibility for a child.²¹⁸⁶ Parents are encouraged to, but need not necessarily, regard the best interests of the child as paramount.²¹⁸⁷ There is no provision in the Family Law Act for the involvement of children in the development of a parenting plan.

16.49 A parenting plan may be registered in the Family Court if the court considers registration appropriate having regard to the best interests of the child.²¹⁸⁸ In deciding whether to register a parenting plan, the court need not determine the child's best interests in accordance with the specific statutory principles set out in section 68F(2). To be registered in court, parenting plans must have been developed after consultation with a family and child counsellor or following independent legal advice as to the meaning and effect of the plan.²¹⁸⁹ Once a plan is registered, the provisions operate as though they are orders of the court.²¹⁹⁰ Registration of parenting plans may be unilateral. Between July and September 1996, 179 parenting plans were registered in the Family Court of Australia and the Family Court of Western Australia.²¹⁹¹

16.50 These registration requirements may mean that parenting plans do not promote appropriately flexible parenting arrangements which are able to adapt with changed circumstances over time.²¹⁹² Parenting plans should be an effective alternative to court orders,²¹⁹³ encouraging parents to take a co-operative long term approach to their children's welfare, and able to accommodate changes in circumstance. The National Children's and Youth Law Centre pointed out that parents may be unable to focus properly on the wishes or interests of their children in the emotional turmoil of separation.²¹⁹⁴ Another submission suggested that a review mechanism should be established to take account of changed circumstances.²¹⁹⁵

16.51 In its response to DRP 3, the Attorney-General's Department noted that it '...supports the aim of [the draft recommendation] that the provisions allowing registration of parenting plans be monitored and reviewed over the next 12 months'.²¹⁹⁶ The Department suggested that a consideration of whether, and to what extent, registration prevents or inhibits flexible parenting arrangements may best be conducted as a longitudinal study by the Family Law Council. As an initial step, a sample of registered parenting plans may be usefully scrutinised to determine whether their provisions, on their face, are likely to inhibit flexible parenting.

16.52 DRP 3 noted that the legislation makes no provision for children to be involved in developing a parenting plan. They may be the subject of a plan but need not be a party to it. It suggested that parents should be encouraged to involve their children in the development of parenting plans and that counsellors should also involve children as appropriate. National Legal Aid disagreed with the draft recommendation on the basis that '...it would be too open to abuse and the further manipulation of children'.²¹⁹⁷ In its submission on IP 18, the federal Attorney-General's Department noted

[t]here are no specific provisions which would guarantee such participation. It would only occur to the extent that the professionals involved seek to involve them. Parenting plans are designed for the assistance of separating parents at a low level of conflict. In such circumstances it is quite likely that they would be open to involving children in the process.²¹⁹⁸

16.53 In any situation of family breakdown there is potential for the parents to manipulate or inappropriately involve of children. Parenting plans are essentially directed to co-operative parents who ought to take account of the opinions and wishes of the children concerned. The involvement of legal representatives or counsellors in the promotion of co-operative arrangements between parents should assist parents to focus on

the needs, perspectives and best interests of their children. Children's wishes would, at first instance, be relayed to court counsellors by the parents. Where the counsellor is satisfied that the parents are sufficiently co-operative in the best interests of their children to ensure that children are not subject to inappropriate manipulation, counsellors should generally consider speaking to verbal children to ensure they understand the arrangements proposed.

16.54 The federal Attorney-General's Department has expressed support for these recommendations but noted that children's involvement '...should be done very carefully, and the responsibility for decision making should not be inappropriately placed on the child'.²¹⁹⁹ We agree with this caveat but suggest that a culture of appropriately involving children in the choices to be made in developing parenting plans should be fostered. Children who are capable of and willing to have a say in their family circumstances should have the opportunity to do so.²²⁰⁰ This should be formally recognised in legislation to ensure the opportunity is afforded to children to participate in appropriate cases.

Recommendation 148. The Family Law Council should monitor the operation of parenting plans over the next 12 months and assess

- whether and to what extent registration is likely to prevent or inhibit flexible parenting arrangements
- whether registered parenting plans are based on appropriate and careful assessments of the best interests of the children by parents
- whether the court, in registering parenting plans, in fact considers any or all of the relevant principles of s 68F(2) of the Family Law Act.

In the light of this research, the Attorney-General should review the provisions allowing registration of parenting plans.

- If the research indicates that registration of parenting plans is likely to prevent flexible approaches to parenting, the Family Law Act should be amended to remove or modify the registration provisions.
- If parenting plans continue to be registrable, rules specifying the information that must be filed along with the plan should require sufficient detail to allow the court to scrutinise the plan closely and ensure that the long term best interests of the child are protected.

Implementation. The Family Law Council should undertake this research and the Attorney-General and the Family Court should take appropriate action as a result of the research.

Recommendation 149. Parents should be encouraged to involve their children in the preparation of parenting plans to the extent appropriate to the child's age, maturity and wishes.

Implementation. Section 63B of the Family Law Act should be amended to this effect.

Recommendation 150. Where parenting plans are developed with the assistance of family or child counsellors, counsellors should involve children who are the subject of the plan in its formulation to the extent appropriate to the child's age and maturity and commensurate with the child's wishes.

Implementation. A provision should be inserted into the Family Law Act to this effect.

Children's evidence

16.55 The Family Law Act does not prohibit children from giving evidence but the Family Law Rules state that leave of the court must be obtained before a child may be called as a witness, remain in the courtroom or swear an affidavit for the purposes of the proceedings unless he or she is a party or seeking to become a party.²²⁰¹ There have been few instances of a judge allowing a child to give evidence in the Family Court.²²⁰²

16.56 The court generally considers that children should be removed '...as far as possible, from forensic partisanship in spousal conflict'.²²⁰³ The court takes steps to ensure that parties do not introduce the evidence of children without thought for the effect giving that evidence may have on the integrity and development of the child. However, in many cases, evidence of children's wishes as to the outcome of litigation of the matter may be helpful to the court in determining the issues, instructive to the parties and beneficial for the

development of the child. In most cases, the court would prefer to use those mechanisms already discussed to hear from the child without subjecting the child to cross-examination in open court.

16.57 One submission to the Inquiry suggested that children who are to give evidence in the Family Court should be provided with witness preparation and support.²²⁰⁴ The Inquiry agrees. The recommendations in Chapter 14 regarding child witnesses are intended to apply to children who give evidence in the Family Court.

Recommendation 151. The Family Court practice that children generally not be called to give evidence should be retained where the evidence proposed to be given by a child relates to disputes of fact between the parties. However, where the child is of sufficient maturity and is anxious to give evidence concerning his or her wishes about a parenting order the practice should be relaxed.

Implementation. A Family Law Rule should be made to this effect.

Children as parties

16.58 Children may be heard in family law proceedings by initiating proceedings on their own behalf.²²⁰⁵ Children of appropriate age and maturity should be informed of their right to institute proceedings, to instruct legal representatives on their own behalf or to join applications. The Inquiry was told that children are often dissuaded from intervening when they express a wish to participate in family law proceedings as parties. One submission noted

[m]uch of the resistance appears to be associated with a failure to recognise the competence of young people in forming their own views and a failure to take seriously the right of children to be heard.²²⁰⁶

16.59 Children should not have to institute or join proceedings merely to express their wishes or participate in litigation concerning their living arrangements. However, in some circumstances it may be appropriate for a child to become a party to proceedings. These could include situations where a parent is 'litigation weary' and the child is able to present cogent reasons as to why arrangements should change.²²⁰⁷ Practitioners and court officers acknowledge that children of a certain age who are unhappy with the results of litigation concerning their living arrangements will 'vote with their feet'. These children should have access to the court to formalise their arrangements. That they are not in a position to do so may well undermine the stability of their new living arrangements.

16.60 The Geelong Rape Crisis Centre supported the draft recommendation that children be provided with information about their ability to initiate proceedings but suggested that a variety of mediums, for example video or audio tapes, should be used to provide the relevant information to children.²²⁰⁸ We agree.

Recommendation 152. Children should be informed about their options for participation in family law proceedings. The information should relate to the availability of counselling and their options for more direct participation in family law proceedings including their rights to seek legal advice or initiate proceedings. Brochures and other appropriate mediums should be produced to provide this information and should be directed to at least two developmental and literacy levels of children. The brochures should be provided to both the applicant and the respondent at the early stages of the proceedings to be passed along to the children concerned.

Implementation. The Family Court should prepare brochures that provide this information.

Children interviewed by a judicial officer

16.61 The Family Law Rules provide that a judge, judicial registrar or magistrate may interview a child in chambers or elsewhere.²²⁰⁹ If the child is separately represented, the child's representative must consent before the child may be interviewed by the judicial officer.²²¹⁰ Evidence of anything said during this interview is inadmissible in court, although the judicial officer may take the discussion into account in the

decision making process.²²¹¹ The judicial interview is another mechanism by which children may be heard in family law proceedings. Judicial officers rarely interview children in this way. It has been noted that '...this practice, never widespread, has (thankfully) all but vanished'.²²¹² This opinion expresses the almost universal advice given to the Inquiry concerning the practice²²¹³ and there has been at least one case where the Full Court criticised the use of the option.²²¹⁴ National Legal Aid noted that all evidence should be heard in open court and that judges in any event may not have the necessary expertise for interviewing children.²²¹⁵ The option of a judicial officer speaking to a child in chambers is quite rightly used very sparingly. However, in the interests of flexibility, the option should remain available.²²¹⁶

Recommendation 153. The option of a judicial officer interviewing a child in chambers should remain available but be employed only in rare circumstances where the best interests of the child justify a judicial interview.

Vulnerable children and the Family Court

Indigenous children

16.62 Submissions indicate that the relationship between Indigenous people and the Family Court is problematic.²²¹⁷ This may be the result of a historical legacy including

...an association of the Court with previous 'welfare' policies which resulted in the removal of indigenous children from their families.²²¹⁸

Australia's Indigenous population is predominantly young.²²¹⁹ This highlights the importance of ensuring that Indigenous families are properly served by the Family Court. Initiatives in recent years are making the Family Court more aware of issues of concern to Indigenous families and children.

16.63 The Family Law Act explicitly requires the court to take into account 'any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders' in assessing a child's best interests.²²²⁰ In *B and R and Separate Representative* the Full Court held that the Family Court has an obligation to receive evidence relevant to the unique experience of Indigenous Australian people in determining the best interests of Indigenous children.²²²¹

16.64 The Family Court is also taking administrative steps to facilitate the participation of Indigenous people in family law processes. It has established the Aboriginal and Torres Strait Islander Awareness Committee to consider the extent to which Indigenous people use the court, to increase the awareness of officers of the court of problems confronting Indigenous people and to make the services of the court more relevant to Indigenous people.²²²²

16.65 These developments are relatively recent and progress is currently affected by funding constraints.²²²³ Their impact is yet to be fully realised. The relevance of the court to Indigenous families and children will be affected by the extent to which the court is able to take account of the involvement of extended families in dispute resolution and of the extent of family violence in family breakdown among Indigenous communities.²²²⁴

16.66 Statistics kept by the Family Court do not record the Aboriginality of parties or children who are the subject of proceedings. This makes monitoring the effects of the initiatives almost impossible. The Family Court is presently considering how it can best collect the statistics suggested in DRP 3.²²²⁵ National Legal Aid suggested that keeping statistics on Aboriginality '...could result in improper manipulation and misrepresentation of Aboriginal litigants by assorted community groups'.²²²⁶ However, the collection of these statistics is justified by the importance of an accurate understanding of the extent and manner of use of the court by different client groups and particularly Indigenous people. As the submission from the Education Centre Against Violence noted, '[a]ccess to justice has not traditionally been equitable for indigenous people and specific strategies should address this'.²²²⁷

Recommendation 154. The Family Court should continue to promote the access of Indigenous families and children to the court and continue its work in liaising with Indigenous communities. The court should continue research to ensure that its processes are adapted to take account of the dynamics of dispute resolution among Indigenous communities, particularly in relation to the involvement of extended families and family violence.

Implementation. The Family Court should undertake research in consultation with relevant community organisations and maintain programs to ensure appropriate access of Indigenous children and families to the court.

Recommendation 155. The Family Court should take urgent action to collect and publish comprehensive statistics in relation to the number of applications made to the court involving Indigenous parties or children. Statistics should be collected and maintained regarding the passage of those applications through the court and their outcomes.

Implementation. The Family Court should establish a database, collect these statistics and publish them in its Annual Report.

Children from non-English speaking backgrounds

16.67 Many people from non-English speaking backgrounds have difficulty accessing Family Court services. This may be due to language or cultural barriers. Some communities are unfamiliar with the notion of a court determining family disputes and have traditionally relied upon extended family networks to assist in the resolution of family disputes. However, for many families those extended family networks are not available in Australia. It is important that the Family Court be accessible and relevant to all Australians, particularly to those families which may be suffering some social and cultural dislocation as well as the trauma of family breakdown. To address these issues, the Family Court has introduced a number of strategies to make it less intimidating for people, such as producing information audiotapes and pamphlets in community languages.²²²⁸ None of the initiatives is aimed specifically at children.

16.68 In its report on *Multiculturalism and the Law*, the ALRC recommended that all federally funded support services, including the Family Court, have a component included in their grants or budgets to be applied to developing comprehensive and detailed access and equity plans.²²²⁹ These plans could be of particular benefit in assisting the Family Court to eliminate barriers to people of non-English speaking background, including children, accessing its services.

16.69 The House of Representatives Standing Committee on Community Affairs recently made a number of recommendations to promote access and equity principles in the provision of government services.²²³⁰ For example, the Committee recommended that cross-cultural communication training be incorporated as an essential element of staff development across all levels of government²²³¹ and that the practice of supplementing interpreting and translating services by the employment of bilingual/bicultural staff be adopted across all government agencies that provide services.²²³² The Inquiry supports the implementation of these recommendations in the Family Court. The Family Court has pointed out that there is a limited budget for interpreters.²²³³

Recommendation 156 The Family Court should develop an access and equity plan to assist it in eliminating barriers which people of non-English speaking background, including children, experience in accessing its services.

Implementation. The Family Court should develop this strategy.

Children in rural and remote areas

16.70 The Family Court has 21 registries or sub-registries throughout Australia located in capital cities and some major regional centres.²²³⁴ Outside these urban centres, applicants may choose to make use of the State or Territory magistrates' court network which has been invested with family law jurisdiction.²²³⁵ The Family

Court provides some counselling services on a circuit basis but there may then be difficulty in accessing them in a timely manner. Remote areas have no access to counselling services. The alternative to these options for people in rural or remote areas is to travel sometimes very long distances to the nearest Family Court. The ability of people living in remote areas to obtain access to the Family Court is an issue of particular concern to Indigenous communities.

16.71 The court has indicated its willingness to travel to some remote locations. However, as the court points out, these services are costly and cannot presently be provided at the level required.²²³⁶ Access to the court may also be provided for people in rural and remote areas by the greater use of processes such as video-links or telephone services. The Family Court is able to hear evidence or sub-missions by video link or telephone from any place within or outside Australia.²²³⁷ Before doing so, the court must be satisfied that the arrangement is more convenient than requiring live evidence or submissions.²²³⁸ Full use should be made of this capacity. The Inquiry is aware that one registry has a toll free number. This service should be expanded, promoted and resourced on a national scale.

16.72 In general, however, the Family Court will only remain accessible through the maintenance of its regional registries. The Family Court is aware of the priority of this issue and noted in its submission that registry closures 'were the least favoured option of the court', a step taken only after other measures were instituted.²²³⁹ Counselling circuits to rural areas should be maintained at an acceptable standard particularly if court counsellors take on a greater investigative role.²²⁴⁰ The Inquiry's recommendations concerning the introduction of a specialised family and children's magistracy and a specialist federal magistracy should assist in the provision of family dispute resolution services in rural areas.²²⁴¹

Recommendation 157. Closure of Family Court registries should be treated as a least favoured option for dealing with funding constraints in the Family Court. The continuation of circuits of the counselling service to rural and remote areas is particularly important. The Family Court should attempt to expand or promote on a national scale toll free telephone access to the court. It should consider making greater use of its ability to take evidence by video link or telephone, particularly from parties living in rural or remote communities.

Implementation. The Family Court should investigate the use of communication technologies to provide greater access to Family Court services for rural families and children.

Young people with intellectual disabilities

16.73 The needs of children with disabilities must be considered by the Family Court in determining any parenting orders.²²⁴² Specialist skills may be needed in providing reports and expert advice to the court when the children involved have special needs. Reports ordered under O 30A of the Family Law Rules may be particularly relevant here.²²⁴³ This may include advising on the support needs of the child and devising suitable options for the care of the child. The guidelines in *Re K* on appointing a child's representative do not refer specifically to children with disabilities.²²⁴⁴ However, the criteria in that case are wide enough to ensure that children with disabilities are provided with a child's representative as appropriate. Sensitivity and care are required to ensure that children with disabilities can participate in the decision making process to a degree commensurate with their abilities and willingness.

16.74 Of particular relevance to children with disabilities is the Family Court's statutory welfare power.²²⁴⁵ This power has been used to authorise special medical procedures for children,²²⁴⁶ most frequently the sterilisation of young women with profound intellectual disabilities.²²⁴⁷

16.75 States also retain the right to determine sterilisation applications for children with intellectual disabilities. The Family Court has developed co-operative arrangements with other relevant agencies in Victoria and Queensland in regard to sterilisation applications.²²⁴⁸ Children with intellectual disabilities should not be sterilised without approval from either the Family Court or a State or Territory authority such as the NSW Guardianship Board but evidence indicates that many unauthorised operations are performed.²²⁴⁹ Approval rates vary greatly. Since January 1994 the NSW Guardianship Board approved only one out of seven such applications brought before it while the Family Court approved the procedure or refused to

exercise jurisdiction to prevent it from being performed in seven of the eight reported cases it has dealt with.²²⁵⁰

16.76 One submission to the Inquiry urged an awareness that parents with children with a profound disability struggle for many years to facilitate their children's development and provide for their basic care. The submission urged

...consideration of these issues needs to be a two way street, because at the end of the day it remains the parents of the young people and young adults who provide their primary care...²²⁵¹

There can be little disagreement with this but the procedure is one of such significance that taking the decision to an independent third party is in all parties' interests. Parents must be given every opportunity to consider alternatives to sterilisation procedures. In fact, the Family Law Rules require affidavits to be filed indicating that the procedure is necessary and there is no appropriate alternative.²²⁵²

16.77 Although the Family Court has accepted the need for guidelines for these proceedings,²²⁵³ no comprehensive or detailed guidance is available. DRP 3 suggested that further guidance is needed to ensure that the procedures are used only when strictly necessary in the best interests of the child.²²⁵⁴ That suggestion received some support in submissions.²²⁵⁵ The Family Law Council has also recommended that appropriate guidelines be developed.²²⁵⁶ National Legal Aid disagreed with the draft recommendation, arguing that '....such guidelines already exist in the Family Court and are contained in the Family Law Act'. It also argued that this may throw up a new threshold test of 'strictly necessary'.²²⁵⁷ However, the numbers of sterilisations apparently performed without court approval indicate the need for guidelines to ensure that an application is approved only as a last resort.

16.78 Concerns have been raised about the child's right to participate and be heard in sterilisation application proceedings and the standard of advocacy provided to them.²²⁵⁸ The degree of participation of children who are the subject of the application should depend on individual capacity — clearly a 16 year old with a mental age of 7 is still capable of expressing an opinion.²²⁵⁹ The child may, and generally would, be appointed a next friend or child's representative for the hearing.²²⁶⁰

16.79 A number of submissions expressed some concern that DRP 3 dealt with only sterilisation of young women with intellectual disabilities.²²⁶¹ One submission urged that '...neither the Commissions nor the implementers of this report be entrapped by the emphasis upon sterilisation alone'.²²⁶² Another submission urged that the Inquiry 'recognise the far reaching implications for children' of the statutory welfare jurisdiction of the court.²²⁶³ The submission pointed out that equivalent jurisdictions internationally have addressed a broader range of procedures than sterilisation of intellectually disabled young women and that the Australian jurisdiction is beginning to deal with a broader range of matters.²²⁶⁴

16.80 One submission proposed that guidelines be developed to encompass the range of procedures that may be sanctioned under the special medical procedures provisions of the Family Law Rules.²²⁶⁵ It argued for further direction to ensure that the court is able to take account of the wishes of the child in all these cases.²²⁶⁶ Recommendations 70-76 deal with the requirements of a legal representative for children before the Family Court.²²⁶⁷ These requirements provide an appropriate level of participation for children, commensurate with the ability and willingness of the child concerned to participate. The recommended guidelines in relation to the welfare jurisdiction should include an express requirement that the child participate in the proceedings to the extent that he or she is able and willing to do so.

Recommendation 158. An awareness campaign should be conducted to provide medical practitioners with information about the legal requirements for approval for the conduct of sterilisation operations on young people with an intellectual disability.

Implementation. The Attorney-General, through his department, should co-ordinate and conduct this campaign.

Recommendation 159. Research should be conducted to establish the comparative levels of approval of sterilisation applications in each jurisdiction by the various courts and bodies with this responsibility.

This research should investigate the reasons for any discrepancy to ensure that procedures allow for appropriate exploration of alternatives to the sterilisation application.

Implementation. The Family Court should conduct such research in co-operation with relevant State and Territory agencies.

Recommendation 160. Guidelines should be developed to regulate the pre-hearing processes for applications for approval of special medical procedures under the Family Court welfare jurisdiction. These guidelines should ensure that the procedures are used only where strictly necessary in the best interests of the child. The guidelines should require that parties be provided with information about all alternatives to the procedure, that all options have been explored prior to the hearing and that suitable counselling has been undertaken. They should also ensure that the child has participated as appropriate.

Implementation. The Family Court should consider developing such guidelines for inclusion in O 23B of the Family Law Rules or in case management guidelines as appropriate.

17. Children's involvement in the care and protection system

Introduction

17.1 Children who enter the formal care and protection system are among the most vulnerable children in Australia. They are victims of abuse, neglect or family breakdowns, may not have support from their extended family and are often educationally and socio-economically disadvantaged. The Inquiry received considerable evidence indicating that the support offered to children in care is grossly inadequate and too often fails to address their disadvantage.²²⁶⁸ In fact, children in care may be at more risk of adverse contact with other legal systems than children who have had no contact with the care and protection system.²²⁶⁹

17.2 Although definitions vary between the jurisdictions, a child can be considered in need of care and protection if the child

...is being or is likely to be abused or neglected, if the child is abandoned, if adequate provision is not being made for the child's care, or if there is an irretrievable breakdown in the relationship between the child and his or her parent(s).²²⁷⁰

17.3 There were 13 241 children under care and protection orders in Australia on 30 June 1996.²²⁷¹ The types of care and protection orders that a child may be under and their use differ as between the States and Territories. Most jurisdictions have the following possibilities

- a child can be placed under a supervision order and remain with his or her family under the supervision of the relevant State or Territory department
- a child may be placed under the guardianship of the department and become a ward of the state, yet remain living with his or her parents
- a child may be removed from his or her family and placed in out-of-home care, either as a ward or remaining under the guardianship of the family.²²⁷²

17.4 Children can also be placed in out-of-home care voluntarily by their parents or carers and not subject to care and protection orders at all. There were approximately 14 000 children in out-of-home care placements on 30 June 1996 and in during the 1995–96 financial year over 20 000 children were in at least one out-of-home care placement.²²⁷³

A government guarantee for children in care

Introduction

17.5 Many children entering the care and protection system are already disadvantaged according to other social indicators. For example, there is a clear relationship between economic disadvantage and contact with care and protection systems.²²⁷⁴ In addition, Indigenous children, who are generally disadvantaged on many scales, are particularly over-represented in the care and protection systems in Australia.²²⁷⁵ On 30 June 1996, Indigenous children made up 19% of all children in substitute care placements, despite making up only about 3.5% of the child population.²²⁷⁶

Systems abuse

17.6 Children are traumatised not only by violence, neglect or physical or emotional abuse. Their trauma can also be perpetuated or exacerbated by insensitive, neglectful or exploitative practices within government and non-government agencies set up to assist and protect children. The phrase 'systems abuse' is used to describe this. It is defined as

preventable harm [that] is done to children in the context of policies or programs which are designed to provide care or protection. The child's welfare, development or security are undermined by the actions of individuals or by the lack of suitable policies, practices or procedures within systems or institutions.²²⁷⁷

The Australian Association of Social Workers informed the Inquiry that '[t]here is little doubt that systems abuse occurs in all States and Territories'.²²⁷⁸ Claims that State and Territory family services departments are mismanaged, underfunded and fail to care adequately for children are consistently made in newspaper and professional publications throughout Australia.²²⁷⁹ These allegations were confirmed by submissions to the Inquiry.²²⁸⁰

17.7 Families involved in care and protection systems often rely on other government services and agencies, such as health care, income support and child care. They may also find themselves involved in multiple legal proceedings resulting from the allegations of abuse or neglect, for example in the Family Court, children's courts and criminal courts.²²⁸¹ Children involved in care and protection systems therefore may have substantial contact with many aspects of Australia's legal and administrative processes and for this reason alone are more vulnerable than other children to systems abuse. One submission to the Inquiry noted '[t]he greater the number of agencies involved [with a child] the greater the capacity for confusion, conflict and contradiction'²²⁸² and therefore the greater the risk of systems abuse.

17.8 Systems abuse derives from poor management, a lack of co-ordination and a failure to take responsibility.²²⁸³ Evidence to the Inquiry has shown that these failings frequently characterise care and protection systems.²²⁸⁴ For example, one submission noted

[a] young woman who is a ward of the state with serious behavioral problems was due to be released from a detention centre. It was clear that she had need for mental health support services on release. Neither DOCS nor Juvenile Justice could agree who was responsible for locating and paying for those services. Not surprisingly, the young woman has re-offended and is back in detention.²²⁸⁵

17.9 Other contributions to systems abuse include delays in investigating or deciding placements for children, lack of information or services and inadequate or inaccessible services. The NSW Community Services Commission informed the Inquiry that the manner in which some investigations of child abuse and neglect are conducted may also contribute to systems abuse and that there is often a failure to provide counselling and support for children during and after investigations.²²⁸⁶

Harmful treatment of children in care

17.10 Many children placed in out-of-home care are not placed in safe environments. The NSW Community Services Commission informed the Inquiry

[o]ur information and experience gathered through complaints, reviews and the community visitors indicate that, as a community, we are failing many of our most vulnerable children, and, in too many cases, actually exposing them to further abuse within the very system that is supposed to care for and protect them....Research suggests that children in out-of-home care are at greater risk of abuse — be it physical, emotional or sexual — than children generally living at home with their parents. As such, these children have early and frequent reminders of their limited voice within the legal process.²²⁸⁷

17.11 Children in care often experience numerous placings and are deprived of stable environments. A study of children leaving care in NSW found that the median number of placements was 6.5 and nearly 80% of the young people surveyed had three or more placements while in care.²²⁸⁸ This study indicated that children with more stable long-term placements had more successful outcomes than those who experienced a number of placements.²²⁸⁹ It also suggested that schooling should be a primary factor in decisions about changes to a child's placement because children are more likely to suffer academically when their schooling is interrupted by moving schools.²²⁹⁰

17.12 Evidence suggests that children in out-of-home care do not achieve the same level of education as the average child and that children who are state wards are insufficiently assisted to acquire the skills and resources they need to become independent adults.²²⁹¹ A Victorian study found that '...more than half the sample population in care are below the average in literacy, numeracy levels, personal development, social skills [and] emotional and behavioral development'.²²⁹² It also found that more than half had frequent episodes of truancy, exclusion and suspension.²²⁹³ The HREOC report *Our Homeless Children* and other research have shown that many homeless children are former wards of the state or involved with the care and protection system.²²⁹⁴

17.13 Research in NSW and Victoria also indicates that children in care are significantly more likely to come into adverse contact with the juvenile justice system than other children.²²⁹⁵ In the Inquiry's survey of young people, 41% of young people in detention centres who responded to the question indicated that they had been involved in child welfare proceedings.²²⁹⁶ The Youth Advocacy Centre summarised the concerns expressed in many submissions to the Inquiry.

The continued propensity for those working with children and young people in residential care, both in the non-government and government sectors, to use the police to deal with behaviour problems is a significant contributor to their journeys into the juvenile justice system. The management of difficult behaviour in residential care is inappropriately punitive.²²⁹⁷

17.14 Concrete information available about the circumstances of children entering care and the outcomes for those children in care is limited. The data that are available relate to particular jurisdictions. Policy makers have little access to information about the circumstances of children in their care. Policy will continue to harm children in care if it is made in ignorance of the current failings of the state as parent and the effects of different policies and programs on children in care.

International commitments for children

17.15 In ratifying CROC, the Commonwealth made a number of commitments to Australia's children and to the international community in relation to the care and protection jurisdiction. These include a commitment to recognise and assist in the realisation of the right of every child 'to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'²²⁹⁸ and to protect children from violence and mistreatment. Article 3 of CROC provides

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

CROC requires

States Parties shall 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, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.²²⁹⁹

17.16 Participating States are obliged to provide effective procedures to this end including procedures for the prevention of abuse and identification, reporting, referral, investigation, treatment and follow-up of allegations of abuse.²³⁰⁰ CROC requires participating States to provide appropriate alternative care for children who are removed from their family environment.²³⁰¹ It also provides that a child

...who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child, either directly, or through a representative or an appropriate body...²³⁰²

17.17 Evidence to the Inquiry overwhelmingly established that Australia is failing to meet these commitments in relation to those children for whom the state has the greatest and most direct responsibility.²³⁰³ The nature of Commonwealth/State service provision makes meeting these commitments the responsibility of federal, State and Territory governments jointly and severally.

Federal responsibilities

17.18 The States and Territories are responsible for the care and protection of children who have been abused or neglected. The Commonwealth has funding and oversight responsibilities in areas that are directly related to child protection²³⁰⁴ and constitutional responsibility for Indigenous children who form a significant proportion of children in care.²³⁰⁵ The Commonwealth also has constitutional responsibility for Australia's compliance with its commitments under CROC.

17.19 It is difficult to obtain a national picture of the care and protection system. This is particularly the case in attempting to assess the circumstances of children who are involved with several government departments. In collecting statistical information from all jurisdictions and promoting common care and protection definitions for the purposes of collecting those statistics, the Commonwealth has documented the services provided by the States and Territories.²³⁰⁶ These statistics, published by the Australian Institute of Health and Welfare in their Child Welfare Series, provide invaluable information on children within State and Territory care and protection systems and on the differences between these systems.

17.20 Through the Standing Committee of Community Services and Income Security Administrators, the Commonwealth also has developed the *Baseline Out-of-Home Care Standards*.²³⁰⁷ These standards provide a framework for the implementation of a core set of minimum out-of-home care standards consistent across the States and Territories.²³⁰⁸ Consumers and others involved in the care and protection system are proposing a forum involving government agencies and consumers to establish benchmarks for care and protection and to review the progress of the implementation of the *Baseline Out-of-Home Care Standards*.²³⁰⁹

17.21 These efforts require continuing Commonwealth leadership. There is further work to be done, however, to address all of the differences between the States and Territories in their standard of data collection, their definitions of child abuse and neglect, the focus of their protective services, their arrangements for securing orders, the range and types of care and protection orders made by courts and the monitoring and review of placement and in-care decisions for the children for whom they are responsible.

17.22 In addition to the inter-jurisdictional problems, the Inquiry heard consistent criticism of each and every care and protection system in Australia. Clearly, national standards for the arrangement and delivery of services by all Australian care and protection systems are necessary. Moreover, these systems should be co-ordinated at a national level.

17.23 One submission to the Inquiry, critical of care and protection systems nationally, contained a note of caution.

The problem with pursuing uniform laws is that much time and energy is wasted, while children continue to die and suffer damage. There is a considerable waste of limited time and effort if there is no tangible result proven for children.²³¹⁰

This is a valid point. It is also true that different State and Territory systems have produced innovation, as each system assesses and improves upon the initiatives of other jurisdictions. Uniform laws across all jurisdictions could provide 'lowest common denominator' protections for children involved in care and protection systems, as a result of compromise to achieve consensus between the jurisdictions.²³¹¹

17.24 All these are theoretical possibilities. The reality presented to the Inquiry, however, is one of confusion, inconsistency, inflexibility and conservatism that harms the very children the state has intervened to protect.

[L]aws do not prevent child abuse, but...a variety of philosophical approaches to the delivery of child protection, child welfare and family support services serve to splinter the policy response to child abuse prevention across the nation.²³¹²

17.25 Australia's commitments to children as a party to CROC and the consistent and persistent criticism of all care and protection systems in Australia lead the Inquiry to recommend that the Commonwealth undertake to co-ordinate the various care and protection systems. The Inquiry does not propose that uniform model care and protection legislation be introduced nationally.²³¹³ However, certain core elements of a good care and protection system should be included in each jurisdiction's laws and programs. In addition, a national consensus about those processes that are effective, of no benefit or harmful in protecting and supporting vulnerable children would be a useful starting point for the development of national, consistent and effective care and protection systems. The Commonwealth should lead the development of these national standards. Wherever possible the standards should form a part of the legislative basis for all care and protection systems.

17.26 Care and protection knowledge and practice are not static. National and international initiatives and research do and should influence notions of best practice. To ensure that the national standards continue to

reflect up-to-date concepts of best practice around Australia and internationally, they should be evaluated and updated regularly in consultation with those involved in care and protection systems. This work should involve relevant government authorities, non-government organisations, community groups and, importantly, consumers of care and protection services such as children, families and foster carers. National conferences could provide a forum where research and developments are discussed and should lead to recognition of the current understanding of best practice and agreement on the direction of legislative reform. The Inquiry supports AAYPIC's initiative to hold a forum on the *Baseline Out-of-Home Care Standards*²³¹⁴ and recommends federal Government leadership and support for this process.

Recommendation 161. National standards for legislation and practice in care and protection systems should be developed. These national care and protection standards should, where necessary, provide a clear allocation of responsibility for their implementation.

Implementation. These standards should be developed by OFC in consultation with the relevant government authorities, non-government organisations, community groups, families, foster carers and, particularly, children and young people who are or have been involved in care and protection systems.

Recommendation 162. The national standards should be reviewed and updated regularly in light of developing national and international initiatives in care and protection practice.

Implementation. OFC should monitor and evaluate the national standards on a regular basis in consultation with relevant government authorities, non-government organisations, community groups and consumers of care and protection services such as children, families and foster carers. National conferences, organised by OFC, could be convened for this purpose.

Recommendation 163. The federal Government should support continuing research into care and protection systems, including the collection of data on the circumstances of children in care and in particular on their level of education, health and cultural and socio-economic backgrounds. The research should focus on the outcomes for children in care and in particular their contact with juvenile justice agencies (including police), their school retention rates and levels of education attained while in care and their access or lack of access to government services.

Implementation. This research could be co-ordinated by the AIFS and/or the AIHW.

A charter for children in care

17.27 The primary vehicle for the recognition of government commitments to children in care should be a charter of their rights. Children in care deserve an unqualified guarantee that support will be provided to them to ensure that their life opportunities will not be reduced by the intervention of the state in their lives. While the state is not able to guarantee a particular outcome for every child, all children in care should have an opportunity, at least equal to that of the general population of Australia's children, to achieve their full potential. They should not be failed because the state is ill-prepared, unwilling or unable to shoulder its parental responsibilities for those children it has taken into its care.

17.28 The South Australian Department of Family and Community Services recently developed a charter for children in care in consultation with that State's branch of AAYPIC, Future Echoes. This document

provides clarity for children/young people, staff and care-givers about what can be expected from the care relationship. It provides the basis for monitoring practice, establishing service agreements and the auditing of service delivery.²³¹⁵

The Commonwealth's *Baseline Out-of-Home Care Standards* also contain minimum standards and best practice guidelines.²³¹⁶ However, greater specificity is needed in these guidelines than is given. They also lack legislative force.

17.29 The Inquiry has drawn upon these initiatives in developing our recommendations. The charter we propose would be a statutory clarification of the state's common law obligations to children in care. It would ensure that each child in care has certain rights, enforceable at law, and would set out the fiduciary duties of the state as carer towards each child in care. The charter should be prepared in consultation with government

departments concerned with the provision of services to children in care and other relevant groups and bodies. Federal Government leadership in the development of the charter is crucial, as the charter should be the basis for the development of national standards.

17.30 The charter should be provided to all children on their entry into care, as well as to their parents and carers. It should be written in language easily comprehended by children. Its terms should be explained to all children in care old enough to communicate. Even very young children should have a reasonable understanding of their rights while in care.

Recommendation 164. A Charter for Children in Care should be developed. The Charter should create a legally enforceable obligation on the part of the relevant State or Territory family services department to provide each child in care with

- a safe living environment
- accommodation in the least restrictive placement commensurate with the child's best interests and wishes
- suitable education and job training opportunities or assistance in finding appropriate employment when the child reaches working age while in care
- an appropriate amount of spending money
- therapeutic support or additional educational assistance where necessary and with the consent of the child
- a mentor from whom the child can obtain confidential advice and assistance
- regular reviews of the child's case plan and circumstances in care
- the right to be consulted and to have the child's views given due weight (in accordance with age and maturity) in the decision-making process, particularly when decisions are made about residence, family contact, schooling and health
- appropriate assistance in the transition from care including housing assistance, access to income support, further training and/or education and continuing support from a mentor
- service delivery models tailored to the needs and capacities of children.

Implementation. OFC should develop the Charter for Children in Care in conjunction the relevant State and Territory family services departments and in consultation with other relevant government agencies, non-government service providers, children's advocacy groups and children in care. This Charter should be enacted in legislation at federal, State and Territory levels.

Recommendation 165. The Charter for Children in Care should be explained to each verbal child on his or her entry into care and at regular periods while in care, as well as to the child's parents and his or her carers. Copies of the Charter, in various forms appropriate for different age levels, should be provided to all children in care, the child's parents and his or her carers on the child's behalf if the child is too young to understand the nature of the Charter.

Primary and secondary prevention of abuse and neglect

17.31 Barnardos Australia has noted

[A]busive families are socially vulnerable and thus will have periods when they cope adequately and rapid periods of disintegration. Services should therefore be available but be flexible enough to change with need. ...[I]f the causes of abuse and neglect lie in the long-term disadvantage of families and their subsequent social isolation, the short-term approaches are unlikely to make a difference to the family's functioning.²³¹⁷

17.32 The federal Government is responsible for many of the services that aid in the prevention of child abuse and neglect and provide assistance to vulnerable families.²³¹⁸ These services include income support, child care, housing and medical services. The 1994 AIFS report *The Commonwealth's Role in Preventing Child Abuse* found that, while the Commonwealth funds and plans services, policies and programs aimed at children and families, the division of responsibility for child and family protection is less than clear among different levels of government and the co-ordination of policy, research and planning service delivery is less than ideal.²³¹⁹

17.33 The report made eight recommendations for better federal support of child protection policies and strategies, including recommendations that the Commonwealth instruct a responsible body to produce an annual report on policies and programs for children and families with children. It recommended that this body eventually take on responsibility for policy and program co-ordination at the federal level, undertake a national program of research into child abuse prevention strategies across all portfolios and evaluate current child abuse prevention programs.

17.34 DRP 3 suggested that the Child Protection Council be revived.²³²⁰ The Commonwealth Department of Health and Family Services submitted to the Inquiry that

...the Standing Committee of Community Services and Income Security Administrators, which reports directly to the Federal and State Community Services Ministers, is the most appropriate location for responsibility for monitoring and co-ordinating issues relevant to the prevention of child abuse and neglect.

In order to draw more effectively on the breadth of experience in the community, it has been decided that a community based advisory council...will be set up. This body will provide community perspectives on child abuse and parenting education issues to the Minister for Family Services.²³²¹

The Minister for Family Services announced the establishment of this council, the National Council for the Prevention of Child Abuse, on 9 September 1997.²³²²

17.35 This arrangement may suffer from a divided focus between the Standing Committee answering to the Ministerial Council and the new Advisory Council answering to the federal Minister. However, it goes some way to satisfying the Inquiry's recommendation for government and community liaison on prevention of child abuse and neglect. The Advisory Council must be assured some degree of independence in identifying areas for attention. We recommend that this council work closely with OFC and the Standing Committee of Community Service and Income Security Administrators.

Recommendation 166. Research should be conducted and data collected on child protection strategies across portfolios. This research should focus not only on those policies and programs that specifically address child abuse prevention but also on policies and programs directed at children, and families with children, that have implications for child abuse prevention, such as income support, child care, housing and medical services. It should identify those areas in which the federal Government could encourage co-operative arrangements with and between States and Territories for the effective provision of services. It should form the basis for OFC's advice to the federal Government on the co-ordination necessary for the provision of primary and secondary prevention services by federal agencies.

Implementation. OFC should support this research and co-ordinate data collection to these ends. It should publish its findings in its annual reports on the status of children in Australia (see recommendation 3) and provide the required advice.

Recommendation 167. The proposed National Council for the Prevention of Child Abuse should be provided with some measure of independence to identify issues and problems requiring attention. Links should be developed and maintained with OFC and with the Standing Committee of Community Services and Income Security Administrators.

Implementation. The Department of Health and Human Services should take the appropriate action.

Reporting and investigation

17.36 Allegations of child abuse or neglect may be made directly to State and Territory family services departments or indirectly through other agencies such as the police or hospitals.²³²³ Notifications generally are investigated, although some are referred to other agencies, responded to with advice or not investigated due to inadequate information or an initial assessment that investigation was not warranted.²³²⁴ Investigations of child abuse and neglect are generally carried out by a family services department. Investigations may be conducted in conjunction with the police where the allegations also constitute allegations of a crime.²³²⁵ Most jurisdictions require that investigations of child abuse allegations include interviews with the child the subject of the allegation and other family members.²³²⁶ Chapter 14 discusses the evidence of children and

makes recommendations about the manner in which investigatory interviews of children should be conducted. Those recommendations are relevant here.

17.37 As a result of the investigation, the departmental officer responsible for the case generally decides whether there are reasonable grounds to believe that the child has been abused or neglected (that is, the case is 'substantiated') or that the child may be 'at risk' of abuse or neglect²³²⁷ and whether the child is in need of protection or the family is in need of assistance. In 1995–96, approximately 91 800 cases of child abuse or neglect were reported throughout Australia and around 29 800 of these cases were substantiated after investigation.²³²⁸

17.38 The number of children subject to reports and substantiations varied from jurisdiction to jurisdiction. For example, the number of children subject to reports of suspected abuse or neglect varied from 7 reports per 1 000 children in WA to 22 reports per 1 000 children in Victoria, and the number of children subject to substantiated reports varied from 2 per 1 000 children in WA and Tasmania to 8 per 1 000 children in NSW.²³²⁹ These wide differences in reporting and substantiation rates between the States and Territories could indicate systemic problems or mere differences in reporting requirements, investigations and/or the criteria for substantiation.²³³⁰

17.39 In most of the States and Territories, certain people — for example doctors, police or teachers — are required by law to report to the relevant care and protection department incidents of suspected child abuse.²³³¹ Critics of mandatory reporting argue that abusers may be less likely to seek help for themselves or the child if they know that the person to whom they would turn for help must report them. Abused children may be reluctant to seek help if they know a close family member could be charged as a result. Mandatory reporting also denies abused children the option of deciding not to have their abuse reported and to deal with the situation in other ways. This is particularly relevant for older children. Professionals working with and providing support for families can face conflicts of interest if they are also mandated reporters.²³³² Barnardos Australia has asserted that mandatory reporting

- Offers little positive assistance to identified 'at risk' children to ensure that the child is protected.
- Is an inefficient way of identifying 'at risk' children, which draws people under surveillance unnecessarily.
- Comes too late to assist some children as it depends on harm already being done.
- Interferes with the ability to provide services to help children.
- May further endanger the child by disempowering the family.²³³³

17.40 On the other hand, mandatory reporting sends a strong message that child abuse will not be tolerated. It also resolves the conflict some people, particularly medical professionals, may have about disclosing information given in confidence. It should ensure an immediate and thorough response to assist a child at risk. It was generally supported in submissions to the Inquiry.²³³⁴

17.41 The Inquiry's major concern in relation to mandatory reporting is that it is often introduced without sufficient resources to ensure that it works effectively.²³³⁵ Further, mandatory reporting schemes may actually divert resources from prevention and treatment. A recent study of the care and protection system in Victoria indicated that its child protection services were less able to protect children from significant harm after mandatory reporting was introduced.²³³⁶

Recommendation 168. Detailed cross-jurisdictional research should be conducted into the effect and effectiveness of mandatory reporting of child abuse to

- document the impact of mandatory reporting of suspected child abuse on the delivery of family services in Australia, in particular, to investigate whether the introduction of mandatory reporting transfers resources from prevention of child abuse and support for its victims to the

- investigatory and legal side of child abuse
- identify the conditions required for optimum effectiveness of mandatory reporting schemes, particularly focusing on the appropriate allocation of resources to family services departments for investigation, litigation and support for children and families
- establish why there are wide differences in substantiation rates in the different jurisdictions.

Implementation. OFC should co-ordinate this research on the basis of information provided by State and Territory family services departments.

Alternatives to court

Introduction

17.42 After investigation, the relevant family services department assesses the situation of the child and family, determines whether any intervention is required and, if so, decides whether intervention should take the form of a court issued care and protection order. Only a very small number of investigated cases eventually become the subject of care and protection proceedings in court. In 1995–96, of the 71 766 children involved in notifications of suspected child abuse and neglect across Australia, approximately 25 500 children were subjects of substantiated cases and only 4 123 of these children were placed under care and protection orders by a court, less than 6% of those notified.²³³⁷

17.43 In many cases, the decision whether to make a care and protection application depends on the immediate family's willingness to co-operate with the department's provision of services, the resources available to the department and an assessment of whether the child would be safe in the family. The family and child concerned may or may not have a say in the development of the case plan with which the family must comply to avoid the matter being brought to court.

17.44 Some jurisdictions actively promote the family's participation in out-of-court solutions to care and protection matters through 'family group conferences' or pre-hearing conferences. The goal of these out-of-court conferences is to help the family and the family services department come to a protective solution for the child that avoids court involvement.²³³⁸

Family group conferences

17.45 Family group conferencing was pioneered in New Zealand in the *Children, Young Persons and Their Families Act 1989*. This model emphasises the importance of the extended family in protecting and caring for children and gives children, young people and their extended families substantially increased responsibility in decision-making.²³³⁹ The conference is a mandatory second step after an investigation has revealed a child to be *prima facie* in need of care and protection.²³⁴⁰ The conference itself has three stages. First, the professionals who have investigated the allegations detail the information that they have received and members of the extended family are given the opportunity to ask questions or correct factual errors. Next, the family discusses, in private if they wish, their response to the information and whether they think the child is in need of care and protection and then decides on a plan to ensure that the child receives that care and protection (at this point the family may also discuss with the professionals various services that may be offered or available). Finally, the family's plan is conveyed to the professionals, who may agree to it or request modifications. If the result of the conference is a plan that is acceptable to both the family and the professionals involved, it is formally recorded and subject to implementation by all concerned.²³⁴¹

17.46 In Victoria, family group conferencing, based on the New Zealand model, was established following a successful pilot program. Family group conferences may be convened where there are protective concerns but before an application is made to the Children's Court.²³⁴² Unlike the New Zealand model, the Victorian scheme is not legislatively based.²³⁴³ The evaluation of the pilot study concluded that '[t]he majority of the children considered in the family group conferences...have been able to be cared for within their wider family networks'.²³⁴⁴ The Victorian Government submission noted that conferencing

...plays an important role in maintaining children at home, or within their extended family network. While not necessarily diverting matters from court action, Family Group Conferencing increases the likelihood of these processes being settled by consent.²³⁴⁵

A similar conferencing arrangement is now included in South Australian care and protection legislation.²³⁴⁶ A 'family care conference' must be convened before application for a care and protection order is made to the courts, unless there are special circumstances that require otherwise.²³⁴⁷ Family group conferences are also being proposed in Tasmania's Children, Young Persons and their Families Bill 1997.²³⁴⁸

Pre-hearing conferences

17.47 Victoria has also introduced a system of pre-hearing conferences to encourage settlement, reduce delays and promote the involvement of the immediate family in decision-making after a care and protection application has been made to the children's court.²³⁴⁹ Under this scheme, either party to child welfare proceedings (the parents or the family services department) or the presiding magistrate may seek a conference. The conference convenor reports to the magistrate on any settlement that may be reached during a conference.²³⁵⁰ When a conference is convened, it must be attended by the parents concerned and representatives of the family services department, although the court may order that the child, other relatives and/or an ethnic community representative also attend.²³⁵¹ Only the parents and the child may be represented at the pre-hearing conference.²³⁵² The evaluation of this program found it successful in promoting resolution of matters in the majority of cases.²³⁵³

Evaluating conferencing models

17.48 Family group conferences and prehearing conferences hold a good deal of promise for the resolution of disputes about the care and protection of children. They attempt to ensure that the family, and in some cases the extended family or other community members, can participate in reaching a co-operative solution to their problems. They also minimise paternalism and exclusion on the part of the legal process. An agreement may be reached to foster the child voluntarily, to have the abuser leave the family home, to have the family attend therapy or counselling or to provide continued informal supervision by the relevant department. These agreements may protect the child with minimal distress and disturbance. These kinds of voluntary arrangements to protect children were supported in submissions to the Inquiry.²³⁵⁴

17.49 On the other hand, there are concerns with processes that pressure vulnerable families into negotiation with social workers who are privy to all the family concerns and failings and that may result in limited contact between or even separation of parents and children. Submissions to the Inquiry also expressed concern that the vulnerability of some family members within violent and abusive families may mean that dynamics in conferences could hamper appropriate resolutions.²³⁵⁵ There is a '...potential [in conferencing schemes] to mask the inequality of the parties by a veneer of participation'.²³⁵⁶ Appropriate training of conference convenors and an ability of family members to access legal advice before conferences may address some of these issues.

17.50 The Inquiry is concerned about the appropriate level of children's involvement in these conferences.²³⁵⁷ Where the conference convenor is unable to protect the child or is unaware of negative family dynamics, participation by the child could constitute further abuse of the child. It may involve the child in discussions with an allegedly abusive parent or with family members who may intimidate or blame the child for 'disrupting' the family.²³⁵⁸ In some family group conferences in New Zealand the entire family spent their time haranguing the child or subjecting the child to intimidation.²³⁵⁹ On the other hand, it is important that children are able to participate or at the very least that their wishes or best interests are made clear when conference participants are making decisions about children's residence, contact with parents or family members and services needed. Children consistently told the Inquiry that they should be able to participate in decision making processes when the decisions to be made directly concerned them.²³⁶⁰ The current levels of children's participation in these conferences is unknown.²³⁶¹

17.51 Recommendation 82 proposed that a representative be appointed for a child as early as possible in the process of a care and protection intervention. Legal advice should be provided to a child before the child decides whether or not to participate in a conference. The legal representative should attend the conference to

represent the child's interests if the child is too young to participate or wishes the representative to participate on his or her behalf or to assist a child who wishes the additional support during these processes.²³⁶²

17.52 Another concern is that, in the promotion of a solution acceptable to the family and professionals involved, the best interests of the child may become of secondary importance. The commitment in conferences is to negotiation and settlement by agreement, a commitment that may subsume concerns about the welfare of the child.²³⁶³ Most jurisdictions require that the best interests of the child be promoted in court proceedings.²³⁶⁴ Conferencing models should also incorporate this principle.

17.53 Finally, the initial assessment of whether a child is at risk should not be the subject of negotiation or compromise at these conferences.²³⁶⁵ Pre-application or pre-hearing conferences are not an appropriate investigation tool nor should they be a forum in which the family or family services department attempts to prove or disprove the allegations. Conferencing procedures are appropriate only to decide upon a plan for the protection and care of children found to be at risk following an investigation and for whom court orders will be sought if the conference fails to reach an acceptable solution.²³⁶⁶

17.54 Many of these concerns may be addressed if conference convenors are appropriately trained to identify and handle them. However, more research is needed to evaluate existing conferencing models, develop criteria for effective conferencing schemes and identify the professional requirements for conference convenors. This research should also take into account the particular perspectives and needs of Indigenous children and families and those from non-English speaking backgrounds and ensure that people with disabilities are not effectively excluded from the process. The long-term effectiveness of conferencing schemes in reaching appropriate resolutions as compared to court-based resolution should also be studied.²³⁶⁷

Recommendation 169. Research should be conducted into the practice of family group conferencing and pre-hearing conference schemes, to encourage the adoption in all jurisdictions of effective conferencing models. This research should

- evaluate the effectiveness of various case conferencing arrangements used in Australian jurisdictions, particularly in relation to procedures, outcomes and levels of satisfaction or dissatisfaction of all the participating parties with the arrangements
- identify the types of cases most amenable to case conferencing solutions, the stage of the proceedings when conferences are most effective, whether the conference works best in the shadow of or outside court confines and whether the participation of legal representatives assists or retards proceedings
- focus on children's levels of participation in, and satisfaction with, these processes and the assistance they require to participate effectively in conferences
- be aimed at ensuring appropriate participation in conferencing by Indigenous children and families and those from non-English speaking backgrounds as well as people with disabilities.

Implementation. OFC or the Australian Child Protection Advisory Council should co-ordinate this research on the basis of information provided by State and Territory family services departments. The research should include longitudinal studies of the effectiveness of different models as compared to court-based resolution.

Recommendation 170. The procedures associated with conferencing schemes should be set down in legislation, based on the evaluation proposed in recommendation 169. The legislation dealing with procedures for conferencing models in care and protection jurisdictions should require that

- in family group and pre-hearing conferences the best interests of the child should be the paramount consideration
- family members and children have access to independent legal advice before participating in any conference
- children who are too young to participate or who wish to have additional support during the conference should be represented by a lawyer or advocate of their choice in these conferences
- convenors of family or pre-hearing conferences should have knowledge of and training in care and protection law, family dynamics and child development issues, so that they are aware of power imbalances between the participants at the conferences and are able to work to overcome these

imbalances to arrive at a resolution in the best interests of the child.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The national care and protection standards should specify the minimum training and experience requirements for convenors of conferences.

Court processes

Introduction

17.55 Children's courts deal with juvenile justice matters as well as care and protection cases. Traditionally, little distinction was made between the criminal and care jurisdictions either in the manner of proceeding or in the orders available to the courts. All jurisdictions have amended their law, making the two areas distinct divisions within the jurisdiction with different processes and practices. However, '[v]ery often,...the offending child and the child in need of protection are one and the same — the clear distinction envisaged by legislation does not in practice exist'.²³⁶⁸

Issues of structure

17.56 In all Australian jurisdictions, care and protection applications are heard at first instance in State and Territory children's courts, which may be magistrates' or District courts.²³⁶⁹ Many submissions to the Inquiry suggested that care and protection matters should be dealt with by a tribunal or expert panel rather than by a court.²³⁷⁰ For example, the NSW Community Services Commission recommended a more flexible, multi-disciplinary approach to care and protection matters to ensure that care orders are appropriate to the circumstances of the individual child. It suggested that a new body be established

...which could deal with both guardianship decisions and regular reviews of children in care. It would have the advantage of using a multi-disciplinary child focussed and non-adversarial approach.²³⁷¹

17.57 We agree that decisions concerning the placement and care of children in need of care should be flexible and child focused. We agree that decision makers should have available a wide array of orders able to be adapted to the needs and circumstances of the individual child. We also consider that decisions should draw upon the knowledge and expertise of social scientists.²³⁷²

17.58 However, the far-reaching and potentially damaging consequences of decisions to separate children from their families or to coerce certain actions on the part of families require a judicial rather than an administrative process.²³⁷³ Around the world, child protection systems give final recourse to the courts when allegedly abusive or neglectful families are unable to or refuse to comply with less coercive interventions.²³⁷⁴ Judicial decision making, particularly in contested matters, also provides an assurance to parties that due process will be observed and reflects the gravity of the decision being made. The Inquiry's approval of courts as the final arbiter in care and protection systems does not exclude the possibility of alternative dispute resolution in appropriate cases or of a more flexible and less adversarial approach to these cases within the courts.²³⁷⁵

Evidence

17.59 Legislation in most jurisdictions encourages cases to be conducted as informally as possible.²³⁷⁶ One result of this is that most jurisdictions have dispensed with rules of evidence in care and protection proceedings.²³⁷⁷ The informality of the courts may benefit children and assist in the appropriate resolution of care and protection matters in the best interests of the child. However, some concern was expressed in submissions that avoiding strict rules of evidence leads to a dangerous lack of rigour in the presentation of evidence. One submission noted that '[a]t present, unsworn documents [such as Court Reports] are tendered...Such documents contain a mix of observations, hearsay and opinion.'²³⁷⁸ The Children's Court of Victoria was critical of the support and training given to care and protection workers presenting cases in court. It noted

...it is not unusual to see words attributed to very young children which are well beyond the child's vocabulary. This practice can only detract from the probative value of the child's words and affect the credit of the evidence being given.

Protective workers have difficulty in determining what is relevant. This probably relates to a difference in perspective with regard to what is relevant in a social work sense and what is legally relevant to the issues a Court must decide.... While the Children's Court is able to be flexible concerning the admissibility of evidence, it is not a matter of 'open slather'. Workers do not have adequate training...²³⁷⁹

17.60 Care and protection proceedings should be as informal as possible. Strict rules of evidence are not appropriate in determining issues of fact in this jurisdiction. However, decisions should be transparent and based upon acceptable standards of information and proof. Some degree of rigour should be required in the presentation and assessment of evidence in care and protection matters. Preference should be given to the direct evidence of the witness concerned. Evidence should always be relevant to the issues to be decided. Because children should not generally be required to give evidence in these proceedings, it is appropriate that hearsay statements by children should be admissible. However, the form of the hearsay statement should as far as possible reflect the words of the child. The process by which children are interviewed during investigations and by which they might give evidence in these cases is discussed in Chapter 14.

Recommendation 171. The national care and protection standards should specify that direct evidence by a witness should be preferred, except when the witness is the subject child. Hearsay evidence of statements by the subject child should as far as possible be presented in the child's own words.

Orders

17.61 Courts in the States and Territories may make a number of different care and protection orders, including

- undertakings or recognisances by parents or children, with no further supervision
- supervision by the department, with or without undertakings
- custody orders to other relatives or appropriate people
- custody orders to the minister or department
- guardianship to the minister or department.

The names given to the orders vary in different jurisdictions and some States and Territories do not have all these types of care orders. Some have a greater range of care and protection options available.²³⁸⁰ Orders may be made in combination so that, for example, a guardianship order may be made whether or not the child remains at home or is removed from the family.

17.62 In the past Western Australia avoided developing a range of non-guardianship orders,²³⁸¹ as there has been a preference in that jurisdiction for informal work with the family of a child at risk without recourse to court orders until a guardianship order is considered necessary. The Department of Family and Children's Services discussion paper *Proposed New Legislation*, indicates that a wider range of orders may be included in the future.²³⁸² It is important to have the option to work informally with the family of a child at risk in many cases. However, a range of court orders available that fall short of a full transfer of guardianship are also required. This allows flexibility in dealing with the individual circumstances of each family, from the least coercive option to full intervention.

17.63 In England, the *Children Act 1989* introduced the 'no order' principle. Under this principle, the court must be satisfied before making an order that the making of an order would accomplish something which is unlikely to be achieved without it.²³⁸³ A similar principle is embodied in some Australian care and protection legislation, particularly with respect to guardianship orders or orders placing a child away from home.²³⁸⁴ We

do not recommend this rule because it seems unnecessary in Australia. We received no evidence of overuse of orders. Magistrates and judges should be free to make whatever orders seem necessary and appropriate. They should not be restricted to accepting or rejecting the orders applied for by the parties. This flexibility will assist in ensuring that the orders, if any, reflect and promote the best interests of the child.

17.64 Current moves towards expanding the portability of orders across State and Territory boundaries require a range of similar orders in the different jurisdictions.²³⁸⁵ Chapter 15 discusses the jurisdictional arrangements between care and protection jurisdictions and the Family Court and recommended ways to streamline the processes so that issues that cross the two jurisdictions may be dealt with appropriately in the one forum. These recommendations would allow both care and protection and Family Law Act orders to be made in the one proceeding. The orders available in the different jurisdictions must therefore be compatible and sufficiently flexible to accommodate protection and family issues. Incompatible orders could lead to forum shopping or the inability of courts to work within the proposed arrangements.

Recommendation 172. The national care and protection standards should specify that

- legislation in all jurisdictions should provide for consistent definitions of abuse and neglect and consistent or similar orders allowing a range of formal interventions suitable to the different protective and family law issues associated with individual children and families
- children's court magistrates and judges should not be restricted to making those orders applied for by the parties but rather should have authority to make whatever orders are appropriate from a range available under the legislation.

Delays, case management and active judges

17.65 Some jurisdictions have imposed time limits on the length of adjournments and on time taken to determine care and protection matters.²³⁸⁶ Even so, the Inquiry heard evidence that delays in care and protection matters are common in all jurisdictions.²³⁸⁷ Delays in hearing care and protection applications are of particular concern because the child may be out of the family home or remain at home and at risk pending the finalisation of the case.

17.66 The Attorney-General of the ACT has indicated that delays could be reduced by firmer case management at interlocutory stages of litigation.²³⁸⁸ The Inquiry sees merit in allocating matters to a particular magistrate or judge at the time the application is filed.²³⁸⁹ Not only does this ensure accountability on the part of representatives and parties for unwarranted delays but it also allows the judicial officer to develop an understanding of the history of each matter. In New York, for example, care and protection applications are assigned to a particular judge from their inception and that judge then handles the case through to completion as well as all subsequent court reviews.²³⁹⁰ In addition, the same judge usually handles any further matters concerning that particular family, including custody applications, apprehended violence orders and care and protection applications for other children.²³⁹¹ A judge will often have a history with a particular family going back 10 or more years, longer than the combined terms of the individual lawyers or social workers involved with them. In the UK, courts exercise significant control over the entry of children into care and their transition and discharge from care.²³⁹²

17.67 The level of involvement in care and protection proceedings by decision makers — whether magistrates or judges — is the subject of some debate and was discussed in the family law context at paras 16.31-32. The same arguments apply here.

Recommendation 173. The national care and protection standards should specify that children's court magistrates and judges should be active and managerial in their approach to care and protection cases and that the same magistrate or judge should manage a case from first listing, on an individual case management or single docket model.

Children's participation in court processes

17.68 A common complaint to the Inquiry from and on behalf of children in care was that children do not understand the care and protection process.²³⁹³ In the survey conducted by the Inquiry, of those young people who indicated they had been involved in welfare proceedings, 46% said they had not understood the proceedings and 71% stated they had not had the opportunity to have a say in the proceedings.²³⁹⁴ Many children who do not understand the process tend to think they are to blame for what happens to them and their families. One young woman told the Inquiry

I think the worst thing for young people in care is that they think they are criminals, that they have done something wrong, and that's why they are going into care. I think that's the guilt that they live with for years and years and years.²³⁹⁵

A NSW study on young people leaving care indicated that

...young people who had believed at some stage they were responsible for going into care were less likely to complete high school, more likely to have thoughts about suicide and less happy after leaving care than those who did not believe that.²³⁹⁶

17.69 Where children are able to participate in the court process involved in care and protection matters, they may be able to understand better what is happening and why. In Chapter 13, we have dealt with children's participation in the court processes involved in care and protection proceedings.

Children under care and protection orders

Children remaining at home

17.70 Some orders in care and protection proceedings require that children remain at home with their families under the supervision of the relevant family services department or with appropriate undertakings. A child who has been made a ward of the state, that is, whose guardianship has been transferred to the state, may also live with his or her family, generally on a trial basis.²³⁹⁷ If the trial is successful, some States and Territories will discharge the order but sometimes the guardianship order will remain in place until the child turns eighteen, even though the child remains at home.²³⁹⁸ In 1995–96, on average approximately 13% of children under guardianship orders were living at home with a parent or other adult relative and the majority of children under non-guardianship orders remained with their families.²³⁹⁹

17.71 The Australian Association of Social Workers pointed out to the Inquiry that

[a] decision to return a child to [or continue a child in] his or her parental home under supervision is often made with an acknowledgement that a degree of risk exists for the child. Unless there are live in support staff, it is not possible to supervise a child's placement 24 hours a day....There can be no guarantees of safety and no supervisory process will ever be able to preclude that element of risk.²⁴⁰⁰

The submission continues

[n]otwithstanding the above, the resources available to adequately supervise children living at home are negligible and often result in such children receiving poor service.²⁴⁰¹

Wherever possible children should remain at home with their families.²⁴⁰² It is therefore critical that families and children are given adequate support when children are continued in their families after protective concerns have been identified. With support, supervision and access to services and programs, further departmental intervention may be unnecessary. We recognise the difficulty in allocating priorities within tight budgets but strongly recommend that adequate resources be provided for the supervision and support of families and children in these circumstances.

Recommendation 174. The national care and protection standards should indicate the resource levels necessary to ensure that family services departments are able to supervise adequately and provide

services to families with children under care and protection orders living at home.

Children in out-of-home care

17.72 Most children removed from their families are placed in foster care or in a residential care centre.²⁴⁰³ Residential care includes family group homes, juvenile hostels and campus homes.²⁴⁰⁴ A small number of children in care may be in juvenile detention centres and some older children live semi-independently.²⁴⁰⁵ Most children in foster care are under guardianship orders as are most children in residential care.²⁴⁰⁶

17.73 Children may 'drift' in care on non-permanent orders that do not serve the child's long term interests and do not allow for permanency planning. In all appropriate cases orders should allow certainty and permanence for the child.²⁴⁰⁷ Where a non-permanent order is to be made, orders for shorter periods of out-of-home care should be preferred since in most cases the child eventually returns to his or her family.²⁴⁰⁸ DRP 3 proposed that all non-permanent orders that do not transfer guardianship should extend for no more than one year.²⁴⁰⁹ However, there has been some concern that our proposal was too inflexible particularly where the child remains at home under supervision orders or undertakings. It may well be unnecessarily disruptive to the child and family, and a waste of resources, to return to court each year for a review of a supervision order that is working well.²⁴¹⁰ We are persuaded that non-guardianship orders allowing the child to remain living at home should be able to extend for any suitable and fixed period of time. However, a child placed in out-of-home care should not become lost in the system on indefinite or long term orders that may become inappropriate as the child gets older or as his or her family circumstances change. Where a non-permanent out-of-home order is made, it should be subject to review by the court on an annual basis unless particular circumstances warrant a different fixed period of time.²⁴¹¹

17.74 State and Territory governments co-ordinate the provision of services to children living away from home but non-government organisations may manage these services using government funds. The national standards and the requirements of the Charter for Children in Care should extend to non-government organisations that receive government funding.²⁴¹²

Recommendation 175. The national care and protection standards should require that all government agencies and non-government organisations that receive funding for the care of children in out-of-home care should be bound by the terms of the Charter for Children in Care.

Recommendation 176. The national care and protection standards should require that in all appropriate cases care and protection orders should be directed to providing permanence and certainty for the child.

Recommendation 177. The national care and protection standards should specify that where permanent orders are inappropriate non-permanent care and protection orders should be made as follows.

- Where the child is removed from his or her family, orders should operate for one year unless the party seeking the order can show that a longer fixed period of time is in the best interests of the child.
- Where the child is to remain at home under orders, orders may be expressed to continue for any fixed period of time the court considers appropriate in the best interests of the child.
- In all cases, non-permanent orders should be expressed to operate for a specified period and extensions of orders should require an application to the court.

Case plans and reviews

Introduction

17.75 An essential step in meeting the guarantees in the Charter for Children in Care would be the development of a case plan for each child in care and a detailed, regular and accessible review process of

case plans and court orders.²⁴¹³ Children in out-of-home care should have a right to have their circumstances and status reviewed periodically.²⁴¹⁴ Any system of review should be based upon the establishment of an adequate long term care plan.

17.76 In their study of children in care, Brewer and Swain found that '...the picture presented was of an uncoordinated approach to the planning for children in care'.²⁴¹⁵ Their report also pointed to disparities between the States and Territories in the review processes.²⁴¹⁶

17.77 In NSW, for example, legislation provides for Children's Review Panels but these panels have never been proclaimed.²⁴¹⁷ NSW has, however, established a Community Services Commission that can handle complaints about the circumstances of children in care and conduct reviews of the circumstances of individual children in care.²⁴¹⁸ In the ACT the Community Advocate may intervene in case plan reviews and can apply for reviews of orders made by the court.²⁴¹⁹

17.78 In Victoria there is a process of internal review of case plans. Children are encouraged to participate in these reviews.²⁴²⁰ In addition, when certain court orders are made for longer than 12 months, the Director-General of the family services department must review the case before expiration of the first 12 month period and consider whether the order continues to be necessary. If so, he or she must notify the court, the parent and the child. In default, the order ceases to be in force.²⁴²¹ A party dissatisfied with the result of the review may appeal, under certain circumstances to the Victorian Administrative Appeals Tribunal for a review of the case plan.²⁴²² In the Victorian system the court does not review case plans but it does review orders that are made for an initial period of not more than 12 months. In these circumstances, the order may be extended only by the court upon application by the Director General.²⁴²³

17.79 New York has a system similar to that in Victoria, except that case plans are reviewed by the court in conjunction with court orders. Most care and protection orders may be made for periods of not more than 12 months and applications for an extension of placement or supervision must be made if a party wishes the order to continue.²⁴²⁴ In determining whether a placement or supervision order should be extended, the court generally assesses the family services department's plan for the child and makes further orders regarding the case plan and the provision of services related to the plan's goals. Where the order is expressed to be 'permanent', that is, where guardianship of the child has been transferred to the State for the purposes of adoption but adoption has not occurred within 18 months of the order (6 months if the child is not yet in a pre-adoptive home), the family services department must file an application for a court review of the plan to assist the child in being adopted. In reviewing the status of these children, the court may consider the appropriateness of the service plan and may make orders that the child be placed in a different agency to promote a permanency plan for the child.²⁴²⁵

17.80 In the UK, courts used to have power to review the circumstances of children subject to wardship orders. This arrangement was said to have increased case loads of the magistracy and was criticised on the basis that courts may not be in the best position to decide how to handle day to day arrangements for a child's care.²⁴²⁶ Under the *Children Act 1989* (UK) the local authorities now have primary responsibility for management of children in care. Judicial review is now considered a last resort, available where the applicant can show that the local authority acted in a way in which no reasonable authority could act or acted outside its statutory authority. In such cases, the court can order that the local authority discharge its statutory authority or that a decision be quashed but cannot make placement or service orders it considers to be in the best interest of the child.²⁴²⁷

Development and reviews of case plans

17.81 When children are placed under care and protection orders that require them to live away from their families or are voluntarily placed in care by their families, detailed case plans should be formulated for each individual child. The case plan should describe the goals for that child and specify the services and co-ordination necessary both to reach those goals and to provide the basic guarantees in the Charter for Children in Care. Case plans should be formulated in consultation with the child and those involved with the child. In addition, they must be formalised in writing, as a UK report has noted that

...if plans are not written down, they can never be monitored. In addition to the potential damage to children and families, the result of decision-making and planning on inadequate evidence or false assumptions is increased work, greater stress and less job satisfaction.²⁴²⁸

17.82 These case plans should be subject to regular review. Reviews provide a means to ensure that case plans are being followed, that they remain appropriate and that children can have a say in decision-making about them. One submission to the Inquiry noted

I remember one day was really bad when I went to court and that was the day that I was told that my little sister was moving interstate. There was no lead ups and, you know, she might be going interstate or bla bla bla and I had no say in it. They didn't talk to me about it.²⁴²⁹

17.83 At first instance, reviews should be internal. The child should be able to participate in this review process. Each child in care should have a legal representative who remains, as far as possible, the child's representative throughout the time the child is in care.²⁴³⁰ This representative should be able to participate in the review process if so instructed by the child client or, where the child is too young to provide instructions, if the representative considers it necessary in the best interests of the child. The representative should therefore be given notice of each review along with details of the child's current circumstances. In addition, the representative or the child should be able to initiate a review process within the review period if a change in circumstances warrants it.

17.84 In some circumstances an independent agency should be involved in the annual review, as are the ACT Community Advocate and the NSW Community Services Commission.²⁴³¹ An independent, external review of case plans is particularly important where the family services department, family, foster carers and/or child do not agree on the terms or goals of the case plan. These parties should be able to request an independent review. The relevant body should also be able to conduct such a review on its own initiative. Suitable bodies to undertake this function already exist in many jurisdictions, for example, the Queensland Commissioner for Children, the SA Children's Interests Bureau or even the children's courts. In Chapter 7, we discussed other bodies that may be suitable to undertake this function.

Recommendation 178. National care and protection standards should make the following provisions.

- Each child in care should have a detailed case plan within 6 weeks of entry into care.
- The case plan should describe the ultimate goals for the child (for example, return to parent, adoption or independent living) and designate the appropriate day to day services and co-ordination necessary to reach those goals and to provide the child with the basic guarantees in the Charter for Children in Care.
- The educational needs, recreation opportunities and behavioural and/or medical intervention requirements for each child and the responsibilities, time-frames and strategies necessary to achieve the identified goals should be addressed in the case plan.
- The case plan should be developed in consultation with the child. The child's views and wishes should be given due weight in accordance with his or her level of maturity.

Recommendation 179. In each jurisdiction all case plans should be subject to annual review. Reviews should be conducted by the relevant family services department and, for those case plans that may be contested or controversial, also by an independent body.

- The internal and external review processes should include participation by the child and/or the child's legal representative if the child wishes or the child's best interests require representation.
- The independent body, perhaps modelled on the ACT Community Advocate or the NSW Community Services Commission, should be able to conduct a full case plan review at the request of the family services department, parent, foster carer or child or on its own initiative. To facilitate this review, the independent body should be provided with the family services department's proposed case plan prior to each review, have access to the original court and department file and involve all participants, including the child, in the review process. Its review should focus on ensuring that the child's best interests are paramount in the formulation of case plans and on providing objectivity and accountability in the formulation of appropriate case plans.

Implementation. Appropriate bodies should be established or given responsibility for independent reviews in each jurisdiction. This should be included as a legislative requirement in the national care and protection standards.

Reviews of orders

17.85 The circumstances of children under care and protection orders are not static. Children grow older, families evolve and opinions regarding the safety of the child may change. Just as case plans need to accommodate these changing circumstances so too may court orders. Children under non-permanent out-of-home care orders should be subject to orders of no longer than 12 months, except in unusual circumstances.²⁴³² The matter should then be brought back before the court where a party wishes the order to continue for any additional period of time. This arrangement provides an automatic review by the court of the non-permanent orders in most cases and should assist in the prevention of children 'drifting' in care.

17.86 In addition to reviews of non-permanent orders, the child and the parties to care and protection matters may need to have recourse to the court before an order expires or is extended. This situation could arise when the situation of the child and the family changes during the course of an order to the extent that the order is no longer appropriate. In addition, even where permanent orders have been made, there may be situations where they are no longer the most appropriate order. Some jurisdictions provide that only the family services department or the parents may apply for amendment of court orders in such cases.²⁴³³ The child, with the continued assistance of his or her legal representative, should also be able to bring applications to vary or revoke orders.²⁴³⁴

Recommendation 180. National standards should specify that the child or the child's representative may bring an application to vary or revoke an order at any stage.

Complaints mechanisms

17.87 Each State and Territory has an ombudsman or equivalent to provide independent review of services and to handle complaints about government services, including those concerning children in care. Several jurisdictions have established an independent body to focus particularly on the needs of children or the care and protection system, such as the NSW Community Services Commission and the Queensland Commissioner for Children.²⁴³⁵ Chapter 7 discussed the need for State and Territory complaints bodies able to handle complaints from children or about issues affecting them. In addition, the review processes set out above can also act as forums where complaints about the care and protection services provided to a particular child can be heard and addressed.

Leaving care

17.88 Children leave care for a number of reasons including

- the child turns eighteen
- the care and protection order expires
- the child is adopted
- the child returns to the family
- responsibility for the child is transferred to a different government agency (for example, to an agency within the juvenile justice system).

17.89 A NSW study indicated that about 100 children between the ages of 16 and 18 leave care each year in that State.²⁴³⁶ One of the obligations of the state as 'parent' to children in care should be to ensure that the transition from care, whether to their family or independence, is as smooth as possible. This transition could require training and preparation for independence while the child is in care and continuing support once the child leaves care. The NSW study noted that wards making the transition from care to independence

vary considerably in their circumstances, including their age at entry into out-of-home care, how many placements they have had, who they are living with when they are discharged and what sources of support they have. Their needs will therefore vary and they generally also change over time. The need for preparation and ongoing support beyond discharge, however, is common, and may include financial support, emotional support, and advice and information about their background.²⁴³⁷

The Commonwealth is significantly involved in this aspect of children and the care and protection system, as it is responsible for many of the services available to young people who have left care. These services include income support, occupational or other tertiary training, housing and health care.

17.90 There is little information about children's access to these and other services available for children who have left care, but the HREOC report *Our Homeless Children* demonstrated that relevant departments were doing little, if anything, to assist in the transition.²⁴³⁸ Research has shown that children leaving care face homelessness, unemployment, loneliness, depression and poverty.²⁴³⁹ The National Children's and Youth Law Centre has pointed out that

[w]hen our children grow up and leave home, they are not just left high and dry by their parents. The state, as a parent, fails dismally to provide appropriate follow up and support.²⁴⁴⁰

This perception was supported by submissions.²⁴⁴¹ One young woman told the Inquiry

[w]hen I left care, I didn't get a letter. Some people do. I know that's something I was going to mention but I forgot, is when – there's a letter that the minister sends out to all new people coming into care and it says who he is and what it means for him to be their legal guardian. So I'd say he's probably got a letter that goes out for people who are leaving care, but I never got one. I know some people do, but it's almost like: see ya. You know: good luck with your life. I think I got \$200 to buy a fridge or something.²⁴⁴²

Australian care and protection systems, and associated service delivery agencies at federal, State and Territory levels, are currently failing to adequately assist children in care in their transition to independence.

17.91 Research suggests that many children in care may 'leave' care because they have drifted into the juvenile justice system.²⁴⁴³ Systemic factors contributing to this drift include systems abuse, inadequate service provision for children while in care and a routine use of the juvenile justice system as a treatment, punishment and holding mechanism for children in care who may be difficult to manage. They combine with other social and personal factors to create an alarming flow of children in care into the juvenile justice system.²⁴⁴⁴

Recommendation 181. The national care and protection standards should ensure that the case plan for a child who is leaving care is reviewed by the family services department at least 6 months prior to the child's 18th birthday or planned exit from care. A transitional case plan should be developed at that time directed towards assisting the child in the transition to independence or family reunification. It should designate the support necessary for this transition both before and after leaving care.

Recommendation 182. Research should be conducted into the causes of and ways of preventing the drift of children in care into the juvenile justice system.

Implementation. OFC should co-ordinate this research on the basis of information provided by the State and Territory family services departments, juvenile justice departments and DPP agencies.

Recommendation 183. The national care and protection standards should require that caseworkers, particularly staff in residential care settings, receive specialist training in identifying children and young people at risk of juvenile justice contact and in implementing early intervention and prevention strategies. Children in care should have access to intensive support, therapeutic and rehabilitation programs where appropriate.

Special responsibilities for particular children

Indigenous children

17.92 The Commonwealth has a responsibility under the Constitution for Indigenous people, including children involved in care and protection systems throughout Australia.²⁴⁴⁵ While Indigenous people in Australia are the most disadvantaged on any indicators, the significant over-representation of Indigenous children in care compounds that disadvantage.²⁴⁴⁶ In its discussion paper *Our Children, Our Culture, In Our Hands*, the Secretariat of National Aboriginal and Islander Child Care noted that a contributing factor to the level of abuse and neglect of Indigenous children is

...the continued destabilisation process being experienced on a daily basis by Aboriginal families and their children. This destabilisation process has its roots in the previous policies associated with assimilation [and] integration which have proven to have had far reaching effects. Many of which are still apparent today.²⁴⁴⁷

In *The Commonwealth's Role in Preventing Child Abuse*, the AIFS also noted

...the history of Aboriginal and Torres Strait Islander claims to equity and recognition as indigenous peoples, gives their communities a special claim to control the child protection, and child abuse prevention strategies of the States.²⁴⁴⁸

In addition, the National Inquiry into the Separation of Aboriginal and Torres Strait Islanders From Their Families detailed the devastating effects of past and current mechanisms for separating Indigenous children from their families.²⁴⁴⁹ In recognition of the troubled relationship between Indigenous people and the care and protection system, the federal Government provides funding for the Secretariat of National Aboriginal and Islander Child Care. This secretariat coordinates the activities of Aboriginal and Islander child care agencies nationally.

17.93 There is widespread acceptance, and in some cases legislative recognition, of the Aboriginal Child Placement Principle.²⁴⁵⁰ This principle requires that Indigenous children who cannot be cared for by their parents should be placed within their extended family or community, or at least with an Indigenous family. To implement this policy, Aboriginal and Islander care agencies in most jurisdictions assist in decisions as to the placement of Indigenous children. In Townsville, for example, the Aboriginal and Islander Child Care Agency is a member of the multidisciplinary interviewing and investigation team²⁴⁵¹ and in Alice Springs the Central Australian Aboriginal Child Care Agency is a permanent member of the child protection team.²⁴⁵² However, the placement principle is not always followed and the care agencies are sometimes not involved in placement decisions concerning Indigenous children.²⁴⁵³ Legislative recognition of the placement principle would ensure that it is followed by decision-makers when considering the formal out-of-home placement of Indigenous children.

17.94 Despite the Aboriginal Child Placement Principle, some submissions to the Inquiry were critical of the response of care and protection systems to the needs of children in Indigenous communities.²⁴⁵⁴ The three main criticisms were that some workers in family services departments hold racist attitudes,²⁴⁵⁵ that there remains a lack of consultation with the communities concerned²⁴⁵⁶ and that sufficient account is not taken of Indigenous child rearing practices when considering whether an Indigenous child has been neglected.²⁴⁵⁷ The National Inquiry into the Separation of Aboriginal and Torres Strait Islanders From Their Families dealt extensively with the treatment of Indigenous families by care and protection systems.²⁴⁵⁸

Recommendation 184. The national care and protection standards should require that

- the Aboriginal Child Placement Principle and the essential role of Aboriginal and Islander Child Care Agencies be enshrined in legislation in all States and Territories
- all family services department workers receive appropriate information and training in cross-cultural awareness, including information and training on the differing child rearing practices of Indigenous communities.

Recommendation 185. The Minister for Aboriginal and Torres Strait Islander Affairs should prepare and release regular reports on

- the current policies and practices of, as well as best practice guidelines for, State and Territory family services departments concerning investigation, assessment and case management of referrals for Indigenous children
- the operation of Aboriginal and Islander child care agencies, including the funding levels required for their effective operation
- prevention programs aimed at Indigenous communities.

Implementation. Such reports could be prepared in consultation with OFC and the Secretariat of National Aboriginal and Islander Child Care.

Children from non-English speaking backgrounds

17.95 Children from families in which one or both parents were migrants to Australia are not noticeably over-represented in the available statistics on care and protection.²⁴⁵⁹ However, accepted notions of what constitutes abuse or neglect may vary markedly between different cultural and ethnic communities, particularly in relation to acceptable standards of discipline.

17.96 In 1996 the Department of Health and Family Services commissioned a Proposed Plan of Action for the Prevention of Abuse and Neglect of Children from non-English Speaking Backgrounds.²⁴⁶⁰ The Australian Arabic Welfare Association has produced an excellent resource kit entitled Like Engraving in Stone to educate family services department workers on parenting issues and notions of abuse and neglect in the Arabic community and Arabic parents on these issues in the broader community. As far as the Inquiry is aware there are very few other programs on developing cross-cultural awareness in care and protection. Education and awareness campaigns concerning child abuse and neglect appropriately directed towards the major ethnic and cultural communities in Australia are essential. Family services department workers must be well trained in cross-cultural issues and the various methods of child rearing accepted among relevant communities.

Recommendation 186. National education and awareness campaigns about child abuse and neglect should be developed and directed towards the major ethnic and cultural communities around Australia.

Implementation. The Department of Health and Family Services and DIMA should conduct these campaigns in consultation with OFC.

Recommendation 187. The national care and protection standards should require that all family services department workers making assessments or conducting investigations receive appropriate training in cross-cultural awareness, including issues relating to differing child rearing practices in various communities.

Children with disabilities

17.97 About one quarter of the children in care are admitted to care partly or mainly as a result of a disability.²⁴⁶¹ DRP 3 suggested a national education and awareness campaign to assist in the prevention of abuse and neglect of children with disabilities.²⁴⁶² In its submission, the Department of Health and Family Services pointed out that previous attempts to develop a national education and awareness campaign for child abuse prevention '...failed to gain the support of all Australian Governments'.²⁴⁶³ In the light of those difficulties, the submission suggested that '...this recommendation is unlikely to meet with support'.²⁴⁶⁴ Although there may be difficulties in securing the co-operation of all jurisdictions, the need to develop a national education and awareness campaign remains apparent.

17.98 The Inquiry heard criticism about the handling of abuse allegations concerning children with disabilities.²⁴⁶⁵ The problems faced by children in care are generally exacerbated for children with disabilities because they may have greater difficulties communicating and participating in decisions that affect them.²⁴⁶⁶

Their disabilities may make them particularly vulnerable to further abuse or to systems abuse and compound their difficulties in obtaining proper support or services.²⁴⁶⁷

17.99 In 1995 the Department of Health and Family Services released a Proposed Plan of Action for the Prevention of Abuse and Neglect of Children with Disabilities.²⁴⁶⁸ While this is commendable, standards are required to ensure that, once children with disabilities enter care, they are appropriately consulted and their needs and perspectives taken into consideration in providing services and support.

Recommendation 188. National education and awareness campaigns should be conducted around Australia about particular issues concerning abuse and neglect of children with disabilities.

Implementation. The Department of Health and Family Services should conduct these campaigns in consultation with OFC and the relevant State and Territory agencies.

Recommendation 189. The national care and protection standards should require that all family services department workers receive appropriate training in issues relating to abuse and neglect of children with disabilities.

Adolescents, family disputes and the care system

17.100 Care and protection legislation in some jurisdictions prohibit courts making certain orders with respect to young people aged 16 or 17, even where there may be evidence of abuse or neglect.²⁴⁶⁹ In addition, family services departments often do not act to protect young people who have almost, but not quite, attained an age which would preclude involvement by the department (for example, where the young person is 16 years old in a jurisdiction that defines a child as a person under 17).²⁴⁷⁰ Family services departments should be able to respond to the needs of all children and young people who require care and protection.

17.101 Young people may become homeless or be at risk of homelessness due to abuse or neglect by their families or because of family breakdown.²⁴⁷¹ These young people could fall under the jurisdiction of a variety of government agencies including those that provide care and protection, income support and emergency accommodation. In recognition of this, the relevant agencies generally follow the Commonwealth/State Youth Protocol for the case management of homeless children. Current operation of and problems with the Protocol are discussed at paragraphs 9.54-60.

17.102 The Youth Homelessness Pilot Program is another Commonwealth/State project aimed at young people who fall under more than one agency. The Youth Homeless Taskforce, discussed at paras 6.6 and 9.50, oversees the program.

17.103 The national care and protection standards should include a requirement that continuing funding and resources should be made available in each jurisdiction to ensure that adequate family therapy and mediation programs are available to all young people and their families. The national standards on this issue should draw upon the insights and conclusions of the Youth Homelessness Pilot Program Evaluation. In particular, consideration should be given to other early intervention strategies.

17.104 Family breakdown may also be addressed in children's courts in some jurisdictions. Parents and/or children can apply to the courts, on the grounds of irretrievable breakdown or irreconcilable differences, for orders for provision of services or placement of a young person away from the family.²⁴⁷² In some cases, the legislation requires a mediation or conciliation conference between the young person and his or her family before the court may hear an application on these grounds. Many of the concerns surrounding the conduct of these conferences are similar to those involved in family group conferences or pre-hearing conferences in care and protection proceedings.²⁴⁷³

Recommendation 190. The national care and protection standards should include the following requirements.

- A child for the purposes of care and protection jurisdictions should be defined as a person under the age of 18 and a court should be able to make orders for a young person aged 16 to 18 if it finds, after taking into consideration the wishes of the young person, that the young person is in need of care and protection.
- All family services department workers should receive appropriate training in issues relating to abuse and neglect of adolescents, as well as reasons for family/adolescent breakdown.
- Adolescent and family therapy and mediation programs should be available to all young people in dispute with their families.
- Adolescent and family therapy and mediation programs should develop models of best practice to meet the needs of adolescents and their families, particularly in Aboriginal and Torres Strait Islander, non-English speaking background, isolated and/or rural communities.

Recommendation 191. Research should be conducted into the appropriate mechanisms and forums for dealing with adolescent/family breakdown, including the involvement of family services departments, conferencing models and court processes. This research should

- focus on the reasons for such breakdowns and the appropriateness of the care and protection system in alleviating the problems
- monitor the appropriateness of the national care and protection standards for adolescents with family disputes.

Implementation. OFC should co-ordinate this research following the release of the report on the Youth Homelessness Pilot Program.

18. Children's involvement in criminal justice processes

Introduction

18.1 For a significant number of young people throughout Australia, contact with the legal processes associated with education, government service delivery and/or care and protection culminates in their involvement in criminal processes.²⁴⁷⁴ There is also a smaller number of young people for whom contact with police and the criminal justice system represents their first experience of formal legal processes.

18.2 Involvement in the juvenile justice system can have serious social and developmental consequences for children, particularly those who have repeated contact. These consequences can include disrupted education, reduced employment opportunities and family dislocation.²⁴⁷⁵ There are particular problems in juvenile justice processes for Indigenous young people and those living in rural and remote areas. In addition, relations between police and young people around Australia are generally poor.²⁴⁷⁶

18.3 The levels of children's court appearances and formal diversions from the juvenile justice system have remained stable for the last fifteen years.²⁴⁷⁷ Despite this there is a public perception that youth crime is increasing. This 'moral panic' is mirrored in and fuelled by media stories of a juvenile crime wave and by political rhetoric.²⁴⁷⁸

Contrary to police and media reports and the claims of politicians, there is in Australia no juvenile crime wave and no large increase in serious juvenile crime.²⁴⁷⁹

...current [juvenile justice] policy is flawed by political expediency and 'knee jerk' responses to perceived problems of antisocial and delinquent youth behaviour.²⁴⁸⁰

Community perceptions that youth crime is rampant have lead to particularly punitive legislative developments in many jurisdictions.²⁴⁸¹ These developments are harmful to children and endanger community safety.

18.4 Children come into conflict with the criminal law at different rates in different parts of Australia. In all jurisdictions they tend overwhelmingly to commit non-violent offences such as break and enter, motor vehicle theft and offences against public order.²⁴⁸² A study of 52 935 juveniles who appeared before the NSW Children's Court between 1986 and 1994 found that 86% of offences for which juveniles appeared were non-violent.²⁴⁸³ It also found that 7 out of 10 offenders did not reappear before the court and 9% of juvenile offenders were responsible for 31% of all proven offences.²⁴⁸⁴

[T]he research consistently finds that a small proportion of offenders make multiple appearances and are responsible for a disproportionate amount of offending.²⁴⁸⁵

At most only 2% of young people aged from 10 to 17 years come into contact with the Children's Court.²⁴⁸⁶ Even if this figure is increased to take into account contacts with other formal processes such as cautions and family group conferences it is unlikely to exceed 4%.²⁴⁸⁷ The majority of young people do not re-offend. This means that the perception of a juvenile crime wave is based on the difficult behaviour of a very small minority of the youth population which results in all young people being stigmatised and subjected to inappropriate legal processes.

18.5 Children's involvement with the juvenile justice system includes initial contact with police, investigation of alleged offences, diversionary schemes, trial, sentencing and detention. Sentencing and detention are dealt with in the following chapters.

Federal responsibilities

18.6 The Commonwealth has direct responsibility for young federal offenders. These young offenders are dealt in accordance with procedures laid down under the *Crimes Act 1914* (Cth) (Crimes Act) usually by State or Territory police and courts.²⁴⁸⁸

18.7 Offences for which a young person may be charged under the federal Crimes Act include destroying or damaging federal Government property (such as telephone boxes),²⁴⁸⁹ stealing federal Government property,²⁴⁹⁰ hacking into a federal Government computer²⁴⁹¹ or trespassing on federal land.²⁴⁹² Young people may also be charged with crimes, such as social security fraud, under other federal legislation.²⁴⁹³ Only a small minority of young people who come into contact with the criminal law are federal offenders.²⁴⁹⁴

18.8 As well as its specific responsibility for young federal offenders, the Commonwealth has assumed responsibilities relevant to juvenile justice processes under international instruments. Articles 37 and 40 of CROC set down principles for the treatment of young suspects and offenders and require States Parties to develop and maintain a separate juvenile justice system. In addition, the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) and the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 set out detailed principles regarding the treatment of juveniles by law enforcement agencies and in detention.²⁴⁹⁵

18.9 The Commonwealth has an important role in assisting to develop national standards for juvenile justice that reflect Australia's international obligations, are effective in promoting rehabilitation, impose appropriate penalties and ensure due process.²⁴⁹⁶ National standards for juvenile justice should be reflected in uniform legislative provisions. Compliance should be monitored comprehensively by the OFC.²⁴⁹⁷ This approach to juvenile justice would be consistent with that recommended in the Beijing Rules.²⁴⁹⁸

18.10 Many community organisations and peak bodies support the proposed national standards for juvenile justice.²⁴⁹⁹ A number of State and Territory authorities consider that implementation and monitoring of the standards should be left to the States and Territories so that they can be adapted effectively to local conditions and policies.²⁵⁰⁰ The national standards for juvenile justice should set the framework, require best practice and establish benchmarks for performance. They should allow flexibility within this framework for particular appropriate local variations in practice. However, they should not permit local variations that breach human rights commitments. The process recently used to develop the Design Guidelines for Juvenile Justice Facilities in Australia and New Zealand may be a useful consultation model for the national standards for juvenile justice subject to recommendation 256.²⁵⁰¹

18.11 Some of the matters that the Inquiry considers should be included in the national juvenile justice standards are canvassed in the rest of this chapter.

Recommendation 192. National standards for juvenile justice should be developed to reflect Australia's international commitments and ensure a proper balance between rehabilitation, deterrence and due process.

Implementation. The standards should be developed by OFC in consultation with the relevant State and Territory authorities, the legal profession, community groups, peak bodies such as juvenile justice advisory councils and young people.

Recommendation 193. Compliance by the Commonwealth, States and Territories with the national standards for juvenile justice should be monitored. As part of this process, the Commonwealth and each State and Territory should be required to provide a detailed profile of juvenile justice laws, programs and policies annually, including information on performance measures and outcomes. The community sector should be given regular opportunities to contribute to the monitoring process.

Implementation. These monitoring and consultation roles should be performed by OFC which should report annually to Parliament on the results.

Age thresholds in criminal justice processes

Age of criminal responsibility

18.12 Children are not held criminally responsible for their actions until they have reached a certain age.²⁵⁰² The age of criminal responsibility is 10 under federal law²⁵⁰³ and in all jurisdictions except Tasmania and the ACT where the threshold is seven and eight respectively.²⁵⁰⁴

18.13 The age of criminal responsibility under the Crimes Act is generally consistent with standards in common law countries. In England, for example, there is a conclusive presumption that a child under 10 years of age cannot be guilty of a criminal offence.²⁵⁰⁵ In Scotland the age of criminal responsibility is eight and in Ireland it is seven.²⁵⁰⁶ In Canada, the age of criminal responsibility is 12.²⁵⁰⁷ In New Zealand the age of criminal responsibility is 10.²⁵⁰⁸

18.14 The age of criminal responsibility is generally higher in civil law countries.²⁵⁰⁹ For example, in France the age of criminal responsibility is 13.²⁵¹⁰ In Norway and Denmark it is 15.²⁵¹¹

18.15 The United Nations Committee on the Rights of the Child has expressed concern about the 'low age of criminal responsibility' in the UK and recommended that serious consideration be given to raising it.²⁵¹² The Committee recently asked the federal Government to prepare responses to a series of questions raised by the first report under CROC before it appears before the Committee to discuss that report. One of the questions is whether Australian jurisdictions envisage raising the age of criminal responsibility.²⁵¹³

18.16 All Australian jurisdictions should agree on and legislate a uniform age of criminal responsibility. A child should not be liable to be charged with a criminal offence in one State for an act which if committed in another would not attract liability only by reason of his or her age. The Inquiry recognises that there is an element of arbitrariness when setting age thresholds, especially given the great variations in capacity between individual children. However, setting an age provides certainty for both the law and children. As most jurisdictions, including the Commonwealth, have already decided on 10 as the age of criminal responsibility it would seem to be the most obvious choice. This conclusion is supported by a number of submissions.²⁵¹⁴

Recommendation 194. The minimum age of criminal responsibility in all Australian jurisdictions should be 10 years.

Implementation. The Tasmanian Government and the ACT Government should enact legislation to this effect.

Doli incapax

18.17 In addition to a statutory minimum age of criminal responsibility, there is a legal presumption concerning criminal responsibility operating in all Australian jurisdictions known as the principle of *doli incapax*.²⁵¹⁵ This old common law principle presumes that a child aged under 14 does not know that his or her criminal conduct was wrong unless the contrary is proved. That is, it is a rebuttable presumption.

18.18 The principle of *doli incapax* has been controversial in recent years both in Australia and the United Kingdom.²⁵¹⁶ In 1990 the committee reviewing federal criminal law recommended that the principle should be retained but that the onus for the presumption should be reversed.²⁵¹⁷ This would mean it would be up to the accused to demonstrate that he or she did not understand that his or her criminal act was wrong.

18.19 *Doli incapax* can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible.²⁵¹⁸ In these circumstances, the principle may not protect children but be to their disadvantage.

18.20 The Inquiry considers the principle of *doli incapax* a practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility.

...the purpose and effect of the presumption is still to protect children between 10 and 14 from the full force of the criminal law.²⁵¹⁹

The *doli incapax* rule has the merit of making the police, prosecutors and the judiciary stop and think, however briefly in some cases, about the degree of responsibility of each individual child.²⁵²⁰

The principle should be applied consistently throughout Australia and be legislatively based.²⁵²¹ The legislation should require that to rebut the presumption the prosecution must prove that the child defendant knew that the criminal act for which he or she is charged was wrong at the time it was committed.

Recommendation 195. The principle of *doli incapax* should be established by legislation in all jurisdictions to apply to children under 14.

Implementation. All States and Territories that have not already done so should legislate to this effect.

Age of majority

18.21 In the Northern Territory, Victoria, Tasmania and Queensland, children are dealt with in the adult criminal system once they turn 17.²⁵²² In all other States, in the ACT and under federal criminal law all children are juveniles for the purposes of the criminal law, that is until they turn 18.²⁵²³

18.22 The Inquiry considers that there should be national consistency on when a young person is dealt with in the juvenile justice or adult criminal system. An Australian child of a particular age should not be able to be tried as a juvenile in one jurisdiction and as an adult in another. Townsville Community Legal Service gave the hypothetical example of a 17 year old who would be charged, tried and possibly detained as an adult in Coolangatta (Qld) but as a juvenile several metres away across the border in Tweed Heads (NSW).²⁵²⁴ Children should not be treated as adults by the criminal justice system. The age of majority for the purposes of the criminal law should be 18, the age at which a child becomes an adult under general Australian law and under CROC.

Recommendation 196. The age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions

Implementation. All States and Territories that have not already done so should legislate to this effect.

Age of consent

18.23 The age at which a child can participate legally in sexual intercourse is determined by State and Territory legislation. Generally, the age of consent for sexual intercourse between males and females is 16 or 17.²⁵²⁵ The age of consent for male homosexual sex is commonly set higher than the threshold for heterosexual or lesbian sex. For example, in NSW and the Northern Territory the general age of consent is 16 and the age of consent for sex between males is 18.²⁵²⁶ In Queensland, there is a general prohibition on anal intercourse with people who are under 18.²⁵²⁷ While the general age of consent in Western Australia is 16, it is illegal for a man to have sex with another man who is under 21.²⁵²⁸

18.24 The Inquiry received a number of submissions on the social, health and legal implications of a higher age of consent for male homosexual sex.

It seems anachronistic to me that the age of consent is different for males. It is a legal issue that at some stage must be tackled, if not for reasons based on logic or issues of discrimination, then for psycho-social and public health reasons.²⁵²⁹

The laws across Australia are inconsistent, they are discriminatory and they are without regard to privacy. The current law...has real impact upon the day to day life of young gays and lesbians...It reduces the reporting of violence to police where the nature of that violence would identify the young person as gay and it also hinders the young person seeking assistance from many services in that they have a fear of disclosing that they are engaged in criminal activity.²⁵³⁰

18.25 In 1977 the Royal Commission on Human Relationships recommended that the general age of consent should be 15.

We think this approach would be a more realistic reflection of the sexual behaviour of young people and of their ability to make personal decisions. At this age children can leave school, get jobs and start playing a responsible role in society.²⁵³¹

The Model Criminal Code Officers' Committee recently recommended that the age of consent for both females and males be set at 16 years.

The inference that might be drawn from an older age of consent for homosexual conduct is that homosexuality is an undesirable activity from which males should be both protected and deterred until adulthood. It is questionable whether this is an appropriate aim of the criminal law.²⁵³²

18.26 In August 1997 the Wood Royal Commission recommended the removal of gender discrimination in age of consent laws.²⁵³³ The Commission based its recommendation on a number of conclusions including the following.

- Present legislation is, on any view, discriminatory and anomalous in its application.
- Legislative proscription of consensual conduct moves into shaky territory when it is based upon purely moral or religious grounds, particularly where they are the subject of genuinely divergent opinions.
- Young people should not be denied advice and education on safe sex because of the illegality attaching to their conduct.
- Making the age of consent uniform would remove an opportunity which is ripe for selective policing, extortion and corruption.
- Irrespective of legislative provision, parents and religious bodies remain free to teach their children according to their own religious and moral values, as it does for those children to accept or reject them.²⁵³⁴

18.27 The Commissions consider it inequitable and discriminatory to criminalise the sexual activity of young gay men who have reached the age when sex with a person of the opposite sex would be legal. These laws can be seen as an official sanction of the unfairly different treatment experienced by many young gay men and lesbians. All States and Territories that have not already done so should make the age of consent the same for heterosexual and homosexual sex.

Recommendation 197. The age of consent should be the same for heterosexual and homosexual sex.

Implementation. All States and Territories that have not already done so should legislate to this effect.

Crime prevention

18.28 While the terms of reference of this Inquiry do not include specific consideration of crime prevention programs, youth crime must be seen in the context of the family, geographic, cultural and educational circumstances that affect children's behaviour and opportunities.²⁵³⁵

Reducing welfare benefits, cutting expenditure on education, disbanding family counselling and related support services, and failing to resolve problems such as housing and unemployment are sure ways of encouraging the incidence of juvenile crime.²⁵³⁶

...increasingly there is a recognition that the focus of the juvenile justice system on the misdeeds of the child to the exclusion of their context inevitably results in repeated offending behaviour.²⁵³⁷

18.29 For many teenagers minor offending is a means of testing the boundaries of acceptable behaviour as they adjust to their emerging responsibilities and changing position in society.²⁵³⁸ For other young people involvement in the juvenile justice system is the culmination of a history of deprivation and disadvantage.

For many disenfranchised and marginalised young people, it seems, illegal activity of various kinds is increasingly being seen as simply part and parcel of economic survival — a routine way of managing one's day-to-day living expenses.²⁵³⁹

18.30 A recent survey of 400 young people aged 14 to 17 conducted for the Australian Youth Foundation found that a significant proportion of juvenile crime was committed to supplement income or obtain money for survival.²⁵⁴⁰ Many of the participants referred to crime as 'a way to get by'.

I was just shoved right out of home [after he came out to his parents] I really didn't have a job and like it was 13 weeks to that dole that I had to wait, and sort of well the only thing was prostitution.²⁵⁴¹

18.31 All Australian governments must direct resources into developing effective juvenile crime prevention programs to ensure community safety and to stop young people from getting caught in an escalating cycle of offending. These could include primary and secondary education modules, early intervention programs and family support schemes.²⁵⁴² However, these programs must be carefully structured to avoid a risk of net-widening, that is, of identifying ever larger numbers of young people as 'at risk' and bringing them under community and government scrutiny.²⁵⁴³

18.32 Adequate community support must also be provided to disadvantaged young people. For example, the Australian Red Cross provides a supported accommodation service for young women under 19 who are pregnant or have children and who have inadequate family support.²⁵⁴⁴ Many of the service's clients are referred by juvenile justice agencies. Adequate support for young people involved in the juvenile justice system is also important to prevent recidivism.²⁵⁴⁵

Juvenile justice models

18.33 Historically, the two most influential theoretical models of juvenile justice have been the welfare model and the justice model. The welfare model emphasised the rehabilitation needs of the offender. The justice model emphasised due process and accountability.²⁵⁴⁶ In recent years the divisions between these models have become blurred.

[T]he debates over the welfare versus justice models for juvenile justice have been superseded by a process of simultaneous broadening of welfare concerns, as well as the promulgation of the ideology of the justice model. Young people are seen as being in need of guidance and assistance (the welfare aspect), whilst at the same time offending is seen to be the result of calculated decisions by rational actors (the justice aspect).²⁵⁴⁷

18.34 A third approach, the restorative model, is currently emerging as an influence on lawmakers. This model encourages offenders to accept responsibility for their criminal behaviour and its consequences for others.²⁵⁴⁸ One of the key features of the model is the involvement of victims in dealing with the offence. It does not overlook rehabilitation and punishment but places them in the context of individuals taking responsibility for their actions.

[T]he paradigm of restorative justice...argues that criminal behaviour is a conflict between individuals and that when a crime is committed, it is the victim who is harmed rather than the State. Thus, rather than the offender owing a 'debt to society' which must be expunged by experiencing some form of punishment (such as a fine or imprisonment) the offender owes a debt to the victim, which can only be repaid by making good the damage caused to that particular individual.²⁵⁴⁹

The aim of the process is to bring about reconciliation, not to exact punishment...²⁵⁵⁰

The restorative model is often integral to diverting young offenders from the formal court system.²⁵⁵¹ It is a contextual model that acknowledges the desirability of balancing juvenile offenders' rights against their responsibilities to the community. The Inquiry considers that the national standards for juvenile justice should strike a balance between the rehabilitation of offenders and restitution to the victim and the community.

Recommendation 198. The national standards for juvenile justice should stress the importance of rehabilitating young offenders while acknowledging the importance of restitution to the victim and the

community.

Diversion

Introduction

18.35 Diversion is an important aspect of many criminal justice systems throughout the world.²⁵⁵² Australia is no exception.²⁵⁵³ Young people suspected of offences are increasingly being diverted from formal court adjudication through mechanisms such as cautioning and family group conferences.

18.36 Diversionary mechanisms are intended to avoid the danger of trapping young people with a previously good record in a pattern of offending behaviour. They seek to temper the punitive nature of criminal justice processes in recognition of the particular vulnerabilities of juvenile offenders. For example, cautioning a young person for a minor offence indicates clearly that his or her behaviour is unacceptable. However, it avoids the stigma associated with prosecution and conviction and it avoids contaminating a first minor offender through contact with serious or recidivist offenders.

Diversion of a juvenile offender away from the criminal justice system to community support services is the optimal response to the problem of juvenile crime.²⁵⁵⁴

18.37 Diverting young people from the formal legal system may create better opportunities to identify any family, behavioural and health problems contributing to the offending behaviour. It helps to address the causes of unacceptable conduct and not merely the consequences of it.

The main feature of an effective juvenile justice system is that it adopts a minimal interventionist approach at every stage of dealing with young people who come to the attention of justice authorities.²⁵⁵⁵

Diversion may also save law enforcement resources.

Cautioning

18.38 Police have traditionally exercised a discretion to divert young people from court proceedings by warning or cautioning them.²⁵⁵⁶ Cautioning minor or first offenders is now an important feature of most Australian juvenile justice systems.²⁵⁵⁷

The key argument has been that contact with the formal system can contaminate young people who would otherwise avoid involvement in further criminal activity if just left alone.²⁵⁵⁸

In some jurisdictions informal cautions are governed to a limited extent by police instructions. In Queensland, Western Australia, South Australia and NSW legislation regulates cautioning.²⁵⁵⁹

18.39 In Queensland a caution may only be administered to a child who admits committing the offence and consents to being dealt with through this process.²⁵⁶⁰ The caution must be given in the presence of another person of the child's or his or her parent's choosing.²⁵⁶¹ A caution to an Indigenous child should be administered by a respected person from his or her community.²⁵⁶² When the child is cautioned he or she must be given a notice including details of the substance of the offence, the police officer's name and rank and the nature and effect of a caution.²⁵⁶³ Police consider that this system works well.²⁵⁶⁴ The Inquiry is concerned about the fact that in certain circumstances evidence that a caution has been administered is admissible against the child in subsequent proceedings.²⁵⁶⁵ This effectively means that a conviction is recorded against the child without the due process of a judicial hearing.

18.40 In Western Australia police must consider whether it would be more appropriate to take no action or to administer a caution to a young person than to start proceedings against him or her.²⁵⁶⁶ Oral or written cautions can be administered for minor offences.²⁵⁶⁷ A cautioning certificate must be issued.²⁵⁶⁸

18.41 In South Australia, police officers have statutory power to give an informal caution to a young person who admits the commission of a minor offence. Once the caution is given, no further proceedings may be taken against the young person in respect of that offence. No official record is kept of the caution.²⁵⁶⁹

18.42 The new cautioning provisions in NSW enable police to caution formally any child who admits an offence and consents to being cautioned.²⁵⁷⁰ In determining whether it is appropriate to deal with a matter by caution an investigating officer must consider a number of factors including the degree of violence involved in the offence and the harm caused to the victim.²⁵⁷¹ The caution must be expressed in language readily capable of being understood by children.²⁵⁷²

18.43 While discretion is a vital part of police work it must be properly exercised. The Inquiry has received evidence that some children do not receive the benefit of cautioning at the same rate as the general youth population. For example, in 1994–95 only 11.3% of Aboriginal alleged juvenile offenders in Victoria received formal cautions compared with 35.65% of non-Aboriginal juveniles.²⁵⁷³ This is despite the fact that the Royal Commission into Aboriginal Deaths in Custody recommended that police administrators encourage officers to make greater use of cautioning for Indigenous suspects.²⁵⁷⁴

18.44 National guidelines on cautioning should ensure consistent treatment of young people no matter where they live or what their background. They should provide a valuable educative tool for police officers.²⁵⁷⁵

Recommendation 199. The national standards for juvenile justice should provide best practice guidelines for cautioning that will ensure equal treatment of young people wherever they live and whatever their background. OFC should monitor compliance with these guidelines.

Conferencing

18.45 Family group conferences are used increasingly in the States and Territories either to divert young offenders from the courts or as a sentencing option.²⁵⁷⁶ Conferences are a type of restorative justice — a means for the offender to accept responsibility and make amends to the victim.²⁵⁷⁷

18.46 New Zealand was the first common law country to introduce family group conferences for young offenders.²⁵⁷⁸ The first Australian pilot of a form of family conferencing was in Wagga Wagga in rural NSW in 1991.²⁵⁷⁹ Under the Wagga Wagga scheme the apprehending police officer was able to refer minor matters for conferencing. The conferences were conducted by police. After considerable criticism of the level of police involvement in the scheme,²⁵⁸⁰ responsibility for administering conferences was transferred to the Department of Juvenile Justice. The NSW Government has recently replaced the Wagga Wagga and similar pilots with a statewide legislative scheme of youth justice conferences based on the New Zealand model.²⁵⁸¹

18.47 South Australia was the first Australian jurisdiction to give statutory recognition to family conferencing.²⁵⁸² Under its model, referrals are made by the police and by the court if it considers that a matter should not be before it. Conferences are convened by youth justice co-ordinators who are either magistrates of the Youth Court or persons appointed to the position.²⁵⁸³ Tasmania has announced an intention to introduce a similar model of conferencing.²⁵⁸⁴

18.48 In Western Australia juvenile justice teams consisting of a youth justice co-ordinator, a police officer, a Ministry of Education officer and an Aboriginal community worker can convene family meetings to deal with young people who have been apprehended for minor offences.²⁵⁸⁵ As a result of the introduction of juvenile justice teams, in 1995 the number of charges before the Children's Court dropped by 22% and admissions to detention centres by 30%.²⁵⁸⁶

18.49 Queensland recently introduced a legislatively based community conference scheme that is available if the offender admits the offence to a police officer or is found guilty in court.²⁵⁸⁷ The legislation is controversial because the community agreements developed during conferencing can be used in evidence against the child in subsequent proceedings in certain circumstances.²⁵⁸⁸ The Inquiry considers this

inappropriate as it is tantamount to recording a conviction against the child without affording the due process of a criminal trial.²⁵⁸⁹

18.50 While not legislatively based, conferencing schemes have been trialled in the ACT and in Alice Springs and Yuendumu in the Northern Territory.²⁵⁹⁰ The scheme being piloted in Victoria by the Mission of St James and St John is a sentencing option only.²⁵⁹¹

Value of conferencing

18.51 Diversionary schemes have many benefits. The child usually avoids a formal conviction and is given a 'second chance'. The formality of the court system may be particularly alienating to children whereas diversionary programs tend to be informal and therefore less intimidating. The schemes advance the rehabilitative aspect of juvenile justice, encouraging children to take responsibility for their actions and learn from their mistakes. One great advantage is the capacity for the child to participate meaningfully in the proceedings in keeping with article 12 of CROC.

18.52 Despite these apparently positive elements, all of the models of family group conferencing used throughout Australia have been the subject of criticism. Particular concerns include the extent of police involvement, the child's lack of access to legal advice, the severity of penalties imposed and a perceived net-widening effect.²⁵⁹² Where a large number of people participate in a conference it may well be as intimidating for the child as a court room. Conferences are particularly problematic for offenders who have poor verbal skills or no family support.²⁵⁹³

18.53 The Inquiry considers that conferencing schemes can be a just, effective and cost efficient means of diverting young offenders from the formal juvenile justice system. However, conferencing should not usurp the role of other diversions such as warnings and cautions and must not lead to a criminal record for the young person.²⁵⁹⁴

18.54 The national standards for juvenile justice should incorporate best practice guidelines for conferencing models to ensure that children in all States and Territories have access to fair and effective diversionary schemes. Matters to be taken into consideration should include

- the desirability of diversionary schemes being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer²⁵⁹⁵
- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence²⁵⁹⁶
- the need to ensure that young people do not get a criminal record as a result of participating in conferencing
- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person
- the child's access to legal advice prior to agreeing to participate in a conference²⁵⁹⁷
- whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less *ad hoc*²⁵⁹⁸
- the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system or escalate children's degree of involvement with the system.

18.55 A number of jurisdictions are concerned that best practice guidelines for conferencing may undermine the element of discretion that makes this kind of court alternative so valuable.²⁵⁹⁹ The Inquiry considers best practice guidelines necessary for accountability given the increasing role played by conferencing in juvenile justice systems and in light of the concerns noted in paragraph 18.54. Young people in one jurisdiction

should not be treated substantially differently from those in another under these schemes. Guidelines were supported by several submissions.²⁶⁰⁰

Recommendation 200. The national standards for juvenile justice should provide best practice guidelines for family group conferencing. OFC should monitor compliance with these guidelines.

Diversiónary schemes and federal offenders

18.56 Under section 20C of the Crimes Act a child charged with a federal offence is to be dealt with as if the offence were an offence against the law of the State or Territory in which the offence occurred. Thus, on the face of it, matters relating to young federal offenders can be disposed of in the same way as those relating to young people who break State and Territory laws. However, young people do not seem to have access to diversionary schemes once they have been charged with a federal offence.²⁶⁰¹

18.57 Under the *Judiciary Act 1903* (Cth), only courts have jurisdiction to deal with and dispose of federal matters.²⁶⁰² This means that only State or Territory judicial officers have jurisdiction to deal with young federal offenders. Many diversionary schemes are administered by people who are not judicial officers. Therefore young federal offenders do not have lawful access to these schemes. In at least one recent case a young federal offender was denied access to a diversionary scheme.²⁶⁰³

18.58 Until a federal charge is laid a matter need not be disposed of judicially. A young person who is suspected of committing a federal offence but who has not been charged may participate in a diversionary scheme. This means that in some jurisdictions, such as South Australia, young federal offenders will have access to diversionary schemes whereas in others, such as Queensland, they may not or their access may be limited.

18.59 Submissions strongly supported making diversionary schemes available to young people charged with federal offences.²⁶⁰⁴ The Inquiry agrees. State and Territory authorities should make conferencing available to federal offenders prior to charge wherever possible. When this is not possible conferences should be administered by a judicial officer.²⁶⁰⁵

Recommendation 201. The best practice guidelines for family group conferencing should ensure that young federal suspects have access to the schemes. The national juvenile justice standards should ensure that conferencing is available to federal suspects prior to charge wherever possible. When this is not possible, conferences should be administered by a judicial officer.

Diversiónary schemes and Indigenous young people

18.60 Despite increased focus in recent years on the chronic over-representation of Indigenous children at all stages of the juvenile justice system, they are still not being diverted from the juvenile justice system at the same rate as non-Indigenous offenders.²⁶⁰⁶ This may be due to factors such as the effect of prior records in some cases or to the manner of exercise of discretionary powers in others.

18.61 The New Zealand experience indicates that diversionary schemes can work well for Indigenous young offenders because of the scope for the extended family and community to be involved.²⁶⁰⁷ However, current Australian models 'fail to understand the complex reality of Indigenous communities and ignore fundamentally the principle of self-determination'.²⁶⁰⁸ The level of police involvement in most conferencing models is particularly problematic for Indigenous communities.²⁶⁰⁹

18.62 Governments should ensure that Indigenous communities are able to develop and run their own family group conferencing models. Existing conferencing schemes should be modified to be culturally appropriate.²⁶¹⁰

Ultimately the only credible way of breaking out of the destructive relationship between juvenile justice agencies and indigenous young people is to facilitate the move to Aboriginal and Torres Strait Islander community control over juvenile justice administration.²⁶¹¹

Recommendation 202. The national standards for juvenile justice should require governments to ensure Indigenous communities are able to develop their own family group conferencing models. Existing conferencing schemes should be modified to be culturally appropriate.

Interaction with police

Introduction

18.63 Relations between police and young people are problematic throughout Australia.²⁶¹² Participants in our focus groups and respondents to our survey, drawn from a variety of cultural and socio-economic backgrounds, stated overwhelmingly that police are generally hostile and aggressive towards young people and treat them all as troublemakers.²⁶¹³ Many police find young people aggressive and difficult to deal with.²⁶¹⁴

Studies in Australia and overseas have consistently identified police/youth relations as inherently conflictual and underpinned by mutual antipathy and intolerance.²⁶¹⁵

This level of conflict is a matter of serious concern. Like experiences of school discipline, early contact with police influences a child's attitude to authority and the state.

18.64 Of the survey respondents who chose to comment on the way police treat young people, 78% stated that police never or only sometimes treat young people with respect.

The police stereotype kids according to what school you come from, what your background is, what colour you are. Kids should be treated the same no matter who or what you are.²⁶¹⁶

Police look down on us and walk around as if they have the authority to trample over us. I've never met a policeman who respected me.²⁶¹⁷

Indigenous young people complain of being routinely picked on by police in some areas.²⁶¹⁸ For example, they claim they often get charged with minor matters such as offensive language and jay walking.²⁶¹⁹ One boy in the Alice Springs focus group said that he had been taken bush and badly beaten by the police without being charged with any offence.²⁶²⁰ Indigenous young people in Rockhampton said there should be more black police officers, although they said they would not like them any better than their non-Indigenous colleagues.²⁶²¹

Some police don't get along with the Aboriginals and they bash them and that sort of thing, which is racist.²⁶²²

They treat Aboriginal kids like a dog on four legs. Also think we cause trouble all the time.²⁶²³

Its always the black fellas that get treated worst.²⁶²⁴

18.65 Not all young people expressed a negative or critical attitude towards police. A number of the focus group participants acknowledged the work of individual police officers.²⁶²⁵ Several survey respondents noted the importance of young people's attitude to the police in establishing a positive dynamic between the two groups.

They treat you good if you treat them good.²⁶²⁶

18.66 In developing the national standards for juvenile justice in relation to police the Inquiry considers that regard should be had to the model clauses developed by the Australian Youth Foundation.²⁶²⁷

Public spaces

18.67 The relationship between police and young people is particularly difficult when they are interacting in public spaces. Children are highly visible on the streets because they tend to spend their time there socialising in groups.²⁶²⁸ The majority of young people in the focus groups stated that young people are regularly hassled and harassed by police when hanging around together in public places.²⁶²⁹ The harassment is said to be verbal and physical.²⁶³⁰ Police often stop young people in the street and ask for their names and addresses without a good reason.²⁶³¹ A legal aid commission solicitor gave evidence that one police officer in Rockhampton estimated he had stopped 200 young people over the course of several nights.²⁶³²

Police think that every teenager out at night must be up to no good.²⁶³³

I hate being asked for my name and address when I'm only sitting at the station waiting for a train and when I refuse to give it they think you are hiding something.²⁶³⁴

18.68 These problems are also manifest in private spaces used for public purposes such as shopping and entertainment complexes where private security guards 'police' young people.²⁶³⁵ For example, in 1995 the *South Bank Corporation Act 1989* (Qld) was amended to enable private security guards to issue notices excluding people causing a public nuisance from the South Bank retail centre for up to 10 days.²⁶³⁶ Conduct causing public nuisance is defined in the legislation as being drunk or disorderly or creating a disturbance.²⁶³⁷ A young person who enters the area in breach of a notice commits a criminal offence.²⁶³⁸ This means that private security guards can extend the scope of the criminal law, criminalising actions that would otherwise be lawful.

In practice this has meant that private security guards have even greater powers than the State police to exclude young people from certain city sites.²⁶³⁹

18.69 Young people who participated in a recent survey conducted for the Australian Youth Foundation expressed similar concerns about treatment by security guards as they did about treatment by police.

They follow you around as if you're going to steal just because you're young.

They usually watch us really carefully. More than anyone else. We get all the looks and scathing glances.²⁶⁴⁰

18.70 The Midland Gate shopping centre in Western Australia has taken a different approach, employing a youth worker. This has led to greater co-operation between all members of the shopping centre community, including the manager, shopkeepers, young people and other customers.²⁶⁴¹ Vandalism, shoplifting and security costs at the centre have decreased.²⁶⁴²

18.71 The federal Government has recently announced a project on young people's use of public space as part of NCAVAC. The project aims to develop models of good practice for negotiating young people's use of public space, with attention being given to the particular needs of Indigenous young people and those from non-English speaking backgrounds.²⁶⁴³

18.72 The Inquiry considers that State and Territory governments should ensure that legislation does not empower private security organisations to extend the scope of the criminal law. OFC should convene a working party of relevant government, community and industry bodies, including the Business Council and retail traders' associations, and young people to develop guidelines for security organisations dealing with young people in privately owned spaces used for public purposes.²⁶⁴⁴ These guidelines should emphasise the benefits, both in terms of social development and crime prevention, of involving young people in commercial communities rather than alienating them. The guiding principles recently developed by the Australian Youth Foundation could be used as a basis for the guidelines.²⁶⁴⁵

Recommendation 203. Security organisations dealing with young people in privately owned spaces used for public purposes should not have the power to extend the scope of the criminal law.

Implementation. State and Territory governments should ensure that legislation and regulations

enabling private security organisations to extend the scope of the criminal law are repealed. OFC should convene a working party of relevant individuals to develop guidelines for security organisations dealing with young people in privately owned spaces used for public purposes.

Preventive apprehension

18.73 In a number of jurisdictions police have statutory power to remove children from public places if they are considered at risk of offending even though they are not suspected of illegal activity. For example, police in Western Australia have the power to apprehend a child who is away from his or her place of residence, not under the immediate supervision of a responsible person and 'in physical or moral danger, misbehaving or truanting from school' and escort the child home or to school.²⁶⁴⁶ This section was used by Western Australian Police as the basis for the controversial Operation Sweep. Between January and March 1994, 500 young people were taken into custody pursuant to the provision.²⁶⁴⁷

18.74 The *Children (Parental Responsibility) Act 1994* (NSW) gave police power to remove children under the age of 15 from public spaces if they not under the supervision of an adult to reduce the likelihood of a crime being committed or of the young person being exposed to some risk.²⁶⁴⁸ The operation of this legislation was limited to pilot schemes in Orange and Gosford. It was widely criticised for the broad discretion given to police and the perceived disparate impact on certain groups of young people, such as Indigenous young people.²⁶⁴⁹ An independent review of the legislation by the consultants Kearney McKenzie found that it was unlikely to have any impact on reducing juvenile crime.²⁶⁵⁰ However, it was strongly supported by many local governments and by rural and regional communities.

18.75 The NSW Parliament has recently passed the *Children (Protection and Parental Responsibility) Act 1997* (NSW) which repealed the 1994 Act and re-enacted it with a number of modifications. Under the legislation a local government council can apply to the NSW Attorney-General to have its area declared operational.²⁶⁵¹ Police will be empowered to remove young people from public spaces in operational areas and escort them to the home of a carer.²⁶⁵² Before declaring an area operational the NSW Attorney-General will have to be satisfied that adequate crime prevention or youth support initiatives will be in place.²⁶⁵³

18.76 The Act defines a child at risk as being in danger of being physically harmed or abused or being about to commit an offence.²⁶⁵⁴ The age up to which a young person may be apprehended in this manner has been raised from 15 to 16.²⁶⁵⁵ The legislation gives police considerable discretion in determining which children are in danger of harm or offending.

18.77 The *Children (Protection and Parental Responsibility) Act 1997* (NSW) also establishes a juvenile crime prevention structure.²⁶⁵⁶ Local government councils will be encouraged to adopt local crime prevention plans after community consultation. If the Attorney-General approves the plan as a safer community compact, the council will be eligible to apply for financial assistance for its implementation.

18.78 The crime prevention aims of the Act are laudable. However, the legislation remains problematic. It allows police to monitor youth behaviour that is not criminal. It sanctions preventive apprehension but provides little or no accountability for police actions or judicial supervision. It allows police to act on stereotypes about young people. Many submissions argued for the repeal of this and similar legislation in other jurisdictions.²⁶⁵⁷ The Inquiry agrees with them.

18.79 The across the board youth curfews recently proposed in a number of jurisdictions are further extensions of preventive apprehension provisions.²⁶⁵⁸ For example, the Northern Territory Government has recently proposed the use of electronic bracelets to impose a night time curfew on certain children.²⁶⁵⁹

Youth curfews represent a sweeping measure designed to clear the streets of young people once again, regardless of whether or not they have done anything wrong, much less illegal.²⁶⁶⁰

The Inquiry is opposed to arbitrary restrictions on the movement of young people who have committed no criminal offence. These restrictions breach the human rights of young people.²⁶⁶¹ If young people are at risk for welfare reasons they should be supported by the care and protection system not criminalised. Law

enforcement responses to children at risk are inappropriate and increase the tension between young people and the police.

Recommendation 204. Laws that permit preventive apprehension of young people should be repealed.
Implementation. States and Territories that have such laws should arrange for their immediate repeal.

Recommendation 205. The national standards for juvenile justice should provide that no jurisdiction should introduce laws, such as curfews or extensions of criminal trespass, to restrict the movement of young people not suspected of any crime.

Specialist training and police officers

18.80 The Beijing Rules provide as follows.

In order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specifically instructed and trained. In large cities, special police units should be established for that purpose.²⁶⁶²

18.81 Many police stations in Australian cities have dedicated youth officers. For example, in November 1994 Victoria Police appointed 23 District Youth Advisers to develop and co-ordinate police/youth programs across the State. Since November 1995 their work has been complemented by that of station youth officers.²⁶⁶³ Similar arrangements exist or are being developed in a number of other jurisdictions.²⁶⁶⁴

18.82 Contact between young people and police can have serious consequences for young people if it is adverse. There should be at least one officer trained in children's issues in each patrol. In one officer stations, that officer must be appropriately trained. Each major station should have a specialised youth officer who deals only with matters involving young people. Properly trained police will encourage a better informed approach to policing young people and a greater rapport between the police service and the young people in a local area.²⁶⁶⁵

18.83 In her recent report on interaction between the AFP and young people in the ACT, the Commonwealth Ombudsman emphasised that the most effective way of improving adherence to police procedure is a combination of training and supervision. There needs to be a continuing, structured and monitored training process.²⁶⁶⁶

...best practice guides [should] be developed which cover all aspects of police practices concerning children. I consider that these should include not only a reference to the applicable law but also a series of prompts to alert an officer to consider that a situation involving a child requires a response which is different from the norm. Guidelines should require a series of action steps rather than be rigid rule books.²⁶⁶⁷

Police training in children's matters should deal with the contexts of children's lives and the variety of social, cultural and economic factors that contribute to juvenile offending. One of the aims of training should be to promote respectful interactions between police and young people. As one young person told the Inquiry

I treat the police with respect and they treat me the same way and that's the way it should be at all times!²⁶⁶⁸

Recommendations concerning specific components of that training will be made throughout this chapter.²⁶⁶⁹

Recommendation 206. The national standards for juvenile justice should provide as follows.

- Each police department should ensure that there is at least one officer trained in children's issues in each patrol. Each major station should have a specialised youth officer who deals only with matters involving young people. Training for youth officers should include information on
 - the rights of young people
 - young people's recreational use of public space
 - the skills needed to deal effectively and fairly with young people

- the specific laws, rules and policies for the policing of young people
- desired outcomes in the policing of young people
- the role of the other government agencies in the juvenile justice system
- community support services to which young people can be referred.

Summons and arrest

18.84 In some jurisdictions legislation or police instructions restrict the circumstances in which children can be arrested.²⁶⁷⁰ This is in addition to legislation and guidelines governing arrest generally.

18.85 Section 3W(1)(b) of the Crimes Act provides that a constable may arrest a person suspected of a federal offence without a warrant if proceedings by summons against the person would not achieve one or more of the following purposes

- (i) ensuring the appearance of the person before a court in respect of the offence
- (ii) preventing a repetition or continuation of the offence or the commission of another offence
- (iii) preventing the concealment, loss or destruction of evidence relating to the offence
- (iv) preventing the harassment of, or interference with, a person who may be required to give evidence in respect of the offence
- (v) preventing the fabrication of evidence in respect of the offence
- (vi) preserving the safety or welfare of the person.

The AFP has submitted that this provision provides reasonable tests against which decisions about whether to arrest or summons should be made and that it could form the basis of national standards in this regard.²⁶⁷¹

18.86 Young suspects who are arrested under paragraph (vi) for their own welfare should be provided with appropriate health and welfare support services as soon as possible and prior to any interrogation. In other respects, the grounds listed in s 3W are appropriate bases for arrest.

18.87 The problem seems to be not that the restrictions on arresting juveniles are inadequate but that they are not complied with in enough cases. Police in many jurisdictions continue to rely heavily on arrest when dealing with young suspects.²⁶⁷² Arrest can be a traumatic and disturbing experience, particularly for children, and may be unnecessarily stigmatising.²⁶⁷³ In practice, arrest may limit a child's access to legal advice and place him or her at a greater relative disadvantage in the case than would proceeding by way of a summons or a court attendance notice. The fact of the arrest may also influence later police and court decisions and result in a more severe outcome for the child. Arrest should not be used purely as an investigative tool.²⁶⁷⁴

18.88 Police may sometimes decide not to arrest suspects and to rely instead on their 'voluntary attendance' to avoid statutory limitations on questioning.²⁶⁷⁵ Whether this attendance is truly voluntary depends on the suspect's understanding of his or her rights. Many adult suspects feel compelled to comply with police directions whether they have been arrested or not.²⁶⁷⁶ This feeling of compulsion is likely to be exaggerated for young people who are already at a disadvantage in terms of experience and authority.

18.89 Indigenous children are arrested at a higher rate than non-Indigenous young people.²⁶⁷⁷ For example, in 1994–95 46.6% of Aboriginal juvenile alleged offenders processed in Victoria had been arrested compared with 23.5% of non-Aboriginal children.²⁶⁷⁸ In the same period in South Australia, 41.4% of young Aboriginal suspects were apprehended by means of arrest compared with 25.1% of young non-Aboriginal suspects.²⁶⁷⁹ Six years ago the Royal Commission into Aboriginal Deaths in Custody recommended that arrest be used as a last resort against Indigenous young people.²⁶⁸⁰ Clearly that is far from the case.²⁶⁸¹

18.90 The 1994 ABS National Aboriginal and Torres Strait Islander Survey

...established a strong negative relationship between arrest rates and subsequent employment outcomes...The analysis found that, all other things being equal, the fact of having been arrested within the five years prior to the survey reduced the chances of employment by half.²⁶⁸²

In some circumstances, arrest may perpetuate a cycle of crime. The problem of inappropriate policing of Indigenous children should be addressed through a number of mechanisms, including cross-cultural training programs, monitoring of arrest rates and clear police instructions on the subject.

18.91 The Inquiry considers that a summons or court attendance notice should be preferred to arrest in dealing with young suspects. Arresting officers must be accountable for their actions. When scrutinising the charges that an arresting officer proposes to lay against a young person, the officer in charge should always consider specifically whether arrest was necessary in the individual case. If not, the matter should progress by way of summons. The number of arrests of young suspects considered to be inappropriate by senior officers should be taken into account in a police officer's performance assessment.²⁶⁸³

18.92 The Inquiry is aware that in some cases arresting a young suspect will be enough in itself to defuse a difficult or dangerous situation. In these cases the arresting officer's actions should not be grounds for criticism but the supervising officer should ensure that the matter continues by way of summons. The Inquiry supports the recent recommendation of the Wood Royal Commission that police be given training in informal problem solving and conflict resolution techniques to moderate behaviour and to defuse situations that have the potential to result in arrest.²⁶⁸⁴

18.93 There is sometimes a problem with delays in summonses being served. Submissions suggested that in some States it can take up to six months for a child to receive a summons.²⁶⁸⁵ During the time taken to issue the summons children can be uncertain and anxious about status of the matter. In addition, they may forget details of the event and may no longer be able to give proper instructions to their legal advisors. Delay also affects the effectiveness of the criminal justice system. Children need to account for their misconduct and be disciplined for it as soon as possible after it occurs if they are to learn appropriate behaviour from the experience. The Inquiry considers that this problem should be addressed by each police service through reforms to administrative procedures. Police are not subject to time limits in their investigations but generally a young suspect should receive a summons within 2 months of an alleged offence.

Recommendation 207. The national standards for juvenile justice should include the following.

- Police should only arrest a juvenile suspect if proceedings by summons or court attendance notice against the person would not achieve one or more of the following purposes
 - ensuring the appearance of the person before a court in respect of the offence
 - preventing a repetition or continuation of the offence or the commission of another offence
 - preventing the concealment, loss or destruction of evidence relating to the offence
 - preventing the harassment of, or interference with, a person who may be required to give evidence in respect of the offence
 - preventing the fabrication of evidence in respect of the offence
 - preserving the safety or welfare of the person.
- Each police service should provide officers with practical training on the circumstances that justify arresting juvenile suspects.
- When scrutinising the charges that an arresting officer proposes to lay against a juvenile, the officer in charge should consider whether arrest was necessary (as defined in the national standards for juvenile justice) in the individual case. If not, the matter should progress by way of summons. The number of arrests of young suspects considered to be inappropriate by senior officers should be taken into account in a police officer's performance assessment.
- Arrest should not be a bar to the subsequent issue of a summons or court attendance notice.
- Each Australian police service should reform administrative procedures to ensure that summonses are served on young people within 2 months of the alleged offence.
- In an attempt to reduce the arrest rate for young Indigenous suspects, each police service should provide officers with cross-cultural training, monitor arrest rates and provide clear instructions on the subject.

Notification of arrest

18.94 The Beijing Rules require police to notify a child's parents or guardians as soon as possible of his or her apprehension.²⁶⁸⁶ This obligation is reflected in legislation in the Northern Territory, Queensland, South Australia and the ACT.²⁶⁸⁷ In other jurisdictions this matter is covered by police instructions only.²⁶⁸⁸

18.95 The Commonwealth Ombudsman recently reported on 20 cases of interaction between the AFP and young people in the ACT. Six cases involved complaints that juvenile suspects' parents had not been advised that their child had been detained. In one instance, a 16 year old boy was arrested, interviewed, breath-tested and charged with a breach of his bail conditions without his parents being notified.²⁶⁸⁹ This is despite the fact that notification is required by legislation in the ACT.

18.96 The Inquiry considers that all jurisdictions that have not already done so should pass legislation providing that a juvenile suspect's carers must be notified of his or her apprehension as soon as possible.²⁶⁹⁰ However, before notifying carers police should consult the young person to determine whether he or she has any objections to this course of action. Where it appears that a child's safety may be compromised by contacting his or her carers in this situation, the relevant community services department should be contacted instead. In addition, the police commissioner of each jurisdiction should ensure that police receive regular reminders of the importance of ensuring that young people's carers are notified of their child's detention in custody.

Recommendation 208. The national minimum standards for juvenile justice should provide that police should inform a young suspect's carers or the relevant community services department, whichever is most appropriate in the particular circumstances, of his or her whereabouts as soon as possible after he or she is detained.

Recommendation 209. Police should receive regular reminders of the importance of ensuring that young people's carers are notified of their child's detention in custody.

Implementation. The police commissioner of each jurisdiction should ensure that officers receive these reminders.

Investigative procedures and admissibility of evidence

18.97 The Crimes Act determines how the police should investigate a possible breach of federal law.²⁶⁹¹ If the federal offence was committed at the same time as a State or Territory offence, federal law operates in addition to State or Territory provisions to protect the rights of suspected or accused people.²⁶⁹² Where the Crimes Act is silent about investigative procedures or where the State or Territory law is consistent with the federal law, the relevant law of the State or Territory operates.²⁶⁹³ The High Court has said that the arrangement is important in ensuring

...that Federal criminal law is administered in each State upon the same footing as State law and avoids the establishment of two separate systems of justice.²⁶⁹⁴

18.98 Police interviews of young people suspected of committing a crime usually take place at the local police station in the general interview rooms. Before starting to question any person who has been arrested for a federal offence, police are required to advise the suspect of his or her right not to answer any questions.²⁶⁹⁵ This is known as the caution against self-incrimination and is part of an accused person's right to silence.²⁶⁹⁶ A similar obligation arises under legislation or the common law in each of the States and Territories.²⁶⁹⁷ Submissions to the Inquiry suggested that in practice children are not made sufficiently aware of their rights by federal, State or Territory police during questioning.²⁶⁹⁸ This is a matter of serious concern.

The arena of police questioning remains one of the most controversial in the policing system as it relates to young people. It will tend to be at this moment that the vulnerability of the child or young person will make them susceptible to the pressures intrinsic to being detained by police. They may make self-incriminatory remarks or feel compelled to agree with suggestions made to them by police. Even if the police have not set out to deliberately 'soften up' or ensnare the suspect, the surroundings and the process itself are inherently intimidating and unsettling.²⁶⁹⁹

18.99 Section 215 of the *Children, Young Persons and Their Families Act 1989* (NZ) provides a good model. It sets out the rights children should be informed of before being questioned by police, whether they have been arrested or not. These include the right to silence, the right to stop making a statement at any time and the right to make any statement in the presence of a legal practitioner.

18.100 Confessions or admissions made during police interviews by people suspected of committing federal crimes are generally inadmissible unless they have been tape recorded.²⁷⁰⁰ This requirement also applies in several States. In NSW, for example, evidence of an admission is not admissible unless it has been recorded on audio or videotape.²⁷⁰¹ In Tasmania evidence of any confession or admission in relation to an indictable offence is not admissible unless it was videotaped.²⁷⁰²

18.101 The Inquiry considers that admissions and confessions by child suspects should only be admissible as evidence if they have been electronically recorded. This proposal was supported by a number of submissions.²⁷⁰³ It was opposed by the Northern Territory Government which considered current legislative safeguards sufficient.²⁷⁰⁴ The Western Australian Ministry of Justice did not think it practical.²⁷⁰⁵ However, the proposal simply extends existing provisions in some States to all jurisdictions. The resource implications of the recommendation are not great. Electronic recording of interviews is an essential accountability mechanism. Smaller police stations should have facilities to tape record interviews if videotaping facilities are not available.²⁷⁰⁶

Recommendation 210. The national minimum standards for juvenile justice should require police to inform a child of his or her rights prior to interview in language appropriate to the age and understanding of the child. This information should be provided where possible through a specially prepared video.

Recommendation 211. The national standards for juvenile justice should provide that admissions and confessions by child suspects are only admissible as evidence if they have been electronically recorded.

Interview friends

18.102 The Crimes Act places restrictions on police questioning of people under arrest, particularly children. For example, before a police interview young people have the right to communicate with a friend or relative and a lawyer in circumstances where the conversation cannot be overheard. They have the right to have an adult interview friend present during questioning.²⁷⁰⁷

18.103 The presence of the interview friend is an important means of compensating for the disadvantage experienced by young people when being interviewed by police. Robert Ludbrook, former director of the National Children's Youth Law Centre, has summarised the factors contributing to children's disadvantage in this situation as vulnerability to pressure, socialisation to agree with adult authority figures, lack of verbal fluency and a tendency to make false confessions under expert or hostile questioning.²⁷⁰⁸

18.104 Under the Crimes Act, an interview friend may be a parent, a guardian or the young person's legal practitioner. If none of these people is available the role may be filled by a friend or relative of the young person's choice. If such a person cannot be located then the interview friend must be an independent person.²⁷⁰⁹ In most States and Territories legislation requires that an independent third person be present to provide support to young people during police interview.²⁷¹⁰ For the purposes of this discussion all these support persons are referred to as interview friends.

18.105 The role of the interview friend can be problematic.²⁷¹¹ He or she is not intended to act as an advocate for the child but is present as a support person and to discourage, by his or her presence, oppressive conduct by police to ensure that any statements made by the child are voluntary.²⁷¹² Many children choose a parent as an interview friend. A parent or other independent adult may not be willing or able to protect the child's interests. On occasions a parent may seek to have the child 'taught a lesson' and advise the child against his or her legal interests. The interview friend should not be seen as a substitute for a legal adviser, unless of course the particular person is legally qualified.²⁷¹³

Parents may be as intimidated by the process as their children. While it is appropriate to have parents present, this should not be at the expense of legal support.²⁷¹⁴

It is particularly important that the role of interview friend is not performed by a police officer.²⁷¹⁵ The role and responsibilities of the interview friend should be defined by statute.

18.106 A number of the young people in the focus groups said that the interview friend should be someone of the suspect's choice.²⁷¹⁶ Many children prefer not to have their parents present during an interview because they get too upset.²⁷¹⁷ Young people should be able to choose who performs the role of interview friend.²⁷¹⁸ A person cannot support a child if the child does not feel confident and comfortable with that person in the role. If the child does not wish to choose or the person nominated cannot be contacted then a statutory order should continue to apply and an alternative interview friend should be provided. This would be similar to the position in New Zealand.²⁷¹⁹

18.107 The federal Attorney-General's Department does not support an amendment of this nature to the Crimes Act.²⁷²⁰ It identified a risk that young suspects will nominate as interview friends accomplices whom police do not suspect at the relevant time. In addition, the Department considers that 'children are often not the best judge of who has their best interests at heart'. The interview friend must be an effective support for young suspects. Ensuring this outweighs any remote risk that a suspect may choose an unsuspected accomplice to perform the role.

18.108 DRP 3 proposed that, where an interview friend is a relative or friend of the young suspect who has not received training in the role, a senior police officer should be required to explain it to him or her prior to any interview. Several submissions considered that the impartiality of the interview friend may be compromised in the eyes of the suspect if this role is performed by police.²⁷²¹ A suggested alternative is for the child suspect and the interview friend to watch a short video outlining the role of the interview friend prior to questioning.²⁷²² The Inquiry supports this proposal. The video could also contain information about the child's rights during questioning as proposed at recommendation 210. In police stations where video facilities are not available, the suspect and interview friend should be given a plain language information pamphlet instead. This material should be prepared by each police service in consultation with the relevant community organisations and OFC.²⁷²³

18.109 Independent community members who are registered as potential interview friends should be given regular training in their responsibilities.²⁷²⁴ Again, this process should be sufficiently independent of the police.²⁷²⁵ The legal aid commission in each jurisdiction should provide this training in consultation with police and relevant community groups.²⁷²⁶ Where a child suspect has a disability that reduces his or her ability to communicate, an interview friend with specialised training or experience in the relevant field should be appointed.²⁷²⁷ Specialised training should also be provided for registered interview friends supporting young Indigenous suspects.²⁷²⁸

Recommendation 212 The national standards for juvenile justice should include the following.

- An interview friend must be present during police questioning of a child suspect and have an opportunity to confer in private with the child prior to questioning. Statements made in the absence of an interview friend should not be admissible in evidence against the child.
- The function, responsibilities and powers of the interview friend should be defined by statute. The definition should encompass the interview friend's role in providing comfort, support and protection for the young person as well as ensuring the young person is aware of his or her legal rights. The interview friend should not be a substitute for legal advice or representation.
- A child suspect should have the right to choose his or her own interview friend if he or she wishes provided that person is not suspected of involvement in the alleged offence. If the child does not wish to choose an interview friend the existing statutory order should apply.
- Where an interview friend is a relative or friend of the young suspect who has not received training in the role he or she should be given the opportunity to watch a short video outlining his or her responsibilities prior to interrogation. The young person should also watch the video which should also inform the suspect of his or her rights during police interview. Where the police station does not have video facilities information brochures should be provided. This

material should be prepared by each police service in consultation with relevant community organisations and OFC and should be conveyed in language easily understood by young people.

- A register of individuals willing to act as interview friends for child suspects should be maintained in all major regions. Potential interview friends should be selected and trained by the relevant legal aid commission using the material proposed above. Otherwise they should have relevant qualifications or work experience.
- Where a child suspect has a disability that impedes his or her ability to communicate, an interview friend with specialised training or experience in the relevant field should be appointed.
- Specialised training should be provided for registered interview friends supporting young Indigenous suspects.

Recommendation 213. A child suspect should have the right to choose his or her own interview friend during police interviews concerning federal offences so long as that person is not suspected of involvement in the offence. If the child does not wish to choose an interview friend the existing statutory order should apply.

Implementation. Section 23K(3) of the Crimes Act should be amended to this effect.

Time limits on police interviews

18.110 The Crimes Act provides that people under eighteen years old must not be detained by police on suspicion of a federal offence for more than two hours before being released, on bail or otherwise, or brought before a magistrate.²⁷²⁹ The investigation period can be extended once on application to a judicial officer for a period of up to eight hours if the young person is under arrest for a serious offence.²⁷³⁰

18.111 Some of the time that a child spends detained by police is not counted towards the two hour investigation period; for example, reasonable time spent travelling from the place of arrest to a police station or other place with appropriate investigative facilities is not included.²⁷³¹ For children in remote areas, this may entail a journey of several hours. The interview clock also stops if questioning is suspended or delayed because the suspect is intoxicated.²⁷³² This is known as 'dead time'.

18.112 In most States and Territories legislation provides that young offenders must be brought before a court for a bail hearing as soon as practicable or within a specified or reasonable time.²⁷³³ The specified period is generally 24 hours.²⁷³⁴

18.113 Few submissions were received on this matter.²⁷³⁵ The Inquiry considers that the federal standard is reasonable and should be adopted nationally. Young suspects should not be worn down by exhaustion during police interrogation no matter how unintended this consequence is.

Recommendation 214. The national standards for juvenile justice should provide that the requirement in s 23C of the Crimes Act that people under 18 not be detained by police for more than two hours (excluding dead time) before being released, on bail or otherwise, or brought before a magistrate be mirrored in State and Territory legislation.

Questioning Indigenous children

18.114 There are significant cultural differences in the ways Indigenous and non-Indigenous Australians communicate in interview situations.²⁷³⁶ These differences can have a significant effect on the results of police interviews of Indigenous young people, particularly those living in traditional communities. For example, silence is used as a positive and normal part of conversation by Indigenous people but can be interpreted by non-Indigenous police officers as a sign of non-co-operation or an indicator of guilt. Indigenous people often avoid eye contact when talking to an older person out of respect for that person. This custom can be misinterpreted by non-Indigenous people.²⁷³⁷

The special vulnerability of both young people and Indigenous people during police interrogation has been noted for many years. These vulnerabilities may be amplified when the person is both young and Indigenous.²⁷³⁸

18.115 In 1976 the Supreme Court of the Northern Territory formulated rules for police questioning of Indigenous people. The *Anunga* rules were designed 'to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police'.²⁷³⁹ Importantly, the rules state that great care should be taken when formulating questions so that, so far as possible, the answer which is wanted or expected is not suggested in any way. This rule is intended to overcome problems associated with the phenomenon of 'gratuitous concurrence'.

This is the tendency to say 'Yes' to any question (or 'No' to any negative question) regardless of whether or not the person agrees with the question or even understands it. It is a characteristic Aboriginal strategy for dealing with interviews, particularly in situations of serious power imbalance.²⁷⁴⁰

18.116 A number of the *Anunga* rules have been incorporated into the Crimes Act, for example, the suggestion that a support person be present during interview.²⁷⁴¹ If a parent, guardian, lawyer or friend is not available to act as an interview friend for an Indigenous child, the police must select someone from a list required to be maintained of names of people in the region who are suitable and willing to act as interview friends.²⁷⁴²

18.117 The lack of interpreters for Indigenous children involved in the criminal justice system was identified as a serious problem in consultations, particularly in remote areas where English may be the child's third or fourth language.²⁷⁴³ It is often difficult to find someone in the child's community who has the necessary neutrality to act as the child's interpreter. This is also an issue for young people who speak Aboriginal English.²⁷⁴⁴ Section 23N of the Crimes Act gives federal suspects the right to an interpreter.²⁷⁴⁵ However, unless there are sufficient people trained and accredited as interpreters of Indigenous languages this protection will have little benefit in practice for young suspects.²⁷⁴⁶

18.118 The *Anunga* rules have also been incorporated into police procedures in a number of States and Territories.²⁷⁴⁷ Despite this, evidence from consultations suggests that many young Indigenous people do not understand their rights during police questioning.²⁷⁴⁸ Indigenous children are particularly vulnerable when they are in police custody.²⁷⁴⁹ Additional reforms are required to ensure equality for Indigenous children with their non-Indigenous counterparts during police questioning. These reforms should be lead by the States and Territories since their police have the most contact with Indigenous children. More Indigenous police and liaison officers are required as is comprehensive cross-cultural training for all officers to reduce arrest rates and improve interview techniques.²⁷⁵⁰

Recommendation 215. The national standards for juvenile justice should require Indigenous young people to be assisted to understand their rights during police questioning through processes developed in conjunction with Aboriginal legal services and other relevant Indigenous organisations.

Questioning children from a non-English speaking background

18.119 Children from non-English speaking backgrounds may also be vulnerable during police interrogation.²⁷⁵¹ Recent migrants and refugee children who have experienced human rights abuses in their communities of origin may be particularly disturbed by contact with authority figures.

The most superficial contact with the system may reactivate memories of abuse and terror and they are particularly vulnerable to making false confessions. They will probably be less likely to lodge a formal complaint when their rights are violated or, indeed, have no clear idea of what their rights are.²⁷⁵²

18.120 Section 23N of the Crimes Act gives a person suspected of a federal offence the right to an interpreter during police questioning where an investigating official believes that he or she is unable to communicate orally with reasonable fluency in the English language, either because of language difficulties or a physical disability. Questioning must be deferred until the interpreter is present.²⁷⁵³ In 1991 the federal Attorney-General's Department suggested that the Commonwealth should encourage all States to adopt uniform

legislation to this effect.²⁷⁵⁴ Currently, there is a statutory right to an interpreter only in Victoria, South Australia and the ACT.²⁷⁵⁵

18.121 All young suspects should have a statutory right to an interpreter during police interview if they are not fluent in English. To ensure this protection is effective, police should be trained to recognise factors that contribute to the need for an interpreter. A child who seems reasonably fluent in conversation with his or her peers on the street may nonetheless require an interpreter during formal interrogation.

Recommendation 216. Those States and Territories that have not already done so should enact legislation giving young suspects and their interview friends the right to an interpreter during police interview if they are unable to communicate orally with reasonable fluency in the English language. Each police service should ensure that its officers are trained in recognising communication difficulties in young suspects. These requirements should also be included in the national standards for juvenile justice.

Questioning children with a disability

18.122 Children with a disability may require greater assistance than other young people when being questioned by police. For those young people who have a communication handicap as a result of a physical condition, such as deafness or cerebral palsy, this may mean assisted communication either through trained interpreters or appropriate technology.²⁷⁵⁶ These children are usually relatively easy to identify. However, police officers may have greater difficulty identifying children with intellectual disabilities, mental illness or behavioural disabilities such as autism.²⁷⁵⁷ Some children with a disability or illness may be taken by police to be merely 'slow' or affected by drugs or alcohol.

Disturbed and mentally ill adolescents often end up in the juvenile justice system because no one has been able to recognise or deal with their underlying problems.²⁷⁵⁸

18.123 In a recent report, *People with an Intellectual Disability and the Criminal Justice System*, the NSW Law Reform Commission recommended that all relevant government agencies should include training on intellectual disability issues in their staff training program, in particular material on identifying and communicating effectively with people with an intellectual disability.²⁷⁵⁹ The Commission specifically noted the increased vulnerability of juveniles with an intellectual disability when in police custody.²⁷⁶⁰ The Inquiry supports the NSW Law Reform Commission recommendation in regard to young suspects but considers it should be broadened to include training on identifying and communicating effectively with young people with behavioural disabilities and mental illnesses.

18.124 For children with an intellectual or behavioural disability or a mental illness it may be necessary to modify interrogation techniques considerably. The NSW Law Reform Commission recommended that when questioning people with an intellectual disability police should be required to take into account

- (i) the need to attempt to pitch the language and concepts used at a level which will be understood
- (ii) the need to take extra time in interviewing
- (iii) the risk of the person's special susceptibility to authority figures, including a tendency to give answers that the person believes are expected
- (iv) the dangers of leading or repetitive questions
- (v) the need to allow the person to tell the story in his or her own words
- (vi) the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers
- (vii) the need to ask the person to explain back what was said
- (viii) the possibility that the person may be taking medication which may affect his or her ability to answer questions.²⁷⁶¹

The Inquiry supports this recommendation.

Recommendation 217. All police officers who may be required to interrogate young suspects should receive specific training on identifying and communicating effectively with young suspects who have a physical, intellectual or behavioural disability or a mental illness.

Implementation. The AFP and all State and Territory police services should ensure this material is included in the relevant training programs as soon as possible. It should be developed in consultation with health experts and the OFC.

Taking identification material from children

18.125 In the investigation of a federal offence a police officer may only take identification material, including fingerprints and handwriting samples, from a suspect aged between 10 and 17 if the person has been charged or pursuant to a court order.²⁷⁶² Identification material can be taken from young people aged between 10 and 17 who are not suspects, such as witnesses, pursuant to a court order or if the child and his or her parent (or a person of the child's choice who is capable of representing the child's interests) consent in writing.²⁷⁶³ Identification material can only be taken from a child under 10 years of age if he or she is not a suspect and on the order of a magistrate.²⁷⁶⁴ A parent or person of the child's choice capable of representing his or her interests must be present when identification material is taken from any child under 18 years of age, whether a suspect or not.²⁷⁶⁵

18.126 Provisions for taking identification material from children vary considerably among the States and Territories. In the ACT a court order must be obtained before identification material is taken from any child.²⁷⁶⁶ In NSW, Victoria and the Northern Territory a court order is only required to take material from children under 14.²⁷⁶⁷ In South Australia the permission of a commissioned officer is required if the child is under 16.²⁷⁶⁸ In Tasmania there is no power to take identification material from a child prior to conviction.²⁷⁶⁹ In Queensland a court order is required to take an identifying particular from any child charged with an offence.²⁷⁷⁰ In Western Australia there are no specific legislative restrictions on taking identification material from children.

18.127 The federal Government has introduced legislation to reform the procedures for taking forensic samples from people suspected of federal offences. The Crimes Amendment (Forensic Procedures) Bill 1997 (Cth) distinguishes between non-intimate and intimate forensic procedures. Non-intimate forensic procedures are defined to include taking fingerprints, handprints, footprints or toeprints, taking samples from under nails and taking non-pubic hair samples.²⁷⁷¹ Intimate forensic procedures include taking blood samples, an external examination of the genital or anal areas, taking a sample of pubic hair or taking a dental impression.²⁷⁷²

18.128 The Bill provides that all forensic procedures carried out on suspects aged 10 to 17 must be conducted by order of a magistrate whether or not the child is in custody.²⁷⁷³ This raises the level of external judicial scrutiny of forensic procedures carried out on children as a court order will be required even if the child has been charged with an offence. During the hearing for an order a child suspect must be present and represented by an interview friend. He or she may also have a legal practitioner present and may call or cross-examine any witnesses or address the judicial officer.²⁷⁷⁴ If an application for an interim order is dealt with on the papers, the suspect must be given the opportunity to make a written submission.²⁷⁷⁵

18.129 The Inquiry supports these proposed reforms and considers that they should be incorporated into the national standards for juvenile justice.²⁷⁷⁶ However, we consider that clause 23XN of the Bill should be modified. It provides that certain forensic procedures should be carried out by a person of the same sex as the suspect where practicable. The Inquiry agrees with Kreative Kids' submission that forensic procedures should be conducted by a qualified person of the sex of the suspect's choosing where possible to take account of situations where a suspect has been sexually assaulted by a person of the same sex in the past.²⁷⁷⁷ If the suspect does not wish to exercise this choice, the search should be conducted by a person of the same sex as him or her.

Recommendation 218. Clause 23XN of the Crimes Amendment (Forensic Procedures) Bill 1997 (Cth) should be amended to provide that forensic procedures should be conducted by a qualified person of the sex of the suspect's choosing. If the suspect does not wish to exercise this choice, the search should be conducted by a person of the same sex as him or her.

Implementation. The Attorney-General should seek to amend the Bill before its passage.

Recommendation 219. The national standards for juvenile justice should mirror the provisions (as amended in accordance with recommendation 218) regarding young suspects in the Crimes Amendment (Forensic Procedures) Bill 1997 (Cth).

Searching children

18.130 Police are empowered to conduct a frisk search of any person who is arrested for a federal offence to ascertain whether the person is carrying any seizable items.²⁷⁷⁸ If an officer reasonably suspects that an arrested person is carrying evidential material in relation to an offence or a seizable item he or she can also conduct an 'ordinary search' of the person.²⁷⁷⁹ In regard to frisk and ordinary searches, the same provisions apply to child federal offenders as to adult offenders. The Commissions consider this appropriate.

18.131 A person arrested for a federal offence may be strip searched only if a police officer reasonably suspects that he or she is concealing evidence, that a visual inspection of the person's body will provide evidence or that the search is necessary to recover evidence. An officer of the rank of at least superintendent must authorise the search.²⁷⁸⁰ A strip search may include requiring the person to remove all of his or her clothes and a visual examination of the person's body but no search of the person's body cavities is permitted.²⁷⁸¹ The search must be conducted in private by an officer of the same sex as the person being searched.²⁷⁸²

18.132 Additional restrictions apply to the strip searching of young people. A child under 10 years of age may not be strip searched during the investigation of a federal offence.²⁷⁸³ A young person aged between 10 and 17 can be strip searched only if he or she has been charged or if the search is ordered by a magistrate. A parent or another person of the child's choice who is capable of representing the child's interests must be present during the strip search.²⁷⁸⁴

18.133 There are fewer legislative limitations on strip searching child suspects in most States and Territories. For example, in South Australia any person who has been charged with an offence can be searched by a medical practitioner at the request of a senior officer.²⁷⁸⁵ In the Northern Territory a police officer can search a person who has been charged with an offence although no more clothing than reasonably necessary may be removed.²⁷⁸⁶ Under Victorian law a physical examination of the body is defined as a forensic procedure.²⁷⁸⁷ Forensic procedures can only be carried out on those aged between 10 and 17 by order of the Children's Court.²⁷⁸⁸

18.134 Evidence given by young people at focus groups suggests that sometimes police do not conduct strip searches in an appropriate manner. One boy said he had been strip searched on a main street at 10 pm one night. No attempt was made to conduct the search in a private place.²⁷⁸⁹ We heard of one girl who, after being detained for an alleged motor vehicle offence, was strip searched in a cell with other juveniles present, some of them boys. The search was conducted by a male officer.²⁷⁹⁰ These concerns have been raised in a number of other inquiries.

We have come across a number of cases where searches have been conducted without recourse to the protections accorded by regulations. Particular concerns have been expressed about public searches of young people on the street, sometimes involving the full removal of clothing or more than a pat down or frisk.²⁷⁹¹

18.135 Evidence given to the ALRC's inquiry into complaints against the AFP and the National Crime Authority confirms that AFP officers frequently fail to comply with the requirements of the Crimes Act when strip searching people, especially women.²⁷⁹² Unnecessary or illegally conducted strip searches has been identified as a particular problem for Indigenous girls.²⁷⁹³

18.136 A strip search is an invasive procedure that is potentially traumatic for an adult, let alone a child who may already be intimidated by the physical environment. These searches should only be conducted when absolutely necessary for evidentiary purposes and not as an exercise in humiliation. The Commissions consider that strip searches should only be performed on young suspects pursuant to a court order.²⁷⁹⁴

Recommendation 220. The national standards for juvenile justice should provide that a child may be strip searched only pursuant to a court order. The child should have the right to oppose the application for the order and should be legally represented in the proceedings. Strip searches should only be conducted by a qualified person of the sex of the suspect's choosing. If the suspect does not wish to exercise this choice, the search should be conducted by a person of the same sex as him or her.

Recommendation 221. Children charged with federal offences should only be strip searched pursuant to a court order. The child should have the right to oppose the application for such an order and should be legally represented in the proceedings. Strip searches should be conducted by a qualified person of the sex of the suspect's choosing. If the suspect does not wish to exercise this choice, the search should be conducted by a person of the same sex as him or her.

Implementation. Section 3ZI of the Crimes Act should be amended to this effect.

Detaining intoxicated child suspects

18.137 In Western Australia and the Northern Territory police have statutory power to detain intoxicated people, including juveniles, in police custody even if they have not been charged with an offence.²⁷⁹⁵ The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families received evidence that on one particular occasion over 50% of the juveniles detained in police cells in the Kimberley region were there because of alcohol use.²⁷⁹⁶

18.138 Young people should not be detained in police cells solely because they are intoxicated by alcohol or other drugs.²⁷⁹⁷ These children need to be monitored medically and to ensure they do not harm themselves. This should not be a police function. Attending to their health needs must have absolute priority over any criminal action. Each police service should liaise with the relevant health authorities to find suitable alternatives to police cells in each region where appropriate places are not already proclaimed or gazetted. State and Territory governments should take immediate responsibility for establishing facilities in regions where they do not exist.

Recommendation 222. The national standards for juvenile justice should require police to avoid detaining intoxicated young suspects in police cells. Police services in each State and Territory should liaise with the relevant health authorities to find suitable alternatives in each region where appropriate places are not already proclaimed or gazetted.

Police accountability

18.139 Limitations on police conduct during formal interviews are effective only if police are accountable for their treatment of young people before and after the interview through an effective complaints mechanism.

18.140 A number of young people in focus groups alleged that they had been threatened or assaulted by police while being arrested or while in custody.²⁷⁹⁸ Generally little or no independent evidence concerning police conduct is available for the period before the arrival of the interview friend. Admissions made outside the formal interview, for example during preliminary enquiries, are usually not admissible in court. However, coercive or intimidatory tactics at an earlier time are likely to have a significant effect on the child's state of mind when the interview takes place or if the child later appears in court.²⁷⁹⁹

18.141 Many young people are aware of avenues for complaints about police conduct. However, young people consistently stated that they had no expectation that their complaints would result in appropriate outcomes. Indeed, they thought complaining was likely to result in adverse police attention in future.²⁸⁰⁰

Young people and youth advocates point to a general lack of knowledge among young people about the procedure for making complaints about police [and] a lack of trust in the process...²⁸⁰¹

18.142 The ALRC report on complaints against the AFP and the National Crime Authority recommended that a National Integrity and Investigations Commission be established to investigate or supervise the investigation of complaints against both bodies.²⁸⁰² The Inquiry endorses this recommendation and considers that the National Integrity and Investigations Commission should include investigatory officers with specialised training in dealing with complaints made by young people. Similar expert officers should also be included in each State and Territory police complaints system.²⁸⁰³

18.143 The AFP and all State and Territory police should be required to lodge copies of complaints made by young people with the appropriate complaints handling body.²⁸⁰⁴ These bodies are discussed in more detail at paragraphs 7.33-43. The national standards for juvenile justice should include specific guidelines for the handling of complaints against police by children. In particular, they should include standards regarding time limits for hearing complaints and the desirability of dealing personally, rather than in writing, with the child. The guidelines should incorporate the principles enumerated in recommendation 13.

18.144 Official visitor schemes established in police stations in a number of jurisdictions seem to be an effective supplementary means of improving police accountability for the treatment of juvenile suspects.²⁸⁰⁵ Under these schemes, community volunteers visit police stations unannounced to monitor police practices and to give young people an opportunity to make complaints to an independent third party. Official visitors schemes should be introduced nationally.²⁸⁰⁶

18.145 The Aboriginal Legal Service of Western Australia has submitted that complaints made by Aboriginal young people should be investigated by Aboriginal officers wherever possible.²⁸⁰⁷ The Inquiry supports this proposal in principle provided it does not lead to Indigenous police officers being limited to a complaints handling function.

18.146 For many breaches of procedural requirements, the courts may provide an accountability mechanism. Judicial officers have a discretion to exclude evidence that has been improperly or illegally obtained.²⁸⁰⁸ DRP 3 proposed that failure to comply with the national standards for juvenile justice should be the basis for the exercise of a discretion by judicial officers to exclude evidence. Some government and police submissions considered this reform unnecessary in the light of current evidence laws.²⁸⁰⁹ However, as one submission pointed out, the current law regarding the exclusion of improperly or illegally obtained evidence does not distinguish between children and adults.

In balancing considerations of justice and public policy, the obligation for police compliance with procedural standards should be stronger where suspects are children.²⁸¹⁰

The Inquiry considers that the training for judicial officers hearing juvenile justice matters proposed at recommendation 236 should include information on excluding improperly obtained evidence in juvenile matters. Specifically, judicial officers should be advised that failure to comply with the national standards for juvenile justice is *prima facie* evidence of impropriety.²⁸¹¹ Any prosecutor responsible for a juvenile case in which evidence is challenged as improperly or unfairly obtained should be required to report the matter to the relevant ombudsman.²⁸¹²

Recommendation 223. The national standards for juvenile justice should require that the AFP and all State and Territory police lodge copies of all complaints made by young people with the appropriate complaints handling body (see paras 7.33-43). The standards should include specific guidelines for the handling of children's complaints against police. In particular, they should include standards regarding time frames for hearing complaints and the desirability of dealing personally, rather than in writing,

with the child.

Recommendation 224. The national standards for juvenile justice should require the establishment of community visitor schemes in all regions. A national evaluation of these schemes should be conducted by OFC.

Recommendation 225. Police failure to comply with the national standards for juvenile justice on investigation and interviewing procedures should *prima facie* be the basis for the exercise of a discretion by judicial officers to exclude evidence as improperly or unfairly obtained.

Implementation. The judicial training proposed at recommendation 236 should include material on the particular restrictions governing the adducing of evidence against young defendants. The training should also make clear the particular vulnerabilities of young people in police custody. Any prosecutor responsible for a juvenile case in which evidence is challenged as improperly or unfairly obtained should be required to report the matter to the relevant ombudsman.

Legal advice

Police interrogation

18.147 The vast majority of child defendants plead guilty to charges.²⁸¹³ Legal advice early in the process is critical to ensure young people are not pleading guilty simply because of environmental pressures. It is common for young people to agree with police allegations simply to get out of police custody.²⁸¹⁴

18.148 Police can overwhelm young suspects particularly when a young person is being detained or questioned at a police station. Most State and Territory juvenile justice legislation acknowledges this inequality by requiring an independent adult to be present during interview if the evidence is to be admitted in court proceedings.²⁸¹⁵ However, there is no common law right to have a lawyer present during police interrogation.

18.149 Under the Crimes Act an investigating officer must inform any person suspected of committing a federal offence that he or she may attempt to communicate with a legal practitioner prior to questioning and may arrange for that practitioner to be present during questioning. The officer must allow the practitioner reasonable time to get to the station before commencing questioning.²⁸¹⁶

18.150 The position varies in the States and Territories. In South Australia and Victoria children and adults both have a statutory right to have access to a legal practitioner prior to questioning.²⁸¹⁷ In other jurisdictions a lawyer may be present during interrogation as an independent person.²⁸¹⁸

18.151 Evidence given by young people at focus groups around Australia suggests that police are not always co-operative about assisting children in custody to get legal advice. In Alice Springs young people claimed that police often try to scare them out of asking for a lawyer when they are being questioned, for example, by threatening them with a long detention in custody. Some police apparently tell young people that they will infer guilt from silence. One girl was told there was no point getting her a lawyer as he or she would simply tell her not to say anything more.²⁸¹⁹ Young people alleged that police intimidate them into giving confessions, for example, by conducting very long interviews.²⁸²⁰

18.152 The Inquiry considers that young people should have a statutory right to confer with a legal practitioner prior to police interview and to have that person present during the interview. This would be consistent with article 37(d) of CROC, which gives detained children the right to prompt access to legal assistance and had strong support in submissions.²⁸²¹ Children should certainly have access to legal advice before making any decision to admit an offence. Governments need to ensure that legal aid commissions are given sufficient funding to provide this service.²⁸²²

18.153 In a 1991 case concerning a young person's statutory right to contact a legal practitioner during police interrogation, the Victorian Court of Criminal Appeal held that the right arises from the point of arrest and is

a continuing right that may be exercised more than once at any subsequent time.²⁸²³ The Inquiry supports this interpretation.²⁸²⁴

Recommendation 226. The national standards for juvenile justice should provide that a child suspected of committing an offence should have a statutory right to access legal advice prior to police interview and that police must inform young people of this right at the time of apprehension. Duty solicitor schemes should be appropriately resourced to enable practitioners to meet with their child clients before the first court appearance.

After charge

18.154 Young people should also have adequate access to legal advice during any bail applications,²⁸²⁵ during the period leading up to their first court appearance and in court.

18.155 Most young people are represented by duty solicitors attached to the children's court. Duty solicitors are either legal aid lawyers or members of the private profession who are contracted to provide the service by the relevant legal aid commission.²⁸²⁶ Currently, duty solicitors often do not have the opportunity to take adequate instructions from children. Generally the first time they have contact with a child is on the morning of the hearing. There are several reasons for this. Many young people do not realise that they are entitled to seek legal advice prior to a court appearance and would be well advised to do so. Duty solicitors generally do not have the time to seek out children before the hearing. Some commentators consider that the low status traditionally accorded to children's work impedes the effective representation of young people in criminal matters.²⁸²⁷ It can also affect the resources allocated.

18.156 The duty solicitor scheme should be supplemented by a 24 hour freecall youth legal advice telephone service in each jurisdiction. The service could be linked to the more general youth advice telephone service proposed at recommendation 11. It should be staffed by practitioners with specific training in children's matters.²⁸²⁸ The service should be advertised through wallet sized cards distributed through schools and youth centres and through a special Streetwise comic.²⁸²⁹ The availability of specialised legal advice in this way should greatly improve children's understanding of their legal rights and responsibilities while also reducing some of the demands on duty solicitors.

18.157 Some government and police submissions opposed the establishment of a youth advice line on the basis that it would be too costly.²⁸³⁰ The savings to legal aid and the long term savings to the community that will arise from a better informed youth population should outweigh this concern. The proposed youth telephone advice service is supported by a number of community and peak groups and by young people.²⁸³¹

Recommendation 227. Confidential legal advice, with the capacity for trained interpreter assistance, should be available to young people 24 hours a day through a freecall youth telephone advice service. This service should be staffed by practitioners with specific training and experience in dealing with children's matters.

Implementation. The Attorney-General should seek the agreement through SCAG of all States and Territories to the immediate establishment of such a service in each jurisdiction.

Bail and remand

Introduction

18.158 Once a decision has been made to charge a young person with a criminal offence, the authorities have to determine whether the child should be detained prior to the court hearing or whether he or she can be bailed and his or her attendance at court secured by means of a summons or court attendance notice. Any child denied bail is detained on remand, either at a police station or a detention centre, until his or her case

comes to court.²⁸³² CROC and the Beijing Rules provide that detention of young offenders pending trial should be a measure of last resort.²⁸³³

Bail

18.159 In all jurisdictions, police of an appropriate rank have the power to grant bail to persons charged with minor offences.²⁸³⁴ Generally bail will be granted where the officer is confident that the person is not a risk to him or herself or others and that he or she will appear in court when required. Where bail is refused or cannot be granted by a police officer, the offender has the right to seek bail from a justice. Bail conditions vary but most children are required to agree to meet certain conditions rather than post money as security. This is appropriate. However, conditions imposed on young suspects must not be unreasonable or unrealistic.²⁸³⁵ For example, 24 hour curfews are tantamount to detention, disrupt education and may exacerbate problems in the home.²⁸³⁶ Some government submissions supported curfews.²⁸³⁷ Bail conditions should not criminalise a young person's non-offending behaviour. For example, police should not attempt to deal with anti-social behaviour such as petrol or glue sniffing by requiring children to avoid that behaviour as a bail condition.

18.160 The bail conditions applicable to a young person who has been charged with a federal offence are those of the State or Territory in which the charge was laid.²⁸³⁸ In most States and Territories there are special procedures regarding bail for children.²⁸³⁹ In Tasmania and Victoria the child must be released unconditionally, bailed by police or brought before a court within 24 hours of being taken into custody.²⁸⁴⁰ In NSW police are also obliged to bring a child who has been refused bail before a court 'as soon as practicable'. In reality this may mean a delay of three days because there is no provision for children arrested immediately before or during the weekend.²⁸⁴¹ In the Northern Territory a child who has not been released from custody must be brought before a court 'as soon as practicable and in any case within 7 days after the arrest'.²⁸⁴²

18.161 In Queensland a child must ordinarily be bailed by a police officer if the children's court cannot deal promptly with the child.²⁸⁴³ The legislation also authorises police to release the child into the custody of a parent or permit the child to go at large without bail on the condition that the child surrenders into the custody of the relevant court when his or her charge is to be heard.²⁸⁴⁴

18.162 In Western Australia a child is entitled to be released on bail provided a responsible person, such as a parent, gives a written commitment to ensure the child complies with any conditions unless the judicial officer considering the application is not satisfied of certain specified matters, such as the child's attendance in court.²⁸⁴⁵ A young person who is refused bail must be taken to a detention centre as soon as practicable.²⁸⁴⁶ The children's court has the power to remand a young person suffering from any mental or nervous disorder or handicap for up to 21 days for observation.²⁸⁴⁷

18.163 Victorian legislation contains a unique section which provides that a child is not to be refused bail on the sole ground that he or she does not have any, or adequate, accommodation.²⁸⁴⁸ This provision is statutory recognition of the problem of 'welfare' detention, that is, children who are detained in custody because police are concerned that there is nowhere else safe for them to go.²⁸⁴⁹ Welfare detention affects a disproportionate number of young female suspects.²⁸⁵⁰ Crime statistics do not indicate whether the Victorian provision has in fact reduced the number of young suspects who are refused bail. However, the Inquiry considers it an appropriate legislative safeguard.

[R]emand is sometimes used inappropriately to provide a resolution to some social problems. For example when it is used due to lack of accommodation for young people.²⁸⁵¹

In addition, the Victorian Department of Human Services operates a Bail Facilitation Program that seeks to prevent the inappropriate remand of young people. Staff assist young people to obtain support services such as accommodation and legal advice.²⁸⁵²

18.164 The problem of inadequate accommodation for young people released on bail has been addressed in a number of other jurisdictions through the establishment of bail hostel programs. For example, the South Australian Aboriginal Child Care Agency has set up two safe houses in Adelaide that provide an alternative to 'secure care' for Indigenous children who cannot be released to family or community members.²⁸⁵³ The

Inquiry considers that each jurisdiction should establish bail hostels in all regions.²⁸⁵⁴ This has clear resource implications for governments but costs could be reduced in a number of ways. For example, bail hostels could be combined with other community functions in less populous areas. No inference as to a child's likelihood of appearing in court or committing further offences should be drawn from the fact that the he or she lacks permanent accommodation.

18.165 The Inquiry considers that all children should be legally represented during bail applications. This view is supported by the National Children's Youth Law Centre and the NSW Youth Justice Coalition.²⁸⁵⁵

18.166 Bail is particularly problematic for children from rural or remote communities. For example, children are often transported long distances to an appropriate detention facility pending a bail hearing. If the bail application is successful the released child often has no way of returning home.²⁸⁵⁶ Where a child is released on bail, police should have a statutory duty of care to ensure that the child is able to return to his or her carers promptly or an appropriate referral is made to ensure suitable alternative accommodation is provided.²⁸⁵⁷

18.167 Evidence suggests that police and courts may be more reluctant to grant bail to Indigenous young people than to other children despite the Royal Commission into Aboriginal Deaths in Custody recommendation that juveniles should only be detained in police lockups in exceptional circumstances.²⁸⁵⁸

Aboriginal and Torres Strait Islander young people in police lock-ups is a major issue, and the intent of the recommendation has not been implemented in most jurisdictions.²⁸⁵⁹

The over-representation of Indigenous young people in police custody is particularly striking in Western Australia. In August 1995, 61% of young people in custody were Indigenous despite making up only 5% of the youth population.²⁸⁶⁰

18.168 The Royal Commission into Aboriginal Deaths in Custody recommended that governments and Aboriginal organisations work together to devise strategies to reduce the rate at which Aboriginal juveniles are separated from their families and communities.²⁸⁶¹ Research suggests that this recommendation has not yet been adequately implemented.²⁸⁶² The Inquiry considers that all police who may deal with young suspects should be given specific training in the importance of ensuring that Indigenous young people are not unnecessarily separated from their families.

Recommendation 228. The national standards for juvenile justice should provide as follows.

- There should be a presumption in favour of bail for all young suspects. The absence of a traditional family network should not negate this presumption.
- Children should be legally represented at bail application proceedings.
- Monetary and other unrealistic bail criteria should not be imposed on young people.
- Children should not be subject to inappropriate bail conditions, such as 24 hour curfews, that disrupt their education and have the effect of forcing constant contact with their families or that impose policing roles on carers.
- Where a child is released on bail, police should have a statutory duty of care to ensure that the child is able to return to his or her carers promptly or is provided with alternative accommodation.
- Lack of accommodation is not sufficient reason to refuse bail to a young person.
- Bail hostels should be established in all regions for young people on bail who do not have alternative accommodation.
- All police who may deal with young suspects should be given specific training in the importance of ensuring that Indigenous young people are not unnecessarily separated from their families and communities.

Remand

18.169 Children who are refused bail are remanded in custody until their matter comes before a court. The time a child spends on remand depends on a number of factors. Children who plead guilty are generally dealt with fairly quickly whereas it may take several months for a defended matter to come before the court.²⁸⁶³

Further delays can occur if a child's legal representative is unable to defend the matter immediately, either because the child has not given instructions or because of limited time and resources.²⁸⁶⁴

18.170 Being remanded in detention can have serious consequences for accused children. Children report feeling isolated and frustrated by the experience, particularly as they often do not have access to the same programs as detainees serving a sentence. In addition, placing a child on remand can put stress on family relationships and disrupts the child's education.²⁸⁶⁵ Young people on remand feel that they are often treated as if they have already been found guilty.²⁸⁶⁶

18.171 On the other hand there is a small number of children who, while not thriving on remand, at least receive a better standard of care than they would if left to fend for themselves.²⁸⁶⁷ They include homeless children and those from seriously dysfunctional families, for example, those with violent carers. When they are on remand these children have a relatively safe place to sleep and three meals a day. However, chronic welfare problems should not have to be solved by placing young people on remand.²⁸⁶⁸ Where it is necessary to detain young suspects on remand, they should be separated from adult detainees and young women should be separated from male detainees.²⁸⁶⁹

18.172 Young people must have access to legal advice while on remand so that they can make further bail applications if appropriate and properly prepare their defence. Largely this is a matter of each detention facility ensuring that remandees have unfettered telephone access to their solicitor. In addition, they should be able to access legal advice through the 24 hour freecall service proposed at recommendation 227.

18.173 The States and Territories differ in their treatment of children on remand. In Victoria children remanded in custody must be placed in a remand centre unless the regulations permit police custody in that particular region of the State.²⁸⁷⁰ The benefits of this provision are undercut by the fact that police custody is permitted in populous regions such as the City of Bendigo. In that case it is particularly inappropriate since Bendigo is a relatively short drive from Malmsbury Detention Centre.²⁸⁷¹ If held in police cells under the legislation a young suspect has a statutory right to be detained separately from adults and with members of his or her own sex.²⁸⁷²

18.174 Western Australian legislation states that young suspects may be remanded in detention centres.²⁸⁷³ Police orders provide that in deciding whether to transfer a young suspect from a country lock-up to a detention centre consideration should be given to the distance to be travelled, conditions at the lock-up such as over-crowding, the availability of escort staff and the need for family support.²⁸⁷⁴

18.175 Children living in rural or remote areas who are refused bail are often remanded to a detention centre hundreds of kilometres from their home, disrupting their schooling and family relations.²⁸⁷⁵ If they are remanded locally it is usually in the general police holding cells or at an adult gaol.²⁸⁷⁶ These problems affect Indigenous children in particular as they are the most likely to live in remote communities.

18.176 The Inquiry considers that young suspects should be transferred from the police station at which they were charged to the nearest juvenile detention centre at the first opportunity. In any event, they should not be remanded in police custody for longer than 24 hours. In geographically remote communities where it is not feasible to transfer juvenile suspects to a juvenile detention centre, the police station or other appropriate premises should be proclaimed or gazetted as a detention centre for the purposes of remanding young offenders provided the facilities have the approval of the relevant State or Territory body dealing with police complaints. The police station or other premises so proclaimed must meet the national standards for juvenile detention facilities.²⁸⁷⁷

18.177 In granting approval, the ombudsman should consider whether the police have consulted with the local community, particularly Indigenous groups, to find the most creative and appropriate means of remanding young people in police custody.²⁸⁷⁸ Where young suspects are detained in police custody for more than 24 hours it may be useful for the community to organise for an official visitor to inspect whether the conditions are suitable in the particular case. If not, the matter could be reported to the relevant police complaints handling body.

Recommendation 229. The national standards for juvenile justice should provide as follows.

- Where it is necessary to keep young suspects in police custody, they should be detained separately from adults and with members of their own sex.
- Young suspects should be transferred to the nearest juvenile detention centre at the first opportunity. In any event, they should not be remanded in police custody for longer than 24 hours.
- In geographically remote communities where it is not feasible to transfer juvenile suspects to a juvenile detention centre, the police station or other appropriate premises should be proclaimed or gazetted as a detention centre for the purposes of remanding young offenders provided the facilities have the approval of the relevant complaints handling body and comply with the national standards for juvenile detention facilities.

In court

Introduction

18.178 When young suspects face trial, they must be able to defend themselves properly if they are contesting a charge. No matter what their plea, they must be able to understand the proceedings. Factors that can contribute to a child's level of comprehension are the physical environment of the court room, the approach of the prosecutor, defence lawyer and judicial officer, and the effective representation of the child.

Prosecutors in juvenile justice matters

18.179 Juvenile justice matters should be prosecuted by the DPP rather than police prosecutors.²⁸⁷⁹ The prosecutorial duty of fairness is of special importance.²⁸⁸⁰ In rural areas a prosecuting police officer usually travels on circuit with the magistrate. Replacing this person with a DPP officer would have minimal resource implications. Prosecutors should receive specialised training in children's matters, particularly concerning the exercise of the discretion to withdraw charges in minor matters.²⁸⁸¹ The views of the apprehending officer should be persuasive but not binding in such instances.²⁸⁸²

Recommendation 230. The national standards for juvenile justice should require all juvenile justice matters to be prosecuted by the DPP.

Recommendation 231. All DPP staff who prosecute juvenile justice matters should be given specialised training in children's issues particularly concerning the exercise of the discretion to withdraw charges in minor matters.

Understanding the proceedings

18.180 The Beijing Rules provide that criminal proceedings should be conducive to the best interests of the child and conducted in an atmosphere of understanding which will allow the child to participate in the proceedings and express him or herself freely.²⁸⁸³ Some magistrates and practitioners encourage a less formal atmosphere in children's courts than in adult courts. However, the use of legal language and jargon limits children's understanding of the proceedings and is likely to alienate children appearing in the court.²⁸⁸⁴ This is particularly acute in serious indictable matters, such as murder and sexual assault, which are heard in superior courts.

18.181 In NSW and Queensland legislation provides that children before a court have the right to participate in decisions that affect them.²⁸⁸⁵ In the ACT and Victoria courts are required to make sure children understand the nature and purpose of the proceedings.²⁸⁸⁶ There are no similar provisions in the other States and Territories. Some young people consider that they are not given enough opportunities to talk in their own defence in court.²⁸⁸⁷ This view is supported by a number of commentators.

Children's hearings still proceed much as they have always done: as modified, summary courts of justice. Passivity rather than participation characterises the young defendant.²⁸⁸⁸

18.182 One way of increasing children's comprehension of criminal proceedings and their ability to participate in them meaningfully is to ensure appropriate and early legal representation for them.²⁸⁸⁹ Another way may be to give them an entitlement to a support person in court. Young people in the focus groups favoured this option.²⁸⁹⁰

18.183 A pilot children's court assistance scheme was run at Lidcombe Children's Court in NSW between July 1995 and April 1996. The scheme aimed to provide emotional support to child defendants as well as information about the trial before, during and after the proceedings. These kinds of schemes have been found to be effective in increasing children's understanding of proceedings.²⁸⁹¹ Ideally they should be expanded to all courts that hear children's criminal matters. The Inquiry recognises that there are funding ramifications in such a proposal but considers the benefits justify the fairly minimal costs.

18.184 Young Indigenous suspects may be particularly vulnerable in the court room because of cultural differences in methods and styles of communication.²⁸⁹² Judicial officers hearing matters involving Indigenous young people, either as defendants or witnesses, should take particular care to ensure that all questions put to the child are appropriate and comprehensible. For example, multiple subordinate clauses and double negatives should be avoided.²⁸⁹³

Recommendation 232. The national standards for juvenile justice should require each jurisdiction to evaluate the need for court support schemes.

Recommendation 233. The judicial training proposed at recommendation 236 should include material on ensuring Indigenous witnesses understand juvenile proceedings and can participate in them effectively.

Court design

18.185 During consultations young people indicated that the physical environment of the court can be highly intimidating.²⁸⁹⁴ There is a certain symbolic and deterrent value in the formal court environment but it should not be threatening or overwhelming. The physical court environment affects the child's demeanour and can thus affect the outcome of the case, particularly if the child feels intimidated into silence.²⁸⁹⁵ This adversely affects the child's right to a fair trial.

18.186 Difficulties with court design are particularly acute in rural and remote areas where children's criminal matters are often heard in courts built to accommodate indictable adult trials.²⁸⁹⁶ The community has also often outgrown its court facilities. In Wagga Wagga in rural NSW, for example, practitioners complain that they are unable to take proper instructions from children because of the shortage of conference rooms. Often the only place to confer is on the front steps of the courthouse.²⁸⁹⁷

18.187 In many regional areas and indeed in some capital cities, children's criminal matters and care and protection proceedings are heard in the same court room. This arrangement has negative consequences for both groups of children. Young offenders are often exposed to angry outbursts by families involved in care proceedings who are under emotional stress. Children who are the subject of care proceedings may get the impression that they have done something wrong as a result of the association with young offenders.²⁸⁹⁸ The Inquiry considers that judicial and court officers should make every attempt to separate care and juvenile justice matters when scheduling hearings. For example, if there is only one care matter listed it should come on first thing in the morning. There could also be separate days for hearing the different categories of matters.

18.188 Several submissions considered inappropriate court room design a significant factor contributing to children's poor understanding of legal proceedings.²⁸⁹⁹ A former senior children's magistrate has suggested that ideally a court room used for hearing criminal charges against children should be of a size that enables all persons involved to address each other at a normal conversational level, have a bench that distinguishes

the role of the magistrate but that does not dominate the room by its height, size or ornateness and be carefully laid out so that there is a clear line of sight between the bench and all others.²⁹⁰⁰

18.189 Court design is also important in terms of the facilities available when the child is not required in the court room itself.²⁹⁰¹ Young people often have to wait hours for their matter to come on. They, and their families, should be able to do so in a calm, reasonably private environment.²⁹⁰² It was recently reported that the Melbourne Children's Court facilities are so inadequate that lawyers are advising children to use the casino across the road as a waiting area.²⁹⁰³

18.190 The Inquiry considers that, in conjunction with the relevant State and Territory authorities, OFC should develop guidelines to be used when new children's courts are established and existing facilities are modified. These guidelines should ensure that court rooms and waiting areas are designed and modified with the needs of child witnesses and defendants in mind. In particular, attention should be given to providing sufficient private interview rooms and ensuring that court rooms are small enough for communication at normal conversational level.²⁹⁰⁴ Providing a court room can be adapted to be suitable for children's matters there is no need for it to be a designated juvenile forum.

The building of specialist court facilities may not always be possible in the smaller centres, where court buildings and court rooms have to be multi-functional. However, the concept of using guidelines for new buildings, or renovations, is valid.²⁹⁰⁵

Recommendation 234. Guidelines for juvenile court design, to be used when new courts are established and existing facilities are modified, should be developed.

Implementation. OFC should develop these guidelines in conjunction with relevant State and Territory authorities.

Training for decision makers

18.191 The Beijing Rules provide that professional education, refresher courses and the like should be used to ensure that all personnel dealing with juvenile cases maintain the necessary professional competence.²⁹⁰⁶ The Rules also provide that efforts should be made to ensure the representation of women and minorities among these personnel.²⁹⁰⁷

18.192 Every State has a specialised children's court that hears matters involving federal and other juvenile offenders.²⁹⁰⁸ In non-metropolitan and remote areas and in the ACT and the Northern Territory, juvenile crime matters are generally heard by the generalist magistracy sitting as a children's court because of a shortage of resources. There was a great deal of support in submissions to the Inquiry for a specialised children's magistracy.²⁹⁰⁹ Recommendation 130 proposes a specialised family and children's magistracy to hear family law, care and protection and juvenile justice matters. Under the proposal, this magistracy would work on circuit in rural and remote areas.

18.193 The UN Committee on the Rights of the Child has emphasised the need for systematic training activities for professional groups working with or for children in the area of the administration of juvenile justice. These groups include judges, lawyers, social workers, law enforcement officials and immigration officers.²⁹¹⁰

18.194 Whether or not a specialised children's magistracy is introduced in all jurisdictions, there should be a core training program for magistrates hearing juvenile justice matters including communications skills, child development, Indigenous culture, juvenile justice procedure and the structural causes of offending. In particular, they should be trained to avoid the use of legal jargon and acronyms and to improve effective communication, for example, by asking the young suspect whether he or she would like to explain what was happening during the proceedings.²⁹¹¹

18.195 To ensure that there is continuity in the expertise applied to juvenile justice matters, courts of appellate jurisdiction should designate judges to hear appeals in juvenile justice matters. These judges should undertake the training proposed above.

Recommendation 235. Juvenile justice data provided to OFC by the States and Territories in accordance with recommendation 193 should provide a breakdown as to whether a decision was made by a specialist children's magistrate or by a generalist magistrate and be matched with the type of order made in each case.

Recommendation 236. In addition to training already provided, all magistrates and judges who hear juvenile justice matters should receive specialised training. The training should include components on matters such as communications skills, child development, Indigenous culture, juvenile justice procedure and the structural causes of offending.

Implementation. In conjunction with other judicial education bodies, AIJA should develop a core national syllabus for training judicial officers who hear juvenile justice matters.

Recommendation 237. Courts of appellate jurisdiction should designate judges to hear appeals in juvenile justice matters. These judges should undertake the training proposed at recommendation 236.

19. Sentencing

Introduction

Scope of chapter

19.1 The terms of reference require the Inquiry to consider 'sentencing of children and young people for federal offences'. This chapter examines the legal processes associated with sentencing. The recommendations seek to make sentencing options and procedures more consistent with the basic rights of young people as set out in CROC. Submissions to the Inquiry generally supported the Inquiry's draft recommendations in DRP 3. In particular, they emphasised the need for national standards on the sentencing of young offenders,²⁹¹² a wider range of sentencing options based on rehabilitation and minimum intervention in the formal justice system²⁹¹³ and more attention to young people with special needs in the sentencing process.²⁹¹⁴

19.2 The juvenile justice sentencing system assumes that young offenders can and should be rehabilitated. This assumption reflects the requirement in article 40 of CROC that treatment of children who come into conflict with the law must take into account 'the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. This principle is also reflected in some State and Territory legislation.²⁹¹⁵

19.3 CROC requires a wide range of options for dealing with young offenders.

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 to both their circumstances and the offence.²⁹¹⁶

It also requires that children be deprived of liberty only as a last resort and for the shortest appropriate period of time.²⁹¹⁷ Children must be given a voice in any decisions that affect them.²⁹¹⁸ In accordance with these principles most jurisdictions accept that rehabilitation should be a goal of juvenile justice and that detention is not the preferred option for achieving this end.²⁹¹⁹

19.4 The major issues of concern about sentencing expressed to the Inquiry included

- insufficient and/or inappropriate programs for the rehabilitation of young people and, in particular, the limited availability of drug counselling and rehabilitation for young offenders
- the limited range of sentencing options in particular jurisdictions
- the discriminatory impact of sentencing policies on young people from rural and remote communities who have access to a limited number of rehabilitative options and who are detained far from their families and communities
- legislation in Western Australian and the Northern Territory that sets mandatory minimum sentences for certain offences and consequently prevents all relevant factors affecting the particular child being taken into consideration when sentencing
- the shift to more punitive sentencing regimes for young offenders which governments seek to justify by reference to a juvenile crime wave, notwithstanding that there has been no significant increase in juvenile crime in Australia for the past decade.²⁹²⁰

19.5 Comments made by young people to the Inquiry also stressed the importance of rehabilitation and the need to consider the circumstances of the individual child when sentencing. There is still concern about the achievement of this goal in some jurisdictions.

Some crimes young people commit are not that bad and their life shouldn't be ruined because of it.²⁹²¹

... emphasis should be on rehabilitation not punishment.²⁹²²

Give kids a chance because some parents don't care, need money.²⁹²³

The circumstances the offender is in should be looked at more closely under law.²⁹²⁴

The need for national standards

19.6 Aspects of sentencing, such as the number of available options and the degree of reliance on particular options, can vary significantly between jurisdictions. The different approaches to sentencing across different jurisdictions can produce very different results. Clearly, a child's treatment in the juvenile justice system should not be determined by accident of residence. Deficiencies in sentencing processes have been shown to have a particularly severe impact on certain groups of children including Indigenous children who are over-represented in the juvenile justice system and children from rural and remote areas.²⁹²⁵ These problems are national in their dimensions and require a national response. In particular, the inequities that exist between jurisdictions demand Commonwealth leadership in the development of more consistent national approaches.

19.7 The development of national standards for juvenile justice, based on the principles in CROC and other relevant international instruments, is essential to alleviate inequities and injustices in sentencing young offenders.²⁹²⁶ The Inquiry considers that the national standards for juvenile justice proposed at recommendation 192 should include principles for sentencing juvenile offenders. This view was supported by a number of submissions which saw the lack of clear national standards and national co-ordination as major contributing factors to the deficiencies in current processes for sentencing of juvenile offenders.²⁹²⁷

Federal offences

19.8 In defining the role of the Commonwealth in relation to sentencing young offenders, those who offend against federal laws should be considered separately from those who offend against State and Territory laws.

19.9 The Crimes Act provides

[a] child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.²⁹²⁸

The Crimes Act also contains sentencing options including conditional release on parole or licence²⁹²⁹ and a range of sentencing alternatives for persons suffering from mental illness or intellectual disability.²⁹³⁰

19.10 A number of submissions considered these Commonwealth arrangements for sentencing unsatisfactory.²⁹³¹ The complexity of the sentencing provisions has been criticised in case law.²⁹³² Submissions also expressed concern that the different sentences given under various State and Territory laws are discriminatory in their impact on children.

19.11 In its submission the federal Attorney-General's Department highlighted the inconsistency in the treatment and sentencing of federal juvenile offenders which may result from the application of State and Territory laws.²⁹³³ The Department questioned whether this inconsistency would amount to a breach of the constitutional prohibition against discriminatory federal laws identified by some members of the High Court in *Leeth v The Commonwealth of Australia*.²⁹³⁴ The Department suggested that a more detailed examination was needed before a firm conclusion could be made. In *Leeth* the majority, consisting of Mason CJ, Brennan, Dawson and McHugh JJ held that a piece of federal legislation which had inconsistent application among the States and Territories did not breach the constitutional prohibition. In their joint judgement, Mason CJ, Dawson and McHugh JJ said

... [t]he Commonwealth may give a varying application to its laws by reference to the laws of the States ...²⁹³⁵

It is obviously desirable that, in the sentencing of offenders, like offenders should be treated in a like manner. But such a principle cannot be expressed in absolute terms. Its application requires the determination of the categories within which equal treatment is to be measured. Its application in Australia is necessarily upon a State by State basis, for it has long been recognised that sentencing practices may not be uniform from State to State but may be affected by local circumstances.²⁹³⁶

19.12 However, in dissenting judgements, Deane, Toohey and Gaudron JJ took the view that the federal legislation was invalid. Deane and Toohey JJ were particularly strong in their view that the legislation was in breach of the Constitution.

The Commonwealth is one country and criminal laws of the Commonwealth are part of a system of law to which all within the Commonwealth are equally subject.²⁹³⁷

19.13 The divided opinion in *Leeth* ultimately leaves unsettled the question whether inconsistent standards of treatment among States and Territories in the sentencing of young offenders breaches the requirements of the Constitution.²⁹³⁸ The Inquiry's recommendations for national standards and a greater level of uniformity between jurisdictions in sentencing options should go some way towards addressing the disparity in treatment of federal offenders in different States and Territories and the concerns raised in *Leeth*. However, the issues raised in *Leeth* may need to be revisited once the effects of the national standards on sentencing of young federal offenders become apparent.

19.14 Issues also arise in relation to the enforcement of sentences for children convicted of federal offences. Of particular concern is the scope of section 20C of the Crimes Act. There is some doubt as to whether courts have the power to apply State or Territory enforcement provisions if a child convicted of a federal offence defaults on a penalty. The words 'or otherwise dealt with' in section 20C may not extend to enforcement provisions. For this reason the federal DPP has argued that the Crimes Act penalties should be preferred over State and Territory penalties.²⁹³⁹ The federal Attorney-General's Department has highlighted the need for clarification on this issue.²⁹⁴⁰

19.15 An interpretation of 'or otherwise dealt with' to include enforcement is, in the view of the Inquiry, consistent with the intention of section 20C to extend the application of State and Territory provisions to federal juvenile offenders. Given that enforcement procedures are determined by courts the extension of section 20C to those procedures does not offend the requirements of the *Judiciary Act 1903* (Cth) that people charged with federal offences be dealt with judicially.²⁹⁴¹ The Inquiry sees no logical reason, either in law or in policy, why enforcement should be treated differently from other aspects of the criminal justice system in this regard. The issue should be clarified by an appropriate amendment to section 20C of the Crimes Act, making explicit provision for enforcement procedures to fall within its scope.

Recommendation 238. The Crimes Act should be amended to make it clear that s 20C allows the enforcement provisions of State and Territory legislation to apply to young federal offenders.

Implementation. The Attorney-General should initiate this amendment.

Principles of sentencing

A contextual approach

19.16 All relevant factors must be taken into account in determining sentences for children.

Factors that should be considered when sentencing include: the nature and seriousness of the offence, age, maturation, parental or significant other support, environment, education, activities, drugs or substance abuse, programmes or options for support on sentencing, any disability and special needs of the individual.²⁹⁴²

The factors which should be taken into account in sentencing include the youth's

- previous history, whether the offence is isolated or chronic
- reason for committing the offence
- state of mind at the time of the offence
- care and protection issues which impact on the youth's behaviour
- admission of responsibility and preparedness to make restitution
- capacity for rehabilitation.²⁹⁴³

19.17 All children's courts in Australia generally take account of the particular circumstances of the offender. The immaturity or inexperience of the child may affect the commission of the offence and courts are

generally aware of this. Matters such as a prior record or a background report that discusses the likelihood of re-offending play a large part in sentencing children. Some jurisdictions provide explicit sentencing principles.²⁹⁴⁴

19.18 Nevertheless, submissions expressed concern that courts do not always have sufficient regard to the totality of relevant circumstances when deciding sentences.²⁹⁴⁵ Magistrates often do not take sufficient account of social factors such as homelessness, family circumstances, educational needs and so on in determining sentences for children.²⁹⁴⁶ Many offences committed by young people are alcohol or drug related. In these cases, one submission suggested sentencing decisions should place greater emphasis on addressing the addiction which is the root cause of the offending behaviour than punishment for its own sake.²⁹⁴⁷

19.19 Cultural factors should also be considered. One submission, for example, recommended that community service orders should offer work options that are culturally appropriate.²⁹⁴⁸

19.20 The factors which need to be considered in sentencing vary from young person to young person. Policy guidelines should not attempt to prescribe the relevant factors in a rigid or exhaustive fashion. However, inclusive guidelines should be developed to promote the consideration of individual circumstances in sentencing.

Rehabilitation

19.21 Some jurisdictions have included in legislation the principle that rehabilitation should be a goal of sentencing in juvenile justice. Some refer specifically to rehabilitation in their legislation while others do not but nonetheless have provisions which are clearly aimed at rehabilitation.²⁹⁴⁹ However, the situation in a number of jurisdictions raises questions as to whether this goal is realised in practice. The relatively high youth detention rates in the Northern Territory may indicate that courts there do not have sufficient regard to the requirement that detention should be the last resort when sentencing.²⁹⁵⁰ High detention rates may reflect different approaches by individual magistrates.²⁹⁵¹ They may also reflect a lack of appropriate non-custodial sentencing options.

19.22 Rehabilitation is also an important element in relation to non-custodial sentencing options. Greater emphasis on rehabilitation and reintegration into the community is needed in the design of community service orders for young offenders.²⁹⁵² Community service orders should include more positive programs to address offending behaviour or the offending environment.²⁹⁵³

Repeat offenders

19.23 Studies in NSW indicate that most children who appear in court — about 70% — never reappear before the court.²⁹⁵⁴ The proportion of the total child population who appear in court is extremely small, about 2%.²⁹⁵⁵ Most children given detention orders have been convicted of several prior offences. Available statistics and research suggest that detention and other harsh sentencing options are generally ineffective as deterrents to re-offending. As a recent report on recidivism by the NSW Department of Juvenile Justice stated

... higher order penalties, such as custodial orders, Community Service Orders and supervised recognisance and probation orders are associated with higher levels of juvenile re-offending.²⁹⁵⁶

The same report noted

... one cannot totally discount the possibility that such orders further criminalise juvenile first offenders, say, by contamination through their association with other known offenders.²⁹⁵⁷

19.24 Repeat young offenders often have family or other problems.²⁹⁵⁸ To acknowledge this is not to discount their responsibility for offending but merely to focus attention on effective mechanisms for rehabilitation. Programs that involve continuing support aimed at re-directing the young person's behaviour into more socially accepted forms are more likely to succeed in preventing recidivism.²⁹⁵⁹ The Church

Network for Youth Justice submitted that the effectiveness of sentencing options as deterrents to re-offending depends on

[w]hether the experience is a meaningful one to the young person, whether the young person has been treated with dignity, whether the young person has been able to enter into a trust relationship with an adult and what follow-up is available. Conversely, meaningless work, a dehumanising or violent experience will promote bitterness and militate against deterrence.²⁹⁶⁰

19.25 A submission from the South Australian Department of Family and Community Services highlighted a number of principles in relation to repeat juvenile offenders. They include

- the right to be treated with dignity
- the right to be treated as less responsible for their actions than an adult
- the belief that young offenders can change their behaviour
- the offender must take responsibility for his/her actions
- connection to significant adults in the community should be maintained
- offenders will have relapses; tolerance for this is necessary
- for effective rehabilitation offenders need a reason to have hope and an incentive to change their behaviour
- the obligation by the judicial and welfare systems to provide opportunities for change.²⁹⁶¹

That submission noted some elements identified in international literature as important in reducing the likelihood of re-offence. It cited

- the goal of improving the overall social competence and not targeting offending behaviour per se
- empathy training and moral reasoning
- life skills development
- improving literacy and numeracy
- vocational training
- the involvement, where possible, of the youth's family
- follow-up to ensure social and vocational integration.²⁹⁶²

19.26 The Inquiry considers that these principles should be taken into account in developing sentencing options for repeat offenders.

Support services for juvenile offenders

19.27 One submission said that national standards should require that in sentencing juvenile offenders courts should take account of failure in protective service provision or community based juvenile justice services for young offenders.²⁹⁶³ The submission cited the 1988 decision of the Victorian Court of Criminal Appeal in *McCracken* in which this principle was applied. The Inquiry agrees that this should be a relevant consideration in sentencing.²⁹⁶⁴

Recommendation 239. The national standards for juvenile justice should include principles for sentencing of juvenile offenders. These principles should also be reflected in relevant Commonwealth, State and Territory legislation. They should include

- the need for proportionality, such that the sentence reflects the seriousness of the offence
- the importance of rehabilitating juvenile offenders
- the need to maintain and strengthen family relationships wherever possible
- the importance of the welfare, development and family relationships of the child
- the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways
- the impact of deficiencies in the provision of support services in contributing to offending behaviour
- the need to take into account the special circumstances of particular groups of juvenile offenders, especially Indigenous children.

Sentencing options

Range of current options

19.28 Sentencing options across the jurisdictions include

- dismissal of the charges²⁹⁶⁵
- reprimand²⁹⁶⁶
- good behaviour bond/recognition/undertaking (essentially requirements for the offender to be of good behaviour for a specified period of time)²⁹⁶⁷
- conferencing schemes²⁹⁶⁸
- payment of fines²⁹⁶⁹ or compensation²⁹⁷⁰
- community service orders²⁹⁷¹
- probation orders (similar to bonds and recognisances except that they usually involve extra conditions such as supervision and regular interviews with a probation officer)²⁹⁷²
- orders catering for offenders with a mental illness or intellectual disability, such as hospital or psychiatric orders²⁹⁷³
- release on supervision orders,²⁹⁷⁴ community based orders²⁹⁷⁵ or attendance orders²⁹⁷⁶
- home detention²⁹⁷⁷
- weekend detention²⁹⁷⁸
- detention at a Youth Residential centre²⁹⁷⁹ or Youth Training centre²⁹⁸⁰
- detention at a juvenile detention centre.²⁹⁸¹

Some jurisdictions have placed limits on the period for which a juvenile can be detained.²⁹⁸² Some also have special sentencing provisions for juveniles who commit indictable or 'serious' offences.²⁹⁸³

Conferencing schemes

19.29 There are two main types of conferencing schemes, family group conferences and conferences involving offender and victim. Conferencing is discussed in paras 18.45-62 in the context of programs aimed at diverting young people from the formal court system. Conferencing can also play an important role at the sentencing stage. It can help the court in determining an appropriate sentence. It can also be used as a sentencing option, for example involving contact between victim and offender for the purpose of reconciliation or compensation.

19.30 An example of a scheme is the juvenile justice group conferencing pilot project which operates in Victoria through the Children's Court. This program mainly targets second offenders and applies to all offences except sex offences and murder. Under the scheme, the case is adjourned in the Children's Court for 28 days and parties are directed to return with the result of the conference after that period. The magistrate then decides whether to proceed with the order. The conference involves a meeting with the offender and a panel of people, including the victim.²⁹⁸⁴

19.31 The conferencing scheme in the ACT differs from the Victorian scheme in that conferences can only take place in circumstances in which no victim is involved. The panel is comprised of police and community representatives. If the child ignores the order, the case is sent back to court.²⁹⁸⁵

19.32 As part of the sentencing process, conferencing has a lot to commend it, particularly in terms of rehabilitation.

... offenders are confronted with an account of the consequences of their action and can take an active role in doing something to make amends. Such an approach is traditionally not available in the criminal justice system.²⁹⁸⁶

On the other hand, some criticisms have been directed at these schemes.

Criticisms of conferencing schemes arise largely because of concerns that procedural safeguards and rights which are available under the traditional criminal justice system may not be available under the alternative schemes, which may also be less open to scrutiny, accountability and review. An identifiable and effective community to support both victims and offenders is also considered necessary in most cases for there to be an effective outcome.²⁹⁸⁷

19.33 The Inquiry has proposed at recommendation 200 that the development of best practice guidelines for family group conferencing be included in the national standards for juvenile justice. The guidelines should cover conferencing schemes used as part of the sentencing process for young offenders.

Fines

19.34 Although the provisions dealing with fines generally set monetary limits for juveniles there remain serious questions as to their appropriateness as a sentencing option for juvenile offenders. Many young offenders come from financially disadvantaged backgrounds and indeed poverty is often one of the root causes of their offending behaviour.²⁹⁸⁸ They may encounter difficulty paying the fine on the terms set by the court. Default may then lead to further involvement in the criminal justice system. In addition, financial penalties have limited rehabilitative value for young offenders.²⁹⁸⁹

Parole and probation

19.35 Parole is a period of supervision in the community following the completion of a period in detention. Probation is an order for supervision in the community without any prior period of detention. These orders are available in Australian jurisdictions under a variety of names. They are intended to assist rehabilitation of the child by providing continuing guidance and support.

19.36 Actual levels of supervision and support vary. It has been suggested that insufficient supervision is made available to child offenders.²⁹⁹⁰ One reason for inadequate supervision is a lack of available funding. Another is that magistrates and judges may not specify the agency responsible for supervising the child and as a consequence no agency takes responsibility for supervision.²⁹⁹¹

19.37 Submissions were very critical of the level of supervision and guidance provided under these orders.

The system of probation and parole, as applied to children, is of very little assistance. Children are supervised for short periods of time and the supervision is very superficial. This is caused by lack of resources. It is totally different to supervision of adults on probation and parole, which is much more appropriate.²⁹⁹²

It is more often true than not that supervision and guidance under these orders is conspicuous by its absence. As the courts do not monitor these orders nor inquire in a subsequent matter whether they have been activated, it has no way of knowing if supervision and guidance has been provided and at what level. The court more often than not presumes that a high level of supervision and guidance has been provided.²⁹⁹³

19.38 Suggestions to make parole and probation orders more effective included the provision of additional resources, proper training and realistic caseloads which enable them to provide quality supervision and guidance to young people. Submissions also emphasised the need for closer monitoring of these orders by the courts.²⁹⁹⁴

Community based orders

19.39 Most community based orders for children are based on adult programs. A child must be assessed as suitable for a program and must consent to involvement and a place must be available. These orders aim to

- provide the Children's Court and young people with a direct alternative to incarceration
- prevent the young offender from further offending
- reduce the population of offenders in detention centres
- punish the young offender through imposing restrictions on his or her liberty
- provide young offenders with an opportunity to make amends for the offences committed.²⁹⁹⁵

19.40 Magistrates have suggested that the range of community based orders should be increased and the terms of the orders be capable of extension so that they can be used as a real alternative to a detention order.²⁹⁹⁶ A former Senior Magistrate of the New South Wales Children's Court has proposed greater use of options such as home detention, periodic detention, programs operated by community youth centres and other forms of intensively supervised release.²⁹⁹⁷

19.41 Community services orders and other non-custodial sentencing options offer significant benefits for young offenders in terms of rehabilitation and reintegration into society. However, they can also attract quite significant and onerous legal consequences.

The imposition of a CSO [community service order] has serious consequences, including the existence of a criminal record showing a serious offence was committed. Breaches of CSO may also have the consequences of re-sentencing, including the option of full-time custody, and the arrest and placement of the person into custody pending the re-sentencing. Further, the fact that a person was performing a CSO is an aggravating factor if that person is convicted of any other offence said to have taken place during the time of the CSO. Accordingly, CSO should not be viewed as a benign program giving young people something to do. CSOs must remain as a direct alternative to custody and be for appropriate lengths of time and offer appropriate work.²⁹⁹⁸

19.42 Community service programs should not be so onerous that young people find it difficult to complete them. Courts must be aware of the problems children in difficult circumstances face in complying with orders. For example, travel for a community service order may be problematic for a young person who is not receiving any assistance or support from parents and other family members and perhaps no income security payment.²⁹⁹⁹

19.43 The effectiveness of community service orders as sentencing options depends in large measure on the level of resources committed to their implementation. This has been a major problem in the system of community service orders operating in South Australia. A recent report by the South Australian Juvenile Justice Advisory Committee found that there was frequently not enough work for young offenders and insufficient supervision to ensure compliance with orders.³⁰⁰⁰ This has been attributed to a number of factors including lack of resources in the Department of Family and Community Services and reluctance by community groups to offer work to young offenders.³⁰⁰¹ Another relevant factor is the significant increase in

the number of orders handed down. The report also said there was confusion over the respective roles of the police, the Department of Family and Community Services and community groups in the implementation of these orders.³⁰⁰²

19.44 The South Australian experience highlights the need for allocation of sufficient resources and a streamlined and co-ordinated approach in the implementation of community service orders for young people. Community based sentencing options need to be better funded, more culturally appropriate and with a greater focus on integration in the community.³⁰⁰³ More programs are needed to assess effectiveness and the outcomes of community based sentencing options.³⁰⁰⁴

Detention

19.45 On 31 December 1996 there were 717 children aged 10 to 17 in juvenile corrective institutions in Australia.³⁰⁰⁵ The rates of detention for children are slightly lower than for adults and have been dropping over the last ten years.³⁰⁰⁶ There are substantial differences between the States and Territories in the rates of detention of children. The Northern Territory, with a detention rate of 68.8 per 100,000 of the child population, continues to detain children at a much higher rate. Victoria has the lowest rate at 14.9 per 100,000 of the child population.³⁰⁰⁷

Table 19.1: Rates of Persons aged 10–17 in Juvenile Corrective Institutions, 31 December 1996³⁰⁰⁸

(per 100,000 relevant population)	
NSW	47.7
Vic	14.9
Qld	33.9
WA	36.2
SA	46.7
Tas	31.8
NT	68.8
ACT	42.2
Australia	35.5

19.46 Young people in detention are most commonly convicted of property offences. In NSW 65% of detention orders given by the courts are for property crimes.³⁰⁰⁹

19.47 Some jurisdictions recognise that detention, while appropriate in some circumstances, is not the preferred option for achieving rehabilitation of young offenders. In Queensland, for example, the legislation provides that a court may only make a detention order against a child if, after having considered all other available sentences and taken into account the desirability of not holding a child in detention, it is satisfied that no other sentence is appropriate in the circumstances.³⁰¹⁰ In New South Wales and Victoria, the legislation sets out a hierarchy of penalties in order of seriousness and provides that a court must not impose a particular sentence on the scale unless it is satisfied that a lighter sentence is inappropriate.³⁰¹¹ Detention is recognised as necessary in some circumstances. The NSW Government, for instance, acknowledged

... that, in many cases, ordering young people into detention is not a solution. Detention frequently does not make sense because it is more likely to teach young and impressionable people how to become criminals rather than to deter them from a career in crime. In addition, a record of a young person's involvement in the juvenile justice system, particularly time served in detention, is likely to adversely affect the young person's future prospects.

However, the Government is adamant that detention is an appropriate and necessary penalty for juvenile offenders who commit serious crimes and for those juvenile offenders who repeatedly engage in criminal behaviour. Society must be protected from people, even young people, who commit serious crimes.³⁰¹²

19.48 Submissions to this Inquiry reinforced the view that detention should only be used as a measure of last resort.³⁰¹³ Many questioned the effectiveness of current detention practices in rehabilitating young offenders. They argued strongly that more attention needs to be given to the circumstances in which detention is applied

as a sentencing option and the environment provided for young detainees. Young people themselves also expressed very negative perceptions of the appropriateness of detention as a sentencing option for young offenders.

Kids should not get locked up.³⁰¹⁴

Stop locking young kids up.³⁰¹⁵

19.49 Issues relating to the treatment of young people in detention are discussed in more detail in Chapter 20.

Mandatory detention and other punitive measures in sentencing

19.50 Various States and Territories have adopted more punitive sentencing provisions, with longer sentences, particularly in relation to repeat offenders. In some jurisdictions they have included mandatory detention laws.

19.51 The Queensland Parliament has amended its juvenile justice legislation to increase significantly the sentences that can be imposed on young offenders, including life sentences for more serious offenders.³⁰¹⁶ Under the amendments, official cautions form part of children's criminal records.³⁰¹⁷ The stigmatising nature of this provision has been the subject of criticism.³⁰¹⁸

19.52 Western Australia's *Young Offenders Act 1994* contains special provisions relating to repeat offenders, defined as persons who have served at least two previous periods of detention and who have a high likelihood of re-offending within a short period of release from detention. The Act allows for the imposition of a special order for an additional 18 months in detention for these offenders.³⁰¹⁹

19.53 The Northern Territory Parliament's juvenile justice amendments provide for a 'punitive work order' as a sentencing option with the minister determining the sort of work which can be designated as part of a punitive work order.³⁰²⁰ The punitive work order was presented by the Attorney-General as 'a punishment that shames the guilty person'. He indicated that those serving a punitive work order would be clearly identifiable by a uniform or label, again with the purpose of making it a shameful experience.³⁰²¹ The Inquiry views these measures as entirely inappropriate, rendering the young offender vulnerable to discrimination, victimisation and retribution from other members of the community. They are likely to harden criminal behaviour because they stigmatise the young offender in the eyes of the community and in his or her own eyes.

19.54 In 1996 mandatory detention provisions were introduced in the Northern Territory and Western Australia. The Northern Territory amendments provide for mandatory imprisonment of young people found guilty of more than one property offence. These provisions apply regardless of how minor the second property offence.³⁰²² The amendments in Western Australia provide that when convicted for a third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of 12 months' imprisonment or detention (the '*three strikes and you're in*' legislation).³⁰²³ The Western Australian Minister of Justice justified the provisions by reference to Western Australia's high burglary rate, the traumatic impact of burglary on victims and the fact that the legislation targeted a small number of repeat offenders.

19.55 Mandatory detention offends against the principle of proportionality which requires that the penalty imposed be proportional to the offence in question.

[I]t is now firmly established that our common law does not sanction preventative detention. The fundamental principle of proportionality does not permit the increase of sentence imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.³⁰²⁴

19.56 The Western Australian mandatory detention provisions have attracted adverse comment in several cases from the President of the Western Australian Children's Court, Judge Fenbury. In two cases the President ruled that a non-custodial Conditional Release Order could be imposed despite the provisions of the mandatory detention legislation.

19.57 In one case the child was aged fourteen and had not previously had such a conditional release order.³⁰²⁵ The President characterised the mandatory detention provisions as contrary to the 'long accepted theory that when sentencing juvenile offenders, rehabilitation is of prime importance'.³⁰²⁶

19.58 In the other case, the child was only 11 years old and had received two convictions for minor offences, one for keeping lookout for two other children and the other for breaking into a house and stealing a container holding a small amount of loose change. His third burglary offence was recorded when he stole \$15 worth of food and drink when he had been left to fend for himself in a Pilbara town while his carers were in Perth for medical treatment. Again, Judge Fenbury used his discretion to place the child on a Conditional Release Order.³⁰²⁷

19.59 In a later case involving a young offender who was 17 years of age and had a long criminal history, the offender was sentenced to 12 months detention as required. Again the President expressed concern that the young offender may well spend more time in custody than an adult with a similar conviction.³⁰²⁸ Had he been a few months older, this offender could have received a significantly lesser penalty.

19.60 All three cases involved Indigenous children. They highlight the disproportionate impact this kind of legislation will have on the Indigenous community.³⁰²⁹

It is a general and clearly espoused principle of juvenile justice that detaining a young person in custody for an offence should only be used as a last resort and, if required, is only to be for a short time as is necessary...A mandatory minimum sentence of 12 months detention clearly contravenes this principle of juvenile justice.³⁰³⁰ In dealing with a young person who has been found guilty of an offence, the court is to dispose of the matter in a way that is in proportion to the seriousness of the offence (s 46(3) of the *Young Offenders Act*)...A mandatory minimum sentence of 12 months detention is in clear contradiction to this principle. A child convicted of stealing a torch from a tent can become subject to a mandatory penalty of 12 months detention.³⁰³¹

It is clear from our observations of the application of the three strikes law that the Aboriginal young persons are grossly over represented in its application.³⁰³²

19.61 The Northern Territory legislation has been considered in similar ways. In *Trennery v Bradley*, which involved an adult, the defendant stole items from a toy shop, but returned the goods to police five days later and pleaded guilty.³⁰³³ Under the mandatory detention regime, the offender would have served a term of imprisonment of not less than 14 days. The Full Court of the Supreme Court considered whether it could suspend the term of imprisonment, with or without conditions, such as an order for home detention or the fixing of a non-parole period, but it decided reluctantly that such orders would defeat Parliament's intention.

19.62 The mandatory provisions were criticised in this case as the 'very antithesis of just sentences'³⁰³⁴ and as posing particular problems in relation to defendants suffering from mental illness. Under the mandatory detention regime, the court may not be able to consider diagnosis and treatment or make a hospital order, as such orders do not constitute imprisonment in the legislation.³⁰³⁵

19.63 The Northern Territory and Western Australian laws breach a number of international human rights standards and common law principles. They violate the principle of proportionality which requires the facts of the offence and the circumstances of the offender to be taken into account, in accordance with article 40 of CROC. They also breach the requirement that in the case of children detention should be a last resort and for the shortest appropriate period, as required by article 37 of CROC. Mandatory detention violates a number of the provisions in the ICCPR including the prohibition on arbitrary detention in article 9. Both CROC and ICCPR require that sentences should be reviewable by a higher or appellate court.³⁰³⁶ By definition, a mandatory sentence cannot be reviewed.

19.64 The Inquiry considers these violations of international and common law norms so serious that it recommends federal legislation to override the laws unless the Parliaments of Western Australia and the Northern Territory repeal them.

The adequacy of sentencing options

19.65 There are different opinions on whether there are sufficient sentencing options for children in Australia. This reflects to some extent the considerable variations between States and Territories.

19.66 The sentencing options in legislation are not always reflected in the range of programs available to young offenders. Failure by governments to commit sufficient resources has restricted young people's access to suitable non-custodial sentencing programs.³⁰³⁷ In Victoria, for example, even though the legislation provides for a wide range of sentencing options³⁰³⁸ submissions identified deficiencies in the availability of programs and services to give effect to these legislative options. Those deficiencies include lack of residential drug rehabilitation programs, lack of alternatives to mainstream education and lack of adolescent psychiatric inpatient and outpatient services.³⁰³⁹ Some potentially effective programs have been limited by stringent eligibility requirements and other restrictions on their application.³⁰⁴⁰

19.67 The Inquiry considers that sentencing legislation should provide the broadest possible options for young people, including community service work, appropriate forms of home detention, other community based programs and periodic detention.³⁰⁴¹ Sentencing orders should be designed and implemented with greater creativity. They should be tailored more specifically to the needs and circumstances of the individual.³⁰⁴² The special needs of particular groups of children, such as children with disabilities, need to be addressed in available sentencing options.³⁰⁴³

19.68 Sentencing options should be designed to encourage rehabilitation and reintegration into the community.

Programs that re-connect children with their communities, mainstream and social institutions are more likely to reduce offending and make some changes in a child's life.³⁰⁴⁴

19.69 More care is needed to ensure that the length of a court order is appropriate for the young person. One submission highlighted the need for time frames that are more meaningful for young people.

A significant problem is that Court Orders are often too long. This is particularly the case with young Aboriginal people from remote communities. The concept of time, that is months and years is not well understood by these young offenders. Indeed all young people have a varying degree of understanding of time. It is important that these young offenders are given achievable penalties in sentencing. For example, in regard to bonds of good behaviour, appropriate length should be in school terms or until Easter or Christmas or another significant festival recognisable by the young person. A time period that is readily understood by the young person should be used. To say to a 13 year old, "you are on a good behaviour bond for 12 months" is of little use.³⁰⁴⁵

19.70 For young sex offenders, sentencing options should include sex offender-specific treatment programs designed to address the offending behaviour and reduce the likelihood of re-offence.³⁰⁴⁶

19.71 The Commonwealth should become more involved in compiling, updating and disseminating statistics and other information about sentencing young offenders in all States and Territories. At present, this information is provided in a fragmented and unco-ordinated manner by a range of State and Territory agencies.³⁰⁴⁷ As part of this process, research should be commissioned to evaluate and analyse all non-custodial sentencing options currently operating in Australian jurisdictions to inform the development of national standards.³⁰⁴⁸

19.72 Government and non-government agencies involved in the implementation of sentencing options should develop clear program objectives and performance indicators so that success or failure can be assessed in a systematic manner.³⁰⁴⁹

Recommendation 240. A wide range of sentencing options, with clearer and more appropriate hierarchies based on minimum appropriate intervention by the formal justice system, should be provided in the national standards for juvenile justice. Sentencing options should embody the principles in recommendation 239 dealing with national standards for sentencing. In addition, matters to be taken into account in the development of sentencing options should include the following.

- Rehabilitation and reintegration into the community should be the primary objectives in the development of sentencing options.
- Programs should be tailored as far as possible to the individual needs and circumstances of young offenders, including the difficulties they may have in complying with certain orders.
- Sentencing options should take into account the special health and other requirements of children

and young people. This should include the provision of appropriate drug treatment facilities incorporating both detoxification programs and treatment or referral services. It should also include counselling and other practical programs to assist these young people and their families. These could be run by voluntary, community or church based agencies, by non-profit concerns or by government agencies.

- Sentencing options for young sex offenders should include specific treatment programs appropriate to this category of offenders.

Recommendation 241. The national standards for juvenile justice should be consistent with Australia's international obligations and should include a prohibition on mandatory detention or mandatory terms of imprisonment for certain juvenile offenders.

Recommendation 242. The Attorney-General through SCAG should encourage Western Australia and the Northern Territory to repeal their legislation providing for mandatory detention of juvenile offenders. In the event that this is not successful, the Attorney-General should consider federal legislation to override the Western Australian and Northern Territory provisions.

Recommendation 243. Alternative non-custodial sentencing options should be evaluated to assist the development and promote the use of a greater range of alternatives to detention. These alternatives should be included in the relevant national standards for juvenile justice.

Implementation. OFC should commission research into the effectiveness of alternative non-custodial sentencing options, disseminate the findings of such research and develop in conjunction with the relevant State and Territory authorities, community groups and young people best practice models for non-custodial options.

The sentencing process

Use of background reports in sentencing

19.73 Submissions were generally supportive of the use of background reports in the sentencing of young offenders.³⁰⁵⁰ Some submissions expressed the view that insufficient use is made of background reports in sentencing.³⁰⁵¹

19.74 There is variance between jurisdictions as to the circumstances in which background reports should be obtained. In South Australia, for example, it is discretionary in all cases.³⁰⁵² Some other jurisdictions make them a requirement in cases involving certain categories of offence or offender. For example, in New South Wales a background report is required when a detention order is being considered.³⁰⁵³ In Victoria the requirement applies if the court is considering making a detention order or the child is intellectually disabled.³⁰⁵⁴ In all cases, submissions may be made by the prosecution and the defence as to the appropriate penalty. The child does not normally address the court but the magistrate or judge may question the child and hear the child's views before passing sentence.

19.75 Submissions to the Inquiry generally supported the use of background reports, including psychiatric and psychological assessments, in sentencing young people. One submission stated that they should be provided as a matter of course prior to any sentencing decision relating to a young person.³⁰⁵⁵ The Inquiry considers these are generally useful when more serious sentences are being considered.

19.76 Background reports give vital information to courts to assist in sentencing decisions.

Care and protection issues, emotional difficulties and substance abuse are often factors in juvenile offending, particularly for repeat offenders. It is thus imperative that where such issues are indicated in the nature and circumstances of a youth's offence that skilled assessments are conducted, depending upon their indications, by a social worker or psychologist. Both the assessment stage and the sentencing stage are crucial for such involvement. The expertise of social workers and psychologists can assist the Court in making an informed decision on the factors which contributed to a youth's offending and the most appropriate sentence to address these factors.³⁰⁵⁶

19.77 Background reports can be particularly useful where the young person resides a considerable distance from the court or the defending solicitor does not have easy access to the child's family, teachers, friends and other relevant people. Obtaining a report from the relevant agency can help overcome these difficulties.

19.78 However, there are also problems associated with background reports, including the processes by which they are obtained.

- Pre-sentence reports can prolong the process for young people as the court may need to adjourn for preparation of the report. This is especially concerning in cases where juveniles are held in detention pending consideration of the report.³⁰⁵⁷
- The usefulness of pre-sentence reports is undermined by staff shortages and resource constraints in agencies responsible for their preparation. These constraints limit the amount of information collected and the time to assess that information.³⁰⁵⁸
- Pre-sentence reports do not always contain significant contribution from the young person. The onus is normally on the child to attend at the agency preparing the pre-sentence report. For children in difficult circumstances this can be problematic. It may appear, for example, that the child is unco-operative when the child is unable to engage with agency staff.
- Background reports sometimes contain information which the child was assured would remain confidential. This may include admissions relevant to the offence but not disclosed to the court during the trial. This information can work to the detriment of the child and may even lead to a more severe sentence.³⁰⁵⁹

19.79 Children should have a full and clear understanding of the reporting process. They should be aware that they are not obliged to participate in the preparation of background reports and that their comments to agency staff are not confidential. One submission favoured the introduction of a requirement that young people be advised of their right not to participate in the preparation of background reports.³⁰⁶⁰ The Inquiry supports this proposal.

19.80 Another submission suggested that a clinic be annexed to the children's court in each State and Territory to provide independent psychologists where required and reports to assist the court, addressing any psychological aspects that should be taken into account in sentencing.³⁰⁶¹ At recommendation 83 the Inquiry proposed such clinics be introduced to provide assistance to the court in care and protection matters. These clinics could assist in the preparation of background reports in this context.

Recommendation 244. The national standards for juvenile justice should make the following provisions in relation to pre-sentencing reports.

- Background reports should be provided in all cases where a detention order for a child offender is being considered.
- Young offenders should be advised clearly by the magistrate ordering a background report and by the officer preparing the report of the purpose of the report, the role and responsibilities of the reporting officer and the importance of the child's involvement by way of interview in the preparation of the report. The young offender must be advised that the interview will not be confidential and that anything said during the interview may be reported. The young offender must be advised also of his or her right not to participate in the preparation of background reports.
- Children's clinics proposed at recommendation 83 should be resourced to provide assistance in the preparation of background reports in juvenile justice cases.

Children's voice in the sentencing process

19.81 A number of submissions expressed concern that the present arrangements do not give children an appropriate voice in the sentencing process.³⁰⁶²

19.82 Involving children in sentencing means giving them the opportunity to express their views. It also means ensuring that they are able to be fully engaged in the process — giving them an environment in which they do not feel intimidated but feel sufficiently comfortable to express their views, using language that the child understands and can reply to and providing adequate explanation of matters relating to sentencing.³⁰⁶³

Often neither the charges nor, after the conviction, the sentence is properly explained to the child. Clients are often not given charge or fact sheets or they may lose them before their first appearance in court. Often, children will never have the charges read to them. Sometimes a Duty Solicitor will whisper quickly into a child's ear to let them know what has happened in court. Often the Duty Solicitor will not go down to the cells or the holding room to explain to a child what a "Control Order" is or what the effect of their sentence is. This can lead to extreme distress and depression. At times, clients are so confused and distressed as to become suicidal.³⁰⁶⁴

19.83 Rehabilitation is likely to be enhanced by sentencing procedures which allow for greater engagement of children. The greater the participation of the child, the more meaningful the sentence is likely to be.

19.84 Magistrates sometimes give children an opportunity to express their views on sentencing, although this varies among individual magistrates. However, even where they are given this opportunity, the confusing and intimidating nature of court proceedings can make it difficult for many young people to participate or give proper expression to their views.

Some magistrates and judges believe they allow children an appropriate voice in sentencing by merely asking rhetorical questions. Some magistrates and judges are demeaning and even dehumanising of young people in the court as well as in the sentencing processes. In such circumstances children are intimidated and are less likely to participate in any meaningful way. They consider the situation to be hopeless and are further alienated by their understanding of what is happening to them.³⁰⁶⁵

This can be particularly problematic for Indigenous children for whom court processes tend to be especially alienating.

19.85 Much of the language used by judges and magistrates in relation to sentencing is confusing and alienating for children.

There is an inappropriate use of language by judges and magistrates to young people within the judicial system. This is related to the lack of explanation to the young person of the process, of the penalty handed down and the reasons for the penalty. The use of expressions such as "recognisance", "control order", "detention", "bail", "parole", "probation", "reparation", "retribution", "community deterrents", and "Community Service" would confuse and alienate many adults. Their effect on children is even worse.³⁰⁶⁶

19.86 Young people in focus groups reinforced the view that they lack a proper voice in the sentencing process.

Kids don't get sufficient opportunity to express their views when they are in court. There should be more opportunities for them to say what they think.³⁰⁶⁷

The Children's Court rarely gives a proper explanation of the meaning of the sentence and what it involves.³⁰⁶⁸

19.87 Legal representatives play an important role in ensuring that young offenders are given proper advice about sentencing. However, resource constraints within duty lawyer schemes can prevent them from discharging this responsibility adequately.³⁰⁶⁹

Recommendation 245. Duty solicitor schemes should be sufficiently resourced to ensure that children are given timely and appropriate advice on matters relating to sentencing and are assisted to express their views during the sentencing process.

Implementation. This provision should be included in the national standards for juvenile justice. The OFC, in consultation with legal aid commissions and State and Territory agencies responsible for juvenile justice and court systems, should monitor the operation of duty solicitor schemes for young offenders.

Post-sentence processes

19.88 Follow-up support programs for young offenders can play a role in helping to reduce recidivism. Courts and agencies should formally acknowledge completion of orders by young people. This could be as simple as a brief letter from the court or relevant government department stating that 'you have completed all the requirements of the order. Well done.' As a submission to the Inquiry recognised, this encourages non-offending behaviour in young people.³⁰⁷⁰ Many young people who come into conflict with the law have received very little from other people in the way of encouragement or positive remarks. Acknowledgement has a strong rehabilitative influence, both by making the experience more meaningful for the young person and by providing an incentive to change his or her behaviour.³⁰⁷¹

Recommendation 246. The national standards for juvenile justice should make the following provisions in relation to sentencing.

- Completion of orders such as community service orders and probation orders should be formally acknowledged by the court or relevant agency.
- There should be suitable mechanisms for recognising outstanding achievement by young people in these programs.

Training the magistracy

19.89 Magistrates dealing with young offenders must be made aware of the range of available sentencing options. They should be informed properly and systematically of the alternatives to detention. This requires regular flows of information from government departments and other organisations about relevant community programs. Submissions suggest that in many cases judicial officers may not take advantage of the range of sentencing options.³⁰⁷²

19.90 Magistrates need to be aware of the sentencing options designed specifically for particular young people, including Indigenous young people, young people with disabilities and young women.

19.91 The judicial training proposed in recommendations 236 and 247 should include training on the range of sentencing options available in each jurisdiction, the benefits of each option and the circumstances in which they are likely to be most effective.

19.92 The Inquiry agrees with submissions advocating training for magistrates in the relevant factors in sentencing and the weight which should be attached to them, as a means of achieving greater consistency and fairness in sentencing decisions.³⁰⁷³

Recommendation 247. Training for judicial officers should include material on the availability and effectiveness of sentencing options for juvenile offenders in each jurisdiction.

Sentencing vulnerable children

Introduction

19.93 As a result of their vulnerability, some children face particular difficulties in their dealings with the juvenile justice system, including sentencing. The responsibility for sentencing vulnerable children resides with the States and Territories. The Commonwealth should play a greater co-ordination and policy role in this area. This includes co-ordinating the development of national standards and collecting and analysing statistics on the sentencing of vulnerable children. This has been strongly supported in submissions received by the inquiry.³⁰⁷⁴

Girls

19.94 One submission stressed the need for full use of non-custodial programs designed specifically for young women. It stated that young women participating in these programs should be linked with female case workers wherever possible.³⁰⁷⁵

19.95 The training for magistrates proposed at recommendations 236 and 247 should cover gender issues as well as children's issues.³⁰⁷⁶

Children affected by mental illness

19.96 Many young people are incarcerated instead of being given appropriate treatment for their mental illness.

Reluctance to identify young people as being mentally ill 'leads to them being treated in a default system'. Without assessment and an appropriate range of intervention services they just 'slip between the cracks of the various systems and end up in the juvenile justice system'.³⁰⁷⁷

19.97 The emphasis should be on treatment and rehabilitation of juvenile offenders affected by mental illness rather than punishment and detention. Submissions indicated that there is still a lack of appropriate programs, a lack of accommodation options and a lack of staff with the skills and training needed to manage appropriate programs for this category of offenders.³⁰⁷⁸

19.98 In a submission to the Inquiry, the Mental Health Legal Centre recommended

Once the child has been placed, whether on a non-custodial program, in a correctional centre or a care and protection residential set-up, there should be ongoing assessment and treatment. Again, this should not be conducted on an ad hoc basis, but in a way that ensures problems are identified, and treated, in as many cases and at early and constructive a stage as possible.

As suggested above, permanent, trained staff should be employed by the courts and institutions which have responsibility for children post-sentence to provide assessment, support and treatment to all children encountering the system, irrespective of their means or level of legal representation.³⁰⁷⁹

The Inquiry endorses these proposals.

Children in rural and remote areas

19.99 Sentencing may have particularly harsh effects on children from rural areas. Generalist magistrates tend to impose relatively harsher sentences on juvenile offenders than specialised children's magistrates.³⁰⁸⁰ In addition, children in rural areas may not have access to non-custodial programs, making a custodial sentence the only option in some cases. In detention they are likely to be placed in a centre far from their family and community. They may suffer a greater degree of dislocation than children from urban areas.

19.100 Non-custodial programs available in rural or remote areas tend to involve much less supervision and support than those in metropolitan areas. For example, in the country a departmental officer might make only monthly visits to a young person on a supervised order.³⁰⁸¹

19.101 A submission favoured Commonwealth funding for non-government organisations in rural and remote areas to develop programs for juvenile offenders which magistrates could use as sentencing options.³⁰⁸² The Inquiry endorses this suggestion.

Children involved in substance abuse

19.102 Submissions expressed concern about the lack of appropriate sentencing options for young offenders who are substance abusers. In Victoria there are no youth-specific residential rehabilitation centres. Young substance abusers are required to attend adult oriented programs with adults.³⁰⁸³

19.103 The Youth Advocacy Centre highlighted the lack of adequate programs and support services for these offenders in Queensland.

When representing a drug-addicted client there are few options available to the legal representatives and their client. There are no detoxification units for children and drug counselling is expensive and virtually non-existent. The magistrates often say in court that the child must attend drug and alcohol counselling as directed by the Department of Families, Youth and Community Care but readily acknowledge that they know the department "ignores this". Therefore children are frequently sentenced to custody due to the failure of the State to provide proper services for these children.³⁰⁸⁴

19.104 Residential facilities for young petrol sniffers and their families are urgently needed in the Northern Territory and Western Australia. According to submissions there are virtually no programs designed specifically for petrol sniffers and sometimes these young people are incarcerated because they have nowhere else to go.³⁰⁸⁵

Indigenous children

19.105 Indigenous children are disadvantaged at each stage of the juvenile justice system compared to non-Indigenous children.

Discrimination at earlier stages of the system results in Indigenous young people being less likely to receive diversionary options and being more likely to receive the most punitive of discretionary options. These factors compound as the young person moves through the system. Apparently equitable treatment at the point of sentencing may simply mask earlier systemic biases.³⁰⁸⁶

19.106 In this context, treating children equally on the basis of their criminal characteristics does not necessarily do justice and does not redress discrimination earlier in the system.

19.107 The juvenile justice system should give recognition to Indigenous culture and kin relationships in sentencing young Indigenous people. This requires appropriate training for both magistrates and practitioners. Defence lawyers should have the knowledge to propose culturally appropriate sentencing arrangements. This might include, for example, involvement of the extended family and maintenance of links between the young offender and his or her local community. Isolation from family, culture and country is a major issue for young Indigenous people who are often detained in centres thousands of kilometres from their local communities.

19.108 Where there is no alternative but to impose a custodial sentence on a young Indigenous offender, custodial arrangements must be designed to maintain as far as possible the links between the juvenile and his or her culture.

19.109 Indigenous young people brought before the courts are more likely to come from rural backgrounds and therefore more likely to appear before non-specialist magistrates' courts. This is significant in that non-specialist magistrates tend to hand down harsher sentences.³⁰⁸⁷ The lack of resources in rural and remote areas also means that fewer non-custodial sentencing options are available.³⁰⁸⁸

19.110 Indigenous young people's past experiences with the legal system make them more susceptible to receiving a custodial order. For instance, they are more likely to have been previously institutionalised, less likely to have received a diversionary alternative to court and are more likely to have a greater number of previous convictions than non-Indigenous young people. The existence of a prior record is particularly influential in the sentencing process and a particular problem for Indigenous children because intervention occurs at a younger than average age. As a result they accumulate a criminal record much earlier than non-Indigenous children.³⁰⁸⁹

19.111 Many of these issues have been addressed in previous reports.³⁰⁹⁰ Most recently, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families recommended that national standards of treatment for all Indigenous children be enacted to apply to Indigenous children under State or Territory or shared jurisdiction.³⁰⁹¹ It recommended the standards should provide

- that the initial presumption is that the best interests of the child is to remain within his or her Indigenous family, community and culture³⁰⁹²
- that in determining the best interests of an Indigenous child, the decision maker must also consider

- the need of the child to maintain contact with his or her Indigenous family, community and culture
 - the significance of the child's Indigenous heritage for his or her future well-being
 - the views of the child and his or her family and
 - the advice of the appropriate accredited Indigenous organisation³⁰⁹³
- that the removal of Indigenous children from their families and communities by the juvenile justice system be a last resort and that where removal from their family is necessary children should wherever possible remain within their community³⁰⁹⁴
 - that national standards legislation provide for involvement of accredited Indigenous organisations in sentencing decisions affecting an Indigenous child.³⁰⁹⁵

The Inquiry endorses the implementation of these recommendations.

19.112 Other reports have emphasised the need for particular Indigenous sentencing options in consultation with the Indigenous community. In its 1986 report *The Recognition of Aboriginal Customary Laws* the ALRC recommended that alternative sentencing options for Indigenous communities should be developed, taking into account local needs and circumstances and utilising local justice mechanisms. These recommendations have yet to be fully implemented. The federal Attorney-General's Department notes that the recommendations of this report are under consideration through SCAG.³⁰⁹⁶ The Inquiry supports further action to implement these recommendations.

19.113 The Royal Commission into Aboriginal Deaths in Custody also made a number of recommendations relevant to the sentencing of young offenders.

- Indigenous people and governments should co-operate with a view to reducing the separation of Aboriginal juveniles from their families.³⁰⁹⁷
- Imprisonment is to be regarded as a sanction of last resort.³⁰⁹⁸
- Creative and individual approaches by sentencing and correctional authorities should be developed in relation to community service orders for young offenders. This includes community service work involving personal development courses to give young people the skills, knowledge, treatment and counselling necessary to reduce the risk of re-offending.³⁰⁹⁹

Some States and Territories are making progress towards the implementation of some of these recommendations. The Inquiry supports further efforts to achieve full implementation.

19.114 Submissions have highlighted the need for greater attention to cultural issues in sentencing options involving community service work for young Indigenous offenders.

For aboriginal people the work must be culturally appropriate. For example in one remote community the only community work available seems to be gardening for the police station. However, in a creative community, young offenders are taken fishing by older members of the community with the whole catch going to the elderly members of the community.³¹⁰⁰

19.115 The power of Justices of the Peace to determine charges and impose penalties has been identified as one of the factors contributing to the over-representation of young Indigenous people in detention.³¹⁰¹ The Aboriginal Legal Service of WA noted '[w]hile these powers remain in place, Aboriginal juveniles in rural and remote areas will continue to be subjected to an unregulated second class system of justice...'.³¹⁰² The Inquiry supports the enactment of legislation in States and Territories to reduce the powers of Justices of the Peace in relation to sentencing. The Inquiry also supports the appointment of more magistrates in order to reduce the reliance on Justices of the Peace within the juvenile justice system.

19.116 There is a need for greater involvement of Indigenous people in the administration of the juvenile justice system.³¹⁰³ The Inquiry regards this as an essential initiative that could result in a sentencing regime more sensitive to the needs and perspectives of Indigenous people. It should involve increased training and

support for Indigenous people to take positions with government and non-government agencies in the implementation of sentencing programs for young Indigenous offenders. It could also involve training and support for Indigenous judges and magistrates.

Recommendation 248. The national standards for juvenile justice should include a requirement that information about offending patterns for particular groups of children be collected and used to inform sentencing decisions and practices. Children about whom this information should be collected include boys, girls, Indigenous children, children from non-English speaking backgrounds, children with disabilities, children in care and children from rural and remote communities.

Recommendation 249. The national standards for juvenile justice should make the following provisions in relation to sentencing.

- Magistrates and judges considering sentences for young people with a mental illness or severe emotional or behavioural disturbance should obtain and give appropriate consideration to specialist psychiatric reports prior to making any decisions about sentencing.
- Sentences should, where appropriate, provide for systematic and continuing assessment and treatment for young offenders affected by mental illness or severe emotional or behavioural disturbance. This should apply to both custodial and non-custodial sentencing programs.
- Courts, detention centres and other agencies with responsibility for sentencing and post-sentencing arrangements for juvenile offenders should ensure that relevant staff are provided with appropriate training in the assessment, treatment and support of young people affected by mental illness or severe emotional or behavioural disturbance.

Recommendation 250. A range of alternative non-custodial sentencing schemes to be conducted within local communities should be developed in conjunction with local organisations. Particular attention should be given to rural and remote communities, including the need for greater supervision and support.

Implementation. Attorneys-General of each State and Territory should develop the schemes in conjunction with local communities. Grants should be provided to local organisations for this purpose.

Recommendation 251. Appropriate residential facilities and therapeutic programs should be developed and included in sentencing programs for young people affected by substance abuse. Particular attention should be given to the lack of support services for young people involved in petrol sniffing.

Implementation. Attorneys-General of each State and Territory should develop and fund schemes in consultation with relevant community groups and other organisations.

Recommendation 252. To address the special needs of Indigenous children in relation to sentencing

- information should be obtained from Indigenous communities about local community approaches and practices in relation to juvenile offending
- implementation of the recommendations of the ALRC Sentencing Research Paper 11 *Sentencing of Young Offenders* (ALRC Sydney 1988), ALRC Report 31 *Recognition of Aboriginal Customary Laws* (AGPS Canberra 1986), the *Report of the Royal Commission into Aboriginal Deaths in Custody* (AGPS Canberra 1991) and the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (AGPS Canberra 1997) should be progressed.
- a national strategy should be developed for enhancing the participation of Indigenous people in the administration of juvenile justice, addressing matters such as training programs to increase employment opportunities for Indigenous people in relevant government and non-government agencies and appointment of Indigenous judges and magistrates
- diversionary sentencing schemes in discrete or remote Indigenous communities should be monitored with a view to ensuring resources for the continuation or expansion of those that prove most effective.

Implementation. The OFC should co-ordinate the above initiatives in conjunction with relevant State and Territory authorities.

Criminal records

Introduction

19.117 Criminal records and associated police records detail a young person's contact with the criminal justice system. They can have significant effects in a child's later life. Criminal records can be retained and follow the child into adulthood or they can lapse upon the child's majority or after a certain time.³¹⁰⁴

Convictions

19.118 The view that a child's criminal record should lapse recognises that most children 'grow out' of crime and should not be branded in adulthood by youthful mistakes. A submission made to the Inquiry summarised this view.

This provision appropriately reflects the reality of youth offending — that most youth do not continue criminal behaviour into their adult lives, that the maintenance of a criminal record incurred as a youth stigmatises the young offender, and this stigmatisation could drive them further into criminality.³¹⁰⁵

19.119 The prejudice which a criminal record carries has an enormous impact on a young person, particularly in relation to employment prospects.

Once you have a criminal record and the police know they treat you like shit. The[y] never believe [what] you say and always go against you.³¹⁰⁶

I was given a second chance, and yes, I believe I deserve it! I deserved to be punished — which I was — but I don't think it should hamper my future job.³¹⁰⁷

A criminal record at a young age could ruin their life.³¹⁰⁸

19.120 Submissions generally agreed that young people convicted of criminal offences should only carry a criminal record for the most serious types of offences. Submissions also emphasised the importance of limiting the period of time for which criminal records of juvenile offenders can be retained. Some favoured expunging the record when the child reaches the age of 18; others preferred deletion after a specified period such as two or three years where no further offences have been committed in that time.³¹⁰⁹ One submission argued that young people should be made aware that any conviction for a criminal offence may be expunged after a period of time. 'Youths need to know that offences committed whilst a youth have a use by date...'³¹¹⁰

19.121 Recent amendments to Queensland's juvenile justice legislation are likely to cause more children to make the transition to adulthood with an established criminal record. A new section provides that particular cautions and community conference agreements are retained and admissible as part of a person's criminal history.³¹¹¹ In both written submissions and public hearings great concern was expressed at the amendments.³¹¹²

19.122 Some State and Territory laws limit the imposition or retention of criminal records in relation to children. Some protection is provided by the spent convictions provisions in Part VIIC of the Crimes Act. This law does not affect the recording of criminal convictions. It protects people by giving them the right not to disclose spent convictions under certain circumstances. It also prohibits individuals and organisations from taking into account certain spent convictions or disclosing them to other people. A spent conviction is a conviction for a federal, Territory, State or foreign offence which meets all of the following conditions.

- Ten or more years must have passed in the case of adults and five or more years in the case of juvenile offenders.
- The sentence imposed (not the sentence served) must have been a prison sentence of 30 months or less, a fine, bond or community service order.
- The person has not committed another offence in the last ten year period for adult offenders or five year period for juvenile offenders, subject to some exceptions.

- None of the specified exclusions applies. Where an exclusion is specified, information about the spent conviction can be requested and taken into account. The exclusions include courts when making decisions on matters such as sentencing offenders and law enforcement agencies when making decisions about whether to prosecute.

19.123 DRP 3 proposed that criminal convictions of young offenders should be expunged after a period of two years, or when the young person attains the age of eighteen years, whichever is the earlier, except where further convictions have been recorded.³¹¹³ It also proposed that police records of young offenders should be retained for five years then automatically destroyed where no further offence has occurred.³¹¹⁴ The AFP's submission was generally supportive of the draft recommendations regarding retention of criminal records and favoured a system along the lines of the federal spent convictions provisions.³¹¹⁵ The Northern Territory Government in its submission noted that the *Criminal Records (Spent Convictions) Act 1992* (NT) provides that convictions for some less serious offenders expire after five years in the case of persons convicted in the Juvenile Courts, and after ten years for a conviction recorded as an adult.³¹¹⁶ The Education Centre Against Violence supported the recommendation but suggested that convictions and records of juveniles who have committed sexual offences should be retained because of the 'highly repetitive nature of this class of offences and the general resistance to treatment'.³¹¹⁷ The Inquiry agrees with this and recognises that there are some classes of exceptions to the principle that juvenile criminal records should lapse.

19.124 Any expungement of criminal records for young offenders should be subject to appropriate exclusions. The exclusions which apply in the federal spent convictions legislation provide some useful guidance on this issue, although they should not necessarily be the same. Sexual offending is one area where it may be appropriate to impose more rigorous requirements, given the serious consequences and the likelihood of re-offending.

19.125 The federal spent convictions legislation plays an important role in protecting the rights of people who have offended against the law. However, its main focus is on non-disclosure of information about convictions rather than expungement as such from the records of the relevant authorities. Expungement is necessary to ensure that young people are not stigmatised by aberrant youthful offending.

Police records

19.126 Retention of police records is also a concern for young offenders. Police generally retain a record of a young offender's contact with the police and courts even when no conviction is recorded or no formal record is kept. This internal police record assists police to determine appropriate action to be taken in relation to the child in any future dealings with him or her. The record cannot be used in sentencing for further offences or in any other way adverse to the child. However, submissions expressed concern about the adverse effect on children's future prospects of retaining police records indefinitely. Most agreed that police records should be retained only for a limited period. There is already some provision for this in State and Territory legislation. In New South Wales, for example, the Children's Court may order destruction of a range of records including photographs, fingerprints and any other prescribed records other than records of the Children's Court.³¹¹⁸ Presumably, 'other prescribed records' would include such things as records of official cautions. Submissions expressed concern that the requirements concerning destruction of police records of juvenile offenders, where they exist, should be properly enforced.³¹¹⁹

19.127 A submission from the AFP opposed the proposal in DRP 3 for the automatic destruction of police records after five years. The AFP preferred a system for police records based on similar principles to those which apply to convictions under the Commonwealth spent convictions legislation. This would include appropriate requirements regarding non-disclosure of this type of information.³¹²⁰ However, the stigmatisation of a criminal record is not restricted to the public arena. If police records are retained, they will undoubtedly affect police decision making in later contacts with the young person. The Inquiry recognises that police need access to information about potential offenders in their investigations. However, the patterns of youth offending mean that most young offenders do not re-offend. Young people who have not re-offended within five years are unlikely to offend again. Subject to the same exceptions noted at paras 19.122-124, the utility of retaining police records is outweighed, after five years, by the need to allow a young person who has not re-offended, to outgrow his or her record.

Recommendation 253. Criminal convictions of young offenders should be expunged after a period of two years or when the young person attains the age of eighteen years, whichever is earlier, except where further convictions have been recorded. Exceptions to this requirement may be appropriate in relation to particularly serious offences, some sexual offences and certain other categories.

Implementation. The Attorney-General through SCAG should encourage the implementation of this recommendation, including development of appropriate exceptions, in all Australian jurisdictions.

Recommendation 254. Police records of young offenders should be retained for five years and then destroyed where no further offence has occurred and subject to the same exceptions noted at recommendation 253.

Implementation. The Attorney-General through SCAG should encourage the implementation of this recommendation in all Australian jurisdictions.

20. Detention

Introduction

Scope of chapter

20.1 Detention is at the most extreme end of children's contact with legal processes. The particular characteristics of children, for example their heightened vulnerability to physical and emotional harm and different perceptions of time, make detention a more confronting and difficult experience for them than for adults. Institutional environments, such as juvenile detention centres, can harm some children, with serious social and developmental consequences.³¹²¹

20.2 In the past, detention centres operated as closed systems without external scrutiny, guarantees of natural justice or recognition of young people's right to participate in decisions affecting them. Discipline was the responsibility of centre managers with broad discretion and little accountability.

20.3 In recent years, there have been changes. However, conditions in juvenile detention centres continue to vary markedly across States and Territories. While efforts have been made by way of improvements to policy and procedures manuals, there is still a large gap between the principles and policies of some centres and their operation in practice. Often the standards and programs in the centres do not meet the minimum standards required by international human rights law. These deficiencies are the result, in large part, of lack of monitoring of the implementation of these policies and principles.

20.4 For this Inquiry, the key issue in relation to detention centres is the need for national minimum standards for children in detention, the form those standards should take and how compliance with the standards should be ensured. National Design Guidelines and Quality of Care Standards set out comprehensive provisions relating to many important issues of detention.³¹²² However, a number of significant areas are not addressed. This chapter will deal with those areas requiring improvement.

20.5 This chapter does not examine comprehensively all issues about the conditions and standard of facilities for young people in detention. Some conditions and services provided in detention have been examined by other inquiries, such as the Senate Inquiry into Education and Training in Correctional Facilities³¹²³ and the Inquiry by the NSW Ombudsman into Juvenile Detention Centres in NSW.³¹²⁴

Federal responsibilities

20.6 The terms of reference of the Inquiry require us to consider the treatment of children and young people convicted of federal offences.³¹²⁵ Under section 20C of the Crimes Act, those convicted of a federal offence and sentenced to detention serve their detention order in a State or Territory detention centre.³¹²⁶

20.7 Australia has committed itself to a number of international human rights instruments under which the Commonwealth has certain obligations for the care and treatment of all children in juvenile detention facilities throughout Australia and not simply those who have been convicted of federal offences.³¹²⁷

20.8 Articles 37 and 40 of CROC set out a number of protections for every child deprived of liberty.³¹²⁸ In particular, CROC states

[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.³¹²⁹

20.9 The Beijing Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 deal more specifically and in detail with the conditions of children in detention. In particular, the Beijing Rules note that detention centres should provide

care, protection, education and vocational skills, with a view to [children] assuming socially constructive and productive roles in society.³¹³⁰

20.10 The UN Rules for the Protection of Juveniles Deprived of their Liberty state that children deprived of their liberty shall have the right to services and facilities that meet all their requirements of health and human dignity. They contain detailed requirements about accommodation, education, training, religion, recreation and medical care and make rules for discipline, complaints and return to the community.

Operation of detention centres

20.11 Provisions for children in detention vary markedly across the States and Territories. The relevant principles and procedures are scattered through various pieces of legislation, regulations and departmental policies. Legislation provides the framework and underlying principles by which the detention centres are to be operated.³¹³¹ Some jurisdictions have also developed policy documents and management philosophies.³¹³² The day-to-day operation of the centres is governed by internal guidelines in detention centre procedures manuals, which include the working instructions for centre staff. All jurisdictions have developed or are in the process of developing these manuals.³¹³³

20.12 The head of the relevant government department has certain legal powers and responsibilities for children placed in detention. Some of those are delegated to the manager of the centre with responsibility for the care and control of the young person.³¹³⁴ This arrangement means that the manager of the centre has a great deal of power in relation to children in detention.

Rehabilitation through detention

Introduction

20.13 The current operation of juvenile detention centres is being subjected to two different pressures. First the centres are being subjected to increasing scrutiny through government inquiries and external reviews to address deficiencies in their operations in the interests of rehabilitation.³¹³⁵ Second there has also been a strong push for the increasing use of punitive detention measures.³¹³⁶

Rehabilitative potential of detention

20.14 The ability of the current detention system to rehabilitate young offenders is increasingly in doubt. A number of submissions to this Inquiry acknowledged its limitations.³¹³⁷ Detention seems to criminalise young people further. The Law Society of NSW referred to anecdotal evidence that detainees learn to 'play the game' to make themselves eligible for early release and then re-offend following their return to society.³¹³⁸ The Townsville Community Legal Service pointed out

[r]esearch has shown that prisons often create institutionalisation or dependency, are a perfect training ground for criminal activity, as well as a network base for meeting criminals and leave children with no knowledge of basic life skills for reintegration into society.³¹³⁹

20.15 The Open Door Youth Foundation also noted the deficiencies in detention as a form of crime prevention.

It is simply not true that if you lock up more and more offenders you will reduce crime.³¹⁴⁰

20.16 Indeed, some commentators have pointed to evidence that punitive measures such as detention have a net destructive effect, in that they actually worsen the rates of recidivism.³¹⁴¹ In addition to failing to deal with the underlying causes of criminal activity, it also appears that detention does not protect community safety. As one submission noted

[Detention] can create a revolving door. Children can become more aggressive towards the community and each other, and this can result in being in trouble with the law again.³¹⁴²

Rehabilitative practice in detention centres

20.17 Clearly there will always be some children for whom a sentence of detention is considered necessary as a last resort. The Inquiry has concluded, however, that the policies, practices and procedures in juvenile

detention facilities must be assessed to ensure that these children are rehabilitated. Judge McGuire of the Children's Court of Queensland has stated

[i]f such offenders are detained in a detention centre they are out of harm's way for the time being and cannot commit crimes against society. However, detention will not work, if when they come out, they are more criminally inclined than when they went in.³¹⁴³

20.18 The importance of rehabilitation in the juvenile justice system is recognised to some extent in legislation in most States and Territories.³¹⁴⁴ However, a number of these legislative provisions point to the importance of re-integrating young detainees into the community, without making rehabilitation the explicit, primary aim of detention.³¹⁴⁵ Other jurisdictions refer to rehabilitation in terms of punishment.³¹⁴⁶

20.19 Most governments are attempting to bring a more rehabilitative focus to the operation of their detention centres. For instance, rehabilitation is emphasised as a goal of detention in a number of detention policy documents and procedures manuals.³¹⁴⁷ Structured programs currently provided in detention centres cover areas such as education and employment, recreation, independent living skills, drug and alcohol counselling, pastoral care and anger management. Some centres also provide specialist programs and services, such as sex offender counselling, relapse prevention and victim empathy courses.³¹⁴⁸

20.20 Despite this, it appears that rehabilitation aims are not being implemented in practice. A large number of submissions to the Inquiry expressed concerns about the current operation of juvenile detention centres.³¹⁴⁹ These concerns included lack of adequate living standards, case management, access to family and community contact and education and training programs. Survey responses from young people in detention also indicated their high level of dissatisfaction with the operation of the system. For instance, 45 (45%) of the 101 respondents said that juvenile detention centres do not meet the needs of young people.³¹⁵⁰

20.21 Inadequate funding for rehabilitation programs in juvenile detention facilities contributes to this failure. A submission from the Townsville Community Legal Service pointed out

[w]hilst political rhetoric supports rehabilitation as a primary objective of detention, it is often not matched with funding. Adequately funded rehabilitation programs are critical in any detention centre if it is going to be successful as a means of dealing with criminal behaviour in our society.³¹⁵¹

20.22 Rehabilitation is described in policy documents and procedures manuals as an aim of juvenile detention but this has not prevented the establishment of punitive detention models. In Western Australia, for example, a work camp for young males was established despite the fact that the Management Philosophy of the Juvenile Justice Directorate emphasised rehabilitation as a key focus of detention.³¹⁵² Camp Kurli Murri was established in 1995 near the remote town of Laverton 960 kilometres from Perth. The camp was opened following community concern in relation to juvenile crime and 'repeat offenders'.³¹⁵³

20.23 The work camp concept stems from US military-style correctional camps which are used as an alternative to conventional prison for young adult offenders. The US camps are designed to break down individualism and impose rigid conformity by using physical exertion, stress and shock mechanisms to 'inculcate behavioural and attitudinal change'. Some of the shock mechanisms used include verbal abuse and bullying.³¹⁵⁴ The camps are aimed at punishing offenders and rehabilitating them through hardship. But their success rates seem low. Despite this, these camps are supported by some sectors of the media and public, stemming from a perception that they will address the perceived 'youth crime wave'.³¹⁵⁵

20.24 The Western Australian camp followed the US model in that it adopted a highly structured and disciplined regime and isolated the offenders through its physical remoteness and its policy of no visits for inmates.³¹⁵⁶ That policy was particularly significant in that it was contrary to a number of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.³¹⁵⁷ The proposal for the work camp was criticised widely, including by the National Children's and Youth Law Centre, as ineffectual in rehabilitating offenders and expensive.³¹⁵⁸ Nonetheless, the Government proceeded with it. Camp Kurli Murri operated for a mere 18 months at a cost of approximately \$3.4 million³¹⁵⁹ and was closed in 1996.³¹⁶⁰ In its place, an 'Intensive Supervision Centre' was established in March 1997 at Warminda to deal with persistent offenders. This new Centre is a significant improvement on the work camp and is based on a rehabilitative and restorative rather than punitive approach.³¹⁶¹

20.25 Rehabilitation needs to be established nationally as the primary aim of detention.³¹⁶² This is particularly so given the increasing push towards punitive measures in some jurisdictions.³¹⁶³ As commentators have pointed out, although punishment is rarely cited as an aim of juvenile detention in the 1990s, it is a prevalent function of juvenile detention.³¹⁶⁴ Rehabilitation is beneficial not only to young offenders, but also to the community by assisting the young person to reintegrate into the community. Rehabilitation assists crime prevention by assisting to reduce the commission of further offences.

Recommendation 255. Legislation in all jurisdictions should state that the aim of detention is rehabilitation of young offenders. The legislative provisions should reflect rehabilitative principles set out below.

Implementation. The Attorney-General through SCAG should encourage all States and Territories that have not already done so to ensure that rehabilitation is incorporated into the relevant legislation as the primary aim of detention. This legislation should be implemented in future decision making about juvenile detention centres. National standards for juvenile justice should incorporate this principle.

Existing national standards for juvenile detention centres

Introduction

20.26 National Quality of Care Standards (QOC Standards) and Design Guidelines for Juvenile Justice Facilities in Australia and New Zealand (Design Guidelines) were developed for the juvenile detention system under the auspices of the Australasian Juvenile Justice Administrators (AJJA) forum and endorsed by all States and Territories in 1996.³¹⁶⁵ A second set of QOC Standards is being developed and is currently in draft form. They apply exclusively to juvenile detention centres. The endorsed and draft national QOC Standards are particularly relevant for this Inquiry in that they provide guidelines for programs, services and legal processes provided in detention. While reference will be made to the Design Guidelines, the main focus will be on the QOC Standards.

Development of the Standards and Guidelines

20.27 The Design Guidelines and QOC Standards were developed with reference to several international instruments, including CROC,³¹⁶⁶ and the 1991 Royal Commission into Aboriginal Deaths in Custody report.³¹⁶⁷ A broad consultation process also informed their development. The Design Guidelines were based on the results of a questionnaire and workshop held in 1995, involving representatives of all States and Territories of Australia and New Zealand. The QOC Standards were developed by reference to literature reviews, professional comment from social workers, psychologists and youth workers and consultations with young people in detention. However, there was no consultation with non-government organisations.³¹⁶⁸

Implementation of Design Guidelines and QOC Standards

20.28 The endorsed QOC Standards cover issues relating to alcohol and other drug services, recreation, education, employment and training programs and health services. The draft QOC Standards cover complaints mechanisms, case management programs, visits and correspondence, offender programs, behaviour management and living environment and emphasise the young person's right to natural justice mechanisms. The Design Guidelines encompass a very broad range of issues relating to the layout and environment of juvenile detention centres.

20.29 Generally speaking, the standards and guidelines provide comprehensive provisions to ensure quality treatment and protect the rights of children in detention. However, they do not deal with some important issues, such as regulation of discretion for dealing with criminal offences committed by children in detention, the provision of inspections and Official Visitor's schemes, separation of children from adults and the transfer of children to adult prisons.³¹⁶⁹ Although the QOC Standards cannot be expected to cover every issue in relation to detention centres, these issues are sufficiently important to be included in the QOC Standards. To this end, the Inquiry considers that a consultation and review process should be undertaken to refine the standards. This process should be undertaken by AJJA in consultation with OFC and focus particularly on

bodies not consulted in relation to the QOC Standards, such as community organisations dealing with children. The completed QOC Standards would then form a part of the national standards for juvenile justice. The Inquiry envisages that the national standards for juvenile justice would set the framework, require best practice and establish benchmarks for implementation by each jurisdiction as appropriate.³¹⁷⁰

20.30 A number of jurisdictions have incorporated the Design Guidelines and QOC Standards in their detention procedures manuals or policy documents. Some have explicitly referred to them, while others appear to have reflected the underlying principles in their manuals.³¹⁷¹ The Inquiry acknowledges the positive initiatives of some State and Territory Governments in recent years to create a more humane and rehabilitative environment for young people in detention. However, the lack of a national body to monitor implementation of these standards has meant that their implementation has been *ad hoc*. As a result, treatment of children in detention continues to vary between jurisdictions and over time in accordance with the political priorities and the electoral concerns of governments. Moreover, in many areas, there are serious questions as to whether the treatment of juveniles in detention meets the standards set out in the relevant international treaties and guidelines to which Australia subscribes. Submissions to this Inquiry and many earlier studies and inquiries, including the Royal Commission into Aboriginal Deaths in Custody and the NSW Ombudsman's Inquiry into Juvenile Detention Centres, suggest that it does not.³¹⁷² There is clearly a need for national monitoring of standards in detention centres. A number of submissions to the Inquiry stressed the importance of the Commonwealth's role in bringing a national focus to detention³¹⁷³ and the need for implementation of these standards to be monitored.³¹⁷⁴ Once the Design Guidelines and QOC Standards are completed and become part of the national standards for juvenile justice, their implementation should be nationally monitored by OFC.

Informing the community and children

20.31 There appears to be very little awareness of the QOC Standards in the community. They are not referred to in the literature on juvenile justice and only four submissions to the Inquiry, all of which were from government departments, mentioned them.³¹⁷⁵ There is a clear need for more information, consultation and education about the QOC Standards.

20.32 The completed QOC Standards should be distributed to all involved in juvenile justice, including community organisations, legal practitioners and youth workers dealing with children. A version of the standards appropriate for children should also be distributed to every child in detention on admission or as soon as possible after that. Draft QOC Standards provide that each juvenile detention centre should make a statement of rights and responsibilities available for every child in detention. This is also provided in some jurisdictions.³¹⁷⁶ The Inquiry endorses this. We also recognise that any statement needs to be supplemented in a form more accessible to children.³¹⁷⁷

20.33 A brief, 'plain English' version of the Issues Paper was prepared specifically for children as part of this Inquiry.³¹⁷⁸ The NSW Department of Juvenile Justice has recently commissioned the production of a series of Streetwise comics for children in detention to present their rights and responsibilities in an easily understood form.³¹⁷⁹ The Inquiry recommends that States and Territories use similar methods to inform children of their rights and responsibilities in detention.

Recommendation 256. The Design Guidelines and QOC Standards (both endorsed and draft sets) should be reviewed by AJJA, in consultation with OFC, to ensure that they accord with principles in CROC, the Beijing Rules, the UN Rules for the Protection of Juveniles Deprived of their Liberty and other relevant international treaties and guidelines. Community organisations dealing with children's issues should be consulted about the standards as part of this review.

Implementation. Once the review is completed, the Design Guidelines and QOC Standards should form part of the national standards for juvenile justice as set out in Recommendation 192. Compliance with the standards should be monitored by OFC in accordance with Recommendation 193.

Recommendation 257. The national standards for juvenile justice should be disseminated to officers dealing with children in detention, key community organisations dealing with children and all other

relevant individuals and agencies. Information in appropriate forms summarising rights and responsibilities provided by the standards should be given to every child upon admission to detention.

Implementation. The relevant department in each State and Territory should be given responsibility for disseminating the standards.

Living conditions, services and programs in detention

Introduction

20.34 The well-being and rehabilitation of young people in detention depend to a large extent on the living conditions, services and programs provided for them. Living conditions encompass the physical standard of buildings and other facilities, levels of hygiene, food and clothing, classification of detainees, contact with family and friends and privacy. Programs and services include case management, counselling and drug and alcohol programs, general and mental health services and educational, employment and vocational programs. The legal processes within detention centres also affect the operation of these programs. The Design Guidelines and QOC Standards deal with many of these issues.

Differences in detention centres

20.35 Conditions in detention centres vary greatly both within and between jurisdictions. Their natures and sizes differ. For instance, some detention centres accommodate only a few children. Others, such as Mount Penang in NSW, at present the largest detention centre in Australia, can accommodate up to 160 children.³¹⁸⁰ Most centres hold males only or a mixture of males and females. Yasmar in NSW is the only centre which caters exclusively for girls. Some detention centres are categorised according to minimum, medium and high security classifications.³¹⁸¹ Some provide for detainees of certain ages.³¹⁸² Some hold a mixture of both remanded and sentenced young offenders.³¹⁸³

20.36 Juvenile detention centres in some jurisdictions are located in both metropolitan and rural areas. However, some States and Territories have all their centres located in or near capital cities. For instance, all juvenile detention centres in Western Australia are located in Perth, both centres in South Australia are located in metropolitan Adelaide and both centres in the Northern Territory are located in or near Darwin.³¹⁸⁴ This creates difficulties for young offenders and their families from rural and remote areas.³¹⁸⁵

Living environment

20.37 Many detention centres attempt to provide for adequate living standards in their policies and procedures documents. For instance, the Western Australian policy document emphasises 'normalisation'. This requires a living environment which avoids labelling and stigmatisation, encourages individuality and self-respect and allows expression of cultural identity, the practice of religious beliefs, privacy and personal space.³¹⁸⁶ Queensland's policy document also emphasises the importance of de-institutionalising the living environment to enhance rehabilitation of offenders. It has implemented the Design Guidelines about small group sizes by providing that the living environment and work practices must be responsive to the gender, geographical origins, cultural, religious, developmental and individual needs of children.³¹⁸⁷ However, evidence received during the Inquiry indicates little or no implementation of these policies in practice.

20.38 The Inquiry visited a number of detention centres across Australia. The physical standards within centres varied widely. Some, such as the Don Dale Centre in Darwin and the Cavan Education Centre in South Australia, were of a high standard. Others, such as Longmore Detention Centre in Perth and the John Oxley Centre in Brisbane, were sub-standard, reflecting past policies that built juvenile centres as youth prisons. Longmore and Riverbank detention centres in Perth are to be replaced by a new detention centre now under construction.³¹⁸⁸

20.39 The existence of inadequate living standards in detention centres has been recognised in a number of jurisdictions. In NSW a program of improvement of detention centres was commenced in 1992 because it was recognised that

[m]any of the detention centres were poorly staffed, the standard of accommodation was most unsatisfactory and, more importantly, the level and quality of programming was not of the standard required.³¹⁸⁹

Three years later, in October 1995 the NSW Community Services Minister announced that Minda Detention Centre was so substandard that it would be closed. However, it is still operating, two years later.

20.40 The report of the NSW Ombudsman's Inquiry into Juvenile Detention Centres in 1996 identified many shortcomings with the operation of centres. In some centres basic requirements such as clothing and food were found to be substandard and privacy and respect for individual and cultural differences were commonly ignored.³¹⁹⁰ The Ombudsman said that the NSW Department of Juvenile Justice was falling substantially short of best practice standards in the humane confinement of juvenile offenders and that nearly every centre needed its physical environment improved. The Ombudsman found

- dilapidated buildings and a generally oppressive atmosphere
- reliance upon dormitory accommodation which is generally not conducive to detainees' safety or their privacy
- food which does not meet children's basic nutritional needs
- clothing that is 'substandard and ill-fitting'
- unduly onerous restrictions on the type and amount of personal possessions, including letters, that detainees may retain.³¹⁹¹

20.41 The concerns raised by a number of submissions to the Inquiry indicated that these problems are not confined to one jurisdiction.³¹⁹² One submission quoted some recently published comments of a former employee of the Sir Leslie Wilson Youth Detention Centre in Queensland about conditions in that centre.

The conditions in the Sir Leslie Wilson Youth Detention Centre are atrocious. The staff are apathetic and poorly trained, and more concerned with surviving their shift than watching the kids. The kids have nothing to do, confined in an atmosphere of deprivation and abuse. The atmosphere in the centre is cold and oppressive, and not at all conducive to promoting mental health. It is no wonder that the children who are incarcerated in this hell hole reach such a point that they feel that their only escape is death.³¹⁹³

Another submission to the Inquiry described the conditions in this centre as 'a disgrace'.³¹⁹⁴ The Queensland Government has made a commitment to close this centre in November 1998.³¹⁹⁵

20.42 The provision of proper living standards in detention is an important factor in the rehabilitation of young offenders. The Design Guidelines set out standards for this. They promote a sense of normality in the centre, while addressing the issues of control, security and economy of space. They state, among other things, that family contact and community involvement in the detention centre should be encouraged, that the centre must be designed to reduce the chances of escape while also allowing flexibility for differing levels of risk and that detainees should retain a sense of personal space and privacy.³¹⁹⁶ The Design Guidelines make recommendations in relation to these issues and recognise the particular needs of certain groups of detainees, such as young people with disabilities, young women and Indigenous young people.³¹⁹⁷ The draft QOC Standards supplement these guidelines by setting out provisions about food quality standards.³¹⁹⁸ The Inquiry endorses these provisions.

Case management process

20.43 Case management emphasises rehabilitation of child offenders through individual attention from a caseworker. It provides structured educational, vocational and recreational programs tailored to the needs of the individual child. The aim is to involve the child in decisions about suitable programs while he or she is in detention and to provide co-ordinated services managed by one identified officer. This approach has proved very successful in the rehabilitation of young offenders.

20.44 Case management is integral to rehabilitation. The findings of the NSW Ombudsman's Inquiry highlight this link.

The Inquiry has found that the introduction of case management has had, and continues to have, a fundamental and beneficial impact on the way in which services are provided to young people in detention. The two most important factors in this change are the growth in co-ordination of services that focus on the needs of the young person during their detention and the move away from a strictly punitive custodial culture within juvenile justice.³¹⁹⁹

As the Youth Justice Coalition recommended in its 1990 report on children, case plans should be used to inform decision making in relation to young people in detention, such as in relation to leave, transfers, programs and release.³²⁰⁰

20.45 Policies and procedures documents in all jurisdictions provide for the development of case management plans for detainees and programs covering a range of areas, including education and vocational skills, recreation, sport, health and social development. However, the quality and application of those plans and programs vary across different States and Territories. In some jurisdictions, a time frame is set for development and review of the plans, with the time periods differing across jurisdictions.³²⁰¹ Others provide for development and review of case plans but do not set a time frame.³²⁰²

20.46 Submissions from community and legal bodies raised serious concerns about case managed rehabilitation in practice. They pointed to problems stemming from inadequate resources, inappropriately trained staff³²⁰³ and lack of communication resulting in professional staff working towards different goals.³²⁰⁴ Another submission noted that issues of confidentiality, continuity of support and burnout of youth workers also needed to be addressed.³²⁰⁵ The NSW Ombudsman's report noted that many caseworkers have limited qualifications or training and that there is a lack of consultation between staff in relation to case plans.³²⁰⁶

20.47 The draft QOC Standards address some of these issues. They indicate that case management provides both rehabilitative and restorative functions. They recognise that young people and their families have a right to participate and negotiate outcomes in the case management process and that case plans should reflect the individual needs of the young person, including cultural and religious identity.³²⁰⁷ The standards set out the stages of case assessment and provide for review of plans on a regular basis, with objectives set during weekly supervision sessions.³²⁰⁸

20.48 The draft QOC Standards set out high quality, comprehensive requirements in this area. However, the Inquiry considers that they should provide, in addition, time frames for the development of a case plan for each detainee to ensure that his or her needs are met as soon as possible after admission.³²⁰⁹

Recommendation 258. The national standards for juvenile justice should provide that a detailed case plan should be developed for each detainee by a detention centre caseworker in conjunction with the young person, within 7 days of entry into detention or within 14 days for a sentence of more than 6 months. The case plan should be reviewed and updated regularly.

Case plans: needs of particular children

20.49 Case plans should address the individual needs of each child. Some jurisdictions provide specifically for particular children in their detention policies and procedures documents, including those from a non-English speaking background or other cultural or religious community, those with a disability or medical condition and previous users of drugs or alcohol.³²¹⁰ Others generally state that case plans should respect specific needs, such as ethnicity, culture and gender, but do not state how these needs should be reflected.³²¹¹ There is insufficient focus in case management procedures in some jurisdictions on the needs of specific groups of children in detention, including children from rural or remote areas,³²¹² gay and lesbian young people,³²¹³ children from the care and protection system³²¹⁴ and the different needs of boys and girls.³²¹⁵ The needs of Indigenous children also are often not specifically addressed.³²¹⁶

20.50 The draft QOC Standards state that case management should incorporate the young person's religious and cultural identity. However, they do not address the specific needs of particular groups of children which encompass wider issues, such as dislocation from family, past abuse, gender differences and sexuality. The standards should also refer to groups with these particular needs.

Recommendation 259. The national standards for juvenile justice should provide that case plans should address the specific needs of particular groups of children including boys, girls, Indigenous children, children from non-English speaking backgrounds, young people in care, gay and lesbian young people and children from rural and remote areas.

Educational and vocational programs

20.51 Educational and vocational programs are important in the rehabilitation of young offenders, particularly for their re-integration into the community. All children have a right to an education.³²¹⁷ The UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 affirm that right for juveniles in detention. They require that education and training in detention be integrated into the mainstream education system and that these programs take account of different cultural backgrounds and the special needs of detainees with literacy or learning difficulties.³²¹⁸ The importance of education in assisting young offenders to re-integrate into the community upon release is widely acknowledged.

[I]f young people in institutional care are to break the cycle of failure, lack of employment, and detention, then strategies must be developed to increase their chances of employment and education.³²¹⁹

20.52 Detention centres in all States and Territories provide educational and vocational programs. The structure and quality of these programs vary across jurisdictions and centres. They usually include life skills, literacy and numeracy courses, matriculation and other recognised educational qualifications. Vocational courses generally cover metalwork, woodwork and automotive skills. Some centres allow for continuation, through distance education, of courses commenced before detention.³²²⁰

20.53 As in the general community, attendance at class is compulsory only for those detainees aged under 15. Those aged 15 to 18 can choose whether or not to attend class. However, many detention centres encourage detainees to participate in educational programs by making various privileges contingent on attendance. For instance, Malmsbury Juvenile Justice Centre in Victoria operates a system whereby detainees can earn small financial bonuses if they complete a certain number of hours a week in TAFE programs. The report of the Senate Employment, Education and Training References Committee's Inquiry into Education and Training in Correctional Facilities in 1996 commended Malmsbury on its outstanding approach to the education and rehabilitation of juvenile offenders.³²²¹

20.54 Many factors make education and training for children in detention problematic. The Senate Committee report noted that most children will not remain in detention for the time needed to complete a course, children may be transferred from one detention centre to another before a course is completed and many young people who enter detention have had very negative experiences with school and education. Some may not have attended school for several years or may have attended only intermittently.³²²²

20.55 A number of submissions expressed concern about the disruption to education caused by transfer or release of young people in detention.³²²³ They noted that disruption could be reduced by day release and referral back to main-stream education,³²²⁴ provision of correspondence courses and teachers for the full calendar year, not simply the academic year,³²²⁵ and clear communication between the detention centre and relevant State education authorities.³²²⁶ Young people in focus groups emphasised that children should be able to get credit for classes taken in detention centres when they return to the mainstream school system.³²²⁷

20.56 The Senate Committee report also noted that the diversity of racial and cultural backgrounds which may co-exist in any one detention centre sometimes makes it very difficult to provide for individual educational needs. In NSW, for example, it was found that young people in detention from 1991 to 1993 came from over 60 ethnic and cultural groups.³²²⁸ The report expressed particular concern about slow progress in the provision of educational and training opportunities for young Indigenous people in custody.³²²⁹ Most centres now include a course on Aboriginal studies in the curriculum³²³⁰ and some have an Aboriginal resource worker or liaison officer to assist in the programs.³²³¹ Riverina Juvenile Justice Centre in NSW offers courses in Aboriginal languages, literature, art, music and dance.³²³² However, a number of submissions expressed concern that educational programs do not provide sufficiently for Indigenous children to study their own culture.³²³³

20.57 Submissions suggested a broad range of approaches to the appropriate mix of educational, vocational and training courses for children in detention. One submission emphasised that programs should focus on giving children basic life skills which will enable them to reintegrate into society.³²³⁴ Other submissions suggested that programs should target literacy³²³⁵ and vocational training.³²³⁶

20.58 The endorsed QOC Standards address some of the issues raised in submissions. They provide for a level of uniformity of standards, assessment processes and learning plans, a curriculum framework based upon the National Key Areas of Competencies, consideration of the needs of detainees and continuation of education and vocational training after release. The QOC Standards also provide for a curriculum which reflects cultural diversity and provides for cultural understanding.³²³⁷ The QOC Standards fulfil a number of requirements under CROC and the Beijing Rules.³²³⁸

20.59 DRP 3 proposed that detainees should be invited to participate in decision making about their specific needs for education and training. This has also been addressed in the endorsed QOC Standards. They provide for a forum for young people to discuss their ideas and issues related to the learning environment as part of a consultative process. They also provide the educational and vocational assessment process to be determined in conjunction with young people.³²³⁹ However, implementation of these provisions in practice must also be ensured.

Recommendation 260. OFC should monitor compliance with the national standards for juvenile justice in relation to the provision of education and training programs in detention. In particular, it should encourage adoption of appropriate mechanisms in juvenile detention centres in each State and Territory for young people to participate in decision making about education and employment programs.

Physical and mental health services

20.60 Evidence to the Inquiry emphasised the importance of providing specialist psychiatric services in detention. Some pointed out that many detention centres do not have the resources or expertise, such as trained psychiatric nurses, to deal with children with a mental illness.³²⁴⁰

20.61 The endorsed QOC Standards provide a comprehensive set of provisions relating to health services for young people in detention. They include an assessment protocol for early identification of drug and alcohol abuse problems, a crisis management strategy for detainees with substance use problems, preventive strategies and post-release arrangements for drug and alcohol abuse. They also provide that each juvenile detention centre is to have a Health Care Policy and Standard Procedures for health care services and that physical and mental health assessment and screening mechanisms should be used.³²⁴¹

20.62 Access to mental health services are set out in the QOC Standards. The standards provide that screening mechanisms are to be administered when a young person is admitted to the centre, that data collected in that process is to form the basis for referral to mental health professionals for further assessment and that clear procedures and protocols for referral to mental health professionals are to be established and regularly reviewed.³²⁴² The Inquiry considers that these standards, if implemented, will ensure high quality mental health services to detainees.

Recommendation 261. OFC should monitor compliance with the national standards for juvenile justice in relation to the provision of specialist psychiatric assessments for detainees. In particular, these assessments should be available to detainees before they are brought before court.

Family and community contact

20.63 Rehabilitation and reintegration of young people into the community is assisted by support structures within the wider community. Regular contact with family and community is the best way to ensure this.

Most detention centres recognise the right of detainees to visitors and correspondence and to privacy. However some centres have adopted strict limits on contact and strict censorship guidelines.

20.64 Most jurisdictions allow detainees to have supervised visits from family during specific visiting hours and uncensored written correspondence.³²⁴³ Correspondence is usually only inspected or visits refused in certain circumstances, for instance, where the security, safety or good order of the detention centre is likely to be adversely affected.³²⁴⁴ Phone calls by detainees to family and friends generally require approval of the youth worker on duty.³²⁴⁵ In the Northern Territory, phone calls are limited, in normal circumstances, to 10 minutes.³²⁴⁶ In NSW, the making of unauthorised phone calls constitutes a 'minor misbehaviour'.³²⁴⁷

20.65 Most jurisdictions treat phone calls and correspondence between the detainee and officials such as the minister, the ombudsman and HREOC and his or her legal representative as confidential.³²⁴⁸ In special circumstances, for instance, where a family crisis has occurred or a visitor has travelled a considerable distance to visit a detainee, visits will usually be permitted outside the set hours.³²⁴⁹ However, there is little national consistency.

20.66 The draft national QOC Standards attempt to introduce basic requirements and a degree of consistency between jurisdictions. They provide, among other things, that policies and procedures of detention centres are to ensure a detainee's right

- to receive visitors, subject to the limitations necessary to maintain order and security and the well-being of the young person
- to a reasonable amount of privacy
- if mail is censored, to natural justice, to be notified of the reasons for the action and provided with the opportunity to appeal the decision or make a complaint.³²⁵⁰

20.67 The needs of Indigenous young people, those from a non-English speaking background and those from remote areas are also reflected to some extent in the draft QOC Standards.³²⁵¹ Individual young people in detention may have special visiting requirements. The Standards provide that detention centres should be sufficiently flexible to accommodate them.³²⁵² However, the standards do not provide for detainees to participate in these decisions or a mechanism for assisting family and community contact.

20.68 The Inquiry considers that assistance should be given to detainees in maintaining contact with their families and the community through provision of a family and community liaison officer in each detention centre. This was also recommended in reports by the Youth Justice Coalition³²⁵³ and Federation of Ethnic Communities' Councils of Australia.³²⁵⁴

Recommendation 262. Detainees should be permitted to participate in decision making about the most appropriate arrangements for family and community contact.

Implementation: National standards for juvenile justice should include this requirement.

Recommendation 263. The national standards for juvenile justice should provide that relationships between detainees and their families and communities should be supported through the appointment of family and community liaison officers in detention centres.

Implementation: National standards for juvenile justice should include this requirement.

Legal processes in detention: complaints and disciplinary procedures

Introduction

20.69 Legal processes in detention, particularly in relation to complaints and discipline, raise significant issues in relation to the well-being and rights of detainees. Proper complaints mechanisms are needed to provide redress for children who suffer mistreatment in detention. Disciplinary procedures must be

consistent with the child's dignity and rights and must incorporate natural justice processes. Regulation of the discretion for dealing with offences committed in detention is also necessary.

Complaints procedures

20.70 Detention policies and procedures manuals in most jurisdictions provide for complaints procedures in detention centres.³²⁵⁵ However, submissions to the Inquiry revealed concern about the apparent inadequacy of complaint mechanisms for children in detention. In particular, submissions pointed out that detainees often have little information about available complaint processes and relevant advocacy bodies.³²⁵⁶ Accessibility of complaints mechanisms depends in large part on how well-informed detainees are about their rights and the availability of support mechanisms for lodging complaints.

20.71 Managers of juvenile detention centres retain wide discretion in dealing with complaints by detainees. The NSW Ombudsman's Inquiry was critical of these wide powers.

Both the legislation and the policy appear to view the Centre Manager as having almost complete discretion to hear and determine any complaints by detainees...It assumes that the Centre Manager is the appropriate first contact for all detainee complaints, and the final contact for the vast majority of them. This fails to appreciate that the Centre Manager will not always be the most appropriate person to deal with a complaint. Detainees should be able to go directly to higher people within the Department, or go directly to outside agencies.³²⁵⁷

The report noted the lack of set complaints mechanisms within detention centres.

The Act and Regulations are silent as to the right of a detainee to complain about his or her treatment. The Department's current policy and practice in relation to complaints by detainees is also greatly inadequate. In most cases, no record exists of complaints received or resolved...There is no person or unit within the Department that is specifically responsible for or trained in the investigation and resolution of complaints. Quite serious complaints involving allegations of serious abuse or harassment have been poorly handled and delayed because of this.³²⁵⁸

In response to this, NSW has recently developed a set of guidelines for complaints by children in juvenile detention centres.³²⁵⁹ They provide for comprehensive recording, review and appeal mechanisms.

20.72 A number of submissions, from both government and non-government organisations, recognised the need for proper complaints mechanisms and for recourse to an independent body or person.³²⁶⁰ Submissions advocated adequate and cost-free legal representation before an independent Ombudsman,³²⁶¹ expansion and better use of the Official Visitor Scheme³²⁶² and an independent duty lawyer scheme to attend to these complaints, particularly where a judicial review is warranted.³²⁶³

20.73 The draft QOC Standards attempt to deal with these issues. They provide, among other things, that each young person is to be given a document detailing the complaints procedures, the right to access and involvement of an advocate or support person of his or her choice to raise and assist in resolving complaints, the right to independent appeal procedures, reporting of complaints by external visitors and annual review of complaints procedures.³²⁶⁴ Standards also provide that complaints procedures must account for the different needs of young people from non-English speaking backgrounds and young people with disabilities.³²⁶⁵ These standards appear to be consistent with a number of provisions under CROC and the UN Rules for the Protection of Juveniles Deprived of their Liberty.³²⁶⁶ The Inquiry considers the QOC standards provide quality, comprehensive guidelines for complaints procedures. These procedures will need to be reviewed regularly³²⁶⁷ and their implementation monitored by OFC.³²⁶⁸

Disciplinary procedures

20.74 All jurisdictions have prescribed the conduct which constitutes a disciplinary offence and the action which may be taken in relation to that conduct. However, generally speaking, there is little formal regulation of the disposal of these cases within centres and no access to legal representation for a child in any formal internal disciplinary hearings. If a child commits an offence while in detention, he or she can generally be dealt with in any of three ways: informally within the centre, formally within the centre or by being charged with a criminal offence. Whether an offence is treated as a disciplinary or criminal matter has very different consequences.

20.75 Most detention centres ensure discipline through the use of cautions, restrictions on sport or recreational activities or giving extra duties.³²⁶⁹ All jurisdictions prohibit corporal punishment in detention centres.³²⁷⁰ Some jurisdictions permit the use of reasonable force in certain circumstances, for instance, where reasonably necessary to protect another person or maintain order in the centre.³²⁷¹ Other jurisdictions prohibit withdrawal of food or clothing as a form of punishment³²⁷² and the use of psychological pressure³²⁷³ or emotional abuse.³²⁷⁴ However, in some jurisdictions, certain acts are treated as criminal offences and can result in more serious consequences, such as extension of the detention period.³²⁷⁵

20.76 Many submissions to the Inquiry argued for greater regulation of the discretion for dealing with offences committed by children in detention.³²⁷⁶ One submission pointed out that detention centres lacked appropriate accountability mechanisms, making it difficult to monitor the exercise of discretions.³²⁷⁷ The NSW Ombudsman's Inquiry identified serious shortcomings.

Staff have significant discretion in how they choose to respond to particular behaviour. Policies and guidelines about the appropriate use of this discretion are required.³²⁷⁸

"Abusive, indecent or threatening language" and "disobeying rules or instructions" were the most common form of minor misconduct reported, accounting for 66% of all reported minor misbehaviour within all centres in the period 1-14 December 1995...This...raises some question as to the manner in which staff interact with detainees on a daily basis and may be linked in some way with the general "culture" of the centres.³²⁷⁹

Group punishments (where an entire group of detainees are punished for the conduct of one or two) are still used in some centres...³²⁸⁰

20.77 The draft QOC Standards address these issues to some extent. They prohibit many forms of punishment, including corporal punishment, the deprivation of essential items or activities, use of physical, verbal, racial or sexual harassment, psychological or physical abuse or neglect and psychological pressure intended to humiliate or intimidate. Staff are not permitted to use other people to administer or supervise punishment to young people.³²⁸¹ The draft standards also set out detailed provisions in relation to the use of physical restraint.³²⁸² The effectiveness of the QOC Standards, however, is dependent on implementation by staff. Training staff in behaviour management techniques is necessary to ensure proper implementation of the Standards.

Recommendation 264. Staff in detention centres should be provided with adequate training in behaviour management techniques to ensure disciplinary procedures are used correctly and effectively.

Isolation, 'time out' and separation

20.78 Juvenile detention centres use two methods of separating detainees as part of behaviour management. 'Time out' is generally used to refer to a period of isolation in a detainee's bedroom or isolation room. Some jurisdictions also refer to this as segregation.³²⁸³ Isolation rooms usually have no furniture, apart a bed if the isolation period is overnight. Detainees can also be placed on longer term separation programs which allow continuation of centre programs but restrict contact with other detainees.³²⁸⁴

20.79 Most jurisdictions prohibit the use of isolation as a form of punishment but permit it for behavioural management, for instance, to protect the safety of other detainees or staff members.³²⁸⁵ Regulation of this practice varies markedly as between jurisdictions. Some permit isolation when the detainee refuses to participate in a program or causes damage to property.³²⁸⁶ In some jurisdictions isolation over a certain period requires approval of senior officials.³²⁸⁷ Others set minimum observation periods.³²⁸⁸ In NSW an isolated detainee is to be placed in a physical environment that is 'no less favourable' than the physical environment of other places in the detention centre.³²⁸⁹ Some jurisdictions place time limits on the actual period of isolation. Maximums range from periods of 3 and 6 hours in some jurisdictions,³²⁹⁰ 12 hours³²⁹¹ to 24 hours and 48 hours in others.³²⁹² The ACT alone limits the time a detainee can be placed in isolation to a maximum of 5 minutes.³²⁹³ The NSW Ombudsman's report found high levels of use of confinement, even though its use is restricted under the legislation and it is recognised as a serious penalty.

In reality, confinement is used much more frequently than is envisaged by the wording of the Act, and some of the "safeguards" set out in the legislation are not routinely provided.³²⁹⁴

20.80 Article 37(a) of CROC provides that no child shall be subjected to cruel, inhuman or degrading treatment or punishment. The UN Rules for the Protection of Juveniles Deprived of Their Liberty provide that confinement constitutes cruel, inhuman or degrading treatment and, as such, is to be strictly prohibited.³²⁹⁵

20.81 The draft QOC Standards regulate the use of isolation to some extent. The standards provide for minimum observation intervals and communication with staff and parents for those in isolation or on separation programs and adequate levels of activity and stimulation for those on a separation program for longer than one hour.³²⁹⁶ An earlier draft of the QOC Standards required the use of isolation to be recorded.³²⁹⁷ However, this is not included in the current draft. Some jurisdictions provide for the recording of isolation.³²⁹⁸ However, this is not a uniform practice. The QOC Standards also do not provide for approval mechanisms for the use of isolation, although some detention centre manuals do.³²⁹⁹ Because of the seriousness of isolation as a behaviour management tool and its propensity to harm children, the Inquiry considers that strict time limits should be placed on any period of isolation. As a further protection, the young person's family, probation officer, legal practitioner or person of their choice should be notified if he or she is isolated for more than a specified period.³³⁰⁰ All incidents of isolation should be recorded.

Recommendation 265. The national standards for juvenile justice should provide that

- each use of isolation is to be recorded on a register
- isolation should be subject to appropriate approval requirements
- maximum periods for which young people in detention can be placed in isolation should be set
- where a young person under 16 years of age is isolated for more than 3 hours or, if aged 16-17, for more than 6 hours, the family and probation officer or legal practitioner for the young person or a person nominated by the young person must be notified immediately.

Natural justice and due process

20.82 As well as being subject to disciplinary procedures, children in detention can also be charged with a criminal offence. A number of jurisdictions set out detention centre offences in their legislation. In most jurisdictions, escape from custody is listed as an offence³³⁰¹ and the matter is heard before a court.³³⁰² However, it is often up to the discretion of the centre manager whether an offence is treated as a disciplinary or criminal matter.³³⁰³

20.83 This discretion is of even more significance in some jurisdictions, such as Western Australia, which set out a number of much broader detention centre offences.³³⁰⁴ Under the Western Australian legislation the manager of the centre can hear and determine the charge or refer the charge to a visiting justice for hearing or determination.³³⁰⁵ If the detainee elects to have the matter dealt with by a visiting justice and not the centre manager he or she can do so under the legislation.³³⁰⁶ However, in many cases detainees may not know their rights or may be reluctant to exercise this option.

20.84 Furthermore, although all jurisdictions recognise that children should have legal representation in criminal proceedings before courts,³³⁰⁷ this right is not extended to detention centre offences.³³⁰⁸ The legislation in Western Australia goes further than this by stating explicitly that a detainee is not to be represented by a legal practitioner at a hearing for such an offence.³³⁰⁹ This means that the discretion of the centre manager in relation to offences is largely unreviewed. Although the centre manager is limited under the Western Australian legislation to a certain length of sentence,³³¹⁰ the lack of regulation poses a number of concerns for children's legal rights.

20.85 Submissions to the Inquiry addressed this issue, stating that detainees should have basic legal rights in relation to disciplinary procedures. In particular, they emphasised that principles of natural justice should always be extended to children.³³¹¹ One submission also noted that young people in detention should be accorded certain basic rights when being dealt with for non-criminal disciplinary offences, including the right to be informed upon entry to the centre of expected standards of behaviour and consequences of failure

to comply, the right to a clear statement of the offence, an opportunity to reply to the allegation, the opportunity to use supporting evidence, the right to confidentiality and the right to seek redress.³³¹² Another submission suggested that offences committed while in detention which do not go before a court should come before a visiting justice and the young person should be entitled to legal representation.³³¹³ The Inquiry agrees that disciplinary offences, both criminal and non-criminal, should be subject to due process and natural justice requirements.

20.86 CROC provides that every child accused of infringing the law is to be guaranteed a number of procedural safeguards.³³¹⁴ The UN Rules for the Protection of Juveniles Deprived of their Liberty also provide that young people in detention should be assisted to understand the disciplinary requirements and procedures.³³¹⁵

20.87 Some of these rights have been incorporated to varying degrees in the draft QOC Standards. The Standards provide that young people are to be given an explanation about what types of behaviour are unacceptable in the centre, the range of rewards for positive behaviour and the range of consequences for negative behaviour and how they are likely to be applied. This explanation should be made available to the young person in both written and oral forms within 24 hours of the child's admission to the detention centre.³³¹⁶

20.88 However, the QOC Standards do not deal specifically with the procedures for criminal offences committed while in detention. In particular, they do not guarantee access to legal representation in relation to these offences. The Standard Guidelines for Corrections in Australia for adult prisoners, by contrast, provide that a prisoner must not be punished unless informed in writing of the alleged offence and given an opportunity to present a case, that where necessary a prisoner must be allowed to use an interpreter to make a case and that, where the punishment may entail an extra sentence, there must be a judicial hearing with a right to legal representation for the prisoner charged with the offence.³³¹⁷ Children therefore have a lesser standard of protection than adults. Juvenile justice procedures manuals in Tasmania and NSW provide comprehensive provisions in relation to criminal offences in detention.³³¹⁸ However, many others do not. The Inquiry considers that these important safeguards should be extended to all children in detention in all jurisdictions.

Recommendation 266. The national standards on juvenile justice should include the following.

- All young detainees should be afforded natural justice and due process in all disciplinary procedures, including the right to be informed of the behaviour which led to the disciplinary measures, to be heard in the decision making process and to have the assistance of an advocate in formal disciplinary procedures.
- Detainees should be guaranteed legal representation in any disciplinary proceedings that could result in an extension to the period of detention.
- Discretion for dealing with criminal offences committed by children in detention should be regulated.

Implementation. In developing the national standards in this area, regard should be had to the detention procedures manuals in Tasmania and NSW and to the Standard Guidelines for Corrections in Australia.

Review of programs and procedures

20.89 The Inquiry considers that the QOC Standards should be supplemented by avenues for review of important services and procedures in detention. The QOC Standards provide that detention centres conduct annual reviews of complaints procedures.³³¹⁹ However, this does not deal with a number of other important issues, such as discipline, leave and parole. It also provides no avenue for other interested parties to request a review of procedures. Providing such a review process would assist those detainees who do not wish to make a complaint to seek review of the particular service and would also assist centres to meet the national standards for juvenile justice. By introducing accountability mechanisms, deficiencies in services could be addressed as soon as problems arise. A detainee, his or her family or the centre manager should be able to initiate the review.

Recommendation 267. Case plans for detainees, medical regimes, disciplinary procedures, isolation, leave, visiting arrangements and parole should be reviewed upon application by the detainee, the detainee's family or legal representative or the manager of the detention centre.

Inspections and legal advice

Introduction

20.90 Inspections and legal advice assist children in detention to protect their rights and interests. Official Visitors and Ombudsman's Offices provide an important external mechanism for review of the treatment and conditions of young people in detention. Access to legal advice is particularly important for providing young people with assistance with appeals and parole applications and advice about their sentences or bail conditions and their rights in detention. It is particularly important for those young people on remand.³³²⁰ Article 37(d) of CROC provides that every child in detention should have the right to prompt access to legal and other appropriate assistance.

Inspections

20.91 Inspections by bodies independent of the relevant detention centre and department are carried out by Official Visitors and Ombudsman's Offices. Although Ombudsman's Offices are not given a legislative right of entry, most States and Territories provide for access to centres by Official Visitors.³³²¹ Official Visitors are appointed by the relevant minister and may provide a report to that minister in relation to conditions in centres.³³²² Some jurisdictions specify that this person should have expertise in some area of juvenile justice and have a demonstrated concern for children in the juvenile justice system.³³²³ Others provide that one of the visitors must be a legal practitioner.³³²⁴ Jurisdictions also differ as to the minimum frequency of visits. In some jurisdictions visits are to be made at least once a month.³³²⁵ Others provide for visits every 3 months.³³²⁶ Others do not specify any particular periods but provide that Official Visitors may attend centres at any reasonable time.³³²⁷ Most jurisdictions also provide that detention centres can also be inspected by the Minister or other authorised at any reasonable time.³³²⁸

20.92 Evidence to the Inquiry indicated that Official Visitors may not be fulfilling their purpose. Concerns raised include that they have no real understanding of issues in detention centres.³³²⁹ A report of the Youth Justice Coalition in NSW noted that Official Visitors and the Ombudsman's Office were insufficiently resourced to fulfil their tasks.³³³⁰ However, it appears that the operation of the Official Visitors scheme, at least in NSW, has improved. A submission from the NSW Government indicates that detention centres are usually visited by Official Visitors fortnightly. The NSW Ombudsman is also able to visit centres twice or occasionally three times a year.³³³¹ A submission from the NSW Ombudsman's Office stated that, in their view, recent changes made in the recruitment, training and resources provided to Official Visitors for juvenile justice centres in NSW has significantly improved their capacity to regularly attend these centres.³³³² The NSW Ombudsman's report also noted some positive developments in relation to the provision of Official Visitors in detention centres.³³³³ It is unclear, however, as to whether similar improvements have been made to Official Visitor's schemes in other jurisdictions.

20.93 The draft QOC Standards provide that detainees can use Official Visitors as an advocate and that complaints processes must contain a mechanism for external visitors to report any complaints.³³³⁴ However, they do not actually require that Official Visitor's schemes be established and external inspections permitted.

20.94 In comparison, the Standard Guidelines for Corrections in Australia for adult prisoners provide that a system of accredited community representatives must be established by each jurisdiction to inspect and observe prison facilities and programs, that these representatives must visit prisons regularly and that prisoners and staff must have access to them. This system must also ensure involvement of Indigenous persons in Official Visitor programs.³³³⁵ Again, the rights of children in detention should be no less than those of adult prisoners.

20.95 The Inquiry considers that Official Visitors should regularly visit all detention centres in all States and Territories. The Inquiry also considers that the role of the Ombudsman's Offices in monitoring juvenile detention centres should be strengthened by more regular visits. In view of the high proportion of Indigenous young people in detention, an Indigenous person should be appointed as an investigation officer. In NSW, for instance, the Ombudsman has an Aboriginal Complaints Officer who visits detention centres.³³³⁶ Similar recommendations to this have been made by a previous juvenile justice report.³³³⁷ The Inquiry notes that a submission from the Northern Territory Government supported our draft recommendation in relation to the strengthening of the role of the Ombudsman's Offices in monitoring detention centres.³³³⁸

Recommendation 268. The national standards on juvenile justice should provide that an Official Visitors scheme be attached to every juvenile detention centre and visit detention centres regularly, preferably fortnightly.

Implementation. The Attorney-General through SCAG should encourage States and Territories to adopt these measures.

Recommendation 269. The role of Ombudsman's Offices in monitoring detention centres should be strengthened by more regular visits, provision of specifically designed information material to detainees and the appointment, where appropriate, of an Indigenous investigation officer for detention centres in view of the high proportion of young Indigenous people in detention.

Implementation. The Attorney-General through SCAG should encourage States and Territories to adopt these measures.

Legal advice in detention

20.96 Evidence presented to the Inquiry indicated that young people in detention face significant difficulties in accessing legal advice and representation.³³³⁹ Of young people in detention surveyed as part of the Inquiry, 38 (31% of respondents to the question) indicated that they were not able to see or talk to a lawyer while in detention.³³⁴⁰ Access to legal advice in detention is an important issue for children, particularly those on remand³³⁴¹ and in relation to parole hearings for those serving sentences.³³⁴²

20.97 Policy and procedures manuals in each State and Territory recognise that young people in detention should have access to legal advice in detention.³³⁴³ The draft QOC Standards also provide that young persons in detention should have access to legal representation.³³⁴⁴ However, proper implementation of these standards is often thwarted due to insufficient numbers of solicitors available to visit detention centres.

20.98 In January 1996 a one year pilot scheme for visiting solicitors, known as the Juvenile Justice Visiting Legal Service, was established in NSW. It allowed a solicitor from the NSW Legal Aid Commission to visit 7 out of 9 juvenile justice detention centres. It was funded by an allocation from project money under the NSW Juvenile Justice White Paper.³³⁴⁵ The NSW Ombudsman's report emphasised the need for this pilot service to continue.

A 12 month trial legal service provided by the Legal Aid Commission...is to end in early 1997... Considering the difficulties many detainees have understanding their rights or the legal process...the Inquiry believes this service is highly needed.³³⁴⁶

An evaluation of the service was undertaken by the NSW Legal Aid Commission in December 1996. The evaluation report recommended that the pilot scheme be expanded to provide a regular visiting legal service for all young people in detention.³³⁴⁷ The NSW Department of Juvenile Justice has allocated \$100,000 to the service in 1997/98 and has established a working party to examine ways in which legal advice and representation of young people in detention can be improved.³³⁴⁸

20.99 The Inquiry considers that a national visiting solicitors scheme should be established in each State and Territory to provide legal advice to young people in detention. The Inquiry notes that its proposal in DRP 3 for a visiting solicitors scheme for all juvenile detention centres was supported by a submission from the Legal Aid and Family Services section of the federal Attorney-General's Department.³³⁴⁹

Recommendation 270. A visiting solicitors scheme similar to that recently piloted in NSW should be established to service all juvenile detention centres. The scheme should involve a solicitor visiting each detention centre regularly and at least once a month. These visits should be publicised in advance to all detainees. Legal advice and advocacy should be provided to detainees for bail applications and appeals, complaints, reviews, disciplinary procedures and broader legal and advocacy needs.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories for the joint funding of this scheme. The scheme should be co-ordinated by the relevant legal aid commission.

Separation of adults and juveniles in detention

Introduction

20.100 Generally young offenders under 18 are detained in a juvenile detention centre. However, provisions governing this issue vary across jurisdictions. In some jurisdictions, detainees may remain in these centres past age 18 and, in some, to age 21. In other jurisdictions, young people in detention can be transferred to an adult prison before they reach 18.³³⁵⁰ Procedures relating to transfers to adult prisons are largely unregulated. Separation of adults from juveniles is also of serious concern in this context. The Design Guidelines provide that detainees should be categorised for accommodation and programs according to their age.³³⁵¹ However, they do not specifically provide for the separation of juveniles from adults. The QOC Standards also do not deal with this issue. National standards governing these areas are therefore required.

Separation from adults: international standards

20.101 Article 37(c) of CROC requires that

[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person...In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so...

Australia has made a reservation to article 37(c). That reservation states

Australia accepts the general principles of Article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by Article 37(c).³³⁵²

20.102 Australia's size and population distribution create significant difficulties in simultaneously ensuring separation of juvenile and adult offenders and enabling young offenders to maintain contact with their families. A number of States and Territories, in particular, Victoria and Western Australia emphasise that the small number of children in adult prisons means that separation from adult prisoners would amount to solitary confinement.³³⁵³ This difficulty is real. It strengthens the case for alternative sentencing options such as recognisance orders and community service orders. However, the reservation is unnecessary. Separation is not required where it is in the child's best interests not to be separated. In its own terms and generally, article 37(c) is subject to the paramountcy of the best interests of the child. If the child's best interests require separation then he or she should be moved to a separate place of detention. If the child's best interests require greater priority for family contact than for separation then he or she should be detained close to home, even if detention is in a facility shared with adults, provided that the child's safety is assured. Recommendation 229 proposes minimum standards for remand of children in rural and remote areas. The implementation of that recommendation will assist to ensure that the standards for young people in that context are suitable.

Recommendation 271. The Commonwealth should withdraw its reservation to article 37(c) of CROC.

Separation from adults in juvenile detention centres and prisons

20.103 Children have particular needs that are very different from those of adult offenders. For instance, they tend to have a reduced fear of danger and display 'acting out' behaviours. They may have volatile behavioural patterns and emotional states, self-harming behaviour, different perceptions of time and shorter concentration spans.³³⁵⁴ They are also more vulnerable to contamination from criminal influences they encounter.³³⁵⁵ Their different behavioural and emotional characteristics require different approaches than those for adult offenders. This has been recognised in other reports.³³⁵⁶

20.104 The differing maturity levels and needs of children has been recognised to some extent by States and Territories. Some jurisdictions recognise that the welfare of young offenders over 18 is best served by keeping them at juvenile detention centres, where possible. For instance, in Victoria and NSW it is possible for young offenders up to 21 years of age to remain in juvenile detention centres.³³⁵⁷ There is provision for separation of children and young adults in some of these centres. For instance, in Parkville Detention Centre in Victoria there is provision for separation of the young female detainees according to age categories. However, commentators have noted that low numbers and staff demands work against separation in practice.³³⁵⁸

20.105 Separating juveniles from adult offenders is important in preventing criminalisation of children through contact with adult offenders. It recognises that children have developmental needs that require different programs and services than those for adults. It protects the well-being and safety of children. In recognition of this, separate units in juvenile detention centres should be established for young adults assessed as suitable for the programs.

Recommendation 272. The national standards for juvenile justice should provide that each State and Territory establish separate sub-units within some centres for detainees aged 18 years and over. These units should be managed using rules and routines more appropriate to young adults.

Transfers to adult prisons

20.106 Children usually serve their sentence in juvenile detention centres until they reach 18. However, young offenders under 18 can be transferred to prison if their behaviour is deemed to warrant such action³³⁵⁹ or, in the Northern Territory, once a young person sentenced as a 'repeat offender' reaches 17.³³⁶⁰ Some jurisdictions, such as Queensland, provide that those aged 17 can be transferred to an adult prison in certain circumstances.³³⁶¹ Others, such as NSW, Victoria and Western Australia, provide that children as young as 16 can be placed in an adult prison in certain circumstances.³³⁶²

20.107 Jurisdictions differ as to what action will justify transfer to an adult prison. Children are usually transferred if they commit a detention offence, that is an assault, escape or attempted escape, or where it is deemed that they cannot be controlled in a detention centre.³³⁶³ However, in some jurisdictions, children can be transferred for less serious reasons, for instance, if they have persistently incited others in the centre to cause a disturbance.³³⁶⁴ Children over a certain age may also request to be transferred to prison.³³⁶⁵ There are currently 58 children serving their sentences in adult prisons.³³⁶⁶

20.108 A number of jurisdictions provide that child and adult offenders should be separated in adult prisons.³³⁶⁷ Others provide for separation of different classes of prisoners, but not for separation of children and adults.³³⁶⁸ Evidence to the Inquiry from a variety of sources, including legal practitioners, youth workers and young people themselves, indicates that placement of children with adult prisoners is quite a widespread practice.

It is not uncommon for children to be detained side by side with hardened adult criminals.³³⁶⁹

The Inquiry heard that children on remand are often placed in police cells alongside adults or placed in adult prisons.³³⁷⁰ The Inquiry was also told that young people with a mental illness are placed alongside adults in

some psychiatric institutions.³³⁷¹ One particularly serious problem was the detention of children in watch houses where they are not separated from adults and are exposed to sexual taunts and harassment and dehumanising treatment.³³⁷²

20.109 In the Northern Territory, correctional officers confirmed that there is no separate accommodation for young people transferred to prison. Furthermore, they confirmed that there are no specific education programs in prisons to cater for the particular needs of young people. The correctional officers noted that the new prison in Alice Springs has facilities to enable young offenders to be accommodated separately from older prisoners, but that there is no requirement that they be kept separate.³³⁷³

20.110 The absence of separate juvenile units in adult prisons presents serious problems. Evidence presented to the Inquiry from a young person who had been in detention indicated that use of the protection unit in prison to separate children from adults can stigmatise young offenders.³³⁷⁴ One submission pointed out that, in areas where there are no juvenile facilities in adult prisons, such as Alice Springs, children are held on remand in isolation cells. There have been approximately 26 children detained at the prison at Alice Springs this year, one of whom was a 12 year old girl. Although children are supposed to be separated from adult offenders, the submission stated that this is enforced inconsistently.³³⁷⁵

20.111 The Inquiry has serious concerns about the placement of 16 and 17 year old children in adult prisons. CROC defines children as persons under the age of 18 years. It also stresses the importance of young people who come into conflict with the law being afforded treatment appropriate to their age and legal status.

20.112 Placing a young offender in an adult prison does little to advance the rehabilitative aims of juvenile justice, particularly as contact with adult offenders has a tendency to further criminalise young offenders.³³⁷⁶ This is particularly so if there are not adequate facilities to accommodate and deal with young people separately within the adult prison and appropriate educational and other programs necessary for that age group. The Inquiry would regard as preferable a system whereby young offenders could remain in the juvenile detention centre where possible. Implementation of Recommendation 272 would advance this result.

20.113 There are also no agreed national standards that provide natural justice mechanisms for young people in relation to the decision to transfer. In NSW, an order to place a child in an adult prison must be reviewed at least once a month by the relevant minister and there is provision for the child to apply to court to have the order varied or revoked.³³⁷⁷ The NSW legislation also provides that the child is entitled to be heard and to be legally represented in the proceedings. However, in other jurisdictions, such as Victoria and South Australia, the decision is made by a parole board or court, without giving the young person the opportunity to be heard or the right of review.³³⁷⁸

20.114 The Inquiry heard evidence from one boy who had been transferred to an adult prison when he was 16 after he had absconded from a juvenile detention centre. He was transferred as a result of ministerial approval and there was no opportunity for review or appeal from that decision. That particular boy spent two and a half years in the adult system.³³⁷⁹ Given that children are not generally separated from adults in prison, the implications for young offenders of a transfer to prison is serious. Most jurisdictions do not oblige decision-makers to consider whether suitable accommodation is available in prison before approving a transfer.³³⁸⁰ The provision of natural justice processes in relation to transfer to an adult prison is essential.³³⁸¹

Recommendation 273. No child under the age of 18 should be placed in an adult prison unless a court decides that it is in the best interests of the child to do so.

Implementation. State and Territory Parliaments should amend laws that permit or require the detention of children in adult prisons for any other reason or on any other basis.

Recommendation 274. The national standards for juvenile justice should include a list of general principles and factors to be considered in the determination of all prison transfer decisions, including

- that the safety and interests of the young person should be respected
- the capacity of the prison system to protect the young person
- the most suitable environment for the young person and his or her future and

- the right of the young person to be consulted and represented.

Recommendation 275. The national standards for juvenile justice should provide that transfer policies and procedures in each jurisdiction recognise that young people for whom a transfer is being considered should

- have the assistance of an advocate in making any written or oral submissions concerning the transfer application
- be provided with accurate information about the operation of the adult system
- be given reasons for the decision and a right of review of the decision.

Recommendation 276. The national standards for juvenile justice should provide that the departments in each State and Territory dealing with juvenile justice and adult corrections centres should establish greater links so that any young person transferred to an adult institution may continue the programs commenced in the juvenile justice system. Long term case plans should be developed for those detainees likely to be transferred to the adult system.

Children with particular needs

Introduction

20.115 Certain children have particular needs in relation to detention. For instance, young people from rural or remote areas who are sentenced to a period of detention are likely to be placed in a centre far from their family and community. Maintaining contact with their family and friends is therefore a particularly important need for these young people. Indigenous children and children from some ethnic backgrounds also have particular cultural needs. Their needs may include access to culturally relevant counselling, education and family reconciliation services.³³⁸²

20.116 The draft QOC Standards already provide for the particular needs of certain groups in detention. They deal with different cultural needs of detainees and the needs of children with disabilities.³³⁸³ However, the standards should be more specific in relation to a number of groups at particular disadvantage in detention.

Children from rural or remote areas

20.117 Children who live in rural or remote areas face particular problems when they are placed in detention. There are few centres in rural areas in most Australian jurisdictions.³³⁸⁴ As a result, detainees are likely to be placed in a centre far from their family and community. They may suffer a greater degree of dislocation than children from urban areas.

20.118 For these children, maintaining links with their families and communities through visits, work release and transitional programs is much more difficult. This can hinder the successful re-integration of these young people into the community following release from detention. The problems raised by this isolation are also problems felt most keenly by Indigenous children, many of whom reside in rural or remote areas.³³⁸⁵

Indigenous children

20.119 The particular needs of Indigenous children are catered for to a limited extent in juvenile detention centres. One of the fundamental problems Indigenous detainees face is that detention centres in Australia are often located far from their communities. The Inquiry was repeatedly told of the difficulties this causes Indigenous children and their families.³³⁸⁶

20.120 Particular concern was expressed about the lack of detention centres in rural areas in Western Australia and the Northern Territory. Because all young people in detention in those jurisdictions are held in custody in Perth and Darwin, Indigenous children are often moved hundreds and, in some cases, thousands of kilometres away from their communities.³³⁸⁷ The Inquiry was told that not one of the eight Indigenous

children in Don Dale Centre in Darwin had received a visitor during their period of detention.³³⁸⁸ Four of the children were from communities more than a thousand kilometres from the centre.³³⁸⁹ The NSW Ombudsman also pointed to research conducted in NSW into juvenile detention centres which revealed that, of the 33 Indigenous young people surveyed

- eight were ten or more hours from their home and community
- eight said they had received no visits from their families and
- two stated that it had been fifteen and eighteen months respectively since they had seen their families.³³⁹⁰

Isolation has also been identified as a major problem by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families report, particularly as Indigenous children are more likely to come from a rural or remote area.³³⁹¹

20.121 Some jurisdictions have instituted measures to provide for the special needs of Indigenous children. A submission from the Townsville Community Legal Service noted that some prisons have installed video conferencing to allow communication with communities in remote regions. The submission suggested that this measure be extended to all youth detention facilities.³³⁹² The Inquiry was also told that Don Dale Centre in the Northern Territory liaises with the local communities of Indigenous detainees in assessing their particular needs.³³⁹³ A number of detention procedures manuals and policies also point to the need for culturally appropriate detention.³³⁹⁴ Queensland's policy document provides that Indigenous agencies and community members should be actively involved in the design and delivery of services and that Indigenous detention centre staff should be employed to reflect the numbers of detained Indigenous children.³³⁹⁵ Victoria reports that it has trained all direct care workers in Indigenous culture.³³⁹⁶ Western Australia has piloted an Aboriginal Supervision Program.³³⁹⁷ NSW also has piloted an Aboriginal mentor program covering detention centres, which is currently being evaluated. A recent media report criticised staff cuts made to the program.³³⁹⁸

20.122 A number of submissions to the Inquiry indicated that proper implementation of these programs and policies may not be occurring.³³⁹⁹ One submission stated that programs for Indigenous children in detention tended to be mere 'lip service'.³⁴⁰⁰ A similar view was expressed in a submission from the Law Society of NSW which pointed out that

[w]hile programs relating to indigenous children have a high profile on paper, they are not implemented properly, in a majority of cases, because of insufficient funding and support, together with insufficient involvement of the child's own community.³⁴⁰¹

The submission from the Aboriginal Legal Service of Western Australia noted that comments provided to them from Indigenous children in detention indicated that a culturally appropriate environment may not exist in some juvenile detention centres.

I hate it inside. The guards look down on us Aboriginal kids. I know its not good for the white kids but we have it worse. They treat us like animals. They don't think we have a brain. They think all Aborigines are crooks. I remember last time I got out of jail, one of the guards said he looked forward to seeing me back soon. He had a smile when he said it.³⁴⁰²

It is hard for my family to visit me. They are scared of prison and white authorities. Dad has been in prison a few times and mum was at New Norcia. Dad was in a mission up near Broome. It was just like a prison. My brother is in Casuarina now. When my mum and dad come to visit me they get really upset and scared. It must be all the bad memories from their childhood and dad's stay in prison. The prison officers don't help. They are not friendly. We don't trust them.³⁴⁰³

20.123 A report by the Youth Justice Coalition in 1990 recommended that the number of Indigenous staff in detention centres be increased, including in management positions.³⁴⁰⁴ While Indigenous staffing levels have improved, the numbers are not in proportion to the percentage of Indigenous detainees as compared to non-Indigenous detainees.³⁴⁰⁵ The small numbers of Indigenous staff in detention centres may stem from a reluctance on the part of adult Indigenous people to be employed in a custodial role.³⁴⁰⁶ A submission to the Inquiry pointed out that perhaps Indigenous involvement would be better facilitated as support persons.³⁴⁰⁷

20.124 Evidence to the Inquiry emphasised the need for more awareness of Indigenous kinship systems and the importance of the extended family.³⁴⁰⁸ A submission noted that, while Indigenous detainees are given assistance with literacy, numeracy and work skills, they should also be encouraged to study their own culture.³⁴⁰⁹ Other submissions called for employment of Indigenous juvenile justice and probation officers³⁴¹⁰ and greater involvement of Indigenous communities in providing services to Indigenous children in detention, such as culturally appropriate counselling, social, cultural and educational programs.³⁴¹¹

Detention of children from non-English speaking backgrounds

20.125 Over the last decade there has been increasing representation in detention of children from certain non-English speaking backgrounds in some jurisdictions.³⁴¹² Common problems faced by these children include language barriers, lack of knowledge by staff of detention centres of the young person's culture and traditions, alienation of the offender from his or her parents, family and community and the lack of appropriate programs and services. Submissions to the Inquiry stressed the importance of providing children from non-English speaking backgrounds with access to culturally relevant counselling, education and family reconciliation services³⁴¹³ and employing juvenile justice and probation officers from non-English speaking backgrounds.³⁴¹⁴

20.126 Legislation and policy in some jurisdictions are beginning to respond to the specific needs of children from these groups through the provision of information in languages other than English and interpreters.³⁴¹⁵ The draft QOC standards also make provision in a number of areas for children from non-English speaking backgrounds.³⁴¹⁶ However, access to these services depends very much on each individual detention centre. National monitoring of implementation of the standards is needed.

Girls in detention

20.127 A number of submissions to the Inquiry emphasised that girls have particular needs in detention.³⁴¹⁷ For instance, it is important for young women in detention to have access to female case workers.³⁴¹⁸ The particular needs of girls in detention have been recognised in some detention centre policy and procedures documents.³⁴¹⁹ However, the number of girls in detention is very small. As one submission pointed out, this means that girls in larger male-dominated institutions often find that the management, staff training and programs cater primarily for the majority male population.³⁴²⁰ Consequently, girls often become marginalised in the system. Commentators have also noted that girls admitted to detention can have serious social, emotional and health problems³⁴²¹ and that their small numbers often mean that they are not given priority in allocation of resources.³⁴²² This is significant in terms of Australia's human rights obligations. The Beijing Rules require that the personal needs and problems of girls should be given attention.³⁴²³

Recommendation 277. The national standards in juvenile justice should provide for the development of programs and services in all jurisdictions to address the needs of particular groups of children in detention including children from non-English speaking backgrounds, Indigenous children, children from rural and remote areas and girls in detention.

Transition from detention

Introduction

20.128 Young people released from detention commonly face difficulties re-integrating into the community, particularly in continuing education or training or obtaining employment. They can also encounter problems with simple tasks in day-to-day life. One submission to the Inquiry pointed out

[s]ome young people who are locked up for several months find it difficult on release to walk into a shop and make a purchase.³⁴²⁴

20.129 A number of submissions raised concern over the lack of assistance given to offenders after detention.³⁴²⁵ One submission noted

[t]he lack of ongoing support creates a huge chasm between the structure of the detention centre and the unstructured world outside.³⁴²⁶

Young people, in a survey conducted as part of the Inquiry, said

[b]oys are still not told of all the support they can get on the outside.³⁴²⁷

Should have more support for boys when they leave JJC [Juvenile Justice Centre].³⁴²⁸

20.130 Submissions and evidence presented at public hearings emphasised the importance of community re-integration programs in rehabilitating young people in detention and preventing them from re-offending.³⁴²⁹ Support for young people during and after detention is important. However, support after release is particularly important for the detainee's re-integration into the community.

Experience suggests that most programs within detention centres...will only affect their behaviour if the external environment supports them on release.³⁴³⁰

The Director of the Department of Juvenile Justice in NSW noted recently that, in the face of shrinking federal and state budgets, social welfare departments and agencies are often forced to retract services from particular client groups. Young offenders are particularly vulnerable. They are seen as undesirable housing clients. They receive few services from the mainstream health system and their particular health problems, such as drug and alcohol abuse, are often seen to be their own fault, a consequence of their lifestyle choices.³⁴³¹

Transitional programs

20.131 Submissions identified key elements for transitional programs. They include continued case planning up to release and opportunities for self-direction and community involvement through parole and release programs.³⁴³² Australian jurisdictions incorporate these elements in their transitional programs to varying degrees.³⁴³³

20.132 Submissions to the Inquiry were strongly supportive of properly funded transitional programs for young people in detention.³⁴³⁴

Institutional environments can result in loss of initiative, communication skills, and independent living skill...Transitional programs must provide opportunities for self-direction and the taking of responsibility and set up community resources before release.³⁴³⁵

20.133 The WA Ministry of Justice said in its submission that each detainee should have a tailored management plan which culminates in release planning. It sub-mitted that the transition planning process should involve parents, other significant adults, educational service providers and the young person in deciding on post-release arrangements. The appointment of a field officer to provide support after release (preferably the case worker during the detention period) was also seen as an essential element in the transition process.³⁴³⁶

20.134 The Inquiry was told that a protocol is currently being drafted by the Department of Families, Youth and Community Care and the Department of Corrective Services in Queensland to continue case planning through release into the community supervision component of the detainee's sentence.³⁴³⁷

20.135 Research on transitional support schemes is scarce and inadequate. However, recently NYARS published the results of a study on transitional arrangements for young offenders.³⁴³⁸ The researchers interviewed juvenile justice policy officers, detention centre managers, program co-ordinators, staff of community-based services and young people. It noted that transitional arrangements and policies for the release of young people from custody vary markedly across jurisdictions. In particular, they found significant disparities in relation to temporary leave schemes. In some States use of these schemes is extremely limited or 'practically non-existent'.³⁴³⁹

20.136 Both the endorsed and the draft QOC Standards emphasise the importance of community re-integration after release.³⁴⁴⁰ The NYARS study noted that these standards were a worthy attempt to obtain

national agreement in relation to certain areas.³⁴⁴¹ However, the QOC Standards do not provide for maintaining community contact during detention or staged release through day and weekend leave and work release. A number of submissions emphasised the importance of this in rehabilitating young people in detention.³⁴⁴² The Inquiry considers that pre-release community involvement and post-release support are essential for the success of young offender's reintegration into the community. Particular emphasis should be placed during the detention period on providing children with day, weekend and work release to ease them gradually and successfully into the community.³⁴⁴³

Recommendation 278. The NYARS study on transitional arrangements for young offenders should be analysed by each relevant federal, State and Territory department to ascertain the best features of existing pre-release and post-release support schemes for young detainees. Agreed strategies should be incorporated in the national standards for juvenile justice with a view to ensuring their expansion and widespread application.

Recommendation 279. The national standards for juvenile justice should include particular provisions for pre-release support schemes, such as day and weekend leave, work release and other forms of community involvement.

Employment placement and support

20.137 Obtaining employment after release is one of the most effective ways to assist young people to re-integrate into the community.³⁴⁴⁴ The Commonwealth Government recently announced a range of pilot projects for young offenders, called the 'Improved Integration of Young Offenders into Employment, Education, Training and Community Life', to promote re-integration into education, training and employment. Responsibility for operation of the projects will be shared between DEETYA, which will be responsible for those involving single case management, and ATSIC, which will co-ordinate those aspects of the pilots which are specifically directed at young Indigenous people. The Commonwealth has set aside \$1m in 1997–98 for these initiatives. In addition, JPET assistance will be provided to young people who are or have been in the juvenile justice system.³⁴⁴⁵ The Inquiry applauds these initiatives and encourages their further development.

Recommendation 280. The pilot projects for young offenders established by the Commonwealth should be continued and developed into a national young offender employment and training scheme to enable intensive and supervised job training, placement and support for young offenders. Assistance should begin while the young person is in detention and continue after his or her release.

National standards: research and training

Research

20.138 The NSW Ombudsman's Inquiry into Juvenile Detention Centres in that State has been a valuable benchmarking study. The Inquiry considers that a similar study should be undertaken nationally. All youth detention centres should be audited for compliance with the national standards for juvenile justice and with human rights commitments. To ensure consistency, the audit should be undertaken on a national basis. The results of the audit should be published. Each jurisdiction should undertake a program of up-grading detention centres, their policies and their programs, on the basis of this audit.

Recommendation 281. Upon completion and endorsement of the national standards for juvenile justice, a national audit should be undertaken of every juvenile detention centre in Australia for compliance with those standards and with human rights commitments. The results of the audit should

be published and each State and Territory government should undertake a program of up-grading detention centres, including policies and programs, on the basis of this audit.

Implementation. The Attorney-General through SCAG should encourage State and Territory governments to agree to the national audit of juvenile detention centres and provide the published results of the audit to OFC.

Collection of data

20.139 A number of different research bodies collect information on young people in detention. However, there is no comprehensive national data base on this.³⁴⁴⁶ The AIC collates statistics from the States and Territories quarterly but this information is limited. The statistics encompass gender, age, status of detainee (remanded or sentenced) and Aboriginality but does not include offence, sentence or other demographic information.³⁴⁴⁷

20.140 Collection of data is particularly important in two areas. The first is recidivism rates for detainees. The NSW Department of Juvenile Justice published a collection of statistics relating to recidivism in 1996. A submission from the NSW Government to the Inquiry suggested that this could form a valuable model for a national research project.³⁴⁴⁸ The Inquiry agrees. This information is essential to identify the kinds of programs that work most effectively and to build community support for those programs. The second area is information on young people from specific groups who enter detention. This data is required to inform policy and program development on the over-representation of certain groups and their particular needs in detention. This should include information about the numbers of children who are or have been in the care and protection system.³⁴⁴⁹

Recommendation 282. Information about recidivism rates for detainees should be collected and analysed on a national basis.

Implementation. States and Territories should collect this data through the most appropriate agency in each jurisdiction. The data should be provided to OFC for national analysis and scrutiny in conjunction with ABS and the AIC.

Recommendation 283. Information about the numbers of young people from specified groups who enter detention should be collected and subjected to national analysis and scrutiny. It should record the numbers of boys and girls, children from rural and remote areas, Indigenous children, the ethnic and socio-economic backgrounds of children, children who have been in the care and protection system, children with disabilities and any other groups of children who experience particular problems or have special needs within the detention system. The data should also include information about recidivism rates of young people from each group. The data should inform policy and program development in relation to all children and each group of children.

Implementation. This data should be collected by States and Territories through the most appropriate agency in each jurisdiction. The data should be provided to OFC for national analysis in conjunction with ABS and the AIC and incorporation into the national standards, policies and programs.

Training

20.141 The Beijing Rules provide that professional education and training should be provided to all personnel dealing with young offenders.³⁴⁵⁰ The UN Committee on the Rights of the Child has recognised the need for systematic training of professionals working with or for children in juvenile justice.³⁴⁵¹ To ensure that the national standards for juvenile justice are properly implemented, relevant officials should be trained in the application of the standards. The NSW Government noted that it had allocated \$2.4 million for 1997–98 and 1998–99 for training front line community-based and custodial staff based on national competencies established by the AJJA.³⁴⁵² This should encompass training in relation to the National Design Guidelines and QOC Standards. The Inquiry considers that other States and Territories should ensure proper training for relevant officials working with young people in detention.

Recommendation 284. All those working with young people in detention should be trained in the application of the national standards for juvenile justice.

Implementation. Appropriate training programs should be developed by relevant State and Territory authorities in consultation with the OFC.

Recommendation 285. Official Visitors should be given training on the national standards for juvenile justice and be made aware of the procedural requirements in detention and of the advocacy needs of detainees.

Implementation. Each detention centre should provide this training.

Implementation of past reports

Introduction

20.142 Reports from previous inquiries have made recommendations in relation to young people in detention. They include the Royal Commission into Aboriginal Deaths in Custody,³⁴⁵³ the NSW Ombudsman's Inquiry into Juvenile Detention Centres³⁴⁵⁴ and the HREOC National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families.³⁴⁵⁵

Royal Commission into Aboriginal Deaths in Custody and subsequent reports

20.143 The Royal Commission into Aboriginal Deaths in Custody recommended, among other things, that

- Indigenous children's families, communities and specialist Aboriginal organisations be involved in decisions affecting Indigenous young offenders
- that Indigenous people be employed as youth workers
- that juveniles should not be detained in police lock-ups
- that strategies be designed to reduce the rate at which Indigenous juveniles are separated from their families and communities
- that where possible Indigenous juveniles are to be placed in an institution as close as possible to their families
- that financial assistance should be given to facilitate visits by family and
- that shared accommodation for community living be introduced.³⁴⁵⁶

Some attempts have been made by States and Territories to implement these recommendations.³⁴⁵⁷ A number of these recommendations have been taken into account in the Design Guidelines and QOC Standards and in detention centre policies. However, a number of submissions to the Inquiry and subsequent reports indicate that many of these recommendations are yet to be implemented fully by States and Territories.³⁴⁵⁸ Indeed, a submission from the NSW Ombudsman expressed concern that so many of the Royal Commission recommendations are yet to be implemented.³⁴⁵⁹

20.144 A number of submissions pointed to the over-representation in detention as one of the most serious problems facing Indigenous children.³⁴⁶⁰ Over-representation of Indigenous children in juvenile detention facilities remains a significant and continuing problem in all States and Territories but particularly in Queensland and Western Australia.³⁴⁶¹ In some jurisdictions the problem is worse, not better, than when the Royal Commission reported. The 1996 report of the Aboriginal Social Justice Commissioner on Indigenous Deaths in Custody noted that there were 15 juvenile deaths in custody between May 1989, the time of the last death investigated by the Royal Commission, and May 1996. Five of these children were incarcerated in adult prisons.³⁴⁶² The report pointed out that the average age of death in custody was younger for Indigenous

than for non-Indigenous prisoners. This has significant implications for preventing deaths of Indigenous children in custody in the future.

As the Indigenous juvenile population grows proportionately larger than the non-Indigenous juvenile population, deaths of young Aboriginal and Torres Strait Islander people can only be expected to increase if significant measures are not taken to reduce the disproportionately high level of contact young Aboriginal people presently have with the criminal justice system.³⁴⁶³

20.145 The Royal Commission also recommended that custodial institutions appoint complaints officers to hear and act upon the complaints of prisoners.³⁴⁶⁴ South Australia has implemented this recommendation by appointing a Secure Care Visiting Officer to visit centres regularly and be available to speak to Indigenous detainees.³⁴⁶⁵

20.146 The National Inquiry into the Separation of Aboriginal and Torres Strait Children From Their Families recommended in *Bringing Them Home* the enactment of national standards legislation to address the particular circumstances of all Indigenous children.³⁴⁶⁶ That Inquiry recommended arrangements to permit Indigenous communities to take greater responsibility for their young offenders. This Inquiry endorses those recommendations. Their implementation would result in improvements such as the provision of services to assist family members from rural and remote communities to visit their children, culturally appropriate programs in detention and close involvement of Indigenous organisations in all matters affecting Indigenous detainees.

20.147 Some of the matters raised by the Royal Commission into Aboriginal Deaths in Custody and *Bringing Them Home* have been addressed to some extent in the AJJA Design Guidelines. One of the guiding principles of the guidelines is

[r]ecognition of some aspects of customary law in the management of offenders by Aboriginal and Torres Strait Islander communities who accept such responsibilities should be examined as a means of emphasising community responsibility for crime.³⁴⁶⁷

The Design Guidelines emphasise that all recommendations of the Royal Commission should be observed. Specifically, double bedrooms or interconnected bedrooms should be available and rooms should be designed to minimise risks of self-harm.³⁴⁶⁸ A number of jurisdictions have provided for this in their juvenile detention centres.³⁴⁶⁹ The draft QOC Standards also provide that intervention with an Aboriginal Young Person at risk of self-harm should respect a policy of Aboriginal self-determination.³⁴⁷⁰

20.148 The Design Guidelines provide that

- detainees should be located as closely as possible to their families and communities
- families and communities should be encouraged to maintain close contact with detainees
- families and communities should be involved in decision-making relating to placement, controls and programs for detainees
- when locating Aboriginal detainees, facility management should take account of traditional relationships and interactions
- specific cultural areas should be provided within the facility and
- the views of the local Aboriginal community and Aboriginal organisations should be taken into account in the design of facilities.³⁴⁷¹

Because Indigenous children are often detained in centres thousands of kilometres from their local community, the national standards for juvenile justice should also encourage home detention.³⁴⁷²

NSW Ombudsman's report

20.149 The NSW Government reports that it has adopted the recommendations of the NSW Ombudsman's report into juvenile detention centres as the 'blueprint for reform' of the juvenile detention system in NSW.³⁴⁷³ Information from the NSW Ombudsman's Office indicates that an implementation strategy and taskforce has been established. The taskforce deals with issues of staff training, developing a complaints handling policy and procedures for reviewing behaviour management practices for detainees.³⁴⁷⁴ In Stage One of the process, each juvenile detention centre was provided with a list of recommendations to implement. The list of recommendations focused, among other things, on the level of family contact by Indigenous detainees, involvement of Indigenous organisations and communities within the centres, a review of all detainee handbooks, recruitment of staff from various cultural backgrounds and additional assistance on rules, routines and rights for detainees with intellectual disabilities.³⁴⁷⁵

20.150 All centres provided progress reports on these recommendations in May 1997. The Ombudsman found that each of the centres had developed initiatives for implementing the recommendations. These initiatives included development of an admission video explaining rules, rights and responsibilities of detainees at Riverina, provision of an Aboriginal Education Assistant to co-ordinate involvement of Aboriginal organisations in school curriculum, pre and post-release discharge planning at Keelong and encouragement of family contact and visits by various Indigenous organisations at a number of centres.³⁴⁷⁶

20.151 Stage Two of implementation of the recommendations is now underway. Each centre nominated its own area of priority for this stage. Implementation will vary widely between centres as a result. Progress reports on Stage Two will be requested by the Ombudsman's Office in October 1997.³⁴⁷⁷

Recommendation 286. Implementation of recommendations relevant to young people in detention from previous inquiries including the Royal Commission into Aboriginal Deaths in Custody, the NSW Ombudsman's Inquiry into Juvenile Detention Centres and the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families should be accelerated. This may require additional resources from the responsible governments.

Implementation. The Attorney-General through SCAG should encourage State and Territory governments to implement these recommendations.

Appendix A: Participants

ALRC

Division

The Division of the Commission constituted under the *Australian Law Reform Commission Act 1996* for the purposes of this reference comprises the following.

President

Alan Rose AO

Deputy President

Sue Tongue (to 5 October 1995)

David Edwards PSM (from 13 December 1995)

Members

Dr Kathryn Cronin (from 2 February 1996)

Professor Bettina Cass

Justice Ian Coleman

Michael Ryland (to 29 November 1996)

Christopher Sidoti (to 11 August 1995)

Officers

Team Leader

Sally Moyle

Law Reform Officers

Sabina Lauber (from October 1995 to January 1996)

Frith Way (from January 1996)

Deborah de Fina (from February 1997)

Research Assistants

Rita Shackel (to 13 December 1996)

Katherine McFarlane (from September to November 1995)

Legal Interns

Hanne Andersen (to 29 February 1996)

Kristen Sykes (from 15 January 1996 to 9 February 1996)

Eva Dinesen (from 1 August 1996 to 1 February 1997)

Clare Kelly (from 2 July 1996 to 14 February 1997)

Rhea Knoblauch (from 2 December 1996 to 21 February 1997)

Ilan Freiman (from 4 March 1997 to 30 May 1997)

Project Assistant

Jan Brennan (to 29 March 1996)

Bridie Healy (from 1 April 1996)

Library

Joanna Longley, *Librarian*

Emma Joneshart, *Library Officer* (to 5 September 1996)

Yasmin Catley, *Library Officer* (from 25 September 1996 to 24 April 1996)

Typesetting

Anna Hayduk

Rhonda Kasalo

HREOC

Human Rights Commissioner

Christopher Sidoti (from 14 August 1995)

Officers**Senior Adviser to the Human Rights Commissioner**

Kieren Fitzpatrick

Policy/Research Officers

David Robinson

Maria O'Sullivan (from 26 May 1997)

HREOC Staff**Consultants**

Michael Antrum, National Children's and Youth Law Centre (from 12 February 1997)

Professor Rebecca Bailey-Harris, University of Bristol

Barbara Biggins, Young Media Australia

Dr Kay Bussey, Macquarie University

Brian Butler, formerly Secretariat of National Aboriginal and Islander Child Care

Ron Cahill, Chief Magistrate (ACT)

Pam Cahir, Australian Early Childhood Association

Sally Castell-McGregor, formerly Children's Interest Bureau (SA)

Bill Clark, Smiths Snackfood Company (to 2 October 1996)

Chris Cunneen, University of Sydney

Dr Kate Funder, Australian Institute of Family Studies

Michael Hogan former Public Interest Advocacy Centre

Barbara Holborow, former Children's Magistrate

Hal Holley, former Eastern Area Service for Youth

Justice Hal Jackson, District Court of WA

Marie Kelly (from 2 October 1996)

Robert Ludbrook

Catherine Morrison, Sydney Girls' High School

Gwenn Murray, Youth Advocacy Centre Inc

Jan Owen, Australian Association of Young People in Care

Moirra Rayner, Dunhill Madden Butler

Kathy Scott, AMR Quantum Harris

Dr John Seymour, Australian National University

Young people's panel

Mohammed Abdul-Khalek

Tarik Alameddine

Angela Brown

Amelia Cormack

Sacha Delfosse

Greg Downes

Amanda Duell

Claire Hamilton

Damien House

Amie Madden

Clare Sidoti

Andrew Tod

Appendix B: Written submissions

Submissions on terms of reference

<i>Name</i>	<i>Submission number</i>
Aboriginal and Torres Strait Islander Commission	104, 129
Aboriginal Justice Advisory Committee (Qld)	130, 135
ACT Government Solicitor	87
ACT Juvenile Justice Service	94
Advertising Federation of Australia	66
Association of Independent Schools (Qld)	106
Attorney-General's Department (ACT)	150
Australian Association of National Advertisers	61
Australian Federal Police	126
Australian Institute of Criminology	53
Australian Institute of Family Studies	26
Australian Language & Literary Council	28
Australian Red Cross (NSW Division)	118
Australian Sports Commission	47
AJ Barblett, Deputy Chief Justice, Family Court of Australia	5
Barnardos Australia	62
M Baume, Senator	123, 155
Board of Studies (NSW)	54
A Bond-Hughes	8
P Boss	48
D Bowen, Family Court Counselling Family Court of Australia	93
BoysTown (Qld)	17
P Braddy, Minister for Corrective Services, Minister for Police (Qld)	139
L Brereton, Minister for Industrial Relations	162
DF Bright J, District Court (SA)	98
T Brown, Monash University	56
K Buttrum, Juvenile Justice (NSW)	36, 156
O Campbell	73
Catholic Education Commission (NSW)	122
Catholic Education Office (NT)	100
J Cavanagh, Spectrum Human Services (Vic)	15
Centacare (ACT)	31
Centacare Sydney	59
Child Family & Community Support (Tas)	161
Child Protection Board (Tas)	77
Child Support Action Group (SA)	154
Child Support Agency, Australian Taxation Office	108
Civil Law Division, Attorney-General's Department	143
Commissioner, NSW Police Service	140
Commonwealth DPP	110, 127
Commonwealth Ombudsman	138
Community Services Commission (NSW)	27, 71
Confidential	168
J Consedine	2
Consumer Credit Legal Centre (NSW)	107
Corrective Services Commission (Qld)	158
Council of Single Mothers and their Children Inc (Vic)	55
Criminal Law Division, NSW Attorney-General's Department	43, 151
Curriculum Corp (Vic)	14
C Dawe SJ, Youth Court (SA)	39

Department of Correctional Services (NT)	33
Department of Education (Qld)	90
Department of Education and Training (ACT)	116
Department of Employment, Education and Training	133
Department of Family and Community Services (Qld)	99
Department of Housing, Local Government and Planning (Qld)	91
Department of Immigration and Ethnic Affairs	125, 147
Department of Justice (Vic)	10, 112
Department of Premier and Cabinet (Tas)	78
Department of Social Security	114
Department of the Chief Minister (NT)	103
Directorate School Education (Vic)	119
N Doherty	165
Director of Public Prosecutions (NSW)	37
R Dyer, Minister for Community Services, Minister for Aged Services, Minister for Disability Services (NSW)	136
C Eastwood, Queensland University of Technology	60
Education Department (WA)	153
C Edwardes, Attorney-General (WA)	149
Ethnic Childcare, Family and Community Services Co-operative (NSW)	52
Ethnic Communities Council of Tasmania	20
G Evans, Senator	115
Families at Work (NSW)	67
Family & Community Services (SA)	79
Family Law Reform Association Inc	49
Family Law Section, Law Institute of Victoria	97
Family Services Council	86
Federation of Community Legal Centres (Vic)	167
Federation of Ethnic Communities' Councils of Australia	4
Gay and Lesbian Rights Lobby (NSW)	132
Hal Ginges & Co (NSW)	50
N Goodsell, Court Counselling Family Court of Australia	19
B Gosbell	164
J Grant	74
J Greig MP, Reynell Electorate Office	84
Illawarra Area Health Service	92
Immigration Advice & Rights Centre (NSW)	64
Independent Schools Board (SA)	117
Institute of Private Practising Psychologists Inc	18
M John, Minister for Community Services (Vic)	148
WU Johnston, Department of Justice (Vic)	9
M Jones, University of NSW & LA Basser Marks, LaTrobe University	70
R Kelso, Central Queensland University	166
Law Society of NSW	157
Legal Aid (NSW)	113
Legal Services Commission of South Australia	32
G Levine SM, Children's Court (Vic)	142
F Lo Po, Minister for Consumer Affairs, Minister for Women (NSW)	121
R Lucas, Minister for Education & Children's Services (SA)	152
M Lucieer	96
Macarthur Sexual Assault Service	63
Media Council Australia	65
Mental Health Legal Centre (Vic)	131
Ministerial Council of Immigration and Multicultural Affairs	128
Ministry of Justice	144
Minor's Rights (Vic)	83
L Moloney, LaTrobe University	124

National Aboriginal Youth Law Centre (NT)	169
National Catholic Education Commission	95
National Children's and Youth Law Centre	21
National Health & Medical Research Council	88
MF Nelthorpe	51
J Neville,	105
Noarlunga Regional Centre, Child and Adolescent Mental Health Service	58
Northern Sydney Area Health Service	42
NSW Health Department	146
NSW Ombudsman	111
NT Board of Studies	101
NT Liquor Commission	16
Office of Cabinet (Qld)	145
Office of Consumer and Business Affairs (SA)	34
Office of Disability, Department of Human Services & Health	69
Office of Multicultural Affairs, Department of the Prime Minister and Cabinet	85
Office of the Status of Women	40
C O'Neil	29
J Oswald, Minister for Housing, Urban Development & Local Government Relations (SA)	82
Oz Child	109
Queensland Law Society Inc	137
Parents without Rights (Vic)	11
P Parkinson, University of Sydney	12
Pathways (ACT)	22
J Picton	57
K Prince, Minister for Aboriginal Affairs and Housing (WA)	134
Public Policy Assessment Society (ACT)	6
M Reid, Senator	13
Resolve (NT)	160
Retailing Council of Australia	30
RIFT	3
I Ritchard, Supreme Court (Tas)	7
M Rooney SM, Cobham Children's Court (NSW)	1
D Sandor, Family Court of Australia & J Bondy, Royal Melbourne Institute of Technology	141
Schools Council, National Board of Employment & Education and Training	44
D Smith, Judicial Registrar, Family Court of Australia	46
Solicitor-General of Australia	41
South Western Sydney Area Health Service	68
S Spindler, Senator	89
JA Stubbs, Court Counselling Family Court of Australia	80
Tasmanian Community and Health Services	76
Tasmanian Secondary Assessment Board	75
Victoria Legal Aid	163
Victoria Police	81
Victorian Community Council Against Violence	45
Wentworth Area Health Service	35
D Whitchurch	24
R White	159
B Wiese, Minister for Police, Emergency Services (WA)	102
J Wilkinson	25
S de Wolf	72
Women's Health Centre (Qld)	23
Youth Legal Service (WA)	120
Young Media Australia	38

Submissions to IP 17 and IP 18

Aboriginal Affairs Department (WA)	44
Aboriginal Justice Council (WA)	79
Aboriginal Legal Service of WA	75
Aboriginal Youth Support Service (Vic)	57
Action For Children (SA)	17, 189
Adelaide Central Mission	168
Advertising Federation of Australia Ltd	162
Anonymous	180
Anti-Discrimination Board of NSW	60
SL Asa	103
Association of Heads of Independent Schools of Australia	55, 128
Association of Independent Schools of WA (Inc)	61
Attorney-General (ACT)	194
Attorney-General's Department	178
Australian Association of National Advertisers	132
Australian Association of Social Workers Ltd	207
Australian Catholic Social Welfare Commission	115
Australian College of Paediatrics	30
Australian Family Association (WA)	125
Australian Federal Police	155
Australian Psychological Society Ltd	131
Autistic Association of NSW	80
Barnardos Australia	95
B Bartl	193
Barwon Adolescent Taskforce (Vic)	188
C Beale	106
J Benfer, E Drew & K Shepherd	119
Berry Street Inc (Vic)	53, 159
B Biggins	197, 218
D Bitel	16
S Blair	68
Board of Senior Secondary School Studies (Qld)	7
A Bond-Hughes	23
A Borg	33
C Boshier	225
S Brady	153
Brenda House Inc (Vic)	161
M Brennan	219
T Brown, R Martyn & L Hewitt, Monash University	47
Burnside	214
B Burt	92
G Campbell	139
Campbelltown Health Service	2
S Castell-McGregor	152
Catholic Education Office	38
Central Queensland Community Legal Centre	123
Child & Adolescent Mental Health Service (SA)	174
Child Health Council (SA)	146
Child Support Agency	199
Children's Court, Melbourne	51
Children's Interest Bureau (SA)	156
Children's Protection Society Inc (Vic)	108
Children's Welfare Association of Victoria Inc	138
Church Network for Youth Justice (Qld)	212
Come-In Youth Resource Centre (NSW)	14

Community Services Commission (NSW)	211
Community Services Australia	201
Confidential	24
Confidential	36
Confidential	93
Confidential	114
Confidential	117
Confidential	118
Confidential	127
Confidential	166
Confidential	170
Confidential	215
Confidential	224
CONTACT Incorporated (NSW)	74
Copelen Child & Family Services Inc (Vic)	121
Council of Single Mothers & Their Children (Vic)	124
T Coyne	90, 143
G Cumes	169
Darwin Community Legal Service and Top End Women's Legal Service	202
M Day	150
Defence for Children International	204
Disability Services Office (SA)	205
R Duff	88
G Dyer	192
Department of the Chief Minister (NT)	223
Department of Education and the Arts (Tas)	10
Department for Education and Children's Services (SA)	70
Department of Employment, Education, Training & Youth Affairs	220
Department of Fair Trading (NSW)	157
Department of Health and Family Services	179
Department of Immigration & Multicultural Affairs	217
Department of Social Security	43
Intellectual Disability Services Council (SA)	186
Eastern Domestic Violence Outreach Service (Vic)	165
C Eastwood	160
Emergency Foster Care (SA)	20
Ethnic Communities' Council of Tasmania Inc	67
J Evans	59
Families & Friends for Drug Law Reform (ACT)	112
Family Law Reform Association (Qld)	142
Family Services Council	122
Family Support Services Association of NSW	72
Federation of Community Legal Centres (Vic)	49, 129
Federation of Parents & Citizens Associations of NSW	15
Feminist Lawyers (Vic)	177
Fitzroy Legal Service Inc	126
GM Forrester	133
MR Forrester	116
M Fotheringham, K Kosky & M Sawyer, University of Adelaide	109
Fremantle Community Youth Service	6
Fremantle Hospital	96
Geelong Rape Crisis Centre	151
Guardianship Board (NSW)	107
KF Golding	76
L Grealy & M Shields	22
J & D Gun	144
L Gunawan (Vic)	135

Health Care Complaints Commission (NSW)	182
Minister for Health (Qld)	46
J Holdway	62
Homeless Youth Sexual Assault Counsellors' Network (Vic)	198
Illawarra Disabled Persons' Trust	8
Immigration Advice & Rights Centre	164
HA Jaensch	63
S Jeffreys	3
K Johnson	25
MS King	71
Law Institute of Victoria — Administrative Law Section	149
Law Institute of Victoria — Family Law Section (Children & Youth Issues Cttee)	173
Law Reform Committee of Judges (Vic)	64
Law Society of NSW	209
L Lenane	175
T Lim-Bennett	69
Liverpool Sexual Assault Service	145
R Logue	29
Lone Fathers' Association of Australia	216
Lutheran Community Care (SA)	105
L McKeon & A Brown	140
D Malcolm CJ (WA)	101
Marrickville Legal Centre	221
R Martyn	48
Media Council of Australia	42
Medical Consumers' Association NSW	163
Men's Rights Agency (Qld)	206
Mental Health Legal Centre Inc (Vic)	167
KD Miller	26
Ministry of Justice (WA)	184
Ministry of Sport and Recreation (WA)	13
Minors' Rights (Vic)	66
RG Moodie & Others	130
S Moran	73
Mothers' Support Group (Vic)	52
Multicultural Interest Group (SA)	137
E Murphy	34
National Anglican Caring Organisations Network	191
National Children's and Youth Law Centre	12, 222
National Council for the Single Mother and Her Child	113
MF Nelthorpe	78
Network of Community Activities (NSW)	89
NSW Board of Studies	172
NSW Department of Housing	11
NSW Federation of School Community Organisations	97
C Nugent	77
B Nurcombe	94
Office of Racing & Gaming (WA)	1
Office of the Status of Women	82
D O'Neil, Director of Client Services St Luke's (Vic)	50
Open Door Youth Foundation (NSW)	200
EC Orr	91
Oz Child (Children Australia Inc) (Vic)	9
Oz Child Legal Service (Vic)	195
Parents Without Rights (Vic)	32
Parliamentary Commissioner for Administrative Investigations (WA Ombudsman)	41
T Petersen	226

PLAN International Australia	58
The Public Policy Assessment Society Inc	87
Protect All Children Today (Qld)	154
Queensland Advocacy	104
Queensland Law Society	190
Queensland Police Service	176
Quota International of Gold Coast Inc	148
L Read	37
M Ryan	39
J Saunders	21
S Scarlett SM, Children's Court of NSW	27
K Scott	183
N Scott	65
Secretariat of the National Aboriginal & Islander Child Care	56
B Sharp	35
Social Security Appeals Tribunal	40
Society of St Vincent de Paul (NSW)	99
South Australia Police	208
South Australian Department of Family and Community Services	110
South Australian Foster Care Association	18
South Australian Multicultural and Ethnic Affairs Commission	86
Speech Pathology Australia (Qld)	147
MA Stephenson	171
Streetwize Comics	111
Tasmanian Government	210
Taxi Employees' League (Vic)	98
H Taylor, Director of Public Prosecutions (Qld)	102
AJ Tod	83
Townsville Community Legal Service	181
R & M Trembath	19
UNICEF Australia	187
Victims of Child Abuse Laws (Qld)	5
Victim Support Service (SA)	185
Victoria Police	45
Victorian Government	213
G Vimpani	31
WA Grandparent Support Group Inc	81
M Wall	84
IB Wallace	85
Western Australia Police Service	136
H Wingate	28
Woden Valley Hospital, Child at Risk Assessment Unit	196
Women's Advisory Council (NT)	203
Women's Legal Service (Qld)	141
Youth Advocacy Centre (Qld)	120
Youth Action Priorities and Youth Network of Tasmania	54
Youth Court of South Australia	100
Youth Justice Coalition (NSW)	4
Youth & Family Service (Logan City) Inc	158
Youth Network of Tasmania	134

Submissions to DRP 3

Action for Children SA	55
Alice Springs Youth Accommodation and Support Service	92
Association of Heads of Independent Schools of Australia	15

Association of Independent Schools of Victoria	13
Association of Independent Schools of Western Australia	19
Attorney General's Department	52
Australian Broadcasting Authority	51
The Australian Family Association (NSW Branch)	11
Australian Federal Police	66
Australian Red Cross (NSW Division)	42
Australian Secondary Principals' Association	89
Autistic Association of New South Wales	40
LA Beards	6
Board of Studies (NSW)	38
S Brady	49
Brenda House	65
M Callanan	2
G Campbell	9
Child Health Council of SA	47
Children's Interest Bureau Board SA	79
N Clark	4
Coalition of Community Groups	10
Confidential	1
Confidential	8
Confidential	12
Confidential	18
Confidential	62
Confidential	78
Consumer Affairs Queensland	81
Copelen Child & Family Service	37
Defence for Children International (DCI) Australia	74
Department of Employment, Education, Training and Youth Affairs	60
Department of Health and Family Services	75
GA Dyer	36
Dr P Eastaugh	29
Education Centre Against Violence	43
End Child Prostitution in Asian Tourism	67
Families and Friends for Drug Law Reform (ACT)	17
Family Court of Australia	64
Family Law Reform and Assistance Association	48
Family Support Services Association of NSW	32
Federation of Community Legal Centres (Vic)	72
Geelong Rape Crisis Centre	61
Grandparents Support Group (ACT)	69
MG Hains	24, 50
H Jackson, J	3
Juvenile Justice Advisory Council of NSW	53
Kreative Kids	35
Law Council of Australia	84
Law Society of NSW	90
Law Society of Western Australia	88
Legal Aid & Family Services, Attorney-General's Department	83
Legal Aid Office	7
A McNichol	39
Meerlinga Young Children's Foundation	5
Mental Health Legal Centre	54
Ministerial Advisory Committee on Equity Matters	41
Ministry of Justice	73
K Morn	57
TJ Mulvany & Co	25

National Children's and Youth Law Centre	59
National Legal Aid	58
NSW Government	86
NSW Ombudsman	80
North Queensland Women's Legal Service Inc	45
Northern Territory Government	71
Office of Disability, Department of Health and Family Services	87
EC Orr	23
S Poole	77
Queensland Police Service	56
Quota International of Gold Coast Inc	85
Refugee Council of Australia	27
Relationships Australia	70
D Sandor	30
J Saunders	44
B Simpson	16
The Society for the Best Interests of the Child	34
South Australia Independent Schools Board Inc	31
South Australian Foster Care Association Inc	20
Taxi Employees' League	21
W Thompson, Social Work Department	63
Toughlove South Australia	76
Townsville Community Legal Service	46
Victims' Rights and Civil Rights Project	33
Women's Advisory Council	26
Women's Legal Service	68
World Vision Australia	82
The Yoga Better Living Centre	28
Young Media Australia	22
Youth Advocacy Centre	14
Youth Justice Coalition (NSW)	91

Appendix C: Costing of OFC, Taskforce and Summit

Aggregate figures

Stage One — Total of \$4 893 000 for 2 year period

<i>Year One: OFC, Taskforce and Summit</i>	\$
OFC establishment costs	66 000
OFC staff and operational costs	2 007 000
Taskforce operational costs	404 000
Summit	5 000
Total	2 482 000

<i>Year Two: OFC and Taskforce</i>	\$
OFC staff and operational costs	2 007 000
Taskforce operational costs	404 000
Total	2 411 000

Stage Two — annual recurrent funding of \$3 294 000

Comprising OFC staff and operational costs (per annum) of	\$3 294 000
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Detailed costings per annum

<i>OFC establishment costs</i>	\$
Additional office and computer equipment	60 000
Additional set-up library costs	6 000 ³⁴⁷⁸
Total	66 000

<i>OFC recurrent annual funding</i>	\$
Staffing of OFC (8 staff) (Headed by SES Band 2)	585 000 ³⁴⁷⁹
Consultants/research	1 000 000
Administration costs	50 000
Printing and publications ³⁴⁸⁰	50 000
Conferences/meetings	10 000
Rent	200 000
Ongoing library costs	2 000
Overheads (excl. rent) and incidentals	50 000 ³⁴⁸¹
Travelling expenses	60 000
Total	2 007 000

<i>Recurrent taskforce costs</i>	\$
12 members, 8 meetings a year, say 3 days each	
Sitting fees ³⁴⁸²	65 000
Travel and accommodation ³⁴⁸³	320 000
Administration	12 000
Incidentals ³⁴⁸⁴	7 000
	404 000
Total — recurrent annual funding of OFC and Taskforce	2 411 000

Stage Two — long term duties of OFC

The Commission's preliminary estimate is that funding for OFC would be in the order of three to three and a half million dollars annually. This estimate is based on the following costing schedule.

<i>Recurrent annual funding of OFC</i>	\$
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Staffing (13 staff at full strength, following Taskforce headed by SES Band 2)	882 000 ³⁴⁸⁵
Co-ordination costs (incl. functions previously performed by the Taskforce, costs of consultants, conferences and meetings, research and information services)	2 000 000
Publications	50 000
Rent	200 000
Ongoing library costs	2 000
Overheads (excl. rent) and incidentals	100 000 ³⁴⁸⁶
Travelling expenses	60 000
Total	3 294 000

Summit

The Summit will consist of approximately 20 participants. As most of those will be responsible for their own travel costs, costing for the Summit is based on provision of a meeting room, meals and similar items. The Summit is estimated to cost approximately \$5 000.

Off-sets

Research, policy and program co-ordination functions undertaken by the Youth Bureau, the Human Rights Branch in the Attorney-General's Department and the Social Policy Division within PM&C relating to children will be channelled to the OFC.³⁴⁸⁷ Further off-sets will be derived from staff involved in issues relating to children in DEETYA, Attorney-General's Department, PM&C and Department of Health and Family Services. Any further funds could be charged against the Constitutional Centenary Foundation Fund.

Appendix D: List of recommendations

5. Responding to children: advocacy and action

1. A National Summit on Children should be convened as a matter of priority. The Summit should be attended by Heads of Australian Governments. Areas requiring particular attention to promote co-ordination include assistance to children from broken families, child abuse, causes of offending and crime prevention, youth suicide and youth homelessness.

Implementation: The Prime Minister should convene the National Summit as a matter of priority.

6. The new working federalism

2. A small Taskforce on Children and the Legal Process should be established on the conclusion of the National Summit, comprising representatives from relevant federal, State and Territory departments nominated by the Summit, representatives from non-government organisations, specialist academics, practitioners, young people and parents.

Implementation. The Prime Minister should convene the Taskforce, with the Chair to be nominated and agreed upon during the Summit.

3. An Office for Children (OFC) should be established within PM&C. In the first two years of its operation, OFC's responsibilities should focus on the provision of secretariat services to the Summit and the Taskforce on Children and the Legal Process. Upon completion of the Taskforce, an expanded OFC should assume continuing co-ordination and monitoring responsibilities. In particular, it should

- provide an annual report to Parliament on the status of children in Australia
- monitor performance of international obligations to children, particularly CROC, and co-ordinate the preparation of reports under article 44 of CROC to the United Nations Committee on the Rights of the Child
- provide leadership and co-ordination in the preparation and implementation of national standards in areas of law recommended in this report, in consultation with the States and Territories
- monitor new legislation, programs and initiatives for compliance with CROC and national standards
- encourage and assist federal departments to incorporate the principles of CROC into their policies, programs and practice
- co-ordinate the development of models of best practice for dealing with child consumers of government services or programs, including best practice guidelines for grievance and complaints handling procedures for young people
- advise governments on the most effective use of funds appropriated by Parliament for expenditure in relation to children
- undertake research, in conjunction with State and Territory agencies and the ABS, on children's involvement in legal and administrative processes and the effects of those processes on children
- liaise with federal complaint handling bodies relevant to children, particularly HREOC and the Commonwealth Ombudsman
- liaise with HREOC and State and Territory children's advocacy and complaints bodies throughout Australia
- provide reports on its own initiative to federal Ministers, Ministerial Councils and Parliament dealing with matters of concern for children as and when they arise
- assist in the development of a network of grassroots advocates for children by accrediting, training and providing information to advocates
- encourage and facilitate public debate and community awareness on matters relating to children
- consult with relevant interest and community groups and with children and young people to determine the most appropriate strategies for improving conditions for children.

Implementation. The Prime Minister should take the necessary steps to establish OFC within PM&C.

7. Advocacy

4. HREOC should be resourced to establish a specialist children's rights unit to undertake broad, national systemic advocacy on behalf of children.

Implementation. The federal Attorney-General should provide the necessary funds.

5. The Commonwealth Ombudsman should ensure complaints processes are suitably adapted for children. It should incorporate the principles enumerated in recommendation 13. The Ombudsman, HREOC and OFC should develop links to ensure the co-operative exchange of information to promote best practice for administrative processes in relation to children.

Implementation. The Commonwealth Ombudsman should provide information to HREOC and OFC in relation to any systemic problems for children that become apparent. Information should be collected and provided to HREOC and OFC on a regular basis concerning the numbers of child complainants, types of complaints and results. HREOC and OFC should consult regularly with, and provide information and advice about research and systemic issues to, the Commonwealth Ombudsman.

6. Each State and Territory should ensure that there are appropriate mechanisms, vested in either newly established or existing bodies, to

- handle complaints by or on behalf of children concerning the conduct of that State's or Territory's authorities including conduct of employees and omissions or failures to act by authorities
- advocate children's, or particular groups of children's, interests at a policy level within government
- plan and co-ordinate children's policies and initiatives at State and Territory level
- liaise with OFC, HREOC, the Commonwealth Ombudsman and individual advocates for children, as well as relevant non-government organisations
- provide OFC with an annual report on outcome indicators of programs and initiatives for children that receive federal funding
- provide OFC with information on systemic matters of concern for children as necessary.

Implementation. States and Territories should be encouraged through COAG to establish such bodies or units. The relevant bodies should establish links with other similar bodies.

7. State and Territory children's advocacy and complaints bodies should operate on the basis of principles enumerated at recommendation 13.

8. State and Territory children's advocacy and complaints bodies should undertake access and awareness campaigns directed to young people, particularly those young people who are most likely to require assistance including children who have English language or literacy difficulties, who are outside the education system or who are in the juvenile justice or care and protection systems.

9. A network of grassroots, community or peer advocates for children, drawn from existing informal advocates in all cities and major regional centres of Australia, should be established and a system of accreditation for child advocates developed by OFC. OFC should ensure communication and liaison within this network at national, State and Territory levels. OFC should co-ordinate training programs on legal issues, communication with children and negotiation skills. OFC should provide advocates with information on the network and regularly updated regional contact lists.

Implementation. OFC should co-ordinate the development of this network, initially by inviting applications for accreditation as an advocate and developing training programs and information.

10. The existence and role of the network of advocates should be publicised particularly to those who are most likely to need the assistance of an advocate, including children who have English language or literacy difficulties, those who are outside the education system and those who are in the juvenile justice or care and protection systems.

Implementation. OFC should co-ordinate this publicity.

11. A national toll-free telephone advice line for children should be provided. This may involve utilisation of existing telephone advice services for children. It may best be established as a national network with offices in each capital city. The advice line should form an integral part of the advocacy network and provide suitable referrals to the network wherever it appears a child is in need of advocacy.

Implementation. OFC should commission the establishment of such an advice line to be funded by the Department of Health and Family Services.

9. Administrative decision making — service delivery for children

12. All government agencies should ensure that their advice and complaints services are accessible by children in rural and remote areas through facilities such as freecall telephone hotlines advertised in schools and youth centres, on local radio and the Internet.

13. In developing service delivery standards and implementing its service charter, each federal government agency should have regard to the following principles.

- The agency should consult as appropriate with its child clients and with relevant non-government organisations to determine the most effective ways of informing children about available services.
- Publicity and information about services and review mechanisms should be directed specifically at young people. This material may be most effective if it is in the form of stickers, comics, posters and specifically designed brochures for distribution through schools and youth centres. The information should also be available by telephone and on the Internet.
- Staff should be trained to deal sympathetically with young people and to communicate in age appropriate language. A culture of listening to children should be cultivated. Information and evidence provided by children should be treated with the same degree of seriousness as that provided by adults.
- It will often be inappropriate for agencies to rely on written material alone as a means of communicating with children. Wherever possible communication with children should be in person rather than in writing.
- Most young people cannot deal with complicated forms and elaborate bureaucratic requirements. Where these processes cannot be avoided or adapted for children, the relevant agency should ensure that children are provided with a support person to assist them to negotiate the process.
- Administrative decisions concerning children should be made in a timely manner. Where children are dependent on the provision of services, delay in providing them can put the child at risk. Further, children's perception of time is such that they may interpret any delay as an indication that their application has been rejected. Where delays in decision making are unavoidable, agencies should contact children to explain the reasons for the delay.
- Children should be entitled to have a support person of their choice, such as a parent or community worker, present whenever they are interviewed by a government department or give evidence to a review body concerning an administrative decision.
- Except where it is necessary for the protection or well being of the child, government agencies generally should not interview young children. Where younger children are interviewed, including where they are interviewed on a matter relating to their parents, the process should be carefully explained to the child.

14. The temporary exemptions from the training requirement applicable to under 18 recipients of CYA should not be administered so stringently that young people at risk are deprived of income support by unrealistic administrative requirements

Implementation. Centrelink should ensure that all relevant staff are given training in administering these exemptions.

15. Youth Service Units should be established in each region.

Implementation. Centrelink should ensure these units are established as a matter of priority.

16. Models of income support service delivery should be designed specifically for young Indigenous people and young people from non-English speaking backgrounds to take account of cultural differences in family structures and relationships.

Implementation. Centrelink should develop these models in consultation with appropriate community groups and OFC.

17. Models of income support service delivery should be designed specifically for young people living in rural and remote communities.

Implementation. The Minister for Social Security should co-ordinate a federal strategy for service delivery to young people living in rural and remote communities.

18. Evidential requirements, particularly those concerning identification, should be interpreted flexibly for young homeless applicants and should not of themselves bar them from receiving income support.

Implementation. DSS should ensure that eligibility requirements for young homeless applicants comply with this recommendation.

19. Demographic data and data concerning young homeless clients' race and sexual orientation should be collected by consent to support a better informed and targeted response to youth homelessness. The data should be recorded in a way that preserves young people's anonymity.

Implementation. All federal, State and Territory departments that provide services to young homeless people should collect this data. The data should be collated by Centrelink.

20. The adequacy of the homeless rate of benefits paid to young people should be assessed regularly to ensure appropriate minimum benefit and rent assistance rates are maintained.

Implementation. The Minister for Social Security should commission surveys on a regular basis to ensure that appropriate minimum rates are fixed.

21. Support programs for homeless young people should be publicised extensively in the youth sector and community.

Implementation. All federal government agencies administering these programs should review the effectiveness of their publicity campaigns.

22. All family services department officers who conduct assessments under the Commonwealth/State Protocol for the case management of homeless children should be briefed on how to interview young gay and lesbian applicants appropriately.

Implementation. All parties to the Protocol should ensure staff are appropriately briefed.

23. The Commonwealth/State Protocol for the case management of homeless children should be amended to provide that homeless children must be assessed by the relevant State or Territory family services department within seven days of making an application for income support.

Implementation. All parties to the Protocol should expedite this change.

24. A Citizenship Information Kit aimed specifically at young people and their guardians should be developed to explain the procedures by which children can obtain certificates of Australian citizenship.

Implementation. DIMA should develop the Kit and advertise it appropriately, targeting Australian communities with high immigrant populations.

25. The Minister for Immigration and Multicultural Affairs should investigate the reasons for the significant variations in child visa application processing times as between overseas posts, with a view to ensuring effective, speedy processing of all child visa claims.

26. Provisions in the *Migration Act 1958* (Cth) relating to questioning and searching child visa applicants should give them the same protection as the federal *Crimes Act 1914* (Cth).

Implementation. The Minister for Immigration and Multicultural Affairs should ensure that the necessary amendments are made as soon as possible.

27. A protocol should be developed to resolve immigration problems for children whom a family services department or court has determined are in need of care. In some cases this may mean enabling a child to change or acquire lawful immigration status to allow appropriate supervision of him or her or an alternative family placement.

Implementation. DIMA and State and Territory family services departments should develop this protocol. The Minister for Immigration and Multicultural Affairs should ensure any consequential legislative or regulatory changes are made.

28. Guidelines for overseeing and evaluating overseas intra-family adoptions should be developed.

Implementation. DIMA should develop these guidelines in co-operation with State and Territory family services departments and take steps to implement them in legislation or policy as appropriate.

29. The Commonwealth should give priority to ratifying the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. Immediately prior to the Convention coming into force all relevant DIMA staff should be given training in applying its principles to decision making.

Implementation. The Attorney-General should pursue this issue as a matter of priority.

30. Provisions stating that before granting a visa to a child applicant, the Minister must be satisfied that granting the visa would not prejudice the rights and interests of any other person who has custody or guardianship of, or access to, the child should be redrafted to be consistent with the principles underlying the *Family Law Act 1975* (Cth).

Implementation. The Minister for Immigration and Multicultural Affairs should develop legislation to this effect.

31. Internal review applications by child income support applicants should be taken also to be applications for SSAT review. If internal review is not completed within two weeks, SSAT review should be activated automatically, the case given priority and the review completed within a short time frame.

Implementation. The Minister for Social Security and the Minister for Employment, Education, Training and Youth Affairs should develop legislation to this effect.

32. An access and equity strategy should be developed to ensure that children can participate properly in merits review. Publicity material should be prepared specifically for young people explaining merits review procedures.

Implementation. The proposed Administrative Review Tribunal should develop a young people's access and equity strategy and publicity material aimed specifically at young clients.

33. Directions hearings and preliminary conferences for matters involving young people should include the provision of information directly to young people on tribunal practice, procedure and any evidentiary requirements.

Implementation. The proposed Administrative Review Tribunal should develop practice guidelines to this effect.

34. Merits review procedures should accommodate child applicants and witnesses appropriately. Hearings should be run in an informal and flexible manner. To this end, guidelines should be developed for handling applications by children.

Implementation. The proposed Administrative Review Tribunal should develop these guidelines in consultation with relevant interest groups.

35. The AAT program of using community centres in rural areas as venues for matters involving Indigenous applicants should be extended. These venues could also be used for matters involving child applicants in those areas.

Implementation. The proposed Administrative Review Tribunal should oversee the extension of this program.

36. An advocate with continuing instructions (or ones that have not been countermanded) should be able to pursue an external review application on behalf of a homeless child applicant with whom the advocate has lost contact.

Implementation. The proposed Administrative Review Tribunal should develop a practice direction to this effect.

10. Children in education

37. Guidelines on national best practice for student participation in school decision making should be developed. The guidelines should include material that assists students to understand their rights and responsibilities in the context of school decisions affecting them. A handbook for teachers and students explaining the guidelines should be prepared and distributed to all schools in Australia.

Implementation. DEETYA should prepare the guidelines and handbook in conjunction with State and Territory education departments, peak groups from the independent schools sector, relevant community groups, school students and in consultation with the OFC. DEETYA should co-ordinate distribution of the handbook.

38. NCAVAC should conduct a specific project aimed at reducing school violence. The Campaign should evaluate the benefits for youth crime prevention of anti-bullying policies, anti-harassment policies, peer mediation and peer support schemes and establish benchmarks in each of these areas.

39. All teachers and school counsellors should receive professional development training in identifying children at risk of dropping out of school and referring them to appropriate government and non-government support services and programs. Particular attention should be given to recognising this risk at the end of primary school and the beginning of secondary school.

Implementation. State and Territory education departments should provide this training.

40. In recognition of the relationship between effective early intervention and diverting involvement with the juvenile justice system, the STAR program should be re-established.

Implementation. The Minister for Employment, Education, Training and Youth Affairs should give effect to this recommendation in the next budget allocation.

41. For the same reason, additional local programs to identify and support at-risk and disadvantaged students and encourage their continued participation in education should be developed.

Implementation. These programs should be developed and implemented by State and Territory education departments in conjunction with DEETYA, peak bodies from the independent school sector and relevant community groups.

42. National standards for student support services in primary and secondary schools should be developed. These standards should take appropriate account of the nexus between access to primary and secondary education and involvement with the juvenile justice system.

Implementation. DEETYA should develop these standards in conjunction with State and Territory education departments and in consultation with OFC.

43. Each State and Territory education department should ensure that all teaching staff and school administrators are trained in disability, disability discrimination laws and obligations, and how to meet the educational and social development needs of students with a disability.

44. Government schools should distribute a Charter of School Education to each family at the start of each school year. The Charter should set out

- the nature and extent of the education that will be provided in government schools at no cost to parents
- government policy on voluntary contributions and any subject levies and charges and the rights and obligations of parents and students in relation to each
- information on any financial assistance provided by government agencies, community groups and the school itself to assist families experiencing financial hardship with the costs of schooling.

Implementation. The Minister for Employment, Education, Training and Youth Affairs should seek the agreement of MCEETYA to the development of this Charter.

45. In light of the link between chronic truancy and exposure to the juvenile justice system, the federal Government should co-ordinate the development and implementation of a national strategy to reduce truancy.

Implementation. DEETYA should lead the development of the strategy in consultation with State and Territory education departments, peak groups from the independent schools sector, relevant community groups and the Australian Council for Education Research.

46. Research should be conducted nationally to determine the extent to which young people are excluded from school by informal processes and the extent of the connection between school exclusion and criminal behaviour.

Implementation. This research should be co-ordinated by OFC in consultation with the Australian Council for Education Research and the AIC.

47. National standards for school discipline should be developed setting out the permissible grounds for exclusion and the processes to be followed when a government school proposes to exclude a student. The standards should require that

- the legislative provisions regarding discipline be widely publicised to students and their carers in readily understandable language, including community languages where appropriate
- each State and Territory collect and publish annual statistics on truancy and on excluded students including age, sex, race, length of exclusion, reasons for exclusion and the support provided to excluded children
- each State or Territory department of education establish a unit with responsibility for ensuring appropriate arrangements are made for each excluded child, including counselling or other support and alternative schooling or education.

Implementation. In consultation with OFC, DEETYA should convene a working group comprising representatives of State and Territory education departments, peak bodies in the independent schools sector and relevant community groups to develop the national standards mechanisms for obtaining national education statistics. Each State and Territory government should incorporate the standards into legislation and strongly encourage independent schools to incorporate the standards into their discipline policies.

48. The national standards for school discipline should provide that

- students facing exclusion and their carers should be informed in writing of the reasons why exclusion is being considered and be given sufficient time and opportunity to respond to the allegations
- reviews of serious exclusions, being exclusions for longer than 14 days, repeat exclusions totalling more than 14 days in a year and permanent exclusions, should be heard by a panel of school and community representatives at least one of whom is from outside the particular school community
- an advocate for the child should be permitted and encouraged to be involved in the disciplinary process where a serious exclusion is proposed.

49. The national standards for school discipline should provide conferencing models appropriate for use in schools.

50. Corporal punishment should be banned in all Australian schools (including independent schools).

Implementation. Through MCEETYA the Minister for Employment, Education, Training and Youth Affairs should seek agreement to the passage of uniform legislation to that effect. In the meantime, the Minister should take all available measures, including attaching conditions to financial grants, to eliminate corporal punishment in Australian schools.

11. Children as consumers

51. National child consumer education strategies should be developed for implementation in all Australian infants, primary and secondary schools and in TAFEs.

Implementation. The Australian Competition and Consumer Commission (ACCC), the Consumer Affairs Division of the Department of Industry, Science and Tourism and DEETYA should develop these strategies in conjunction with the relevant State and Territory consumer affairs and education authorities.

52. Legislation similar to the *Minors (Property and Contracts) Act 1970* (NSW) should be adopted on a national basis for young people aged 16 and 17.

Implementation. The Attorney-General, through the Standing Committee of Attorneys-General (SCAG), should encourage the States and Territories to enact legislation to this effect.

53. Information about remedies available under the Trade Practices Act and fair trading legislation should be included in the national child consumer education strategies proposed at recommendation 51.

54. The same exception to time limitations should apply to child litigants under the Trade Practices Act as to other child civil litigants.

Implementation. Section 82(2) of the Trade Practices Act should be amended to enable a person who suffers damage or loss as a child to commence an action at any time within the three years following his or her eighteenth birthday.

55. The European Union product safety model for children's toys should be examined to determine whether it would provide more effective protection for children from injury from defective or dangerous products than the current Australian regime.

Implementation. The Minister for Customs and Consumer Affairs should commission this investigation.

56. Organisations should take the needs of children into account when developing complaints schemes, codes of conduct and consumer charters.

Implementation. The ACCC, the Office for Small Business and the Consumer Affairs Division of the Department of Industry, Science and Tourism should develop and promote guidelines to ensure these schemes are responsive to children.

57. General information about banking services should be included in the national child consumer education strategies proposed at recommendation 51.

58. Information about the services provided by the Australian Banking Industry Ombudsman should be included in the national child consumer education strategies proposed at recommendation 51.

59. Information about the Financial Counselling Program administered by the Consumer Affairs Division of the Department of Industry, Science and Tourism should be included in the national child consumer education strategies proposed at recommendation 51.

60. The proposed Australian Corporations and Financial Services Commission should have regard to the specific needs of child consumers in the banking industry when developing complaints lodging and handling procedures.

61. Information about media complaints mechanisms should be included in the national child consumer education strategies proposed at recommendation 51.

62. Media service providers, the ABA and the Classification Board should ensure that their complaints procedures are appropriately modified for child consumers.

63. International and Australian research on the effects of the media on children at different ages and stages of development should be comprehensively reviewed to determine more clearly what is harmful to the variety of child consumers. A summary of the results should be distributed to legislators, regulators, media providers and schools.

Implementation. The Department of Communications and the Arts, the Consumer Affairs Division of the Department of Industry, Science and Tourism and the ABA should conduct this review in consultation with relevant community groups. The review results should be distributed by OFC.

64. The national child consumer education strategies proposed at recommendation 51 should strongly encourage all States and Territories that have not already done so to include compulsory units on critical evaluation of the media, including advertising, in primary and secondary school syllabuses.

65. The proposed Advertising Standards Board should take into account the particular needs of child consumers when considering complaints about advertising.

66. Research on the effects of advertising on children at different ages and stages of development should be reviewed to enable the preparation of best practice guidelines for all advertisers to protect children at different ages and stages of development from harm.

Implementation. The Department of Communications and the Arts, the ABA and the Consumer Affairs Division of the Department of Industry, Science and Tourism should conduct this review in consultation with the relevant community groups, provide the results to OFC and assist OFC to develop appropriate best practice guidelines for distribution to advertisers.

13. Legal representation and the litigation status of children

67. All court rules should require the guardian *ad litem* or next friend of a child to regard the best interests of the child as the paramount consideration in conducting proceedings on behalf of that child. The rules should stipulate that failure to consider the child's best interests constitutes grounds for removal of the next friend or guardian *ad litem* by the court.

Implementation. The Federal and High Courts, along with State and Territory courts, are encouraged to amend their rules to this effect.

68. There should be a rebuttable presumption that a child over the age of 16 years living independently is competent to initiate or defend litigation.

Implementation. The Attorney-General should introduce legislation to this effect to apply to the Federal and High Courts and the rules of those courts should be amended to reflect that legislation. The Attorney-General through SCAG should encourage the States and Territories to enact similar legislation in State and Territory courts.

69. Court rules should be amended by the insertion of a subrule similar to that contained in the Family Law Rules O 23 r 3(1) whereby the court may require the appointment of a next friend for a child where the child has initiated proceedings directly but the court is satisfied that the child does not understand the nature and possible consequences of the proceedings or is not capable of conducting proceedings directly.

Implementation. The Federal and High Courts, along with State and Territory courts, are encouraged to amend their rules to this effect.

70. Clear standards for the representation of children in all family law and care and protection proceedings should be developed. Among other matters, these standards should require the following.

- In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child.
- Every child should be seen except in those rare instances where it is physically impossible for the representative to see the child. The representative should see the child as soon as possible and, in most instances, well before the first hearing.
- The representative should meet with a verbal child at least before any substantive proceeding or event at which important decisions are being made regarding the child or which are relevant to the representation of the child.
- Contact with the child should occur where and when it is comfortable for the child not merely where and when it is convenient for the representative.
- Even where the child is non-verbal, the representative should at least see the child, preferably in the child's living environment.
- The lawyer should use language appropriate to the age and maturity of the child.
- The representative should employ appropriate listening techniques and provide non-judgmental support.
- Preference should be given to face to face communication with the child rather than communication by telephone or in writing.

Implementation. Legal professional bodies, including the Law Council of Australia, law societies or institutes, bar associations and legal aid commissions should convene a working group to develop appropriate standards in consultation with young people and relevant youth agencies. The Family Court, children's courts and OFC should be consulted in the development of these standards.

71. The standards should make the following provisions where the child is able to communicate and expresses wishes about the direction of the litigation.

- Sufficient time should be devoted to each child to ensure that the child understands the nature of the proceedings and that the representative has established the child's directions.
- The representative should meet with the child often enough to maintain and develop the lawyer-client relationship.

- When discussing the case with the child, the representative should use concrete examples and provide the client with a 'road map' of the interview and the legal process.
- Younger children who wish to direct the litigation may be clear about their views on one or more issues to be decided but be unwilling to express a view on other matters. In such cases, the representative should make procedural decisions with a view to advancing the child's stated position and should elicit whatever information and assistance the child is willing to provide. Representatives should seek the assistance of appropriate social scientists to assist them to ascertain the wishes and directions of younger children where necessary.

72. The standards should make the following provisions where the child is unable or unwilling to provide direction on the litigation.

- Where a child is unable or unwilling to set the goals of the litigation, the representative should ensure that the court is aware of the fact and understands that the representation is to be on the basis of the best interests of the child.
- Under no circumstances should the representative proceed if he or she is uncertain of the basis of representing the child.
- Standards should specify functions of a representative acting in the best interests of a child. They should include
 - to ensure that all relevant evidence, including any evidence that may contradict the assessment of the representative, is placed before the court
 - to investigate all relevant facts, parties and people
 - to subpoena all documents
 - to retain experts as needed
 - to observe the child in the caretaker's setting and formulate optional plans
 - to advocate zealously for the legal rights of the child including safety, visitation and sibling contact
 - to challenge the basis for experts and agency conclusions to ensure accuracy
 - to ensure that all relevant and material facts are put before the court.

73. Legislation should ensure that legal professional privilege applies to communications between the representative and the child in family law and care and protection matters even where the child is not the client of the representative. This privilege should be subject to the obligation of the representative to notify the court of matters

- that may place at risk the safety or best interests of the child
- that the court would otherwise not have access to and
- that would be likely materially to affect the court's deliberations.

Implementation. O 23 of the Family Law Rules and relevant State and Territory care and protection legislation should be amended accordingly.

74. The standards at recommendation 70 should require the representative to explain to the child at the first meeting the limits of the confidentiality that applies to their communications. Where it subsequently becomes clear that it will be necessary for the representative to disclose a communication with the child, the representative should meet with the child and formulate a strategy for that disclosure.

Implementation. The standards referred to at recommendation 70 should include a provision to that effect.

75. In cases where a representative is acting for more than one child the representative should carefully ascertain the views and instructions of each child. Where any divergence in instructions amounts to a conflict of interests for the representative, the representative should not represent all the children.

Implementation. Standards in recommendation 70 should make provision to that effect.

76. Where it appears to the representative that the child is unwilling or unable to express a view about the litigation and

- the representative considers that the best interests of the child do not require that evidence be tested or adduced or
- the representative is merely confirming the submissions of one party and is calling no independent evidence

the representative should apply, as early in the proceedings as possible, to be discharged.

Implementation. Standards for representatives of children in care and protection and family law litigation should make appropriate provision to this effect. Inclusion of a rule to this effect in O 23 of the Family Law Rules may assist as could express provision in relevant care and protection legislation.

77. A child who has been provided with a representative in family law or care and protection proceedings should be able to apply for the representative to be dismissed and request a second representative be engaged where the child has no confidence in the representative. The court should generally make such an order on application if the child can show the representative has failed to consult.

Implementation. Standards for representatives of children in care and protection and family law litigation should make appropriate provision to this effect. Inclusion of a rule to this effect in O 23 of the Family Law Rules and in relevant care and protection legislation may assist.

78. The memorandum filed by the court counsellor for the first directions hearing should contain information as to

- whether the court will need to appoint a counsellor or other person to offer clinical interventions or professional advice to the child or the family
- whether relevant reports are available from someone outside the court system and how they can be obtained
- what other professionals, agencies and persons are already working with the child
- whether any of those professionals would be prepared to
 - maintain liaison with the court with a view to ensuring that the services already being provided to the child are not disrupted by the legal process
 - act as a contact point for any legal representative appointed for the child by the court and
 - where appropriate assist the legal representative in the case and help explain the court processes to the child
- whether the child's interests are being adequately addressed by the parties
- whether or not a child should be assessed further
- the substance of any wishes expressed by the child as to the outcome of the matter.

Implementation. Case Management Guidelines should be drafted to this effect.

79. The appointment of a representative for a child under s68L of the Family Law Act should be made as early as possible.

Implementation. Appointment of a representative should preferably be made at the first directions hearing by the registrar taking into account the assessment by the counsellor referred to at recommendation 78.

80. The role of the Family Court counsellor in providing family reports should be expanded and enhanced in appropriate cases, particularly where a child is unwilling or unable to engage with a representative. There should be more detailed early investigation and assessment of the best interests of the child in preparing family reports and the presentation to the court of the evidence upon which that assessment is based. This investigation should encompass many of the functions currently performed by the child's representative including interviewing relevant people such as family members, school teachers and professionals involved with the child. Where a child is not represented, a co-ordinator/report writer should be responsible, where appropriate, for keeping the child informed about the progress of the litigation and may be asked to oversee and co-ordinate the management of the case.

Implementation. The Family Court should draft an amendment to O 25 of the Family Law Rules to this effect.

81. The order in which evidence is adduced at trial should be changed so that evidence relating to financial matters is heard after evidence concerning children's issues to enable the child's representative to be excused at the completion of the hearing of relevant evidence.

Implementation. The Family Court should amend the Family Law Rules and/or Case Management Guidelines, as appropriate, to this effect.

82. All children who are the subject of a care and protection application in the States and Territories should be provided with a lawyer as early as possible. The ethical principles and standards for representation are outlined at recommendations 70–76.

Implementation. The national care and protection standards proposed in recommendation 161 should include provisions to this effect.

83. Clinics similar to the Melbourne Children's Court Clinic should be attached to children's courts and adequately resourced to provide the court and legal representatives with expert advice on the best interests of the child.

Implementation. The Attorney-General through SCAG should encourage the States and Territories to introduce these clinics.

84. Multi-disciplinary training for lawyers and social scientists working in the area of children and the law should be developed. This training should form part of tertiary studies in law at undergraduate and postgraduate level and professional training and education by existing continuing professional education and specialist accreditation processes.

Implementation. The Commonwealth should make grants available through DEETYA or the Attorney-General's Department to support the development of suitable training programs.

85. The practice of children's law in the Family Court and State and Territory children's courts should be developed as an area of specialisation. Children's representatives in all jurisdictions should receive appropriate training in children's development and cognition and in interviewing children. Legal aid grants should generally be restricted to lawyers accredited as qualified children's representatives. However, exceptions to this requirement should be made where there is good reason to do so.

Implementation. The Attorney-General through SCAG should seek agreement of the States and Territories to the development of specialist accreditation programs in children's law for practice in children's courts and the Family Court and to the introduction of appropriate legal aid guidelines.

86. Specialist children's units should be established within the legal aid commission of each State and Territory to work on children's issues in federal, State and Territory jurisdictions. The units should provide representation for children in family law, care and protection and juvenile justice matters, before tribunals and in pursuing complaints.

- These units should be staffed by lawyers experienced in representing children and skilled in working and communicating with children. Social workers trained and experienced in working with children should also be employed in these units.
- All legal and social work staff in the units should receive regular training on the law and social science practice in relation to children, child development and cognition, interviewing and communicating with children and cross-cultural awareness.

Implementation. The Attorney-General should negotiate with the States and Territories concerning the establishment, operation, staffing, training and funding of children's units to be operated by legal aid commissions.

87. In addition to these specialist units within legal aid commissions, legal advocates for children should be funded within specialist children's legal centres or generalist community legal centres. Initially, at least one legal advocate position should be funded in each State and Territory in addition to the existing positions. These advocates should form part of the advocacy network proposed at recommendation 9 and should be able to work on cases for individual children, matters of public interest and test cases. They should provide legal advice, information, assistance and representation to children and their families.

Implementation. The Attorney-General should take the necessary steps to fund these children's legal advocates.

88. Legal aid for the representation of children should be nominated by each jurisdiction as an area of priority for funding. The Commonwealth and the States and Territories should make separate appropriations of funds for the representation of children in all jurisdictions, particularly care and protection, family law and juvenile justice. These funds should be administered by State and Territory legal aid commissions.

Implementation. The Attorney-General should negotiate with the States and Territories to secure separate appropriations of funds for children's matters across all jurisdictions.

89. The effects of funding caps on children's cases, particularly on repeat applications in family law cases, should be closely monitored. Further retrospective funding caps should not be introduced for children's cases in any jurisdiction.

Implementation. State and Territory legal aid commissions should monitor the effects of caps on children's cases and seek adjustments to funding agreements with the Commonwealth as appropriate.

90. Children's eligibility for legal aid should not depend on the means of their parents in either family law or care and protection matters. However, the Family Court should have a discretion in appropriate cases to order the recovery of costs for representation of a child pursuant to s68L of the Family Law Act from either or both of the parties. These orders should be made only where the parties are able to meet the costs and where it is appropriate to do so. They should be made only on the court's own motion or on the application of the child's representative. Children who are full parties to family law proceedings that involve a parent should be subject to an individual legal aid means test independent of the parents.

Implementation. Commonwealth legal aid guidelines for family law should be amended to this effect and the Attorney-General should propose an appropriate amendment of s 117 of the Family Law Act.

14. Children's evidence

91. National interview standards should be developed and adopted for all interviews of potential child witnesses. These national standards should require that

- all professionals responsible for investigating and interviewing potential child witnesses have appropriate training in child psychology and development, non-misleading questioning techniques and the rules of evidence for the various proceedings in which children may be involved
- interviews with children be as short as possible and the number of interviews be kept to a minimum
- every child who is being interviewed as a potential witness, whether as a victim of abuse, assault or other criminal act or as a witness to any relevant event or occurrence, has the right to have an independent person of his or her choice present while being interviewed.

Implementation. OFC should co-ordinate the development of the national interview standards in consultation with child advocacy organisations, police, legal aid commissions, family services departments and experts in investigative interviewing of children.

92. Specialised interview teams comprising, as appropriate, a police officer and family services department worker or counsellor should deal with all allegations of child maltreatment in which multiple court proceedings are possible. These teams should have as their goal eliciting accurate and reliable information from children in a manner that allows the information to be used in a number of different proceedings (criminal, care and protection, family, civil etc). These teams should be modelled on the US Child Advocacy Centres.

Implementation. These Centres, or the appropriate interview teams, should be developed jointly by State and Territory police and family services departments, with the involvement of Victim's Services/Support organisations and other relevant agencies. OFC should co-ordinate the development of national standards for the staffing, skills and interview methods of Child Advocacy Centres or joint interview teams, in consultation with child advocacy organisations, police, DPP offices, legal aid commissions, family services departments, health and hospitals departments and experts in the field of investigative interviews of children.

93. A multidisciplinary working group on video and audio taping of interviews with child witnesses should be convened to

- evaluate the advantages and disadvantages of various uses of taped interviews
- develop protocols to be used by interview teams in taping, storing and maintaining the audio and video tapes
- establish mechanisms to permit children to be further interviewed in relation to newly remembered details
- propose evidentiary law reforms to allow the tapes to be used as evidence in court.

Implementation. The Attorney-General should recommend to SCAG that it convene such a multidisciplinary working group on taping interviews with child witnesses.

94. Legislation should permit the entire evidence of a child, including evidence in chief and cross-examination, to be taken prior to trial and video-taped for presentation at trial whenever the interests of justice so require.

Implementation. The Evidence Act should be amended to reflect the above provision. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The provisions in the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) are an appropriate model for this legislation.

95. Child witnesses should not give evidence in person at committal hearings. The rules of evidence should be amended to permit a child's written or audio or video taped statement to be produced instead of the live evidence of the child.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

96. When setting hearing dates, courts should give priority to cases involving child witnesses and set a fixed date for the evidence of the child. The prosecutor or legal representative for a party calling a child as a witness should be required to inform the court that a child is scheduled to appear so that the court can set an early pre-trial hearing for the video recording of the child's evidence or so that it can prioritise the matter and set the trial for a specified time rather than allocating it to a rolling list.

Implementation. The State and Territory courts, along with the federal courts, should amend their Rules and listing practices to this effect.

97. A legal privilege should be conferred on all communications between children and counsellors for therapeutic purposes.

- Evidence of the communications should only be able to be adduced in court where the court gives leave.
- The court should not be able to give leave unless the evidence has substantial probative value, other evidence of the matters in the communication is not available and the public interest in protecting the confidentiality of the communications or in protecting the alleged victim from harm is substantially outweighed by the public interest in admitting the evidence.

Implementation. The Evidence Act should be amended to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The Evidence Amendment (Confidential Communications) Bill 1997 (NSW) is an appropriate model for this legislation.

98. All children should be presumed *prima facie* competent to give sworn evidence. Oaths and affirmations should be simple and in language that the particular child understands. Where questions regarding children's competency arise, courts should be able to take a flexible approach to competency testing, including obtaining expert opinion or reports.

Implementation. The Evidence Act is an appropriate model for these provisions. The Attorney-General through SCAG should encourage those jurisdictions that have not introduced legislation based on the Evidence Act to enact similar provisions.

99. The child of a party should have the right to object to being called to give evidence against that party in any criminal and civil proceeding. In deciding whether to require an objecting child to give evidence against a party, judges should apply a balancing test in which the judge looks to whether the harm to the child or to the child's relationship with a party outweighs the need for the evidence to be given.

Implementation. The Evidence Act should be amended to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

100. Corroboration of the evidence of a child witness should not be required. Judges should be prohibited from warning or suggesting to the jury that children are an unreliable class of witness and that their evidence is suspect.

- Judicial warnings about the evidence of a particular child witness should be given only where (1) a party requests the warning and (2) that party can show that there are exceptional circumstances warranting the warning. Exceptional circumstances should not depend on the mere fact that the witness is a child, but on objective evidence that the particular child's evidence may be unreliable.

- Warnings should follow the *Murray* formula to reduce the effect of an individual judge's bias against, or general assumptions about, the abilities of children as witnesses.

Implementation. The Evidence Act should be amended to reflect these provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

101. Expert opinion evidence on issues affecting the perceived reliability of a child witness should be admissible in any civil or criminal proceeding in which abuse of that child is alleged. In particular, evidence that may assist the decision maker in understanding patterns of children's disclosure in abuse cases or the effects of abuse on children's behaviour and demeanour in and out of court should be able to be admitted.

Implementation. The Evidence Act should be clarified to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. This legislation should in particular mirror the Evidence Act's abolition of the common knowledge and ultimate issue rules.

102. Evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any civil or criminal case involving child abuse allegations, where admission of the hearsay statement is necessary and the out-of-court statement is reasonably reliable. A person may not be convicted solely on the evidence of one hearsay statement admitted under this exception to the rule against hearsay.

Implementation. The Evidence Act should be amended to this effect. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

103. Multiple proceedings involving more than one incident concerning the same child victim and accused or more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings over long periods of time and the problems associated with rules against tendency and coincidence evidence. To this end, joinder rules and rules against tendency and coincidence evidence should be reviewed in light of the hardship these rules cause to particular child victim witnesses.

Implementation. The Attorney-General should recommend to SCAG that it convene a working group to conduct this review.

104. Age appropriate literature and other forms of information should be developed for all child witnesses to explain various proceedings, possible parties to the proceedings, the roles of each person involved in the process, the types of questions that may be encountered and the reasons for them and the meaning of common terms, legal and otherwise, that may be encountered by the child while giving evidence.

Implementation. Courts should develop this information in conjunction with the relevant State and Territory authorities. This information should not be considered a substitute for the witnesses preparation and support programs discussed in Recommendation 106.

105. Prosecutors or legal representatives for parties presenting the child as a witness should always meet the child prior to the court appearance and should attempt to establish a rapport. Wherever possible the same prosecution team should conduct the case at committal and trial in a way that minimises the number of people involved in the process of preparing and presenting the child witness.

Implementation. The Attorney-General through SCAG should encourage the development of practice directives for federal, State and Territory DPPs to this effect.

106. Child witnesses should have the right to assistance, support and preparation for the experience of giving evidence.

- Specialist child witness support units should be established to undertake these functions. These services should be staffed by trained counsellors, although this would not preclude the use of volunteers. They should provide individualised assistance to children appearing as witnesses in civil and criminal proceedings.
- The functions of support units should include
 - explaining the court process and preparing the child for the experience of giving evidence
 - keeping the child informed of the progress of the case and liaising with prosecutors, solicitors and police on behalf of the child
 - accompanying the child to court or arranging for a court companion of the child's choice

- making necessary referrals for the child and his or her family to therapeutic counselling, medical care and other services necessary to assist the child.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to establish specialist child witness support units in all jurisdictions. The Western Australian Child Victim Witness Service is an appropriate model for these units. In light of current child witness support programs in some jurisdictions, OFC should co-ordinate the development of national standards for child witness support units in consultation with the relevant State and Territory agencies.

107. Children should be allowed to choose at least one person who may come into the courtroom with them while giving evidence. This person should be permitted to sit next to the child while the child gives evidence.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact legislation to this effect.

108. There should be a presumption in favour of the use of CCTV in all matters, criminal and civil, involving child witnesses. Where CCTV is not available, use of a screen should be the standard procedure.

Implementation. The Evidence Act should be amended to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The provisions in the *Crimes Amendment (Children's Evidence) Act 1996* (NSW) are an appropriate model for this legislation.

109. The decision not to use CCTV or a screen is one for the child. Where a child does not wish to use these facilities, the prosecution or party calling the child as a witness should be required to apply to the court for leave to present the child in open court. The judge should ensure that the child has given informed consent to the application.

Implementation. The Evidence Act should be amended to this effect. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The provisions in the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) are an appropriate model for this legislation.

110. Guidelines and training programs should be developed to assist judges and magistrates in dealing with child witnesses. The guidelines and training should include

- standard periods of time beyond which child witnesses of various ages should not be expected to give evidence in chief or to manage continuous cross-examination without a break
- standard length of breaks needed by child witnesses of various ages
- examples of aggressive or confusing examination tactics so as to enable judges and magistrates to recognise and prevent aggressive, intimidating and confusing questioning
- examples of language and grammar inappropriate to the age and comprehension of child witnesses so as to enable judges and magistrates to ensure questions are stated in language that is appropriate to the age and comprehension of the child witness.

Implementation. The Australian Institute of Judicial Administration (AIJA) should develop such guidelines and training programs for all relevant courts in consultation with experts in the area of child witnesses.

111. All prosecution staff who have contact with child witnesses should receive training in the use of age appropriate language for child witnesses, children's developmental stages and the possible effects of giving evidence on children of various ages.

Implementation. Federal, State and Territory DPPs should ensure appropriate training for all prosecution staff having contact with child witnesses. Where appropriate, child witness units should be developed in the office of each DPP.

112. The advocacy and professional conduct rules incorporated in barristers' and solicitors' rules should specifically proscribe intimidating and harassing questioning of child witnesses. Lawyers should be encouraged to use age appropriate language when questioning child witnesses.

Implementation. Law Societies and Bar Associations should be encouraged to amend their rules to this effect.

113. Child witnesses should be provided with appropriate waiting facilities in all court buildings where they are likely to appear as witnesses. These should ensure privacy and separation from the public and in particular from a defendant or hostile opposing party, that party's counsel and the media.

Implementation. All courts should designate an appropriate facility in or near the court building as a children's waiting room. Where facilities are not available in the court building, the prosecutor or legal representative for the party calling the child as a witness should be responsible for taking all necessary steps to ensure that the child is provided with appropriate facilities and protected from the risk of intimidation or harassment.

114. Upon the application of a party or on its own motion, a court should have the discretion to

- modify seating arrangements
- require the removal of wigs and gowns
- exclude from the court any or all members of the public

if necessary to prevent undue distress to a particular child witness.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

115. Where a court can consider a Victim Impact Statement in the sentencing process, a child victim should have assistance, where required, in preparing the VIS.

Implementation. The Attorney-General through SCAG should encourage those States and Territories in which a Victim Impact Statement is permitted to enact similar legislation.

116. Upon the application of a party or on its own motion, a court should have discretion to permit unconventional means of giving evidence for child witnesses from different cultural backgrounds. In addition, expert evidence explaining cultural behaviours or communication characteristics of a child from a particular cultural background should be admissible.

Implementation. The Evidence Act should be amended to reflect these provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

117. Every child witness who requests or who appears to need the assistance of an interpreter should have the right to the assistance of such interpreter while being questioned, both during the investigation and trial stages of any legal proceeding.

Implementation. The national interview standards should require that all children questioned during investigations have the right to an interpreter. The Evidence Act should be amended to reflect that all child witnesses should have the right to an interpreter while giving evidence in court. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

118. Upon the application of a party or on its own motion, a court should be able to permit unconventional means of giving evidence for child witnesses with disabilities. In addition, expert evidence explaining the disability of a child witness and its physical or behavioral characteristics should be admissible.

Implementation. The Evidence Act should be amended to reflect these provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation.

15. Jurisdictional arrangements in family law and care and protection

119. The current cross-vesting arrangements should be extended to the relevant State and Territory children's courts and the Family Court in relation to the exercise of State and Territory care and protection and related federal family law matters. Under the cross-vesting scheme the first court to receive a matter relevant to the other jurisdiction should be able to deal with the full range of issues. The proceedings should be transferred to the other court only where considerations of justice so require or where proceedings are considered to have been instituted in the court as a result of inappropriate choice of forum. In considering a transfer, the court should prefer the court which will allow the most effective, expeditious and least expensive resolution of the matter.

Implementation. The Attorney-General through SCAG should seek the agreement of States and Territories to the implementation of this scheme. The relevant legislation, protocols and procedures should be amended accordingly.

120. The federal Attorney-General's Department, in conjunction with the Family Court, State and Territory children's courts and relevant family services departments, should examine and report on consequential amendments and practical changes required to ensure the smooth operation of the extended cross-vesting

scheme. In particular, it should examine the effect on the scheme of the differences in the procedures and rules of evidence, delays, costs of proceedings and issues of confidentiality of information in each jurisdiction.

Implementation. The federal Attorney-General's Department should seek the agreement of the relevant State and Territory agencies to this examination and to the implementation of the report. The Family Court should introduce any necessary amendments to the Family Law Rules.

121. The recommended extended cross-vesting scheme should operate in the following way.

- The provisions in s 67ZA of the Family Law Act requiring or allowing notifications of child abuse concerns by officers of the Family Court should refer to the definition of child abuse proposed at rec 172.
- Where care and protection concerns as defined in the relevant State or Territory legislation arise in the course of family law proceedings, the Family Court should notify the relevant family services department as at present and invite the department either to initiate care and protection proceedings under the cross-vesting arrangements or to intervene in the proceedings.
- Where protective concerns have been notified to the relevant family services department by the Family Court, the court should have the power, where it considers that care and protection orders may be necessary, to require the relevant officer from the department to appear before it to explain the reasons for any decision not to pursue the notification and/or provide information on the result of any investigation. This provision is directed to ensure appropriate co-operation and communication between the department and the Family Court and to obviate the need for litigation of a matter which would be more appropriately dealt with informally by the department. The Family Court could adjourn a matter and seek regular reports from the department on progress of informal work with the family.
- Section 69N of the Family Law Act should be amended to provide that, in care and protection matters heard in a State or Territory court of summary jurisdiction, including children's courts, in which relevant Family Law Act issues arise, the State or Territory court should be able to hear the family law issues without the consent of the parties.
- Under the recommended cross-vesting scheme section 69ZK of the Family Law Act should be repealed as it would become redundant.
- The scheme should not extend to the cross-vesting of all family law matters, particularly the statutory welfare jurisdiction of the Family Court and those powers which in general are restricted to superior courts.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the implementation of this scheme. The relevant legislation, protocols and procedures should be amended accordingly.

122. Children's courts should be invested with federal family law jurisdiction under s 69J of the Family Law Act.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to this proposal.

123. Whether or not the proposed extended cross-vesting scheme is pursued, the States should refer power to the Commonwealth to legislate for the welfare of ex-nuptial children, excluding matters falling within the care and protection jurisdiction of the States.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to this referral of power.

124. Protocols for inter-agency co-operation between the Family Court, State and Territory family services departments and the relevant children's courts should be developed where they do not apply already. All protocols should be reviewed regularly to ensure that they enhance co-operation between the agencies concerned and their professionalism, promote the best interests of the child and continue to be relevant to workers in the field. In particular, protocols should ensure that action taken on notifications from the Family Court are reported fully. Family Court, children's and magistrate courts and family services department staff should receive regular training in the protocols. Protocols should be widely published, particularly when they are updated.

Implementation. The protocols committees established in each jurisdiction should pursue the development and regular review of protocols and associated training measures.

125. The Family Court should collect, analyse and publish data concerning child abuse notifications made by the court to State or Territory family services departments and about the results of these notifications. In particular, all allegations of abuse should be recorded along with information about the type of proceedings in which the allegations were raised and the result of the Family Court matter and of any other departmental action including counselling, the provision of reports or the initiation of care and protection proceedings.

Implementation. The Family Court should establish an appropriate database for the collection of these statistics and introduce appropriate procedures and protocols to allow their collection. The statistics should be provided to the Australian Institute of Health and Welfare for publication along with national care and protection statistics.

126. Notifications of care and protection issues arising in family law proceedings should be tracked through the Family Court, family services departments and children's courts and reports provided to the Family Court on the results of investigations.

Implementation. In conjunction with the State and Territory children's courts and family services departments, the Family Court should develop mechanisms to ensure that these notifications are appropriately tracked and reported back to the Family Court.

127. The Family Court should be the sole court of appeal from care and protection and family law matters that involve a cross-vested element. The appeal system should operate as follows.

- In all jurisdictions except Western Australia, where matters with a cross-vested element have been initially heard by a magistrate in either a court of summary jurisdiction or a children's court, appeals should lie directly to the Family Court *de novo* on all issues, irrespective of whether they relate exclusively to care and protection or family law matters alone or a combination of such matters.
- In Western Australia, appeals from magistrates' decisions in matters with a cross-vested element should also be able to be heard by the Family Court of Western Australia.
- Where matters with a cross-vested element are heard originally by a judge of a children's court, appeals should lie to a single judge of the Family Court. These appeals should not be rehearings *de novo*.
- In the Family Court, where matters with a cross-vested element are heard by a judge, appeals should lie only to the Full Court of the Family Court.
- If a federal magistracy is introduced that deals with children's matters at first instance, appeals from decisions of those magistrates involving a cross-vested element should be heard by a judge of the Family Court.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the proposal that appeals should lie to the Family Court from decisions made in matters in which the proposed cross-vested jurisdiction has been exercised. The relevant legislation including Part X of the Family Law Act, protocols and procedures should be amended accordingly.

128. Appellate jurisdiction in matters relating exclusively to care and protection should be conferred on the Family Court. Where such matters arose in children's courts presided over by a magistrate the Family Court should hear appeals only after any internal avenues of appeal to a judge of that court have been exhausted. The appeal system should operate as follows.

- Appeals from care and protection matters originally heard by a magistrate in a court of summary jurisdiction or in a children's court where there is no internal avenue of appeal should be heard *de novo* by a single judge of the Family Court or, in Western Australia, by a single judge of the Family Court of Western Australia.
- Appeals from decisions of children's court magistrates in care and protection matters where there is an internal appeal to a judge of that court should be heard by that judge. Any further appeals from that judge's decision should be heard by a single judge of the Family Court. These appeals to the Family Court should not be rehearings *de novo*.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the proposal that appeals should lie to the Family Court from decisions made in all care and protection jurisdictions. The relevant legislation including Part X of the Family Law Act, protocols and procedures should be amended accordingly.

129. Appeals from decisions of Northern Territory courts of summary jurisdiction exercising federal family law jurisdiction should lie to the Family Court alone.

Implementation. The Attorney-General should negotiate with the Northern Territory to effect agreement to this proposal and a proclamation should be made to that effect.

130. States and Territories should develop a specialist magistracy to exercise federal family law jurisdiction and to handle care and protection and juvenile justice matters. All major population centres should have their own specialist family and children's magistrates, while in more remote areas specialist magistrates should operate on circuit.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the development of this magistracy.

131. States and Territories should produce uniform statistics on family law matters heard in magistrates' courts.

Implementation. The Attorney-General through SCAG should seek the agreement of States and Territories to a common approach to data collection.

132. A specialist Family Court magistracy should be established. These magistrates should be judicial officers in their own right, empowered to hear and determine contested children's matters.

Implementation. The Attorney-General should introduce a specialist federal magistracy for family matters.

133. Judicial officers, including State and Territory magistrates, exercising federal family jurisdiction should receive training in children's matters. Training for State and Territory magistrates could be provided by members and staff of the Family Court during annual training conferences. Training should include material on

- child development
- communication skills and appropriate language for communicating with children
- family dynamics
- issues surrounding disclosure of and family dynamics concerning child abuse
- cross-cultural awareness.

Implementation. In conjunction with other judicial education bodies, AIJA should develop a national core syllabus for this training.

134. All magistrates and judges who hear care and protection matters should be trained in children's issues. Training should include simulated clinical exercises and feedback on the use of appropriate language and communication with children.

Implementation. In conjunction with other judicial education bodies, AIJA should establish minimum training requirements for the children's court magistracy and judiciary and set guidelines for training programs to be implemented in each jurisdiction.

16. Children's involvement in family law proceedings

135. In all actions of a court under the Family Law Act concerning children, unless the Act expressly states otherwise, the best interests of the child should be a primary consideration.

Implementation. Section 43 of the Family Law Act should be amended to reflect the provisions of article 3(1) of CROC in relation to all areas of the Act not subject to the present best interests requirement.

136. The factors relevant to a consideration of the best interests of the child, enumerated in the Family Law Act, should also include factors relevant to all areas of decision-making to which the best interests principle applies, and in particular to location and recovery of children, adoption and the welfare of children.

Implementation. Section 68F(2) of the Family Law Act should be redrafted accordingly.

137. The Family Court should collect statistics on children's participation in counselling, mediation and conciliation processes, including the origin of applications in which children's involvement is requested, the number of matters in which children are involved and the results, including long-term outcomes, of those matters in which children participate in counselling or mediation compared with those where they do not. These statistics should be collected for all post-filing primary dispute resolution processes, including those funded under the Family Services Program.

Implementation. The Family Court should collect these statistics and publish them in its Annual Report.

138. All providers of primary dispute resolution services associated with family disputes, whether employed within or outside the Family Court, should have

- a recognised degree or diploma in psychology, social work or related discipline
- at least 5 years' relevant post-graduate experience, including at least 2 years' working with family relationships
- at least 2 years' experience working with children, including the assessment of children and family relationships.

Implementation. The Attorney-General should specify that these standards are the minimum training and experience requirements for external providers of primary dispute resolution services associated with family disputes.

139. All providers of primary dispute resolution services associated with family disputes should receive continuing training in children's matters. Training should include material on legal issues for children in the family law system, child development and communication and, particularly, issues surrounding the disclosure of, family dynamics concerning and best practice for dealing with allegations of child abuse.

Implementation. The Family Court should develop appropriate continuing training programs to ensure the currency of the skills of its counselling and mediation staff. The Attorney-General should specify that all external providers of primary dispute resolution services should receive similar training.

140. Counselling and mediation services should be available to all litigants involved in family disputes regardless of the court they are before. These services could be supplied in part by extending telephone counselling services or counselling circuits and by making use of video links and other new technologies in appropriate cases.

Implementation. Depending on the results of the Attorney-General's review of alternative dispute resolution services in family law, the Family Court should consider appropriate mechanisms to ensure the provision of these services and should be resourced adequately to put these mechanisms in place.

141. Judges and magistrates deciding family law matters should be encouraged to intervene appropriately to assist the determination of the best interests of the child in Family Court children's matters.

Implementation. The Family Court should consider implementing a training program for judges and, with State and Territory agreement, magistrates exercising federal family jurisdiction on more inquisitorial approaches to determining the best interests of the child. The court should also consider preparing suitable guidelines to assist judicial officers in this regard.

142. Through consultation and research, the Family Court should determine how best to assess at the earliest possible time the need to appoint a legal representative for the child.

Implementation. The Family Court committee monitoring the simplified procedures should conduct such an investigation.

143. The Family Court should review the timing of ordering family reports to ensure that the report can be used to promote settlement while avoiding unnecessary procedures and distress for children and families.

Implementation. The Family Court should conduct a review of its family report procedures and amend the practice accordingly.

144. More effective use should be made of the power under O 30A of the Family Law Rules to appoint experts to assist the court by inquiring into and reporting on issues concerning children.

Implementation. The Family Court should give consideration to the present and potential use of these rules and consult with the legal profession and expert witnesses concerning effective use of experts.

145. The greater use of assessors in children's matters in the Family Court should be explored and, if appropriate, encouraged.

Implementation. The Family Court should consider making more use of this procedure and preparing suitable case management guidelines.

146. The Family Court should collect and maintain statistics concerning the number of times experts, including Family Court counsellors, interview each child in each litigated matter in the Family Court. These

statistics should be used to conduct a regular assessment of whether children are over-interviewed during family law proceedings.

Implementation. The Family Court should establish a database, collect these statistics and publish them in its Annual Report.

147. In deciding whether to grant an application that a child be interviewed or examined by an expert, the court should consider any wishes expressed by the child as well as the other specified considerations.

Implementation. Section 102A(3) of the Family Law Act should be amended to this effect.

148. The Family Law Council should monitor the operation of parenting plans over the next 12 months and assess

- whether and to what extent registration is likely to prevent or inhibit flexible parenting arrangements
- whether registered parenting plans are based on appropriate and careful assessments of the best interests of the children by parents
- whether the court, in registering parenting plans, in fact considers any or all of the relevant principles of s 68F(2) of the Family Law Act.

In the light of this research, the Attorney-General should review the provisions allowing registration of parenting plans.

- If the research indicates that registration of parenting plans is likely to prevent flexible approaches to parenting, the Family Law Act should be amended to remove or modify the registration provisions.
- If parenting plans continue to be registrable, rules specifying the information that must be filed along with the plan should require sufficient detail to allow the court to scrutinise the plan closely and ensure that the long term best interests of the child are protected.

Implementation. The Family Law Council should undertake this research and the Attorney-General and the Family Court should take appropriate action as a result of the research.

149. Parents should be encouraged to involve their children in the preparation of parenting plans to the extent appropriate to the child's age, maturity and wishes.

Implementation. Section 63B of the Family Law Act should be amended to this effect.

150. Where parenting plans are developed with the assistance of family or child counsellors, counsellors should involve children who are the subject of the plan in its formulation to the extent appropriate to the child's age and maturity and commensurate with the child's wishes.

Implementation. A provision should be inserted into the Family Law Act to this effect.

151. The Family Court practice that children generally not be called to give evidence should be retained where the evidence proposed to be given by a child relates to disputes of fact between the parties. However, where the child is of sufficient maturity and is anxious to give evidence concerning his or her wishes about a parenting order the practice should be relaxed.

Implementation. A Family Law Rule should be made to this effect.

152. Children should be informed about their options for participation in family law proceedings. The information should relate to the availability of counselling and their options for more direct participation in family law proceedings including their rights to seek legal advice or initiate proceedings. Brochures and other appropriate mediums should be produced to provide this information and should be directed to at least two developmental and literacy levels of children. The brochures should be provided to both the applicant and the respondent at the early stages of the proceedings to be passed along to the children concerned.

Implementation. The Family Court should prepare brochures that provide this information.

153. The option of a judicial officer interviewing a child in chambers should remain available but be employed only in rare circumstances where the best interests of the child justify a judicial interview.

154. The Family Court should continue to promote the access of Indigenous families and children to the court and continue its work in liaising with Indigenous communities. The court should continue research to ensure that its processes are adapted to take account of the dynamics of dispute resolution among Indigenous communities, particularly in relation to the involvement of extended families and family violence.

Implementation. The Family Court should undertake research in consultation with relevant community organisations and maintain programs to ensure appropriate access of Indigenous children and families to the court.

155. The Family Court should take urgent action to collect and publish comprehensive statistics in relation to the number of applications made to the court involving Indigenous parties or children. Statistics should be collected and maintained regarding the passage of those applications through the court and their outcomes.

Implementation. The Family Court should establish a database, collect these statistics and publish them in its Annual Report.

156. The Family Court should develop an access and equity plan to assist it in eliminating barriers which people of non-English speaking background, including children, experience in accessing its services.

Implementation. The Family Court should develop this strategy.

157. Closure of Family Court registries should be treated as a least favoured option for dealing with funding constraints in the Family Court. The continuation of circuits of the counselling service to rural and remote areas is particularly important. The Family Court should attempt to expand or promote on a national scale toll free telephone access to the court. It should consider making greater use of its ability to take evidence by video link or telephone, particularly from parties living in rural or remote communities.

Implementation. The Family Court should investigate the use of communication technologies to provide greater access to Family Court services for rural families and children.

158. An awareness campaign should be conducted to provide medical practitioners with information about the legal requirements for approval for the conduct of sterilisation operations on young people with an intellectual disability.

Implementation. The Attorney-General, through his department, should co-ordinate and conduct this campaign.

159. Research should be conducted to establish the comparative levels of approval of sterilisation applications in each jurisdiction by the various courts and bodies with this responsibility. This research should investigate the reasons for any discrepancy to ensure that procedures allow for appropriate exploration of alternatives to the sterilisation application.

Implementation. The Family Court should conduct such research in co-operation with relevant State and Territory agencies.

160. Guidelines should be developed to regulate the pre-hearing processes for applications for approval of special medical procedures under the Family Court welfare jurisdiction. These guidelines should ensure that the procedures are used only where strictly necessary in the best interests of the child. The guidelines should require that parties be provided with information about all alternatives to the procedure, that all options have been explored prior to the hearing and that suitable counselling has been undertaken. They should also ensure that the child has participated as appropriate.

Implementation. The Family Court should consider developing such guidelines for inclusion in O 23B of the Family Law Rules or in case management guidelines as appropriate.

17. Children's involvement in the care and protection system

161. National standards for legislation and practice in care and protection systems should be developed. These national care and protection standards should, where necessary, provide a clear allocation of responsibility for their implementation.

Implementation. These standards should be developed by OFC in consultation with the relevant government authorities, non-government organisations, community groups, families, foster carers and, particularly, children and young people who are or have been involved in care and protection systems.

162. The national standards should be reviewed and updated regularly in light of developing national and international initiatives in care and protection practice.

Implementation. OFC should monitor and evaluate the national standards on a regular basis in consultation with relevant government authorities, non-government organisations, community groups and consumers of

care and protection services such as children, families and foster carers. National conferences, organised by OFC, could be convened for this purpose.

163. The federal Government should support continuing research into care and protection systems, including the collection of data on the circumstances of children in care and in particular on their level of education, health and cultural and socio-economic backgrounds. The research should focus on the outcomes for children in care and in particular their contact with juvenile justice agencies (including police), their school retention rates and levels of education attained while in care and their access or lack of access to government services.

Implementation. This research could be co-ordinated by the AIFS and/or the AIHW.

164. A Charter for Children in Care should be developed. The Charter should create a legally enforceable obligation on the part of the relevant State or Territory family services department to provide each child in care with

- a safe living environment
- accommodation in the least restrictive placement commensurate with the child's best interests and wishes
- suitable education and job training opportunities or assistance in finding appropriate employment when the child reaches working age while in care
- an appropriate amount of spending money
- therapeutic support or additional educational assistance where necessary and with the consent of the child
- a mentor from whom the child can obtain confidential advice and assistance
- regular reviews of the child's case plan and circumstances in care
- the right to be consulted and to have the child's views given due weight (in accordance with age and maturity) in the decision-making process, particularly when decisions are made about residence, family contact, schooling and health
- appropriate assistance in the transition from care including housing assistance, access to income support, further training and/or education and continuing support from a mentor
- service delivery models tailored to the needs and capacities of children.

Implementation. OFC should develop the Charter for Children in Care in conjunction the relevant State and Territory family services departments and in consultation with other relevant government agencies, non-government service providers, children's advocacy groups and children in care. This Charter should be enacted in legislation at federal, State and Territory levels.

165. The Charter for Children in Care should be explained to each verbal child on his or her entry into care and at regular periods while in care, as well as to the child's parents and his or her carers. Copies of the Charter, in various forms appropriate for different age levels, should be provided to all children in care, the child's parents and his or her carers on the child's behalf if the child is too young to understand the nature of the Charter.

166. Research should be conducted and data collected on child protection strategies across portfolios. This research should focus not only on those policies and programs that specifically address child abuse prevention but also on policies and programs directed at children, and families with children, that have implications for child abuse prevention, such as income support, child care, housing and medical services. It should identify those areas in which the federal government could encourage co-operative arrangements with and between States and Territories for the effective provision of services. It should form the basis for OFC's advice to the federal Government on the co-ordination necessary for the provision of primary and secondary prevention services by federal agencies.

Implementation. OFC should support this research and co-ordinate data collection to these ends. It should publish its findings in its annual reports on the status of children in Australia (see recommendation 3) and provide the required advice.

167. The proposed National Council for the Prevention of Child Abuse should be provided with some measure of independence to identify issues and problems requiring attention. Links should be developed and maintained with OFC and with the Standing Committee of Community Services and Income Security Administrators.

Implementation. The Department of Health and Family Services should take the appropriate action.

168. Detailed cross-jurisdictional research should be conducted into the effect and effectiveness of mandatory reporting of child abuse to

- document the impact of mandatory reporting of suspected child abuse on the delivery of family services in Australia, in particular, to investigate whether the introduction of mandatory reporting transfers resources from prevention of child abuse and support for its victims to the investigatory and legal side of child abuse
- identify the conditions required for optimum effectiveness of mandatory reporting schemes, particularly focusing on the appropriate allocation of resources to family services departments for investigation, litigation and support for children and families
- establish why there are wide differences in substantiation rates in the different jurisdictions.

Implementation. OFC should co-ordinate this research on the basis of information provided by State and Territory family services departments.

169. Research should be conducted into the practice of family group conferencing and pre-hearing conference schemes, to encourage the adoption in all jurisdictions of effective conferencing models. This research should

- evaluate the effectiveness of various case conferencing arrangements used in Australian jurisdictions, particularly in relation to procedures, outcomes and levels of satisfaction or dissatisfaction of all the participating parties with the arrangements
- identify the types of cases most amenable to case conferencing solutions, the stage of the proceedings when conferences are most effective, whether the conference works best in the shadow of or outside court confines and whether the participation of legal representatives assists or retards proceedings
- focus on children's levels of participation in, and satisfaction with, these processes and the assistance they require to participate effectively in conferences
- be aimed at ensuring appropriate participation in conferencing by Indigenous children and families and those from non-English speaking backgrounds as well as people with disabilities.

Implementation. OFC or the Australian Child Protection Advisory Council should co-ordinate this research on the basis of information provided by State and Territory family services departments. The research should include longitudinal studies of the effectiveness of different models as compared to court-based resolution.

170. The procedures associated with conferencing schemes should be set down in legislation, based on the evaluation proposed in recommendation 169. The legislation dealing with procedures for conferencing models in care and protection jurisdictions should require that

- in family group and pre-hearing conferences the best interests of the child should be the paramount consideration
- family members and children have access to independent legal advice before participating in any conference
- children who are too young to participate or who wish to have additional support during the conference should be represented by a lawyer or advocate of their choice in these conferences
- convenors of family or pre-hearing conferences should have knowledge of and training in care and protection law, family dynamics and child development issues, so that they are aware of power imbalances between the participants at the conferences and are able to work to overcome these imbalances to arrive at a resolution in the best interests of the child.

Implementation. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The national care and protection standards should specify the minimum training and experience requirements for convenors of conferences.

171. The national care and protection standards should specify that direct evidence by a witness should be preferred, except when the witness is the subject child. Hearsay evidence of statements by the subject child should as far as possible be presented in the child's own words.

172. The national care and protection standards should specify that

- legislation in all jurisdictions should provide for consistent definitions of abuse and neglect and consistent or similar orders allowing a range of formal interventions suitable to the different protective and family law issues associated with individual children and families

- children's court magistrates and judges should not be restricted to making those orders applied for by the parties but rather should have authority to make whatever orders are appropriate from a range available under the legislation.

173. The national care and protection standards should specify that children's court magistrates and judges should be active and managerial in their approach to care and protection cases and that the same magistrate or judge should manage a case from first listing, on an individual case management or single docket model.

174. The national care and protection standards should indicate the resource levels necessary to ensure that family services departments are able to supervise adequately and provide services to families with children under care and protection orders living at home.

175. The national care and protection standards should require that all government agencies and non-government organisations that receive funding for the care of children in out-of-home care should be bound by the terms of the Charter for Children in Care.

176. The national care and protection standards should require that in all appropriate cases care and protection orders should be directed to providing permanence and certainty for the child.

177. The national care and protection standards should specify that where permanent orders are inappropriate non-permanent care and protection orders should be made as follows.

- Where the child is removed from his or her family, orders should operate for one year unless the party seeking the order can show that a longer fixed period of time is in the best interests of the child.
- Where the child is to remain at home under orders, orders may be expressed to continue for any fixed period of time the court considers appropriate in the best interests of the child.
- In all cases, non-permanent orders should be expressed to operate for a specified period and extensions of orders should require an application to the court.

178. National care and protection standards should make the following provisions.

- Each child in care should have a detailed case plan within 6 weeks of entry into care.
- The case plan should describe the ultimate goals for the child (for example, return to parent, adoption or independent living) and designate the appropriate day to day services and co-ordination necessary to reach those goals and to provide the child with the basic guarantees in the Charter for Children in Care.
- The educational needs, recreation opportunities and behavioural and/or medical intervention requirements for each child and the responsibilities, time-frames and strategies necessary to achieve the identified goals should be addressed in the case plan.
- The case plan should be developed in consultation with the child. The child's views and wishes should be given due weight in accordance with his or her level of maturity.

179. In each jurisdiction all case plans should be subject to annual review. Reviews should be conducted by the relevant family services department and, for those case plans that may be contested or controversial, also by an independent body.

- The internal and external review processes should include participation by the child and/or the child's legal representative if the child wishes or the child's best interests require representation.
- The independent body, perhaps modelled on the ACT Community Advocate or the NSW Community Services Commission, should be able to conduct a full case plan review at the request of the family services department, parent, foster carer or child or on its own initiative. To facilitate this review, the independent body should be provided with the family services department's proposed case plan prior to each review, have access to the original court and department file and involve all participants, including the child, in the review process. Its review should focus on ensuring that the child's best interests are paramount in the formulation of case plans and on providing objectivity and accountability in the formulation of appropriate case plans.

Implementation. Appropriate bodies should be established or given responsibility for independent reviews in each jurisdiction. This should be included as a legislative requirement in the national care and protection standards.

180. National standards should specify that the child or the child's representative may bring an application to vary or revoke an order at any stage.

181. The national care and protection standards should ensure that the case plan for a child who is leaving care is reviewed by the family services department at least 6 months prior to the child's 18th birthday or planned exit from care. A transitional case plan should be developed at that time directed towards assisting the child in the transition to independence or family reunification. It should designate the support necessary for this transition both before and after leaving care.

182. Research should be conducted into the causes of and ways of preventing the drift of children in care into the juvenile justice system.

Implementation. OFC should co-ordinate this research on the basis of information provided by the State and Territory family services departments, juvenile justice departments and DPP agencies.

183. The national care and protection standards should require that caseworkers, particularly staff in residential care settings, receive specialist training in identifying children and young people at risk of juvenile justice contact and in implementing early intervention and prevention strategies. Children in care should have access to intensive support, therapeutic and rehabilitation programs where appropriate.

184. The national care and protection standards should require that

- the Aboriginal Child Placement Principle and the essential role of Aboriginal and Islander Child Care Agencies be enshrined in legislation in all States and Territories
- all family services department workers receive appropriate information and training in crosscultural awareness, including information and training on the differing child rearing practices of Indigenous communities.

185. The Minister for Aboriginal and Torres Strait Islander Affairs should prepare and release regular reports on

- the current policies and practices of, as well as best practice guidelines for, State and Territory family services departments concerning investigation, assessment and case management of referrals for Indigenous children
- the operation of Aboriginal and Islander child care agencies, including the funding levels required for their effective operation
- prevention programs aimed at Indigenous communities.

Implementation. Such reports could be prepared in consultation with OFC and the Secretariat of National Aboriginal and Islander Child Care.

186. National education and awareness campaigns about child abuse and neglect should be developed and directed towards the major ethnic and cultural communities around Australia.

Implementation. The Department of Health and Family Services and DIMA should conduct these campaigns in consultation with OFC.

187. The national care and protection standards should require that all family services department officers making assessments or conducting investigations receive appropriate training in cross-cultural awareness, including issues relating to differing child rearing practices in various communities.

188. National education and awareness campaigns should be conducted around Australia about particular issues concerning abuse and neglect of children with disabilities.

Implementation. The Department of Health and Family Services should conduct these campaigns in consultation with OFC and the relevant State and Territory agencies.

189. The national care and protection standards should require that all family services departments workers receive appropriate training in issues relating to abuse and neglect of children with disabilities.

190. The national care and protection standards should include the following requirements.

- A child for the purposes of care and protection jurisdictions should be defined as a person under the age of 18 and a court should be able to make orders for a young person aged 16 to 18 if it finds, after

taking into consideration the wishes of the young person, that the young person is in need of care and protection.

- All family services department workers should receive appropriate training in issues relating to abuse and neglect of adolescents, as well as reasons for family/adolescent breakdown.
- Adolescent and family therapy and mediation programs should be available to all young people in dispute with their families.
- Adolescent and family therapy and mediation programs should develop models of best practice to meet the needs of adolescents and their families, particularly in Aboriginal and Torres Strait Islander, non-English speaking background, isolated and/or rural communities.

191. Research should be conducted into the appropriate mechanisms and forums for dealing with adolescent/family breakdown, including the involvement of family services departments, conferencing models and court processes. This research should

- focus on the reasons for such breakdowns and the appropriateness of the care and protection system in alleviating the problems
- monitor the appropriateness of the national care and protection standards for adolescents with family disputes.

Implementation. OFC should co-ordinate this research following the release of the report on the Youth Homelessness Pilot Program.

18. Children's involvement in criminal justice processes

192. National standards for juvenile justice should be developed to reflect Australia's international commitments and ensure a proper balance between rehabilitation, deterrence and due process.

Implementation. The standards should be developed by OFC in consultation with the relevant State and Territory authorities, the legal profession, community groups, peak bodies such as juvenile justice advisory councils and young people.

193. Compliance by the Commonwealth, States and Territories with the national standards for juvenile justice should be monitored. As part of this process, the Commonwealth and each State and Territory should be required to provide a detailed profile of juvenile justice laws, programs and policies annually, including information on performance measures and outcomes. The community sector should be given regular opportunities to contribute to the monitoring process.

Implementation. These monitoring and consultation roles should be performed by OFC which should report annually to Parliament on the results.

194. The minimum age of criminal responsibility in all Australian jurisdictions should be 10 years.

Implementation. The Tasmanian Government and the ACT Government should enact legislation to this effect.

195. The principle of *doli incapax* should be established by legislation in all jurisdictions to apply to children under 14.

Implementation. All States and Territories that have not already done so should legislate to this effect.

196. The age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions.

Implementation. All States and Territories that have not already done so should legislate to this effect.

197. The age of consent should be the same for heterosexual and homosexual sex.

Implementation. All States and Territories that have not already done so should legislate to this effect.

198. The national standards for juvenile justice should stress the importance of rehabilitating young offenders while acknowledging the importance of restitution to the victim and the community.

199. The national standards for juvenile justice should provide best practice guidelines for cautioning that will ensure equal treatment of young people wherever they live and whatever their background. OFC should monitor compliance with these guidelines.

200. The national standards for juvenile justice should provide best practice guidelines for family group conferencing. OFC should monitor compliance with these guidelines.

201. The best practice guidelines for family group conferencing should ensure that young federal suspects have access to the schemes. The national juvenile justice standards should ensure that conferencing is available to federal suspects prior to charge wherever possible. When this is not possible, conferences should be administered by a judicial officer.

202. The national standards for juvenile justice should require governments to ensure Indigenous communities are able to develop their own family group conferencing models. Existing conferencing schemes should be modified to be culturally appropriate.

203. Security organisations dealing with young people in privately owned spaces used for public purposes should not have the power to extend the scope of the criminal law.

Implementation. State and Territory governments should ensure that legislation and regulations enabling private security organisations to extend the scope of the criminal law are repealed. OFC should convene a working party of relevant individuals to develop guidelines for security organisations dealing with young people in privately owned spaces used for public purposes.

204. Laws that permit preventive apprehension of young people should be repealed.

Implementation. States and Territories that have such laws should arrange for their immediate repeal.

205. The national standards for juvenile justice should provide that no jurisdiction should introduce laws, such as curfews or extensions of criminal trespass, to restrict the movement of young people not suspected of any crime.

206. The national standards for juvenile justice should provide as follows.

- Each police department should ensure that there is at least one officer trained in children's issues in each patrol. Each major station should have a specialised youth officer who deals only with matters involving young people. Training for youth officers should include information on
 - the rights of young people
 - young people's recreational use of public space
 - the skills needed to deal effectively and fairly with young people
 - the specific laws, rules and policies for the policing of young people
 - desired outcomes in the policing of young people
 - the role of the other government agencies in the juvenile justice system
 - community support services to which young people can be referred.

207. The national standards for juvenile justice should include the following.

- Police should only arrest a juvenile suspect if proceedings by summons or court attendance notice against the person would not achieve one or more of the following purposes
 - ensuring the appearance of the person before a court in respect of the offence
 - preventing a repetition or continuation of the offence or the commission of another offence
 - preventing the concealment, loss or destruction of evidence relating to the offence
 - preventing the harassment of, or interference with, a person who may be required to give evidence in respect of the offence
 - preventing the fabrication of evidence in respect of the offence
 - preserving the safety or welfare of the person.
- Each police service should provide officers with practical training on the circumstances that justify arresting juvenile suspects.
- When scrutinising the charges that an arresting officer proposes to lay against a juvenile, the officer in charge should consider whether arrest was necessary (as defined in the national standards for juvenile justice) in the individual case. If not, the matter should progress by way of summons. The number of arrests of young suspects considered to be inappropriate by senior officers should be taken into account in a police officer's performance assessment.
- Arrest should not be a bar to the subsequent issue of a summons or court attendance notice.
- Each Australian police service should reform administrative procedures to ensure that summonses are served on young people within 2 months of the alleged offence.

- In an attempt to reduce the arrest rate for young Indigenous suspects, each police service should provide officers with cross-cultural training, monitor arrest rates and provide clear instructions on the subject.

208. The national minimum standards for juvenile justice should provide that police should inform a young suspect's carers or the relevant community services department, whichever is most appropriate in the particular circumstances, of his or her whereabouts as soon as possible after he or she is detained.

209. Police should receive regular reminders of the importance of ensuring that young people's carers are notified of their child's detention in custody.

Implementation. The police commissioner of each jurisdiction should ensure that officers receive these reminders.

210. The national minimum standards for juvenile justice should require police to inform a child of his or her rights prior to interview in language appropriate to the age and understanding of the child. This information should be provided where possible through a specially prepared video.

211. The national standards for juvenile justice should provide that admissions and confessions by child suspects are only admissible as evidence if they have been electronically recorded.

212. The national standards for juvenile justice should include the following.

- An interview friend must be present during police questioning of a child suspect and have an opportunity to confer in private with the child prior to questioning. Statements made in the absence of an interview friend should not be admissible in evidence against the child.
- The function, responsibilities and powers of the interview friend should be defined by statute. The definition should encompass the interview friend's role in providing comfort, support and protection for the young person as well as ensuring the young person is aware of his or her legal rights. The interview friend should not be a substitute for legal advice or representation.
- A child suspect should have the right to choose his or her own interview friend if he or she wishes provided that person is not suspected of involvement in the alleged offence. If the child does not wish to choose an interview friend the existing statutory order should apply.
- Where an interview friend is a relative or friend of the young suspect who has not received training in the role he or she should be given the opportunity to watch a short video outlining his or her responsibilities prior to interrogation. The young person should also watch the video which should also inform the suspect of his or her rights during police interview. Where the police station does not have video facilities information brochures should be provided. This material should be prepared by each police service in consultation with relevant community organisations and OFC and should be conveyed in language easily understood by young people.
- A register of individuals willing to act as interview friends for child suspects should be maintained in all major regions. Potential interview friends should be selected and trained by the relevant legal aid commission using the material proposed above. Otherwise they should have relevant qualifications or work experience.
- Where a child suspect has a disability that impedes his or her ability to communicate, an interview friend with specialised training or experience in the relevant field should be appointed.
- Specialised training should be provided for registered interview friends supporting young Indigenous suspects.

213. A child suspect should have the right to choose his or her own interview friend during police interviews concerning federal offences so long as that person is not suspected of involvement in the offence. If the child does not wish to choose an interview friend the existing statutory order should apply.

Implementation. Section 23K(3) of the Crimes Act should be amended to this effect.

214. The national standards for juvenile justice should provide that the requirement in s 23C of the Crimes Act that people under 18 not be detained by police for more than two hours (excluding dead time) before being released, on bail or otherwise, or brought before a magistrate be mirrored in State and Territory legislation.

215. The national standards for juvenile justice should require Indigenous young people to be assisted to understand their rights during police questioning through processes developed in conjunction with Aboriginal legal services and other relevant Indigenous organisations.

216. Those States and Territories that have not already done so should enact legislation giving young suspects and their interview friends the right to an interpreter during police interview if they are unable to communicate orally with reasonable fluency in the English language. Each police service should ensure that its officers are trained in recognising communication difficulties in young suspects. These requirements should also be included in the national standards for juvenile justice.

217. All police officers who may be required to interrogate young suspects should receive specific training on identifying and communicating effectively with young suspects who have a physical, intellectual or behavioural disability or a mental illness.

Implementation. The AFP and all State and Territory police services should ensure this material is included in the relevant training programs as soon as possible. It should be developed in consultation with health experts and the OFC.

218. Clause 23XN of the Crimes Amendment (Forensic Procedures) Bill 1997 (Cth) should be amended to provide that forensic procedures should be conducted by a qualified person of the sex of the suspect's choosing. If the suspect does not wish to exercise this choice, the search should be conducted by a person of the same sex as him or her.

Implementation. The Attorney-General should seek to amend the Bill before its passage.

219. The national standards for juvenile justice should mirror the provisions (as amended in accordance with recommendation 218) regarding young suspects in the Crimes Amendment (Forensic Procedures) Bill 1997 (Cth).

220. The national standards for juvenile justice should provide that a child may be strip searched only pursuant to a court order. The child should have the right to oppose the application for the order and should be legally represented in the proceedings. Strip searches should only be conducted by a qualified person of the sex of the suspect's choosing. If the suspect does not wish to exercise this choice, the search should be conducted by a person of the same sex as him or her.

221. Children charged with federal offences should only be strip searched pursuant to a court order. The child should have the right to oppose the application for such an order and should be legally represented in the proceedings. Strip searches should be conducted by a qualified person of the sex of the suspect's choosing. If the suspect does not wish to exercise this choice, the search should be conducted by a person of the same sex as him or her.

Implementation. Section 3ZI of the Crimes Act should be amended to this effect.

222. The national standards for juvenile justice should require police to avoid detaining intoxicated young suspects in police cells. Police services in each State and Territory should liaise with the relevant health authorities to find suitable alternatives in each region where appropriate places are not already proclaimed or gazetted.

223. The national standards for juvenile justice should require that the AFP and all State and Territory police lodge copies of all complaints made by young people with the appropriate complaints handling body (see paras 7.33–43). The standards should include specific guidelines for the handling of children's complaints against police. In particular, they should include standards regarding time frames for hearing complaints and the desirability of dealing personally, rather than in writing, with the child.

224. The national standards for juvenile justice should require the establishment of community visitor schemes in all regions. A national evaluation of these schemes should be conducted by OFC.

225. Police failure to comply with the national standards for juvenile justice on investigation and interviewing procedures should *prima facie* be the basis for the exercise of a discretion by judicial officers to exclude evidence as improperly or unfairly obtained.

Implementation. The judicial training proposed at recommendation 236 should include material on the particular restrictions governing the adducing of evidence against young defendants. The training should also make clear the particular vulnerabilities of young people in police custody. Any prosecutor responsible for a juvenile case in which evidence is challenged as improperly or unfairly obtained should be required to report the matter to the relevant ombudsman.

226. The national standards for juvenile justice should provide that a child suspected of committing an offence should have a statutory right to access legal advice prior to police interview and that police must inform young people of this right at the time of apprehension. Duty solicitor schemes should be appropriately resourced to enable practitioners to meet with their child clients before the first court appearance.

227. Confidential legal advice, with the capacity for trained interpreter assistance, should be available to young people 24 hours a day through a freecall youth telephone advice service. This service should be staffed by practitioners with specific training and experience in dealing with children's matters.

Implementation. The Attorney-General should seek the agreement through SCAG of all States and Territories to the immediate establishment of such a service in each jurisdiction.

228. The national standards for juvenile justice should provide as follows.

- There should be a presumption in favour of bail for all young suspects. The absence of a traditional family network should not negate this presumption.
- Children should be legally represented at bail application proceedings.
- Monetary and other unrealistic bail criteria should not be imposed on young people.
- Children should not be subject to inappropriate bail conditions, such as 24 hour curfews, that disrupt their education and have the effect of forcing constant contact with their families or that impose policing roles on carers.
- Where a child is released on bail, police should have a statutory duty of care to ensure that the child is able to return to his or her carers promptly or is provided with alternative accommodation.
- Lack of accommodation is not sufficient reason to refuse bail to a young person.
- Bail hostels should be established in all regions for young people on bail who do not have alternative accommodation.
- All police who may deal with young suspects should be given specific training in the importance of ensuring that Indigenous young people are not unnecessarily separated from their families and communities.

229. The national standards for juvenile justice should provide as follows.

- Where it is necessary to keep young suspects in police custody, they should be detained separately from adults and with members of their own sex.
- Young suspects should be transferred to the nearest juvenile detention centre at the first opportunity. In any event, they should not be remanded in police custody for longer than 24 hours.
- In geographically remote communities where it is not feasible to transfer juvenile suspects to a juvenile detention centre, the police station or other appropriate premises should be proclaimed or gazetted as a detention centre for the purposes of remanding young offenders provided the facilities have the approval of the relevant complaints handling body and comply with the national standards for juvenile detention facilities.

230. The national standards for juvenile justice should require all juvenile justice matters to be prosecuted by the DPP.

231. All DPP staff who prosecute juvenile justice matters should be given specialised training in children's issues particularly concerning the exercise of the discretion to withdraw charges in minor matters.

232. The national standards for juvenile justice should require each jurisdiction to evaluate the need for court support schemes.

233. The judicial training proposed at recommendation 236 should include material on ensuring Indigenous witnesses understand juvenile proceedings and can participate in them effectively.

234. Guidelines for juvenile court design, to be used when new courts are established and existing facilities are modified, should be developed.

Implementation. OFC should develop these guidelines in conjunction with relevant State and Territory authorities.

235. Juvenile justice data provided to OFC by the States and Territories in accordance with recommendation 193 should provide a breakdown as to whether a decision was made by a specialist children's magistrate or by a generalist magistrate and be matched with the type of order made in each case.

236. In addition to training already provided, all magistrates and judges who hear juvenile justice matters should receive specialised training. The training should include components on matters such as communications skills, child development, Indigenous culture, juvenile justice procedure and the structural causes of offending.

Implementation. In conjunction with other judicial education bodies, AIJA should develop a core national syllabus for training judicial officers who hear juvenile justice matters.

237. Courts of appellate jurisdiction should designate judges to hear appeals in juvenile justice matters. These judges should undertake the training proposed at recommendation 236.

19. Sentencing

238. The Crimes Act should be amended to make it clear that s 20C allows the enforcement provisions of State and Territory legislation to apply to young federal offenders.

Implementation. The Attorney-General should initiate this amendment.

239. The national standards for juvenile justice should include principles for sentencing of juvenile offenders. These principles should also be reflected in relevant Commonwealth, State and Territory legislation. They should include the following.

- the need for proportionality, such that the sentence reflects the seriousness of the offence
- the importance of rehabilitating juvenile offenders
- the need to maintain and strengthen family relationships wherever possible
- the importance of the welfare, development and family relationships of the child
- the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways
- the impact of deficiencies in the provision of support services in contributing to offending behaviour
- the need to take into account the special circumstances of particular groups of juvenile offenders, especially Indigenous children.

240. A wide range of sentencing options, with clearer and more appropriate hierarchies based on minimum appropriate intervention by the formal justice system, should be provided in the national standards for juvenile justice. Sentencing options should embody the principles in recommendation 239 dealing with national standards for sentencing. In addition, matters to be taken into account in the development of sentencing options should include

- Rehabilitation and reintegration into the community should be the primary objective in the development of sentencing options.
- Programs should be tailored as far as possible to the individual needs and circumstances of young offenders, including the difficulties they may have in complying with certain orders.
- Sentencing options should take into account the special health and other requirements of children and young people. This should include the provision of appropriate drug treatment facilities incorporating both detoxification programs and treatment or referral services. It should also include counselling and other practical programs to assist these young people and their families. These could be run by voluntary, community or church based agencies, by non-profit concerns or by government agencies.
- Sentencing options for young sex offenders should include specific treatment programs appropriate to this category of offenders.

241. The national standards for juvenile justice should be consistent with Australia's international obligations and should include a prohibition on mandatory detention or mandatory terms of imprisonment for certain juvenile offenders.

242. The Attorney-General through SCAG should encourage Western Australia and the Northern Territory to repeal their legislation providing for mandatory detention of juvenile offenders. In the event that this is not successful, the Attorney-General should consider federal legislation to override the Western Australian and Northern Territory provisions.

243. Alternative non-custodial sentencing options should be evaluated to assist the development and promote the use of a greater range of alternatives to detention. These alternatives should be included in the relevant national standard for juvenile justice.

Implementation. OFC should commission research into the effectiveness of alternative non-custodial sentencing options, disseminate the findings of such research and develop in conjunction with the relevant State and Territory authorities, community groups and young people best practice models for non-custodial options.

244. The national standards for juvenile justice should make the following provisions in relation to pre-sentencing reports.

- Background reports should be provided in all cases where a detention order for a child offender is being considered.
- Young offenders should be advised clearly by the magistrate ordering a background report and by the officer preparing the report of the purpose of the report, the role and responsibilities of the reporting officer and the importance of the child's involvement by way of interview in the preparation of the report. The young offender must be advised that the interview will not be confidential and that anything said during the interview may be reported. The young offender must be advised also of his or her right not to participate in the preparation of background reports.
- Children's clinics proposed at recommendation 83 should be resourced to provide assistance in the preparation of background reports in juvenile justice cases.

245. Duty solicitor schemes should be sufficiently resourced to ensure that children are given timely and appropriate advice on matters relating to sentencing and are assisted to express their views during the sentencing process.

Implementation. This provision should be included in the national standards for juvenile justice. The OFC, in consultation with legal aid commissions and State and Territory agencies responsible for juvenile justice and court systems, should monitor the operation of duty solicitor schemes for young offenders.

246. The National Standards for juvenile justice should make the following provisions in relation to sentencing.

- Completion of orders such as community service orders and probation orders should be formally acknowledged by the court or relevant agency.
- There should be suitable mechanisms for recognising outstanding achievement by young people in these programs.

247. Training for judicial officers should include material on the availability and effectiveness of sentencing options for juvenile offenders in each jurisdiction.

248. The national standards for juvenile justice should include a requirement that information about offending patterns for particular groups of children be collected and used to inform sentencing decisions and practices. Children about whom this information should be collected include boys, girls, Indigenous children, children from non-English speaking backgrounds, children with disabilities, children in care and children from rural and remote communities.

249. The national standards for juvenile justice should make the following provisions in relation to sentencing.

- Magistrates and judges considering sentences for young people with a mental illness or severe emotional or behavioural disturbance should obtain and give appropriate consideration to specialist psychiatric reports prior to making any decisions about sentencing.
- Sentences should, where appropriate, provide for systematic and continuing assessment and treatment for young offenders affected by mental illness or severe emotional or behavioural disturbance. This should apply to both custodial and non-custodial sentencing programs.
- Courts, detention centres and other agencies with responsibility for sentencing and post-sentencing arrangements for juvenile offenders should ensure that relevant staff are provided with appropriate training in the assessment, treatment and support of young people affected by mental illness or severe emotional or behavioural disturbance.

250. A range of alternative non-custodial sentencing schemes to be conducted within local communities should be developed in conjunction with local organisations. Particular attention should be given to rural and remote communities, including the need for greater supervision and support.

Implementation. Attorneys-General of each State and Territory should develop the schemes in conjunction with local communities. Grants should be provided to local organisations for this purpose.

251. Appropriate residential facilities and therapeutic programs should be developed and included in sentencing programs for young people affected by substance abuse. Particular attention should be given to the lack of support services for young people involved in petrol sniffing.

Implementation. Attorneys-General of each State and Territory should develop and fund schemes in consultation with relevant community groups and other organisations.

252. To address the special needs of Indigenous children in relation to sentencing

- information should be obtained from Indigenous communities about local community approaches and practices in relation to juvenile offending
- implementation of the recommendations of the ALRC Sentencing Research Paper 11 *Sentencing of Young Offenders* (ALRC Sydney 1988), ALRC Report 31 *Recognition of Aboriginal Customary Laws* (AGPS Canberra 1986), the *Report of the Royal Commission into Aboriginal Deaths in Custody* (AGPS Canberra 1991) and the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (AGPS Canberra 1997) should be progressed
- a national strategy should be developed for enhancing the participation of Indigenous people in the administration of juvenile justice, addressing matters such as training programs to increase employment opportunities for Indigenous people in relevant government and non-government agencies and appointment of Indigenous judges and magistrates
- diversionary sentencing schemes in discrete or remote Indigenous communities should be monitored with a view to ensuring resources for the continuation or expansion of those that prove most effective.

Implementation. OFC should co-ordinate the above initiatives in conjunction with relevant State and Territory authorities.

253. Criminal convictions of young offenders should be expunged after a period of two years or when the young person attains the age of eighteen years, whichever is earlier, except where further convictions have been recorded. Exceptions to this requirement may be appropriate in relation to particularly serious offences, some sexual offences and certain other categories.

Implementation. The Attorney-General through SCAG should encourage the implementation of this recommendation, including development of appropriate exceptions, in all Australian jurisdictions.

254. Police records of young offenders should be retained for five years and then destroyed where no further offence has occurred and subject to the same exceptions noted at Recommendation 253.

Implementation. The Attorney-General through SCAG should encourage the implementation of this recommendation in all Australian jurisdictions.

20. Detention

255. Legislation in all jurisdictions should state that the aim of detention is rehabilitation of young offenders. The legislative provisions should reflect rehabilitative principles set out below.

Implementation. The Attorney-General through SCAG should encourage all States and Territories that have not already done so to ensure that rehabilitation is incorporated into the relevant legislation as the primary aim of detention. This legislation should be implemented in future decision making about juvenile detention centres. National standards for juvenile justice should incorporate this principle.

256. The Design Guidelines and QOC Standards (both endorsed and draft sets) should be reviewed by AJJA, in consultation with OFC, to ensure that they accord with principles in CROC, the Beijing Rules, the UN Rules for the Protection of Juveniles Deprived of their Liberty and other relevant international treaties and guidelines. Community organisations dealing with children's issues should be consulted about the standards as part of this review.

Implementation. Once the review is completed, the Design Guidelines and QOC Standards should form part of the national standards for juvenile justice as set out in recommendation 192. Compliance with the standards should be monitored by OFC in accordance with recommendation 193.

257. The national standards for juvenile justice should be disseminated to officers dealing with children in detention, key community organisations dealing with children and all other relevant individuals and agencies. Information in appropriate forms summarising rights and responsibilities provided by the standards should be given to every child upon admission to detention.

Implementation. The relevant department in each State and Territory should be given responsibility for disseminating the standards.

258. The national standards for juvenile justice should provide that a detailed case plan should be developed for each detainee by a detention centre caseworker in conjunction with the young person, within 7 days of entry into detention or within 14 days for a sentence of more than 6 months. The case plan should be reviewed and updated regularly.

259. The national standards for juvenile justice should provide that case plans should address the specific needs of particular groups of children including boys, girls, Indigenous children, children from non-English speaking backgrounds, young people in care, gay and lesbian young people and children from rural and remote areas.

260. OFC should monitor compliance with the national standards for juvenile justice in relation to the provision of education and training programs in detention. In particular, it should encourage adoption of appropriate mechanisms in juvenile detention centres in each State and Territory for young people to participate in decision making about education and employment programs.

261. OFC should monitor compliance with the national standards for juvenile justice in relation to the provision of specialist psychiatric assessments for detainees. In particular, these assessments should be available to detainees before they are brought before court.

262. Detainees should be permitted to participate in decision making about the most appropriate arrangements for family and community contact.

Implementation. National standards for juvenile justice should include this requirement.

263. The national standards for juvenile justice should provide that relationships between detainees and their families and communities should be supported through the appointment of family and community liaison officers in detention centres.

Implementation. National standards for juvenile justice should include this requirement.

264. Staff in detention centres should be provided with adequate training in behaviour management techniques to ensure disciplinary procedures are used correctly and effectively.

265. The national standards for juvenile justice should provide that

- each use of isolation is to be recorded on a register
- isolation should be subject to appropriate approval requirements
- maximum periods for which young people in detention can be placed in isolation should be set

- where a young person under 16 years of age is isolated for more than 3 hours or, if aged 16-17, for more than 6 hours, the family and probation officer or legal practitioner for the young person or a person nominated by the young person must be notified immediately.

266. The national standards on juvenile justice should include the following.

- All young detainees should be afforded natural justice and due process in all disciplinary procedures, including the right to be informed of the behaviour which led to the disciplinary measures, to be heard in the decision making process and to have the assistance of an advocate in formal disciplinary procedures.
- Detainees should be guaranteed legal representation in any disciplinary proceedings that could result in an extension to the period of detention.
- Discretion for dealing with criminal offences committed by children in detention should be regulated.

Implementation. In developing the national standards in this area, regard should be had to the detention procedures manuals in Tasmania and NSW and to the Standard Guidelines for Corrections in Australia.

267. Case plans for detainees, medical regimes, disciplinary procedures, isolation, leave, visiting arrangements and parole should be reviewed upon application by the detainee, the detainee's family or legal representative or the manager of the detention centre.

268. The national standards on juvenile justice should provide that an Official Visitors scheme be attached to every juvenile detention centre and visit detention centres regularly, preferably fortnightly.

Implementation. The Attorney-General through SCAG should encourage States and Territories to adopt these measures.

269. The role of Ombudsman's Offices in monitoring detention centres should be strengthened by more regular visits, provision of specifically designed information material to detainees and the appointment, where appropriate, of an Indigenous investigation officer for detention centres in view of the high proportion of young Indigenous people in detention.

Implementation. The Attorney-General through SCAG should encourage States and Territories to adopt these measures.

270. A visiting solicitors scheme similar to that recently piloted in NSW should be established to service all juvenile detention centres. The scheme should involve a solicitor visiting each detention centre regularly and at least once a month. These visits should be publicised in advance to all detainees. Legal advice and advocacy should be provided to detainees for bail applications and appeals, complaints, reviews, disciplinary procedures and broader legal and advocacy needs.

Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories for the joint funding of this scheme. The scheme should be co-ordinated by the relevant legal aid commission.

271. The Commonwealth should withdraw its reservation to article 37(c) of CROC.

272. The national standards for juvenile justice should provide that each State and Territory establish separate sub-units within some centres for detainees aged 18 years and over. These units should be managed using rules and routines more appropriate to young adults.

273. No child under the age of 18 should be placed in an adult prison unless a court decides that it is in the best interests of the child to do so.

Implementation. State and Territory Parliaments should amend laws that permit or require the detention of children in adult prisons for any other reason or on any other basis.

274. The national standards for juvenile justice should include a list of general principles and factors to be considered in the determination of all prison transfer decisions, including

- that the safety and interests of the young person should be respected
- the capacity of the prison system to protect the young person
- the most suitable environment for the young person and his or her future and
- the right of the young person to be consulted and represented.

275. The national standards for juvenile justice should provide that transfer policies and procedures in each jurisdiction recognise that young people for whom a transfer is being considered should

- have the assistance of an advocate in making any written or oral submissions concerning the transfer application
- be provided with accurate information about the operation of the adult system
- be given reasons for the decision and a right of review of the decision.

276. The national standards for juvenile justice should provide that the departments in each State and Territory dealing with juvenile justice and adult corrections centres should establish greater links so that any young person transferred to an adult institution may continue the programs commenced in the juvenile justice system. Long term case plans should be developed for those detainees likely to be transferred to the adult system.

277. The national standards in juvenile justice should provide for the development of programs and services in all jurisdictions to address the needs of particular groups of children in detention including children from non-English speaking backgrounds, Indigenous children, children from rural and remote areas and girls in detention.

278. The NYARS study on transitional arrangements for young offenders should be analysed by each relevant federal, State and Territory department to ascertain the best features of existing pre-release and post-release support schemes for young detainees. Agreed strategies should be incorporated in the national standards for juvenile justice with a view to ensuring their expansion and widespread application.

279. The national standards for juvenile justice should include particular provisions for pre-release support schemes, such as day and weekend leave, work release and other forms of community involvement.

280. The pilot projects for young offenders established by the Commonwealth should be continued and developed into a national young offender employment and training scheme to enable intensive and supervised job training, placement and support for young offenders. Assistance should begin while the young person is in detention and continue after his or her release.

281. Upon completion and endorsement of the national standards for juvenile justice, a national audit should be undertaken of every juvenile detention centre in Australia for compliance with those standards and with human rights commitments. The results of the audit should be published and each State and Territory government should undertake a program of up-grading detention centres, including policies and programs, on the basis of this audit.

Implementation. The Attorney-General through SCAG should encourage State and Territory governments to agree to the national audit of juvenile detention centres and provide the published results of the audit to OFC.

282. Information about recidivism rates for detainees should be collected and analysed on a national basis.

Implementation. States and Territories should collect this data through the most appropriate agency in each jurisdiction. The data should be provided to OFC for national analysis and scrutiny in conjunction with ABS and the AIC.

283. Information about the numbers of young people from specified groups who enter detention should be collected and subjected to national analysis and scrutiny. It should record the numbers of boys and girls, children from rural and remote areas, Indigenous children, the ethnic and socio-economic backgrounds of children, children who have been in the care and protection system, children with disabilities and any other groups of children who experience particular problems or have special needs within the detention system. The data should also include information about recidivism rates of young people from each group. The data should inform policy and program development in relation to all children and each group of children.

Implementation. This data should be collected by States and Territories through the most appropriate agency in each jurisdiction. The data should be provided to OFC for national analysis in conjunction with ABS and the AIC and incorporation into the national standards, policies and programs.

284. All those working with young people in detention should be trained in the application of the national standards for juvenile justice.

Implementation. Appropriate training programs should be developed by relevant State and Territory authorities in consultation with the OFC.

285. Official Visitors should be given training on the national standards for juvenile justice and be made aware of the procedural requirements in detention and of the advocacy needs of detainees.

Implementation. Each detention centre should provide this training.

286. Implementation of recommendations relevant to young people in detention from previous inquiries including the Royal Commission into Aboriginal Deaths in Custody, the NSW Ombudsman's Inquiry into Juvenile Detention Centres and the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families should be accelerated. This may require additional resources from the responsible governments.

Implementation. The Attorney-General through SCAG should encourage State and Territory governments to implement these recommendations

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Crimes Act 1914	
s 3C	18.130-131
s 3W	18.85
s 3ZE	18.130
s 3ZH	18.131
s 3ZI	18.131-132
s 3ZJ	18.125
s 3ZK	18.125
s 3ZN	18.132
s 4M	18.12
s 4N	18.17
s 16A	19.2
s 20BS-BY	19.28
s 20C	18.6, 18.56, 19.9, 19.14, 20.6
s 23A	18.97
s 23C	18.110, 18.111
s 23D	18.110
s 23F	18.98
s 23G	18.102, 18.149
s 23H	18.116
s 23J	18.116
s 23K	18.102, 18.104, 18.105, 18.116
s 23N	18.117, 18.120, 18.122
s 23V	18.100
s 29	18.7
s 71	18.7
s 76B	18.7
s 89	18.7
Pt 1B Div 5	19.9
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Crimes (Child Sex Tourism) Amendment Act 1994	14.6
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Disability Discrimination Act 1992	10.36
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s 4	14.8, 14.14
s 8	15.34, 16.30
s 12	14.61
s 13	14.61, 14.63, 14.64
s 18	14.65, 14.66
s 19	14.65
s 26	14.115
s 29	14.114
s 41	14.115
s 55	14.76, 14.78
s 56	14.76
s 59	14.78
s 60	14.78
s 65	14.82
s 66	14.79
s 72	14.79
s 80	14.76
s 97	14.84
s 98	14.85
s 100	14.84, 14.85
s 101	14.84, 14.85
s 102	14.75
s 108	14.77
s 135	14.76, 14.78
s 136	14.78
s 137	14.76, 14.78
s 165	14.69
Family Law Act 1975	
s 43	16.7
s 55A	16.35
s 60B	16.7
s 60D	15.36
s 60G	16.11
s 62C	16.17
s 62F	16.17
s 62G	16.35
s 63B	16.48, rec 149
s 63C	16.48
s 63E	16.11, 16.49
s 63F	16.49
s 63G	16.49
s 63H	16.49
s 65C	16.58
s 65E	16.11
s 66F	16.58
s 66J	16.14
s 67L	16.11
s 67V	16.11
s 67Z	15.14, 15.22, 15.36
s 67ZA	15.14, 15.22, 15.36, rec 121
s 67ZC	16.11, 16.74
s 68F	13.55, 16.8, 16.11, 16.15, 16.47, 16.49, 16.63

s 68H	16.29
s 68K	15.34
s 68L	13.22, 13.33
s 68M	13.22
s 69C	13.22, 16.58
s 69J	15.50, 15.62
s 69N	15.38, rec 121
s69ZK	15.5, 15.8, 15.13, rec 121
s 69ZF	15.5, 15.8
s 96	15.56, 15.59, 15.60
s 100A	16.30
s 102A	16.45, 16.46, 16.47, rec 147
s 102B	16.41, 16.44
Pt III Div 4	16.17
Pt III Div 5	16.17
Pt VII Div 7	16.14
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O 23B r 1	16.74
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O 23 r 3	13.19, 13.22
O 23 r 5, 6	16.55, 16.61
O 30 r 2AAA	16.71
O 30 r 5	16.32
O 31A	15.30
O 30A r 3	16.41
O 30B	16.44
Federal Court of Australia Act 1976	13.21
Federal Court Rules	
O 43 r 4	13.8
O 43 r 2	13.8
O 43 r 3	13.8
O 43 r 4	13.10
O 43 r 11	13.13
High Court Rules	
O 16 r 18	13.6
O 16 r 20	13.6
O 16 r 23	13.8
O 16 r 25	13.8
O 16 r 25	13.8
O 16 r 20	13.10
O 16 r 21	13.10
O 70 r 7	13.21
Human Rights (Sexual Conduct) Act 1994	3.25, 18.23
Human Rights and Equal Opportunity Commission Act 1986	1.3, 7.5
Immigration (Guardianship of Children) Act 1946	9.70, 9.81
Judiciary Act 1903	15.50, 18.57, 18.160
Life Insurance Act 1945	11.9
Marriage Act 1961	4.6
Migration Act 1958	
ss 72-76	9.84
ss 188-197	9.84
s 189	9.83
s 252	9.69
s 257	9.69

s 346	9.89
s 353	14.8
s 411	9.89
Migration Regulations 1994	
reg 101.211	9.63
reg 101.228	9.77
reg 102.211	9.73, 9.74
reg 102.212	9.74
reg 200.221	9.81
reg 200.411	9.81
reg 200.222	9.81
reg 201.221	9.81
reg 802.211	9.63
reg 866.221	9.81
reg 866.226	9.81
Social Security Act 1991	
s 4	9.19
s 250	9.39
s 733	9.46
s 739	9.46
s 746	9.46
s 1244	9.86
s 1245	9.89
s 1270	14.8
Pt 2.15	9.46
Pt 6.1	9.86
Special Broadcasting Service Act 1991	11.42
Student and Youth Assistance Act 1973	
s 49	14.8
s 65	9.19
s 135	9.20
s 308	9.86
Pt 2	9.20
Pt 9 Div 1	9.86
Pt 9 Div 2	9.89
Trade Practices Act 1974	
Pt V, Div 1A	11.21
s 6	11.15
s 52	11.62
s 75AD	11.21
s 82.	11.21
s 80	11.16
s 80A	11.16

Australian Capital Territory

Bail Act 1992	18.159, 18.160
Children's Services Act 1986	7.9, 13.26, 16.8, 17.39, 17.52, 17.63, 18.17, 18.94, 18.104, 18.126, 18.181, 19.2, 19.17, 19.28, 20.11, 20.12, 20.91, 20.136
Crimes Act 1900	18.23, 18.120
Community Advocate Act 1991	7.9
Consumer Affairs Act 1973	11.21
Discrimination Act 1991	10.36
Education Act 1937	10.77
Evidence (Closed Circuit Television) Act 1991	14.103
Fair Trading Act 1992	11.15
Jurisdiction of Courts (Cross-vesting) Act 1993	15.5, 15.30, 15.34

Limitation Act 1985	11.20
Magistrates' Court Act 1930	14.50
Small Claims Act 1974	11.18

New South Wales

Adoption of Children Act 1965	16.11
Anti-Discrimination Act 1977	10.36
Bail Act 1978	18.159
Children (Care and Protection) Act 1987	13.27, 16.8, 17.39, 17.52, 17.59, 17.63 17.65, 17.77, 17.86, 17.93, 17.100
Children (Community Service Orders) Act 1987	19.28
Children (Criminal Proceedings) Act 1987	18.12, 18.84, 18.104, 18.150, 18.160, 18.181, 19.2, 19.17, 19.28, 19.47, 19.74, 19.117, 19.126, 20.104
Children (Detention Centres) Act 1987	20.11, 20.12, 20.18, 20.64, 20.75, 20.78, 20.79, 20.81, 20.82, 20.91, 20.106, 20.107, 20.113, 20.114
Children (Parental Responsibility) Act 1994	18.74, 18.75-77
Children's Court Act 1987	15.63, 18.192
Commonwealth Powers (Family Law - Children) Act 1986	15.5
Commonwealth Powers (Family Law - Children) Amendment Act 1996	15.5, 15.47
Crimes Act 1990	14.101, 18.23, 18.100, 18.126, 18.133
Crimes Amendment (Children Evidence) Act 1996	14.103
Criminal Records Act 1991	19.117
Community Services (Complaints, Appeals and Monitoring) Act 1993	7.11
Consumer Claims Tribunal Act 1987	11.18
Education Reform Act 1990	10.1, 10.54, 10.77
Evidence Act 1995	14.4, 14.61, 14.63, 14.65, 14.67, 14.69, 14.115, 18.98
Fair Trading Act 1987	11.15-16, 1.21
Jurisdiction of Courts (Cross-vesting) Act 1987	15.5, 15.30, 15.34
Justices Act 1902	14.50
Legal Profession Act 1987	11.11
Minors (Property and Contracts) Act 1970	11.10
Prisons Act 1952	20.108
Young Offenders Act 1997	18.38, 18.42, 18.46

Northern Territory

Anti-Discrimination Act 1992	10.36
Bail Act 1982	18.159
Community Welfare Act 1983	13.28, 16.8, 17.39, 17.52, 17.59, 17.63, 17.65, 17.86, 17.93
Consumer Affairs and Fair Trading Act 1990	11.15, 11.21
Criminal Code	18.17, 18.23
Criminal Records (Spent Convictions) Act 1992	19.117, 19.123
Education Act	10.54
Evidence Act 1939	14.67, 14.68, 14.101, 14.103, 14.115
Jurisdiction of Courts (Cross-vesting) Act 1987	15.5, 15.30, 15.34
Juvenile Justice Act 1983	18.21, 18.79, 18.94, 18.104, 18.126, 18.144, 18.160, 19.2, 19.28, 19.53, 19.117, 20.11, 20.12, 20.75, 20.84, 20.91, 20.106
Oaths Act 1867	14.63
Police Administration Act 1978	18.126, 18.133, 18.137, 18.160
Small Claims Act 1974	11.18

Queensland

Adoption of Children Act 1964	7.10
Anti Discrimination Act 1991	10.36

Bail Act 1980	18.159
Child Care Act 1991	7.10
Children's Commissioner and Children's Services Appeals Tribunals Act 1996	7.10
Children's Court Act 1992	15.63, 18.192
Children's Services Act 1965	16.8, 17.52, 17.63, 17.86
Children's Services Act 1991	7.10
Commonwealth Powers (Family Law - Children) Act 1990	15.5
Corrective Services Act 1980	20.108
Criminal Code	18.12, 18.17, 18.23, 18.133
Criminal Code Act 1995	18.23
Criminal Justice Act 1989	18.142
Evidence Act 1977	14.41, 14.46, 14.59, 14.60, 14.63, 14.67, 14.80, 14.101, 14.103, 14.115
Fair Trading Act 1989	11.15, 11.21
Family Services Act 1987	7.10
Health Act 1937	17.39
Jurisdiction of Courts (Cross-vesting) Act 1987	15.5, 15.30
Justices Act 1886	14.50
Juvenile Justice Act 1992	18.9, 18.21, 18.38, 18.39, 18.49, 18.84, 18.85, 18.94, 18.104, 18.126, 18.160, 18.161, 18.181, 19.2, 19.17, 19.28, 19.47, 19.51, 19.117, 20.11, 20.12, 20.18, 20.65, 20.84, 20.91, 20.106, 20.136
Juvenile Justice Legislation Amendment Act 1996	19.121
Limitation of Actions Act 1974 (Qld)	11.20
Small Claims Tribunals Act 1973 (Qld)	11.18
South Bank Corporation Act 1989	18.68

South Australia

Bail Act 1985	18.159
Children's Protection Act 1993	13.24, 16.8, 17.39, 17.46, 17.52, 17.59, 17.63, 17.65, 17.71, 17.86
Commonwealth Powers (Family Law - Children) Act 1986	15.5
Criminal Law and Consolidation Act 1935	18.23
Criminal Law (Sentencing) Act 1988	19.74
Education Act 1972	10.54
Equal Opportunity Act 1984	10.36
Evidence Act 1929	14.59, 14.63, 14.67, 14.65, 14.101, 14.103, 14.115
Evidence Act (Amendment) Act 1988	14.41
Fair Trading Act 1987	11.15
Jurisdiction of Courts (Cross-vesting) Act 1987	15.5, 15.30, 15.34
Justices Act 1921	14.50
Limitations of Actions Act 1936	11.20
Magistrates Court Act 1991	11.18
Manufacturers' Warranties Act 1974	11.21
Minors' Contracts (Miscellaneous Provisions) Act 1979	11.9
Summary Offences Act 1953	18.98, 18.100, 18.104, 18.120, 18.133, 18.150
Youth Court Act 1993	15.63, 18.192
Young Offenders Act 1993	18.12, 18.38, 18.41, 18.47, 18.79, 18.94, 18.104, 18.160, 19.2, 19.28, 19.74, 20.11, 20.106, 20.107, 20.113, 20.136

Tasmania

Bail Act 1994	18.159
Child Protection Act 1974	17.39
Child Welfare Act 1960	15.63, 17.100, 17.104, 18.21, 18.160, 18.192, 19.2, 20.11
Commonwealth Powers (Family Law) Act 1987	15.5
Criminal Code 1924	14.68, 18.12, 18.17, 18.23
Criminal Law (Detention and Interrogation) Act 1995	18.98, 18.100
Criminal Process (Identification and Search) Act 1976	18.126

Commonwealth Powers (Family Law) Amendment Act 1994	15.5, 15.47
Evidence Act 1910	14.59, 14.67, 14.115
Evidence Amendment (Children and Special Witnesses) Act 1995	14.41, 14.60, 14.63, 14.101, 14.103
Fair Trading Act 1990	11.15
Jurisdiction of Courts (Cross-vesting) Act 1987	15.5, 15.30, 15.34
Justices Act 1959	18.159
Goods (Trade Descriptions) Act 1971	11.21
Limitation Act 1974	11.20
Magistrates Court (Small Claims Division) Act 1989	11.18
Sale of Hazardous Goods Act 1977	11.21

Victoria

Administrative Law Act 1978	10.68
Bail Act 1977	18.159
Community Services Act 1970	16.8, 17.52
Children and Young Persons Act 1989	13.25, 15.5, 15.8, 15.53, 15.63, 17.39, 17.47, 17.59, 17.78, 17.100, 17.104, 18.12, 18.21, 18.79, 18.84, 18.160, 18.163, 18.173, 18.181, 18.192, 19.28, 19.47, 19.74, 20.11, 20.18, 20.106, 20.107, 20.113
Commonwealth Powers (Family Law - Children) Act 1986	15.5
Consumer Affairs Act 1972	11.21
Crimes Act 1958	14.30, 18.23, 18.98, 18.100, 18.104, 18.120, 18.126, 18.133, 18.150
Equal Opportunity Act 1995	10.36
Evidence Act 1958	14.41, 14.59, 14.63, 14.67, 14.68, 14.101, 14.115
Fair Trading Act 1985	11.15
Jurisdiction of Courts (Cross-vesting) Act 1987	15.5, 15.30, 15.34
Limitation of Actions Act 1958	11.20
Magistrates' Court Act 1989	14.50
Property Law Act 1958	11.9
Small Claims Tribunals Act 1973	11.18

Western Australia

Acts Amendment (Evidence of Children and Others) Act 1992	14.41, 14.46, 14.60, 14.63, 14.101, 14.103, 14.113
Bail Act 1982	18.159, 18.160, 18.162
Child Welfare Act 1947	10.54, 18.73
Children's Court of Western Australia Act 1986	13.29, 15.63, 18.192
Criminal Code	18.12, 18.17, 18.23, 18.100, 19.54
Equal Opportunity Act 1984	10.36
Evidence Act 1906	14.10, 14.59, 14.67, 14.68, 14.115
Fair Trading Act 1987	11.15, 11.21
Family Court Act 1975	15.68
Jurisdiction of Courts (Cross-vesting) Act 1987	15.5, 15.30, 15.34
Justices Act 1902	14.50
Legal Representation of Infants Act 1977	13.29
Police Act 1892	18.137
Small Claims Tribunals Act 1974	11.18
Stipendiary Magistrates' Act 1957	15.68
Young Offenders Act 1994	18.9, 18.38, 18.40, 18.48, 18.79, 18.160, 18.162, 18.174, 19.2, 19.28, 19.52, 19.57, 19.117, 20.11, 20.83, 20.91, 20.106

Overseas legislation

Child Abuse Prevention and Treatment Act 1988 (USA)	13.42
---	-------

Children Act 1989 (UK)	13.47, 17.63
Children and Young Persons Act 1933 (UK)	18.13
Children, Young Persons and Their Families Act 1989 (NZ)	7.18, 18.46, 18.99, 18.106
Crimes Act 1961 (NZ)	18.13, 18.17
Criminal Code (Can)	18.13
Criminal Code (Denmark)	18.14
Criminal Procedure (Scotland) Act 1975 (UK)	18.13
Evidence Act 1908 (NZ)	14.77
Family Proceedings Rules 1991 (UK)	13.22
General Civil Code (Norway)	18.14
Guardianship Act 1968 (NZ)	13.107
NY Civil Practice Law and Rules	14.55
NY Criminal Procedure Law	14.55
NY Family Court Act	14.55, 17.79
NY Uniform Rules for the Family Court	17.66
Oregon Revised Statutes	10.55
Radio and Television Act 1992 (Den)	11.66
Telecommunications Act 1996 (US)	11.44
Toys and Children's Products Safety Ordinance 1993 (Hong Kong)	11.23
Texan Family Code	13.104
Young Offenders Act 1989 (Can)	18.9

Table of cases

<i>Attorney-General v Colonial Sugar Refining Co Ltd</i> (1913) 17 CLR 644	3.32
<i>Attorney-General's Reference No 2 of 1993</i> (1994) 4 Tas R 26	14.60
<i>B and R and the Separate Representative</i> (1995) FLC 92-636	13.35, 13.36, 16.63
<i>BP Australia Ltd v Amann Aviation Pty Ltd; Cortaus Ltd (in liq) v Larken Ltd and ors; Southern Steel Suppliers Pty Ltd v Favelle Favco Holdings Pty Ltd</i> (1996) 137 ALR 447	15.28
<i>Bellgrove v Marine & General Insurance Services Pty Ltd</i> (1996) 5 Tas R 409	13.21
<i>Bennett and Bennett</i> (1991) FLC 92-191	13.35, 13.36, 13.39
<i>Benson v Hughes</i> (1994) 17 Fam LR 761	16.30
<i>Brandy v Human Rights and Equal Opportunity Commission</i> (1995) 183 CLR 245	14.114
<i>Bunning v Cross</i> (1979) 141 CLR 54	18.146
<i>C (A Minor) v DPP</i> [1996] AC 1	18.18, 18.19, 18.20
<i>Calmao Pty Ltd v Stradbroke Waters Co-owner Co-operative Society Ltd & Ors</i> [1989] ATPR 40-984.	11.20
<i>Cashman v Cork Co Council</i> [1959] Ir Jur Rep 7	18.13
<i>Cheers v Porter</i> (1931) 46 CLR 52	14.16
<i>Chester v R</i> (1988) 165 CLR 611	19.55
<i>Clarkson v Clarkson</i> (1972) 19 FLR 112	13.97
<i>Cleary v Booth</i> [1893] 1 QB 465	10.77
<i>Cooper and Cooper</i> [1980] FLC 90-870	16.56
<i>Cooper v Dummett</i> [1930] WN 248	13.16
<i>Dage v Baptist Union of Victoria</i> [1985] VR 270	10.68
<i>Dey v Victorian Railway Commissioners</i> (1949) 78 CLR 62	13.4, 13.8, 13.9
<i>De Jesus v R</i> (1986) 61 ALR 1	14.86, 14.87
<i>Dietrich v R</i> (1992) 177 CLR 292	3.12, 14.114
<i>Demetriou and Demetriou</i> (1976) FLC 90-102	13.34, 13.39, 13.72, 13.96, 16.61
<i>Dillon v Wood</i> (1881) 2 LR (NSW) 298	11.9
<i>DPP v DJC (a child)</i> (unreported) Children's Court of WA 10 February 1997	19.57
<i>DPP v DMP (a child)</i> (unreported) Children's Court of WA 10 February 1997	19.59
<i>DPP v Hester</i> [1973] AC 296	14.17
<i>DPP v Kilbourne</i> [1973] AC 729	14.17
<i>DPP v RMJ (a child)</i> (unreported) Children's Court of WA 19 March 1997	19.58
<i>E and E</i> (1979) FLC 90-645	13.38, 13.61, 13.63, 13.96
<i>F and M1 & M2</i> (1994) FLC 92-493	15.13
<i>Foley and Foley</i> (1978) FLC 90-511	16.55
<i>Gillick v Norfolk and Wisbech Area Health Authority</i> (1985) 3 All ER 402	4.7, 13.17
<i>Goodbody v Waterford Corporation</i> [1953] Ir Jur Rep 39	18.13
<i>Grice v R</i> (1957) 11 DLR(2d) 699	13.35
<i>GWW & CMW</i> (unreported) Family Court of Australia 21 January 1997	16.79
<i>H v W</i> (1995) FLC 92-598	3.10
<i>Heard v DeLaine</i> (1996) FLC 92-675	13.135, 13.142
<i>Hoch v R</i> (1988) 165 CLR 292	14.84, 14.86, 14.87
<i>Hutchings v Clarke</i> (1993) 16 Fam LR 452	13.97, 16.30
<i>In the Marriage of Bartlett</i> (1994) 17 Fam LR 405	16.32
<i>In the Marriage of Lonard</i> (1976) 2 Fam LR 11	16.31, 16.32
<i>In the Marriage of Wood</i> (1976) 11 ALR 657	16.31
<i>In the Matter of an Application by the Children of L</i> (unreported) Family Court of Australia 30 January 1997	13.22, 13.149, 13.137
<i>In the matter of KMF and CJMcP</i> (unreported) Family Court of Australia Sydney 2 May 1995	15.12
<i>In re AW Case no 86 J 3561</i> (Circuit Ct Cook County, Juvenile Division)	13.78
<i>In re Birchall</i> (1880) 16 Ch D. 41	13.8
<i>In re Taylor's Application</i> [1972] QB 369	13.90
<i>IPH v Chief Constable of New South Wales</i> (1987) Crim LR 42	18.17
<i>Kable v Director of Public Prosecutions for NSW</i> (1996) 138 ALR 577	17.58
<i>Khan v College of Physicians and Surgeons of Ontario</i> (1992) 9 OR(3d) 641	14.81

<i>L v L (Minors) (Separate Representation)</i> (1994) 1 FLR 156	13.48
<i>Leeth v R</i> 174 CLR 455	18.97, 19.11-13
<i>Longman v R</i> (1989) 168 CLR 79	14.73
<i>Mansell v Griffin</i> [1908] 1 KB 16	10.77
<i>McMillan v Price</i> (unreported) Full Court of the Supreme Court of NT 20 June 1997	19.61
<i>Mewburn v Mewburn</i> (1934) 51 WN (NSW) 170	13.16
<i>Minister for Immigration and Ethnic Affairs v Teoh</i> (1995) 128 ALR 353	3.21-22, 16.13
<i>Monagle v Donegal Co Council</i> [1961] Ir Jur Rep 47	18.13
<i>Monticelli and McTiernan</i> (1995) 19 Fam LR 108	16.30
<i>Murphy v R</i> (1985) 158 CLR 596	18.97
<i>Murray v R</i> (1987) 39 A Crim R 315 (NSW Court of Criminal Appeal)	14.72
<i>Murray v Kirkpatrick</i> (1940) 57 WN (NSW) 162	13.8
<i>New South Wales v Commonwealth</i> (1990) 8 ACLC 120	6.23
<i>Newman v A (a child)</i> (1992) 9 WAR 14	18.57
<i>Omychund v Barker</i> (1744) 1 Atk 21	14.16, 14.60
<i>P and P</i> (1992) FLC 92-615	13.15, 13.36, 13.37, 13.41
<i>P and P</i> (1994) 120 ALR 545	15.51
<i>P v P</i> (1994) 17 Fam LR 457	16.74
<i>Pagliariella and Pagliariella</i> (1993) FLC 92-400	13.22, 13.34, 13.39, 13.104
<i>Pfennig v R</i> (1995) 182 CLR 461	14.84
<i>R v Aguilar</i> (1992) 10 OR(3d) 266	14.81
<i>R v Anunga and ors</i> (1976) 11 ALR 412	18.115-116
<i>R v Beserick</i> (1993) 30 NSWLR 510	14.87
<i>R v Brasier</i> (1779) 1 Leach 199	14.16, 14.60
<i>R v Brown</i> [1977] Qd R 220 (Court of Criminal Appeal)	14.16, 14.60
<i>R v C</i> [1993] 60 SASR 467	14.75
<i>R v Harvey</i> (unreported) NSW Court of Criminal Appeal 3 September 1996	14.87
<i>R v J</i> (1994) 75 A Crim R 522 (Vic Court of Criminal Appeal)	14.77
<i>R v Johnson</i> (unreported) Vic Court of Criminal Appeal 8 Dec 1994	14.75
<i>R v Ingles</i> (unreported) Court of Criminal Appeal 4 May 1994	14.75
<i>R v Khan</i> (1990) 2 SCR 531	14.81
<i>R v M</i> [1977] 16 SASR 589	18.19
<i>R v McCracken</i> (1988) A Crim R (Vic Court of Criminal Appeal)	19.27
<i>R v P(J)</i> (1992) 74 CCC (3d) 276	14.81
<i>R v Paull</i> (1990) 20 NSWLR 427	19.10
<i>R v Revesz</i> (unreported) WA Court of Criminal Appeal 18 October 1996	14.70
<i>R v Schlaefer</i> [1992] 57 SASR 423	14.1617, 14.60
<i>R v Ugle</i> (1989) 167 CLR 647	14.79
<i>R v Vella</i> (unreported) NSW Court of Criminal Appeal 1 August 1997	14.69
<i>Ramsey v Hartley</i> [1977] 2 All ER 673	13.21
<i>Re Bell; Ex parte Lees</i> (1980) FLC 90-850	13.97
<i>Re Chapman and Jansen</i> (1990) 13 Fam LR 853	15.29
<i>Re F (The Court)</i> (1996) 83 A Crim R 502	14.75
<i>Re JRL; Ex parte CJL</i> (1986) 161 CLR 342	16.32
<i>Re K</i> (1994) FLC 92-461	13.39, 13.52, 13.60, 13.107, 16.73, 16.80
<i>Re Karen and Rita</i> (1995) 19 Fam LR 528	15.11, 15.30
<i>Re Nobbs</i> IRT decision N92/01902 Sydney 18October 1993	9.75
<i>Re R v Mansell</i> (unreported) Tas Court of Criminal Appeal, 1 March 1994.	14.60
<i>Re S (A Minor) (Guardian Ad Litem/Welfare Officer)</i> (1993) 1 FLR 110	13.48
<i>Re S (A Minor) (Independent Representation)</i> [1993] 3 All ER 36	13.53, 13.60
<i>Re Williamson</i> IRT decision V94/00938 Melbourne 29 May 1995	9.75
<i>Re Z</i> (1997) 20 Fam LR 651	15.20, 15.34
<i>Rhodes v Swithenbank</i> (1889) 22 QBD 577	13.10
<i>Rubinovich v Emmett</i> (1901) 27 VLR 265	11.9
<i>S and P</i> (1990) FLC 92-159	16.30
<i>Sartori v MacLeod</i> (1897) 22 VLR 498	13.16
<i>Secretary, Department of Health & Community Services v JMB & SMB</i>	

(1992) 175 CLR 218 [Marion's case]	3.10, 4.7, 13.17, 15.5, 16.74
<i>Separate Representative v JHE and GAW</i> (1993) 16 Fam LR 485	16.31, 16.32
<i>Seymour v Swift</i> (1976) 10 ACTR 1	10.68
<i>Shaw v R</i> (1991) 57 A Crim R 425	18.153
<i>Spellson v George</i> (1987) 11 NSWLR 300	13.16
<i>Street v Queensland Bar Association</i> (1989) 168 CLR 455	19.13
<i>Stiffle and Stiffle</i> (1988) FLC 91-977	16.32
<i>Surrey Insurance Co Ltd v Nagy</i> [1968] SASR 437	13.6
<i>Trennery v Bradley</i> (unreported) Full Court of the Supreme Court of NT 20 June 1997	19.61
<i>Vink v Schering Pty Ltd & Ors</i> (No 1) [1991] ATPR 41-64	11.20
<i>Ware v R</i> (unreported) Qld Court of Criminal Appeal 7 March 1987	14.87
<i>Watson ex parte Armstrong</i> (1976) 136 CLR 248	16.31
<i>Yonge v Toynbee</i> [1910] 1 KB 215	13.16
<i>ZP and PS</i> (1994) 17 Fam LR 600	16.30

Table of international instruments

European Council Directive 88/378/EEC (OJ 1988 L187/1)	11.23
European Union/Australia Mutual Recognition Agreement on Conformity Assessment	11.23
Hague Convention on Civil Aspects of International Child Abduction	3.13
Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption	9.76
International Covenant on Civil and Political Rights	1.30, 3.1, 3.13, 18.98, 18.120, 19.63, 20.8
International Covenant on Economic, Social and Cultural Rights	3.13, 10.1
International Labour Organisation Convention No 138 Concerning Minimum Age for Admission to Employment	3.13
International Labour Organisation Conventions No 79 and No 90 on Night Work of Young Persons (Non-Industrial and Industrial Occupations)	3.13
Statute of the International Court of Justice	3.12
UN Convention on the Elimination of Racial Discrimination	3.13
UN Convention on the Elimination of All Forms of Discrimination Against Women	3.13
UN Convention on the Rights of the Child	
preamble	1.26, 3.1, 3.25
art 1	1.21, 18.21
art 3	3.16-17, 14.4, 16.6, 16.13, 16.14, 17.15
art 4	3.17
art 8	9.61
art 9	3.17, 9.61
art 10	9.61
art 12	3.16, 10.57, 11.37, 13.1, 14.4, 16.36, 17.16, 19.3, 20.58
art 13	3.17, 11.37
art 15	18.79
art 17	3.17, 11.37
art 18	3.17
art 19	3.17, 14.4, 17.15
art 20	3.17, 17.16
art 22	3.17, 9.61
art 23	3.17, 10.35
art 25	3.17, 17.15, 17.75
art 26	3.17, 9.17
art 27	3.17, 17.15
art 28	3.17, 10.1, 10.57, 20.51
art 29	3.17, 10.15
art 31	11.37
art 37	3.17, 18.8, 18.158, 20.8, 20.80, 19.3, 19.63, 20.90
art 39	14.4
art 40	3.17, 18.8, 18.12, 18.98, 18.120, 19.2, 19.3, 19.63, 20.8
art 42	10.10
UN Convention on the Status of Refugees and Protocol	9.80-81
UN Educational, Scientific and Cultural Organisation	
Convention against Discrimination in Education	3.13
UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally	3.13
UN Guidelines for the Prevention of Juvenile Delinquency	3.13, 18.8
UN Rules for the Protection of Juveniles Deprived of their Liberty	20.9, 20.50, 20.58
UN Standard Minimum Rules for the Administration of Juvenile Justice	3.13, 18.9, 18.35, 18.80, 18.94, 18.158, 18.180, 18.191, 20.9, 20.58, 20.127, 20.141
Vienna Convention on the Law of Treaties	3.12
World Declaration on the Survival, Protection and Development of Children	3.14

Index

Aboriginal and Torres Strait Islander children characteristics

see Indigenous children

Abuse

see Care and Protection, Witnesses Advocacy

Advocacy

ch 7

definition and features

7.3

international models

7.15-19, 7.57

national package

5.34-45

need for

5.24-31

network of advocates

7.44-56

other models

7.13-14

State and Territory advocacy bodies

7.33-43

systemic advocacy

7.1-2

telephone advice and advocacy

7.57-59

see also Children's Commissioner, Complaints bodies Co-ordination,
HREOC, Office for Children, Ombudsman, Representation

Best interests of the child

see Family Court, Representation

Care and protection

ch 17

abuse and neglect

17.2, 17.4

investigation

14.27-44, 17.36-38

notification and reporting

17.36, 17.39-41

primary and secondary prevention

17.31-35

substantiation

17.37-38, 17.42

adolescents

17.100-104

Charter for Children in Care

17.27-30

children from non-English speaking backgrounds

17.95-96

leaving care

17.88-91

children under orders

case plan development and reviews

17.75-84, 17.87

children remaining at home

17.70-71

juvenile justice system, involvement with

4.42-50, 17.13-14

orders for out-of-home care

17.72-74

reviews of orders

17.85-86

children with disabilities

17.97-99

Children's Court Clinics

13.21-22

children's court proceedings

alternatives to court and family group conferencing

17.42-54

appeals

15.53-59

case management and the role of judges

17.65-67

orders

17.61-64

structure of children's courts

17.55-58

rules of evidence

17.59-60, 17.68-69

federal responsibilities

17.5, 17.15-26, 17.32-35, 17.89

Indigenous children

17.5, 17.92-94

national care and protection standards

17.25-26

outcomes for children in care

17.73

statistics on

2.58-69, 4.43-44, 4.46-8, 17.3-4

systems abuse

17.6-14

judicial training

15.62-67, 15.71-74

see also Jurisdiction, Representation

Children

capacities

assumptions about	1.26-29
development of	4.4-9
childhood, definition	1.21-2, 3.2-4
political responsibilities	
federal policies	3.36-57
international obligations	3.12-26
jurisdictional arrangements	3.27
young person, definition of	1.22
Children's Commissioner	
Commonwealth	7.22-25
State and Territory	7.10, 7.12
Civil litigation	
civil capacity	11.9-10, 13.16-21
next friends and guardians ad litem	13.6-15
statistics on	2.136-143
Commonwealth	
funding for children's issues	3.36-52
international obligations	3.12-26, 13.133-150, App C
leadership	7.20
Complaints bodies	
State and Territory complaint bodies	7.33-43
statistics on	2.153-163
see also Advocacy, Children's Commissioner, Ombudsman	
Consumers	ch 11
advertising	11.60-67
enforcing children's contracts	11.9-10
financial services	11.30-35
informing child consumers	11.6-8
media regulation	11.36-59
private complaint schemes	11.25-29
product liability and safety standards	11.21-24
statistics on	2.25-31
trade practices and consumer protection	11.15-24
Co-ordination	
benefits of	6.21-24
current Commonwealth initiatives	3.53-57
models	6.3-12
need for	5.6-23
see also Office for Children	
Criminal processes	ch 18
age of consent	18.23-27
age of criminal responsibility	18.12-16
age of majority	18.21-22
bail	18.158-168
children from non-English speaking backgrounds	18.119-121
children with a disability	18.122-124
courts and the magistracy	18.178-195
court design	18.185-190
judicial training	18.191-195, 19.89-92
prosecutors	18.179
understanding the proceedings	18.180-184
crime prevention	18.28-32
diversion	18.35-62
cautioning	18.38-44
conferencing	18.45-62, 19.29, 19.33
doli incapax	18.17-20
federal responsibilities	18.6-11, 19.8-15

Indigenous children juvenile justice models	18.33-34
legal advice and representation	13.5, 18.147-157
national standards for juvenile justice	18.9-11
police	18.63-146
accountability	18.139-146
admissibility of evidence	18.97-101
identification material	18.125-129
interview friends	18.102-109
intoxicated suspects	18.137-138
preventive apprehension	18.73-79
public spaces	18.67-72
searches	18.130-136
summons and arrest	18.84-96
time limits on police interview	18.110-113
training	18.80-83
remand	18.169-177, 20.90, 20.96, 20.108
statistics on	2.75-105
<i>see also</i> Sentencing, Detention, Table of international instruments (page 761)	

Detention	19.45-64, ch 20
case management	20.43
children from non-English speaking backgrounds	20.49, 20.67, 20.125-126
children from rural and remote communities	20.49, 20.67, 20.117-118
complaints procedures	20.70-73
data collection	20.139-40
deaths in custody	20.143-48
Design Guidelines	20.26-32
disciplinary procedures	20.74-88
education and vocational training	20.51-59
gender and sexuality	20.49-50, 20.127
health services	20.60-62
Indigenous children	20.49, 20.119-124, 20.143-148
inspections	20.91-95
legal advice in	20.96-99
living conditions	20.34-42
national standards for juvenile justice	20.29
natural justice	20.82-89
Quality of Care Standards	20.73, 20.77, 20.81, 20.87-8, 20.93, 20.97
rehabilitation	20.13-25
separation from adults	20.101-105
statistics on	2.117-121
transfers to prisons	20.106-114
transition from detention	20.128-137
training	20.141
visits	20.63-68
<i>see also</i> Criminal Processes, Sentencing	

Disabilities, children with	
statistics on	2.9
<i>see also</i> Care and protection, Criminal Processes, Education, Family Court, Witnesses	

Education	ch 10
alternative dispute resolution	10.73-75
children at risk	4.36-38, 10.21-48
children with disabilities	10.35-40
civics education and participation	10.6-20
corporal punishment	10.77-78
disciplinary measures	10.57-78

family support programs	10.27-34
fees and charges	10.45-48
Indigenous children	10.41-44, 10.76
natural justice	10.68-72
statistics on	2.32-40, 2.45-48
truancy	10.49-56
violence in schools	10.15-20
Evidence	ch 14
communications made during therapeutic counselling	14.53-56
corroboration	14.67-73
hearsay	14.78-82
judicial warnings	14.67-73
tendency and coincidence evidence	14.83-89
video-taped evidence	14.39-47
<i>see also</i> Care and protection, Criminal processes, Family Court, Witnesses	
Families	
theories of state intervention in	3.5-11
statistics on	2.17-24
Family Court	ch 16
adversarial proceedings	16.3, 16.31
alternative dispute resolution	16.17-26
best interests principle	
application of	16.6-14
assessment of best interests	16.15
child abuse allegations in	16.34-35, 16.37, 16.45
child's right to be heard	16.27-30
children as parties	16.58-59
children from non-English speaking backgrounds	16.67-69
children with intellectual disabilities	16.73-80
courts of summary jurisdiction	16.4, 16.26
evidence of children	16.55-57
expert witnesses	16.41-47
family reports	16.35-40
Indigenous children	16.62-66
interviews by judges	16.61
jurisdiction of	16.2
magistracy	15.5, 15.60, 15.61-70, 16.4
parenting plans	16.48-54
rural and remote communities	16.70-72
simplified procedures	16.33-34
statistics on	2.70-74, 16.17, 16.22
training of judicial officers and others	15.71-74, 16.24-26, 16.32
wishes of the child	16.3, 16.8, 16.15
<i>see also</i> Jurisdiction, Representation	
Government services	ch 9
children from rural and remote communities	9.5-7
service charters	9.8-14
statistics on	2.144-151, 2.49-57
<i>see also</i> Income support, Immigration	
Guardian ad litem	
<i>see</i> Next friend	
HREOC	7.5, 7.26-30
<i>See also</i> Advocacy	

Immigration	
citizenship	9.64-65
Immigration Review Tribunal	9.89-91
merits review	9.89-94
non-citizen children	9.70-79
processing issues	9.66-69
refugee children	9.80-85
Refugee Review Tribunal	9.89-91
<i>see also</i> Government services	
Income support	
Administrative Appeals Tribunal	9.86-7, 9.90-94
Administrative Review Tribunal	9.90-94
Centrelink	9.22-24
children from non-English speaking backgrounds	9.40
children from rural and remote communities	9.41-43
current system	9.18-21
Common Youth Allowance	9.25-33
homeless children	9.44-60
Indigenous children	9.37-39
internal review	9.86-88
merits review	9.89-94
Social Security Appeals Tribunal	9.86-94
Youth Service Units	9.34-36
statistics on	2.41-44, 2.49-57
<i>see also</i> Government services	
Indigenous children	
statistics on	2.5, 2.11-12, 2.16, 2.21, 2.23, 2.43
<i>see also</i> Care and protection, Criminal processes, Detention, Education, Family Court, Income Support, Legal Process, Sentencing, Witnesses	
Judicial training	14.112-115, 15.71-74, 16.24-26, 16.32, 18.191-194, 19.89-92
Jurisdiction	ch 15
cross-vesting arrangements	
current arrangements	6.21-24, 15.5, 15.28-30
extended scheme	15.29-41
division between Commonwealth and States and Territories	3.27-35, 5.3-5, 15.1-6, 15.18-19
division between Family Court and children's courts	ch 15
inappropriate choice of forum	15.7-10
investigations of child abuse allegations	15.14-17
numerous proceedings	15.1-13
overlapping jurisdictions	15.20-25
State and Territory magistrates exercising federal jurisdiction	15.5, 15.50
transfer of powers	
full transfer of powers	15.42-45
limited transfer of powers	15.46-48
welfare jurisdiction	15.5, 15.51, 15.62-67, 16.73-80
<i>see also</i> Care and protection, Co-ordination, Family Court	
Juvenile Justice	
<i>see</i> Criminal Processes	
Legal process, the	
adverse outcomes of	4.32-50
barriers to children's participation in	4.3-31
definition of	1.24
particular groups, problems of	4.51-65
Litigation	

see Care and protection, Civil litigation, Evidence,
Family Court, Next Friend, Representation, Witnesses

National standards	10.66-67, 18.9-11, 19.6-7, 20.26-30
Next friend	13.6-21
Non-English speaking backgrounds, children from	
statistics on	2.6-8, 2.13-14, 2.20, 2.22, 2.44
<i>see also</i> Care and protection, Criminal processes, Detention, Family Court, Government services, Income support, Witnesses	
Office for Children	
comparable bodies	6.49-56
co-ordination models	6.3-12, 6.21-24
funding implications	6.48-61
location	6.15-18
functions of	6.33-45
<i>see also</i> Advocacy, Co-ordination	
Ombudsman	7.6, 7.31-2, 7.34
<i>see also</i> Advocacy, Complaints bodies	
Representation	
best interests model	
participation of children	13.52-58
evaluation	13.49-64
operation	13.33-41, 13.49-64
best interests representative, duties of	13.96-101
care and protection	13.23-32, 13.119-122
Family Court	13.22, 13.107-118
funding issues	13.133-150
instructions model	13.74-79, 13.88-92
international models	13.42-48
skills and training of representatives	13.123-132
standards	13.80-106
confidentiality	13.96-101
siblings	13.102-103
termination of appointment	13.104-106
team approach	13.66-73
<i>see also</i> Advocacy, Care and protection, Family Court	
Rights	
education	10.6-14
<i>see also</i> Table of international instruments (page 761)	
Rural and remote communities, children from	
statistics on	2.15-6, 2.24
<i>see also</i> Family Court, Government Services, Sentencing	
Schools	
<i>see</i> Education	
Sentencing	
background reports	19.73-80
children affected by mental illness	19.96-99
children from rural and remote communities	19.99-101
children involved in substance abuse	19.102-104
criminal record	19.117-127
federal offences	19.8-15
gender	19.94
Indigenous children	19.105-116
national standards for juvenile justice	19.6-7

participation of children in	19.81-87
rehabilitation	19.21-22
repeat offenders	19.23-26
sentencing options	
adequacy of	19.65-72
community service orders	1.39-44
detention	19.45-64
other sentencing options	19.28-38
statistics on	2.106-116
<i>see also</i> Criminal processes, Detention	
Summit on Children	
functions	5.43-5
national package, part of	5.34-41, 6.32-3
<i>see also</i> Office for Children	
Taskforce on children and the legal process	
functions	6.32-42
national package	5.34-41
<i>see also</i> Office for Children	
UN Conventions on the Rights of the Child,	
<i>see</i> Table of international instruments (page 761)	
Victims	
<i>see</i> Witnesses	
Welfare	
<i>see</i> Income support	
Witnesses	ch 14
children from different cultural backgrounds	14.121-125
children with disabilities	14.126-129
closed circuit television and screens	14.102-109
committal hearings	14.48-50
compellability	14.65-66, 16.55
competency	14.59-64
court companions	14.101
cross-examination and legal language	14.110-115, 16.56
delays, consequences of	14.20, 14.51-56
expert witnesses	14.74-77, 16.41-47
federal proceedings	14.6-8
interpreters	14.125, 18.117, 18.120-121
investigations	
Child Advocacy Centres	14.37-38, 14.100
interview teams	14.31-38
national standards	14.29
video-taping	
interviews	14.39-44
pre-trial hearings	14.45-47
judicial training	14.112-115
legal representation for	14.130-131
preparation of	14.95-100
Prosecutor, role of	14.93-94
reliability	14.15-25
state and territory proceedings	14.9-14
statistics on	2.122-135, 2.144-152
support programs	14.95-100, 16.57
victim impact statements	14.119

Young person
see Child

1 B Stevenson, *Stevenson's Book of Proverbs, Maxims and Familiar Phrases* Routledge and Kegan Paul Ltd, London 1949.
2 s 21.
3 s 11(1)(f).
4 D Williams, Attorney-General and Minister for Justice *Media Release* 23 September 1997.
5 A list of consultants is included at appendix A.
6 R Ludbrook 'Children and the political process' (1996) 2(2) *Australian Journal of Human Rights* 278, 283.
7 However, see paras 4.4-9 for a discussion of the changing views of the appropriate and varying ages used to define childhood.
8 A child is defined as a person under the age of 18 unless the relevant national law specifies an earlier age of majority: art 1.
9 See CROC preamble.
10 G Van Bueren (ed) *International Documents on Children* Martinus Nijhoff Dordrecht 1993, xv.
11 As of 15 September 1997 only the USA and Somalia had not ratified CROC.
12 The effect of CROC in Australia is discussed in more detail at paras 3.20-22.
13 art 26.
14 ABS unpublished data prepared for the Inquiry 22 July 1997.
15 *ibid.* The total population counted in Australia on 6 August 1996 was 17 267 825: ABS 1996 *Census of Population and Housing: Selected Social and Housing Characteristics — Australia* ABS Canberra 1997, 1.
16 ABS *Australian Social Trends 1997* ABS Canberra 1997, 8-9; ABS unpublished data prepared for the Inquiry 22 July 1997.
17 ABS *Australian Social Trends 1997* ABS Canberra 1997, 8-9.
18 ABS 1996 *Census of Population and Housing: Selected Social and Housing Characteristics — Australia* ABS Canberra 1997, 1.
19 *id.* 36.
20 *ibid.*
21 ABS unpublished data prepared for the Inquiry 22 July 1997.
22 ABS 1996 *Census of Population and Housing: Selected Social and Housing Characteristics — Australia* ABS Canberra 1997, 1.
23 Derived from ABS unpublished data prepared for the Inquiry 22 July 1997; ABS 1996 *Census of Population and Housing: Selected Social and Housing Characteristics — Australia* ABS Canberra 1997, 1.
24 Compared to only 7.3% of the total Australian population: *ibid.*
25 *ibid.*
26 ABS unpublished data prepared for the Inquiry 22 July 1997.
27 ABS 1996 *Census of Population and Housing: Selected Social and Housing Characteristics — Australia* ABS Canberra 1997, 1.
28 ABS unpublished data prepared for the Inquiry 22 July 1997.
29 *ibid.*
30 *ibid.*
31 *ibid.*
32 *ibid.*
33 *ibid.*
34 Australian Institute of Health and Welfare (AIHW) *Australia's Welfare Services and Assistance 1995* AGPS Canberra 1995, 244. Disability is defined as the presence of one or more specified limitations, restrictions or impairments which had lasted or was likely to last for 6 months or more.
35 *id.* 246. Handicap is defined as a limitation or restriction in performing certain specified tasks associated with daily living, due to a disability.
36 *id.* 244.
37 ABS unpublished data prepared for the Inquiry 22 July 1997.
38 Derived from ABS 1996 *Census of Population and Housing: Selected Social and Housing Characteristics — Australia* ABS Canberra 1997, 6-19 & ABS unpublished data prepared for the Inquiry 22 July 1997.
39 ABS unpublished data prepared for the Inquiry 22 July 1997.
40 *ibid.*
41 *ibid.* The proportions for the other States and Territories were: Qld — 15.8% of all overseas-born children; SA — 5.3%; WA — 13.3%; Tas — 0.88%; NT — 0.74; ACT — 1.9%. Australia's external territories account for the rest.
42 ABS unpublished data prepared for the Inquiry 22 July 1997.
43 *ibid.*
44 A major urban centre is defined as a community with a population of 100 000 or more. The term 'other urban area' means those areas that have populations of between 1000 and 99 999: ABS & National Youth Affairs Research Scheme (NYARS) *Australia's Young People* ABS Canberra 1993, 7.
45 Derived from table 1.5: ABS & NYARS *Australia's Young People* ABS Canberra 1993, 9. The 1996 census statistics had not been released when this Report was finalised
46 *ibid.*
47 The proportion of children who were living in these rural areas remained constant between 1989 and 1991: ABS & NYARS *Australia's Young People* ABS Canberra 1993, 8. In the last few years however, there appears to be a growing trend for Australians, and subsequently for their children, to move away from major cities to adjacent rural areas and the coast: Shu et al, Bureau of Immigration, Multicultural and Population Research *Australia's Population Trends and Prospects 1995* AGPS Canberra 1996, 51.
48 G Hugo & C Maher, Bureau of Immigration, Multicultural and Population Research *Atlas of the Australian People — 1991 Census* AGPS Canberra 1995, 4, 10-11.

ABS 1996 *Yearbook Australia* ABS Canberra 1996, 81.

ABS *Australian Social Trends 1997* ABS Canberra 1997, 30. An additional 255 000 families consisted of a couple with dependents aged 15 and older: derived from ABS *Australian Social Trends 1997* ABS Canberra 1997, 24, 30. The ABS defined 'dependents' as family members, other than the parent or family head, aged 15-24 who attended an educational institution full-time.

ABS *Australian Social Trends 1997* ABS Canberra 1997, 34.

ibid.

id 35.

ABS *Australia's Families — Selected Findings from the Survey of Families in Australia 1992* ABS Canberra 1993, 5.

ABS *Australian Social Trends 1995* ABS Canberra 1995, 29.

id 30.

ABS *Focus on Families: Demographics and Family Formation* ABS Canberra 1994, 17.

ibid.

ABS & NYARS *Australia's Young People* ABS Canberra 1993, 34.

ABS *Focus on Families: Demographics and Family Formation* ABS Canberra 1994, 8.

ibid.

J Shu et al, Bureau of Immigration, Multicultural and Population Research *Australia's Population Trends and Prospects 1995* AGPS Canberra 1996, 10.

ABS 1994 *National Aboriginal and Torres Strait Islander Survey: Australia's Indigenous Youth* ABS Canberra 1996, 1.

ibid.

ABS *Australian Social Trends 1997* ABS Canberra 1997, 30.

id 36.

ibid.

ABS *Focus on Families: Income and Housing* ABS Canberra 1995, 6. The lowest income quintile was defined as an income of less than \$16 000 per year and the second lowest was \$16 001 to \$25 000.

J Taylor & H MacDonald, Bureau of Immigration and Population Research *Disadvantage and Children of Immigrants: A Longitudinal Study* AGPS Canberra 1994, 15.

id 16.

ABS *Focus on Families: Income and Housing* ABS Canberra 1995, 4.

ibid.

K Scott 'Consumer kids: Winning the hearts, minds and \$\$\$ of the next generation of consumers by understanding their behaviour' *Paper Marketing to Kids IIR Conference Sydney 24-25 July 1995*, 10.

Australian Association of National Advertisers *IP Submission 132* quoting AMR Quantum Harris *AMR Quantum Harris Youth Scan: General Report 1995* AMR Quantum Harris Victoria 1995.

ibid.

This included amounts spent on bus fares and school books: ibid.

Australian Association of National Advertisers *IP Submission 132* quoting McCann, Erickson & Small *McCann Monitor* McCann Information Service 1994.

ibid.

ibid.

Australian Association of National Advertisers *IP Submission 132* quoting AMR Quantum Harris *AMR Quantum Harris Youth Scan: General Report 1995* AMR Quantum Harris Victoria 1995.

Survey Question 15.

Australian Association of National Advertisers *IP Submission 132* quoting AMR Quantum Harris *AMR Quantum Harris Youth Scan: General Report 1995* AMR Quantum Harris Victoria 1995.

Survey Question 15.

NYARS *Young People and Consumer Credit* (Summary) National Clearinghouse for Youth Studies Hobart 1991, 5.

ibid. Overall, the results of the NYARS study showed the most common types of credit used by 15 to 25 year olds were credit cards (21%), personal loans (13%), store cards (10%) and company loans (4%). Girls were more likely to use credit cards to buy clothing and special things such as presents. Boys on the other hand were more likely to use credit to pay for entertainment, to access cash, and to pay for car service and petrol: id 7-8.

Australian Association of National Advertisers *IP Submission 132* quoting AMR Quantum Harris *AMR Quantum Harris Youth Scan: General Report 1995* AMR Quantum Harris Victoria 1995.

ibid.

Australian Association of National Advertisers *IP Submission 132* quoting AC Nielsen 1996 *Australian Television Facts* AC Nielsen Sydney 1996.

AC Nielsen unpublished data prepared for the Inquiry 21 August 1997. This survey was of 1 031 young people nation-wide, conducted in May 1997. 461 of these young people had accessed the Internet and 316 had accessed it in the past month. The majority of young Internet users (62%) had accessed the Internet from school, college or university and 28% had done so from home.

ibid.

See Trade Practices Commission *Survey of Consumer Opinion in Australia* AGPS Canberra 1987, 22; Media Council of Australia *IP Submission 42*.

ibid.

Trade Practices Commission *Disadvantaged Consumers: Survey of Consumer Opinion In Australia — A Supplementary Report* AGPS Canberra 1987 1.

id 2.

ABS unpublished data prepared for the Inquiry 22 July 1997.

ibid.

The proportion of young people attending non-government schools tends to increase with increasing family income. Among households with school-aged children only 22% of those in the lowest income quintile and 14% in the second lowest income quintile had children attending non-government schools. In comparison, 41% of those in the highest income quintile had children attending non-government schools: ABS *Australian Social Trends 1997* ABS Canberra 1997, 73.

ABS *Yearbook Australia 1997* ABS Canberra 1997, 234.

id 239.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 2.

In 1991 there were 79 600 Aboriginal and Torres Strait Islander people aged 12 to 25 living in Australia: ABS & NYARS *Australia's Young People* ABS Canberra 1993, 48.

ibid.

ABS *Focus on Families: Education and Employment* ABS Canberra 1994, 16.

ABS & NYARS *Australia's Young People* ABS Canberra 1993, 51.

ibid.

ABS 1994 *National Aboriginal and Torres Strait Islander Survey: Australia's Indigenous Youth* ABS Canberra 1996, 13.

In 1991, there were 329 700 young people aged 12 to 25 from non-English speaking backgrounds living in Australia: ABS & NYARS *Australia's Young People* ABS Canberra 1993, 48.

ABS *Focus on Families: Education and Employment* ABS Canberra 1994, 16.

ABS & NYARS *Australia's Young People* ABS Canberra 1993, 51.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 2.

P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 253.

ibid.

ibid.

ibid.

Defence for Children International *Australia's Promises to Children: The Alternative Report* Defence for Children International Canberra 1996, 24.

ABS *Focus on Families: Education and Employment* ABS Canberra 1994, 17.

ibid.

ABS *Australian Social Trends 1996* ABS Canberra 1996, 97.

ibid.

ibid.

ibid.

Dept of Employment, Education, Training and Youth Affairs (DEETYA) *Annual Report 1995-96* AGPS Canberra 1996, 12.

ABS *Australian Social Trends 1996* ABS Canberra 1996, 99.

ibid.

id 121.

ibid.

ABS 1994 *National Aboriginal and Torres Strait Islander Survey: Australia's Indigenous Youth* ABS Canberra 1996, 17.

ibid.

P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 284.

ibid.

ibid.

See paras 4.36-38 for a discussion of the links between school and other legal processes.

See paras 2.34-38.

ABS *Focus on Families: Education and Employment* ABS Canberra 1994, 25.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 9.

id 10.

See para 10.59 for definitions of the terms suspension, exclusion and expulsion.

NSW Dept of School Education *Annual Report 1995* NSW Dept of School Education Sydney 1996, 57-58.

ibid.

S Raethel 'Parents blame teachers for rise in school suspensions' *The Sydney Morning Herald* 23 January 1997, 7.

NSW Dept of School Education *Annual Report 1995* NSW Dept of School Education Sydney 1996, 57-58.

ibid.

S Raethel 'Suspensions from school: Boys top class' *The Sydney Morning Herald* 29 July 1996, 6.

K Ashworth 'Discipline chaos in State schools' *The West Australian* 21 August 1997, 1.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 12.

ibid.

ibid.

ibid.

DEETYA *Annual Report 1995-96* AGPS Canberra 1996, 12. The full-time unemployment rate measures the number of unemployed 15 to 19 year olds looking for full-time employment as a share of the full-time labour force of the same age. The full-time labour force consists of 15 to 19 year olds who are either unemployed and looking for full-time work or working full-time. As most 15 to 19 year olds are attending educational institutions and may only be able to or want to work part-time, the full-time unemployment rate is equivalent to 7.2% of the Australian population in that age group. In August 1997, the full-time unemployment rate for 15 to 19 year olds was 27.3%: ABS *Labour Force Australia Preliminary* ABS Canberra 1997.

DSS *Annual Report 1995-96* AGPS Canberra 1996, 160. See paras 9.25-33 for a discussion of the Common Youth Allowance which is to replace these benefits.

DSS *Annual Report 1995-96* AGPS Canberra 1996, 154.

DEETYA *Annual Report 1995-96* AGPS Canberra 1996, 151-152. Breakdowns of recipients are provided only for secondary school students because it is assumed that tertiary students would generally be above the age of 18 years.

ABS *Yearbook Australia 1996* ABS Canberra 1996, 293. 1994-95 data are given for Abstudy assistance because the 1995-96 data did not differentiate between school and university students. In 1995-96 a total of 48 000 students benefitted from Abstudy: DEETYA *Annual Report 1995-96* AGPS Canberra 1996, 164.

Youth and Students Segment, Cth Services Delivery Agency *A Discussion Paper: Youth Servicing in the Commonwealth Services Delivery Agency* unpublished 1997 tables 4-7.

Recipients may include migrants who have not yet met the residency requirements, women in the later stages of pregnancy or children under school leaving age who are not eligible for YTA or Austudy and who are without parental support.

DSS *Annual Report 1995-96* AGPS Canberra 1996, 266.

House of Representatives Standing Committee on Community Affairs *Report on Aspects of Youth Homelessness* AGPS Canberra 1995, 34.

AIHW *Australia's Welfare Services & Assistance 1995* AGPS Canberra 1995, 49.

DSS *Annual Report 1995-96* AGPS Canberra 1996, 161. The programs under which young people received this rate included Special Benefit, Sickness Allowance, Job Search Allowance and YTA.

DSS *Annual Report 1995-96* AGPS Canberra 1996, 161.

Youth Homeless Taskforce *First Report of the Prime Ministerial Youth Homeless Taskforce: Framework for the Youth Homelessness Pilot Programme* AGPS Canberra 1996, 47. See paras 9.44-48 for a discussion of these rates.

Youth and Students Segment, Cth Services Delivery Agency *A Discussion Paper: Youth Servicing in the Commonwealth Services Delivery Agency* unpublished 1997, 9-10 tables 8, 9.

AIHW *SAAP National Data Collection Report July-December 1996* AIHW Canberra 1997, 15.

id 39. The number of cases rather than clients is given here as some clients may be assisted more than once and therefore have more than one case.

ibid.

id 24.

Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 175.

ibid.

A Broadbent & R Bentley *Child Abuse and Neglect Australia 1995-96* Child Welfare Series 17 AIHW Canberra 1997, 3.

AIHW *Australia's Welfare Services and Assistance 1995* AIHW Canberra 1995, 148.

A Broadbent & R Bentley *Child Abuse and Neglect Australia 1995-96* Child Welfare Series 17 AIHW Canberra 1997, 25.

id 9.

ibid.

id 25.

ibid. See para 17.37.

A Broadbent & R Bentley *Child Abuse and Neglect Australia 1995-96* Child Welfare Series 17 AIHW Canberra 1997, 28.

eg jurisdictions that assign children to the 'child at risk' category rather than 'substantiated' may have lower substantiation rates than those States and Territories that place these children in the 'substantiated' category, while States that count these types of cases as 'unsubstantiated' could have even lower substantiation rates: see para 17.37.

A Broadbent & R Bentley *Child Abuse and Neglect Australia 1995-96* Child Welfare Series 17 AIHW Canberra 1997, 41.

The ratio of girls to boys differed greatly depending on their age group and the type of abuse or neglect substantiated. eg boys aged 0 to 4 and 5 to 9 were more often the subjects of substantiated physical abuse (57% and 60% of physical abuse cases in the respective age groups), emotional abuse (51% and 52) and neglect cases (52% and 55%), while girls aged 10 to 14 and 15 to 17 were much more often the subjects of substantiated physical abuse (52% and 70%) and emotional abuse (53% and 64%). Girls were more often the subjects of substantiated sexual abuse cases in all age groups. See A Broadbent & R Bentley *Child Abuse and Neglect Australia 1995-96* Child Welfare Series 17 AIHW Canberra 1997, 38.

id 51-52.

The names and types of orders vary around Australia. Orders are collectively termed 'care and protection' orders in this Report.

A Broadbent & R Bentley *Children on Care and Protection Orders Australia 1995-96* Child Welfare Series 18 AIHW Canberra 1997, 18.

Of these children, 8 744 (66%) were on guardianship orders and 4 497 (34%) were on non-guardianship orders, including custody or supervisory orders and undertakings: id 4.

Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision* Industry Commission Melbourne 1997, 547.

ibid. Note that these figures exclude children placed voluntarily in Qld and NT as these jurisdictions could only provide data on children on legal orders.

Ibid.

Ibid.

Ibid.

ibid. See also para 2.5.

Derived from Letter from R Lindsay, Acting Director Legal Aid WA 25 August 1997; Information from B Cross, Assignments Manager Tas Legal Aid Commission 22 August 1997; Letter from J Battersby, Policy and Research Officer Legal Services Commission of SA 13 August 1997; Letter from C Staniforth, Chief Executive Officer Legal Aid ACT 13 August 1997; Letter from C Reynolds, Executive Legal Officer Legal Aid Qld 25 August 1997; Letter from R Cornall, Managing Director Legal Aid Vic 13 August 1997; Letter from J Stone, NT Legal Aid Commission 9 September 1997. NSW is not included in this table as NSW Legal Aid did not supply this information to the Inquiry.

P McDonald *Families in Australia: A Socio-demographic Perspective* AIFS Melbourne 1995, 55.

For the purposes of this section, the Family Court of Australia and the Family Court of WA will be referred to collectively as the Family Court. Information is given for these courts only, although many children are involved in these cases before State and Territory magistrates' courts: see para 2.74.

Family Court of Australia *Annual Report 1995-96* Family Court of Australia Melbourne 1996, 64.

ABS *Australian Social Trends 1995* ABS Canberra 1995, 36.

id 27.

Family Court of Australia *Annual Report 1995-96* Family Court of Australia Melbourne 1996, 66.

ibid.

id 67.

Family Law Council *Annual Report 1995-96* AGPS Canberra 1996, 38.

Family Court of Australia *Outcomes Report* unpublished October 1996.

ibid.

Family Court of Australia *Annual Report 1995-96* Family Court of Australia Melbourne 1996, 71.

Family Court of Australia *Outcomes Report* unpublished October 1996.

ibid.

Derived from Letter from R Lindsay, Acting Director Legal Aid of WA 25 August 1997; Information from B Cross, Assignments Manager Tas Legal Aid Commission 22 August 1997; Letter from J Battersby, Policy and Research Officer Legal Services Commission of SA 13 August 1997; Letter from C Staniforth, Chief Executive Officer Legal Aid of ACT 13 August 1997; Letter from C Reynolds, Executive Legal Officer Legal Aid Qld 25 August 1997; Letter from R Cornall, Managing Director Legal Aid Vic 13 August 1997; Letter from J Stone, NT Legal Aid Commission, 9 September 1997. NSW is not included in this table as NSW Legal Aid did not supply this information to the Inquiry.

Magistrates' Court of Vic *Annual Report 1995-96* Magistrates' Court of Vic Melbourne 1996, 20.

See S Mukherjee, C Carcach & K Higgins *Juvenile Crime and Justice* Australian Institute of Criminology (AIC) Canberra 1997, 1-9.

State and Territory Children's, Youth and Juvenile Courts are collectively referred to as children's courts.

As Tas included in its police involvement statistics only those children aged 7-16 for whom charges were actually laid, the Inquiry has not included those statistics in this section. NSW counts children's appearances in children's and other courts rather than police involvement and these statistics also are reported in a later section of this chapter. The age ranges in the following statistics reflect the different ages of criminal responsibility and adulthood for the purposes of juvenile justice in each jurisdiction. See para 18.12.

Derived from S Mukherjee, C Carcach & K Higgins *Juvenile Crime and Justice* AIC Canberra 1997, 13-14, tables 2.1 a, b.

id 18-19, tables 2.2 a, b.

id 28-29, tables 2.4 a, b.

id 23-24, tables 2.3 a, b.

id 38-39, tables 2.6 a, b.

id 43-44, tables 2.7 a, b.

Letter from Deputy Commissioner AFP 8 November 1995. This does not reflect the actual number of children who come to police attention for federal offences. Most federal offences are dealt with by State and Territory police and separate statistics are not maintained: see para 18.6.

See paras 18.45-50 for a discussion of family group conferencing.

Children's Court of Qld *Third Annual Report 1995-96* Children's Court of Qld Brisbane 1997, 21.

SA Juvenile Justice Advisory Committee *Annual Report 1995-96* SA Juvenile Justice Advisory Committee Adelaide 1996 table 3.1.

A Ferrante & N Loh *Crime and Justice Statistics for Western Australia 1995* Crime Research Centre University of WA Perth 1996, 53.

Letter from Director, Youth and Family Services Vic Dept of Human Services 23 July 1997.

Letter from Deputy Commissioner, AFP 8 November 1995.

Crime Research Centre *Aboriginal Youth and the Juvenile Justice System of WA* Crime Research Centre University of WA Perth 1995, 13, 18.

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 514.

J Wundersitz *The South Australian Juvenile Justice System: A Review of Its Operation* Office of Crime Statistics Adelaide 1997, xx.

See National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 513-516.

SA Juvenile Justice Advisory Committee *Annual Report 1995-96* SA Juvenile Justice Advisory Committee Adelaide 1996 table 3.5.

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 524.

id 516.

J Wundersitz *The South Australian Juvenile Justice System: A Review of Its Operation* Office of Crime Statistics Adelaide 1996, xix.

A Ferrante & N Loh *Crime and Justice Statistics for Western Australia 1995* Crime Research Centre University of WA Perth 1996, 45.

J Wundersitz *The South Australian Juvenile Justice System: A Review of Its Operation* Office of Crime Statistics Adelaide 1996, xix.

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 516.

id 493.

ibid.

However, that some young people in police custody may not be alleged criminal offenders and therefore may not have been arrested at all, eg, in WA and NT police can detain a person for public drunkenness even though this is not a criminal offence: see para 18.137.

Letter from Director Cth DPP 8 November 1995. These figures do not include those prosecutions by State or Territory DPPs for federal offences or any prosecutions in the NT or Tas as prosecutions are conducted by the Australian Government Solicitor in these jurisdictions.

Letter from Director Cth DPP 8 November 1995.

Children's Court of Qld *Third Annual Report 1995-96* Children's Court of Qld Brisbane 1996, 61.

id 102.

id 64, 71, 73.

Letter from Acting Manager Statistical Services Qld Dept of Families, Youth and Community Care 23 December 1996.

ibid.

Children's Court of Qld *Third Annual Report 1995-96* Children's Court of Qld Brisbane 1996, 61.

Letter from C Reynolds, Executive Legal Officer Legal Aid of Qld 25 August 1997.

NSW Dept of Juvenile Justice *Information Package for 1995-96* NSW Dept of Juvenile Justice Sydney 1996, 18. See also NSW Dept of Juvenile Justice *Annual Children's Court Statistics — Criminal Matters 1995-96* NSW Dept of Juvenile Justice Sydney 1996, 1-10. NSW statistics are reported in 'appearances' rather than individual children. Some children may have had more than one case and thus made more than one appearance in the children's court during the year.

NSW Dept of Juvenile Justice *Information Package for 1995-96* NSW Dept of Juvenile Justice Sydney 1996, 11-12.

id 6; NSW Dept of Juvenile Justice unpublished data prepared for the Inquiry 7 July 1997.

NSW Dept of Juvenile Justice *Annual Children's Court Statistics — Criminal Matters 1995-96* NSW Dept of Juvenile Justice Sydney 1996, 177.

Statistics are available regarding Indigenous children and children from non-English speaking backgrounds in NSW juvenile detention centres: see para 2.119.

Vic Dept of Justice, Caseflow Analysis Section of the Courts, Tribunals & Registries Division *Children's Court Statistics 1995* Vic Dept of Justice Melbourne 1997, 7.

ibid.

id 15.

id 20-22.

Letter from R Cornall, Managing Director Vic Legal Aid 13 August 1997.

A Ferrante & N Loh *Crime and Justice Statistics for Western Australia 1995* Crime Research Centre University of WA Perth 1996, 87.

Derived from id 96.

The Children's (Suspended Proceedings) Panel operated until March 1995. It dealt with children who admitted their offence and who were referred by either police or the courts as an alternative to handling the case through the formal court process. It was subsequently replaced by Juvenile Justice Teams. See para 18.48.

A Ferrante & N Loh *Crime and Justice Statistics for Western Australia 1995* Crime Research Centre University of WA Perth 1996, 88-89.

Derived from id 102.

id 89.

Letter from R Lindsay, Acting Director Legal Aid of WA 25 August 1997.

SA Juvenile Justice Advisory Committee *Annual Report 1995-96* SA Juvenile Justice Advisory Committee Adelaide 1996 table 6.2.

id table 6.3.

265 ibid.
 266 id tables 6.4, 6.5.
 267 id table 6.4.
 268 Letter from J Battersby, Policy and Research Officer Legal Services Commission of SA 13 August 1997.
 269 Derived from S Mukherjee, C Carcach & K Higgins *Juvenile Crime and Justice* AIC Canberra 1997, 33-34, tables 2.5 a, b.
 270 Information from B Cross, Assignments Manager Tas Legal Aid Commission 13 August 1997.
 271 Letter from Policy and Special Projects Officer Youth Justice Service 4 March 1997.
 272 ibid.
 273 Letter from Registrar ACT Supreme Court 8 August 1996.
 274 Letter from C Staniforth, Chief Executive Officer ACT Legal Aid Office 13 August 1997.
 275 Office of Courts Administration *Annual Report 1995-96* Office of Courts Administration Darwin 1996, 38.
 276 Letter from J Stone, NT Legal Aid Commission 9 September 1997.
 277 Letter from J Stone, NT Legal Aid Commission 9 September 1997.
 278 Children's Court of Qld *Third Annual Report 1995-96* Children's Court of Qld Brisbane 1996, 70.
 279 id 71-72.
 280 id 73.
 281 Qld Dept of Families, Youth and Community Care *Annual Report 1995-96* Qld Dept of Families, Youth and Community Care Brisbane 1996, 44.
 282 NSW Dept of Juvenile Justice *Annual Children Court Statistics — Criminal Court Matters 1995-96* NSW Dept of Juvenile Justice Sydney 1996, 27.
 283 Vic Dept of Justice, Casflow Analysis Section of the Courts, Tribunals & Registries Division *Children's Court Statistics 1995* Vic Dept of Justice Melbourne 1997, 18.
 284 Vic Dept of Human Services *Annual Report 1995-96* Vic Government Printer Melbourne 1996, 137.
 285 ibid.
 286 ibid.
 287 A Ferrante & N Loh *Crime and Justice Statistics for Western Australia 1995* Crime Research Centre University of WA Perth 1996, 105.
 288 id 89, 105.
 289 ibid.
 290 SA Juvenile Justice Advisory Committee *Annual Report 1995-96* SA Juvenile Justice Advisory Committee Adelaide 1996 table 6.9.
 291 Tas Dept of Community and Health Services *Annual Report 1995-96* Tas Dept of Community and Health Services Hobart 1997, 56.
 292 Letter from Policy and Special Projects Officer Youth Justice Service 4 March 1997.
 293 ibid.
 294 See para 18.169 for a discussion of remand and ch 20 for a discussion of detention.
 295 L Atkinson 'Detaining Aboriginal juveniles as a last resort: Variations from the theme' (1996) (64) *Trends and Issues in Crime and Criminal Justice* 2.
 296 ibid.
 297 S Mukherjee, C Carcach & K Higgins *Juvenile Crime and Justice* AIC Canberra 1997, 75.
 298 NYARS *Juvenile Justice: Services and Transition Arrangements* National Clearinghouse for Youth Studies Hobart 1997, 20.
 299 L Atkinson 'Detaining Aboriginal juveniles as a last resort: Variations from the theme' (1996) (64) *Trends and Issues in Crime and Criminal Justice* 3. The over-representation ratios for the other jurisdictions were: NSW — Indigenous children were 20.5 times more likely to be in detention than non-Indigenous children; ACT — 19.0; SA — 13.7; Vic — 9.8; Tas — 8.2; NT — 3.8.
 300 NSW Dept of Juvenile Justice *Information Package 1995-96* NSW Dept of Juvenile Justice Sydney 1996, 23.
 301 id 27.
 302 Letter from Program Officer for Youth Justice, Tas Dept of Child, Family and Community Support, 17 December 1996; Tas Dept of Community and Health Services *Annual Report 1995-96* Tas Dept of Community and Health Services Hobart 1996, 57.
 303 Vic Dept of Human Services *Annual Report 1995-96* Vic Government Printer Melbourne 1996, 137.
 304 SA Dept of Family and Community Services *Annual Report 1995-96* SA Dept of Family and Community Services Adelaide 1996, 21.
 305 ibid.
 306 No children gave evidence in the Supreme Court at Brisbane during the last 5 months of 1996: Letter from Registrar Brisbane Supreme Court, 24 January 1997.
 307 Letter from Youth Justice Manager Qld Dept of Families, Youth and Community Care 21 March 1997.
 308 Letter from Acting Manager of Statistical Services Qld Dept of Families, Youth and Community Care 23 December 1996.
 309 Judicial Commission of NSW *Child Sexual Assault* Judicial Commission of NSW Sydney 1997, 2-3, 11.
 310 id 11.
 311 ibid. Two of the alleged offenders died before trial.
 312 Judicial Commission of NSW *Child Sexual Assault* Judicial Commission of NSW Sydney 1997, 11.
 313 NSW DPP *Annual Report 1995-96* NSW DPP Sydney 1996, 76.
 314 It appears that few, if any, child witnesses (or any other child participants) appeared before Vic Supreme Courts in the latter half of 1996: letter from Deputy Prothonotary Supreme Court of Vic 13 February 1997.
 315 Vic DPP *Annual Report of Operations: Office of Public Prosecutions 1995-96* Vic DPP Melbourne 1996, 49. However, as such cases might involve adult as well as child witnesses, this number cannot accurately represent the total number of child witnesses in criminal cases in Vic.
 316 Vic Police *IP Submission 45*.
 317 ibid. On the other hand, the existence of the videotaped interview may often have led to guilty pleas, perhaps lessening the number of children required to give evidence in court.
 318 Letter from Director Youth and Family Services Vic Dept of Human Services 23 June 1997.
 319 31 children gave their evidence via CCTV, 25 used a screen and 8 had their evidence taken prior to trial and presented at trial via videotape: letter from Registrar's Chambers WA Supreme Court 15 November 1996.
 320 Although most child witnesses under 16 years of age are presumed to give evidence in these ways, this number does not include child witnesses appearing in criminal proceedings other than those in which the crime is a 'specified offence', those child witnesses aged 16 and over and those appearing in civil proceedings.
 321 Letter from Principal Legal Officer WA Dept of Family and Children's Services 7 April 1997.
 322 S Bellett *Agency Referrals to Child Victim Witness Service* unpublished 25 August 1997.
 323 J Wundersitz 'Sexual Offending in South Australia' *Information Bulletin Issue 1* SA Attorney-General's Dept Adelaide 1996, 6.
 324 Office of Crime Statistics *Crime and Justice in South Australia 1994* SA Attorney-General's Dept Adelaide 1995 table 4.3.
 325 ibid.
 326 ibid.

Letter from Chief Executive SA Dept of Family and Community Services 20 December 1996.
 Letter from Director Youth and Family Services Tas Dept of Community and Health Services 15 May 1997.
 ibid.
 ibid.
 Tas Dept of Justice *Annual Report 1995-96* Tas Dept of Justice Hobart 1996, 39.
 ACT DPP *Annual Report 1995-6* ACT DPP Canberra 1996, 23.
 Letter from Registrar Supreme Court Office Law Courts of the ACT 8 August 1996.
 ibid.
 Letter from Manager Court Services Unit ACT Dept of Education & Training and Children's Youth & Family Services 12 May 1997.
 Letter from Registrar Supreme Court of NT 3 March 1997.
 ibid.
 ibid.
 J Baker *Who Settles and Why?* Law Foundation of NSW Sydney 1994 appendix 4.
 Derived from Letter from R Lindsay, Acting Director Legal Aid of WA 25 August 1997; Information from B Cross, Assignments Manager Tas Legal Aid Commission 22 August 1997; Letter from J Battersby, Policy and Research Officer Legal Services Commission of SA 13 August 1997; Letter from C Staniforth, Chief Executive Officer Legal Aid of ACT 13 August 1997; Letter from C Reynolds, Executive Legal Officer Legal Aid Qld 25 August 1997; Letter from R Cornall, Managing Director Legal Aid Vic 13 August 1997; Letter from J Stone, NT Legal Aid Commission 9 September 1997. NSW is not included in this table as NSW Legal Aid did not supply this information to the Inquiry.
 In addition, by the time the child's matter is heard before a court, the child for whom the guardian *ad litem* was originally appointed may have become an adult: letter from Registrar Supreme Court of NT 3 March 1997.
 Letter from Registrar Supreme Court at Brisbane 29 July 1996.
 Letter from Registrar ACT Supreme Court 8 August 1996.
 Letter from Registrar Supreme Court of NT 3 March 1997.
 Letter from Registrar ACT Supreme Court 8 August 1996.
 Magistrates' Court of Vic *Crimes Compensation Tribunal 24th Annual Report 1995-96* Magistrates' Court of Vic Melbourne 1996, 24.
 R Bentley & A Broadbent *Adoptions Australia 1995-96* Child Welfare Series 19 AIHW Canberra 1997, 9.
 id 13. These figures do not include adoptions of overseas-born children by relatives in Australia.
 id 15.
 See para 17.104.
 Vic Dept of Human Services *Annual Report 1995-96* Vic Government Printer Melbourne 1996, 132.
 Vic Dept of Justice Caseload Analysis Section of the Courts, Tribunals and Registries Division *Children's Court Statistics 1995* Vic Dept of Justice Melbourne 1996, 74.
 Results calculated from completed questionnaires provided to the Inquiry by IRT.
 ibid.
 ibid.
 ibid.
 Letter from Principal Member RRT 7 May 1997.
 ibid.
 ibid.
 ibid.
 ibid.
 Letter from Operations Manager SSAT 2 October 1996.
 ibid.
 ibid.
 ibid.
 See SSAT *Annual Report 1995-96* AGPS Canberra 1996, 21.
 Letter from Operations Manager SSAT 30 December 1996.
 Letter from President AAT 9 September 1996.
 SSAT *Annual Report 1995-96* AGPS Canberra 1996, 69.
 Dept of Immigration and Multicultural Affairs (DIMA) *Annual Report 1995-96* AGPS Canberra 1996, 14.
 Letter from Principal Member RRT 7 May 1997.
 IRT *Annual Report 1995-96* AGPS Canberra 1996, 13.
 See para 16.58.
 See paras 16.55-56.
 See para 2.88.
 End Child Prostitution in Asian Tourism *DRP Submission 67*.
 See ch 4 for a discussion of the barriers to children's participation in these processes.
 In 1995-96, the Cth Ombudsman received 19 144 complaints, including 7 023 about DSS, 2 668 about DEETYA and 638 about DIMA. An additional 794 complaints were received about the AFP: Cth Ombudsman *Annual Report 1995-96* Cth Ombudsman Canberra 1996, 49-50.
 id 64.
 id 32.
 Parliamentary Commissioner for Administrative Investigations (Qld) *22nd Annual Report 1995-96* Qld Government Printer Brisbane 1996, 30.
 id 10-12.
 NSW Ombudsman *DRP Submission 80*. For case studies on complaints regarding police treatment of children see also NSW Ombudsman *Annual Report 1995-96* NSW Ombudsman Sydney 1996, 32-33, 34, 52, 55.
 NSW Community Service Commission *IP Submission 211*.
 ibid.
 Vic Ombudsman *Annual Report 1995-96* Vic Ombudsman Melbourne 1996, 46, 80.
 id 37.
 Vic Auditor-General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 345.
 Parliamentary Commissioner for Administrative Investigations (WA) *IP Submission 41*.
 ibid.
 ibid.

Parliamentary Commissioner for Administrative Investigations (WA) *Annual Report 1995-96* Parliamentary Commissioner for Administrative Investigations Perth 1996, 27, 45.
 SA Ombudsman *24th Annual Report of the SA State Ombudsman 1995-96* SA Ombudsman Adelaide 1996, 97, 175-176.
 Many of the cases were reported as concerns about 'son', 'daughter' or 'child': *ibid.*
id 103, 179-181.
 Many of the cases were reported as concerns about 'son', 'daughter' or 'child': *id* 179-181.
 Tas Ombudsman *Annual Report 1995-96* Tas Government Printer Hobart 1996, 74-77.
id 82-83.
ibid. The majority of complaints regarding children were reported in terms of 'son', 'daughter', 'children' or 'grandchild'.
 NT Ombudsman *Annual Report 1995-96* Ombudsman's Office Darwin 1996, 54.
id 60-61, 123.
 Anti-Discrimination Board of NSW *Annual Report 1995-96* Anti-Discrimination Board of NSW Sydney 1996, 18.
 Anti-Discrimination Board of NSW *IP Submission 60*.
 Media Council of Australia *IP Submission 42*.
ibid.
 C Smith 'Children's rights: Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103, 134. See also ICCPR art 23; CROC preamble.
 C Smith 'Children's rights: Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103, 133.
ibid.
 See paras 18.67-72.
 For a general discussion of the public/private divide see M Coady 'Reflections on children's rights' in K Funder (ed) *Citizen Child* AIFS Melbourne 1996.
 L Fox-Harding *Perspectives in Child Care Policy* Longman House London 1991, 13.
id 37.
ibid.
id 59-60.
ibid.
id 60-61.
id 104.
id 105-107.
id 131-132.
 art 12.
 art 9.
Secretary, Department of Health and Community Services v JWB and another (1992) 175 CLR 215, 293.
 (1995) FLC ¶92-598.
 Constitution s 51(xxix).
 See Vienna Convention on the Law of Treaties (1969) art 26: '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. The jurisdiction of the International Court of Justice to enforce international treaties is provided by the Statute of the International Court of Justice, art 38.
 However, in Australia's first report on CROC released in December 1995 the federal Government acknowledged that it has a significant role to play in implementing the provisions of CROC. The report outlined a wide range of federal Government policies and programs in areas relevant to children and the legal process. They included social welfare programs, income support schemes, programs specifically for Indigenous children, legislation dealing with sexual exploitation of children, assistance for refugee children, and the federal Government's *Justice Statement* which included funding for legal advice and advocacy for children and young people. The report also included information on several hundred pieces of federal, State and Territory legislation affecting children: Attorney-General's Dept *Australia's Report under the Convention on the Rights of the Child* Attorney-General's Dept Canberra 1996.
 In addition to CROC, Australia has also ratified ICCPR, the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. These provide rights to: equality, non-discrimination, fairness and privacy; freedoms of speech, movement, association and to found a family; protections against cruel and unusual punishment and unlawful detention. The International Covenant on Economic, Social and Cultural Rights and certain International Labour Organisation Conventions also provide for the protection and advancement of social welfare and work-related rights to health, education, safe employment conditions and an adequate standard of living.
 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally 1986. The federal Government is currently negotiating with States and Territories regarding ratification of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: see para 9.76, rec 29.
 The Hague Convention on Civil Aspects of International Child Abduction.
 UN Educational, Scientific and Cultural Organisation Convention against Discrimination in Education 1960.
 International Labour Organisation Convention No 138 Concerning Minimum Age for Admission to Employment 1973.
 International Labour Organisation Conventions No 79 and No 90 on Night Work of Young Persons (Non-Industrial and Industrial Occupations), 1946 and 1948 respectively.
 These are the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) and the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).
 Australia has also committed itself to the World Declaration on the Survival, Protection and Development of Children 1990.
 preamble.
 art 4.
 art 3(3).
 arts 13, 17.
 arts 3(2), (3), 9(1), 19.
 arts 3(2), (3), 20, 25.
 art 22.
 arts 37, 40.
 art 23.
 arts 18, 27.
 art 26.

arts 28, 29.

Attorney-General's Dept *Australia's Report under the Convention on the Rights of the Child* Attorney-General's Dept Canberra 1996, 2–3.
eg M Hogan & E Fishwick *Doing the Rights Thing* Public Interest Advocacy Centre Sydney 1992; G Brewer & P Swain *Where Rights are Wronged* National Children's Bureau of Australia Melbourne 1993; Defence for Children International *Australia's Promises to Children—The Alternative Report* Defence for Children International Canberra 1996.

See paras 19.63–64 for a discussion of two of these violations of international law — the mandatory sentencing laws in WA and NT.

Attorney-General's Dept *Australia's Report under the Convention on the Rights of the Child* Attorney-General's Dept Canberra 1996, 2–3.

Dietrich v R (1993) 177 CLR 292, 348–9 per Dawson J. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, 362 per Mason CJ & Deane J.

A Mason 'The influence of international and transnational law on Australian municipal law' (1996) 7 *Public Law Review* 1, 20.

Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353.

Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353, 365 per Mason CJ & Deane J.

Dept of Foreign Affairs and Trade *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* Dept of Foreign Affairs and Trade Canberra 1994 para 56; see also D Kinley 'The implications of executive ratification of treaties for democratic governance' in P Alston & M Chiam (eds) *Treaty Making in Australia: Globalisation Versus Sovereignty?* Federation Press Sydney 1995, 62–63.

A federal parliamentary standing committee could either conduct a review of all federal, State and Territory legislation or it could undertake this function only with respect to federal legislation and receive reports from a separate body on State and Territory legislation. Rec 3 suggests the establishment of an Office for Children that could undertake this function.

There is certainly precedent for the use of the external affairs power in this manner: eg the *Human Rights (Sexual Conduct) Act* 1995 (Cth) was a response to Tasmanian legislation that criminalised male homosexual sex.

See para 19.64.

B Burdekin 'Transforming the Convention into Australian law and practice' in P Alston & G Brennan (eds) *The UN Children's Convention and Australia* HREOC, ANU Centre for International and Public Law & Australian Council of Social Service Canberra 1991, 7.

The Joint Committee on Foreign Affairs, Defence and Trade recently recommended that a similar process be introduced for the two Senate legislative scrutiny committees, by amending their terms of reference to require them to examine the compliance of legislation with the specific terms of ICCPR and the International Covenant on Economic, Social and Cultural Rights: Joint Committee on Foreign Affairs, Defence and Trade *A Review of Australia's Efforts to Promote and Protect Human Rights* Joint Committee on Foreign Affairs, Defence and Trade Canberra 1994, 53.

See paras 3.15–26.

s 51 (xxvii).

s 51 (xix).

s 51 (xxi).

s 51 (xxii).

s 51 (xxii).

s 51 (xxiiiA).

s 51 (xxvi).

s 51 (xxix).

s 107; *Attorney-General v Colonial Sugar Refining Co. Ltd* (1913) 17 CLR 644, 653.

For a discussion of the cross-vesting scheme and its future see paras 15.26–41.

Attorney-General's Dept *Australia's Report under the Convention on the Rights of the Child* Attorney-General's Dept Canberra 1996, xxiv–xxviii.

See ch 5.

See para 5.12.

See ch 5.

In this section, figures are given for Cth expenditure on programs that have in past financial years provided support for children. Significant changes have been made to many of the programs and their funding for future years and we have attempted to indicate those trends where relevant. Unless otherwise stated, the figures are for total expenditure on the program and include running costs as well as actual outlays of funds to children and/or their families and other program costs.

Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997, 4.57.

ibid.

See paras 9.22–25 for a full discussion of these proposals.

Minister for Finance *The Commonwealth Public Account 1997–98 Budget Paper No 4* AGPS Canberra 1997, 56.

See paras 9.25–33 for a discussion of the Common Youth Allowance.

DEETYA *Annual Report 1995–96* AGPS Canberra 1996, 156. The 1997–98 budget allocations for many programs within DEETYA were not available at the time of printing.

These figures were calculated by dividing the total 1995–96 expenditure for each program by the total number of commencements for each program in 1995–96 and then multiplying the result by the number of commencements by 15–17 year olds in each program for 1995–96. They are intended as a rough estimate only and do not represent actual spending by each program on young people or actual numbers of young people in the programs at any given time: see DEETYA *Annual Report 1995–96* AGPS Canberra 1996, 118, 122–128.

DEETYA *Annual Report 1995–96* AGPS Canberra 1996, 44–46.

Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997, 4.37.

id 4.38.

ibid.

DEETYA *Annual Report 1995–96* AGPS Canberra 1996, 151–152. Breakdowns of expenditures and recipients are provided only for secondary students because it is assumed that tertiary students are generally above the age of 18 years and therefore do not fall within the scope of this reference. It is impossible to ascertain from the 1997–98 budget what the cost of the program will be for children under the age of 18. The total 1997–98 budget for this program is \$1 677.1 million: Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997, 4.38.

See paras 9.25–33 for a discussion of the Common Youth Allowance.

ABS *Yearbook Australia 1996* ABS Canberra 1996, 293. Breakdowns for expenditures and numbers of recipients in primary and secondary schools are given because it is assumed that tertiary students are above the age of 18 and therefore do not fall within the scope of this reference. In addition, this breakdown was given for 1994 as data on primary and secondary school Abstudy recipients were not available for 1995–96. According to DEETYA, in 1995–96 there were a total of 48 000 Abstudy recipients and a total expenditure of \$129 million that year: DEETYA *Annual Report 1995–96* AGPS Canberra 1996, 164. In 1997–98, \$181.5 million was budgeted for Abstudy and other assistance to Indigenous students (such as the Aboriginal Tutorial Assistance Scheme): Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997, 4.39.

DEETYA *Annual Report 1995–96* AGPS Canberra 1996, 154.

Minister for Finance *Commonwealth Public Account 1997–98 Budget Paper No 4* AGPS Canberra 1997, 50.

ABS *Australian Social Trends 1995* ABS Canberra 1995, 143.

AIHW *Australia's Welfare Services and Assistance 1995* AGPS Canberra 1995, 84–85.

Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision 1997* Industry Commission Melbourne 1997, 233.

id 576.

DSS *Annual Report 1995–96* AGPS Canberra 1996, 386.

Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997, 4.60–61.

Dept of Health and Family Services *DRP Submission 75*. The National Child Care Strategy implemented accreditation for long day care, with standards set through tied funding arrangements and monitored through the Quality Improvement and Accreditation System: Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision 1997* Industry Commission Melbourne 1997, 464–465.

Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision 1997* Industry Commission Melbourne 1997, 466.

id 461–463.

id 464.

Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997 4.59.

Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision 1997* Industry Commission Melbourne 1997, 464.

In conjunction with the completion of the National Child Care Strategy, capital subsidies to non-profit community-based services are being reduced: Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997, 4.58.

Treasurer & Minister for Finance *Budget Strategy and Outlook 1997–98 Budget Paper No 1* AGPS Canberra 1997, 4.58–59.

Attorney-General's Dept *Australia's Report under the Convention of the Rights of the Child* Attorney-General's Dept Canberra 1996, 10.

Minister for Finance *The Commonwealth Public Account 1997–98 Budget Paper No 4* AGPS Canberra 1997, 167.

Dept of Health and Family Services *DRP Submission 75*.

See paras 15.1, 15.22–25.

Commissioner of Taxation *Annual Report 1995–96* AGPS Canberra 1996, 53.

ibid.

AIFS was formed in 1980 with objectives including promoting the identification and understanding of issues relating to marital and family stability in Australia. Many of its research projects have relevance to children. Studies have covered issues such as homelessness, literacy, child health services, child support law and policy, youth mediation, education, living standards, and the effect of parental separation and remarriage on family structures.

NYARS was established in 1985. Its aims include undertaking research into current social, political and economic issues relating to young people. It also provides federal, State and Territory governments with information to assist in the development of youth policy. Issues addressed in research projects undertaken by NYARS include the health of young Indigenous people, mental health of young people, and young people as victims of violence.

AIHW was established in 1987 to provide governments with research and recommendations on health related issues. Its role now extends to collecting, analysing and distributing national information and statistics relating to welfare services, including child care and other services specifically relating to children.

The federal Government developed a National Program of Action titled *Our Children, Our Future*, released in 1994, for the implementation within Australia of the 1991 World Declaration on the Survival, Protection and Development of Children. The Program of Action was co-ordinated by the Dept of Human Services and Health. It involved consultation with State and Territory governments, community groups and non-government organisations. It brought together relevant policy initiatives at federal and State level, targeting basic education, food and nutrition, child health, water and sanitation, children in difficult circumstances, Indigenous people and women's health and education.

This Action Plan was developed in accordance with the recommendations of the Vienna Declaration endorsed by the 1993 World Conference on Human Rights. It sets out challenges and future action to be taken by the federal Government and contains a section on protecting the rights of children. It was most recently updated in 1994.

Australian and NZ Youth Ministerial Council *Discussion Paper Australian Youth Policy: A Statement of Principles and Objectives* AGPS Canberra 1992.

The National Child Protection Council was established to focus government and community attention on the elimination of child abuse and neglect. In the past, the Council played a role in supporting and co-ordinating the efforts of the federal and State and Territory governments in the implementation of the National Prevention Strategy for Child Abuse and Neglect. The Council was defunded but in 1997 the Minister for Family Services announced the establishment of a new National Child Abuse Prevention Council to provide the federal Government with expert advice on preventing child abuse and encouraging healthy, well-functioning families: J Moylan, Minister for Family Services *Media Release* 9 September 1997.

SCAG was established to promote harmony between federal, State and Territory laws relating to the court system and access to justice generally. Its work has encompassed a wide range of areas including domestic violence, cross-vesting legislation, female genital mutilation and child sex tourism legislation. SCAG meets several times each year.

The Standing Committee of Community Services and Income Security Administrators is made up of representatives from relevant State and Territory government depts and the Cth Dept of Health and Family Services and DSS. It co-ordinates policies relating to social welfare with an emphasis on the development of consistent laws, policies and practices. The Committee meets biannually.

MCEETYA comprises Education Ministers from all State and Territory governments as well as the federal Government. The Council has formulated the *Hobart Declaration on Schooling in Australia* which sets out ten national goals for Australian education. The goals are based on the principles in CROC.

The National Health Policy for Children and Young People was endorsed by Australian Health Ministers in June 1995. The Policy was developed by a National Working Party with members from federal, State and Territory governments, ATSIC, the National Health and Medical Research Council and consumer organisations. The Policy includes principles and strategies for national action to promote, maintain and improve the health of children and young people in Australia.

The Protocol recognises that DSS, DEETYA and State and Territory family services depts all have some responsibility for young people who are homeless. It establishes a mechanism by which these depts can manage and provide services to young people who may fall within the jurisdiction of one or more of these depts.

See para 9.5. In 1997–98, the program was budgeted at \$3.6 million: Minister for Finance *Commonwealth Public Accounts 1997–98 Budget Paper No 4* AGPS Canberra 1997, 165.

See para 15.5, rec 124.

527 NCAVAC Unit *Crime Prevention Initiatives Across the Commonwealth Government* Attorney-General's Dept Canberra 1997. Launched on
528 5 June 1997, NCAVAC is a three year \$13 million initiative to support a wide range of crime prevention strategies.
529 NCAVAC Unit *Domestic Violence — General Fact Sheet No 5 & Young People and Crime — General Fact Sheet No 6* Attorney-General's
530 Dept Canberra 1997.
531 *ibid.*
532 The Australian Youth Foundation was established at the end of 1988 following the bicentenary of European settlement in Australia. It is an
533 independent non-government organisation that 'assists young Australians who are socially, financially, physically or intellectually
534 disadvantaged to reach their full potential': Attorney-General's Dept *Australia's Report under the Convention of the Rights of the Child*
535 Attorney-General's Dept Canberra 1995, 21.
536 AAYPIC was established in 1993 and operates as a consumer group for young people who are or have been in the care system. It is a
537 national, independent organisation with networks in each State and Territory, except Tas and the ACT. It provides advocacy on a national
538 level and peer support for children in care: J Owen & G Crowter, AAYPIC *Public Hearing Submission* Brisbane 31 July 1996.
539 The Australian Youth Policy Action Committee, established in 1991, is the peak organization representing young people and non-
540 government youth organisations in Australia. Its board consists of representatives from 17 organisations and an independent chairperson. All
541 States and Territories are represented on the board. It aims to promote cultural, social, economic, political and spiritual interests and
542 participation of young people (especially disadvantaged young people) in all areas of Australian society, promote and support programs for
543 the eradication of poverty, and assist governments in the development of policy.
544 See paras 14.15-18.
545 See paras 13.6-7; cf ages of criminal responsibility at paras 13.4-5, 18.12-20.
546 See paras 14.16-18.
547 See para 18.23.
548 A young person cannot marry until he or she reaches 18. There is provision for court approval for marriage in exceptional circumstances
549 where one of the parties is 16 or 17 years old: *Marriage Act 1961* (Cth) Pt II, s 12.
550 eg see paras 14.19-24 for recent research in the area of children's abilities to be reliable, accurate witnesses.
551 *Gillick v Norfolk and Wisbech Area Health Authority* (1985) 3 All ER 402.
552 *Secretary, Department of Health and Community Services v JWB and another* (1992) 175 CLR 215, 293.
553 *ibid.*
554 eg SA Dept of Family and Community Services *IP Submission 100*.
555 See paras 11.9-10.
556 See paras 18.23-27 for a description of some of these age-related restrictions.
557 See R Ludbrook *Youthism: Age Discrimination and Young People* National Children's and Youth Law Centre Sydney 1995.
558 See paras 4.4-4.6.
559 See paras 18.67-72.
560 H Sercombe 'Easy pickings: The Children's Court and the economy of news production' *Paper Youth* 93: The Regeneration Conference
561 Hobart 3-5 November 1995 quoted in C Cuneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne
562 1995, 112.
563 Adelaide Focus Group 29 April 1996; Wagga Wagga Focus Group 9 May 1996; Darwin Focus Group 15 July 1996; Alice Springs Focus
564 Group 19 July 1996; Rockhampton Focus Group 2 August 1996; Tranby College Focus Group 10 May 1997. See also paras 18.63-64, 18.69.
565 Survey Question 12. Of the 674 total responses, 76 stated that the most common problem with buying goods was that the retailer was
566 suspicious of young people or assumed they would shoplift.
567 Youth Advocacy Centre *IP Submission 120*.
568 Survey Question 21. There were 768 responses to the question of whether police treat young people fairly and 763 responses to the question
569 of whether police treat young people equally.
570 See paras 2.153-163.
571 R Gurr, President NSW Community Services Appeal Tribunal Minutes of Meeting Sydney 9 August 1996.
572 C Staniforth, CEO ACT Legal Aid Commission Minutes of Meeting Canberra 6 May 1996.
573 NSW Community Services Commission *IP Submission 211*.
574 Bendigo Practitioners' Forum 31 May 1996.
575 Brisbane Focus Group 29 July 1996.
576 L Foster, Registry Manager Newcastle Family Court Registry Minutes of Meeting Newcastle 3 May 1996.
577 A Male, Director-General Qld Dept of Families, Youth and Community Care Minutes of Meeting Brisbane 31 July 1996; Adelaide Focus
578 Group 29 April 1996; Darwin Focus Group 15 July 1996.
579 Tranby College Focus Group 10 June 1997.
580 Brisbane Focus Group 29 July 1996.
581 Newcastle Focus Group 13 May 1996.
582 Rockhampton Focus Group 2 August 1996; Tranby College Focus Group 10 June 1997.
583 Confidential Minutes of Meeting Sydney 5 November 1996.
584 Bendigo Practitioners' Forum 31 May 1996.
585 G Dooley, NT Aboriginal Juvenile Justice Advisory Committee Minutes of Meeting Darwin 16 July 1996.
586 Rockhampton Focus Group 2 August 1996.
587 Hobart Focus Group 30 May 1996.
588 Newcastle Focus Group 13 May 1996.
589 Alice Springs Focus Group 19 July 1996.
590 Survey Question 6.1. There were a total of 208 respondents to the survey who were in detention. Some of these respondents did not answer
591 all of the questions in the survey.
592 Survey Questions 6.3(b), 6.4(a). There were 135 responses to the question of whether the judge/magistrate had let the young person have a
593 say in the case.
594 Tranby College Focus Group 10 June 1997.
595 Newcastle Focus Group 13 May 1996.
596 Newcastle Focus Group 13 May 1996.
597 Brisbane Focus Group 29 July 1996.
598 eg Bendigo Practitioners' Forum 31 May 1996.
599 Confidential oral submission 7 August 1997.
600 M Hanger, B Nurcombe et al Children and Family Therapy Unit Brisbane Royal Children's Hospital Minutes of Meeting Brisbane 29 July
601 1996.
602 Tranby College Focus Group 10 June 1997.

Residents of Malmsbury Youth Training Centre Minutes of Meeting Bendigo 31 May 1996.

Alice Springs Focus Group 19 July 1996.

Alice Springs Focus Group 19 July 1996.

Survey Question 6.9(b). There were 208 respondents to the survey who were in detention centres, 113 of whom answered the question about involvement in care and protection proceedings. Of these, 46 (41%) indicated that they had some involvement with the care and protection system and 33 of these believed that they had not had enough say in the decisions made.

Canberra Focus Group 6 May 1996; Hobart Focus Group 30 May 1996.

Hobart Focus Group 30 May 1996.

Brisbane Focus Group 29 July 1996.

K Wright, Youth Accommodation and Support Service *Public Hearing Submission* Alice Springs 18 June 1996.

Alice Springs Focus Group 19 July 1996.

Hobart Focus Group 30 May 1996.

D Williams, Youth Network of Tas *Public Hearing Submission* Hobart 30 May 1996.

See paras 5.3-4.

Youth Justice Coalition Minutes of Meeting Perth 1 July 1996.

Bendigo Practitioners' Forum 31 May 1996.

Links between education, socio-economic factors and crime do not necessarily imply a causal relationship between these factors. Care must be taken in interpreting these links.

NYARS *Under-Age School Leaving* National Clearinghouse for Youth Studies Hobart 1997, 29.

ibid.

P Salmelainen *The Correlates of Juvenile Offending Frequency: A Study of Juvenile Theft Offenders in Detention* NSW Bureau of Crime Statistics and Research Sydney 1995, 13.

ibid.

ibid.

SA Dept of Family and Community Services *IP Submission 110*.

NYARS *Under-Age School Leaving* National Clearinghouse for Youth Studies Hobart 1997, 29.

See R Ludbrook 'Children's rights in school education' in K Funder (ed) *Citizen Child: Australian Law and Children's Rights* AIFS Melbourne 1996, 109.

Federation of Community Legal Centres (Vic) *IP Submission 129*.

P Salmelainen *The Correlates of Juvenile Offending Frequency: A Study of Juvenile Theft Offenders in Detention* NSW Bureau of Crime Statistics and Research Sydney 1995, 21.

id 25.

K Freeman 'Young people and crime' (1996) (32) *Crime and Justice Bulletin* 5.

R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997, 58.

K Freeman 'Young people and crime' (1996) (32) *Crime and Justice Bulletin* 5.

Children from economically disadvantaged families come to the notice of the care and protection system at a greater than average rate: see M James 'Child Abuse and neglect: Incidence and prevention' *Issues in Child Abuse Prevention No 1* National Child Protection Clearing House Canberra 1994. See also P Salmelainen 'Child neglect: Its causes and its role in delinquency' (1996) (33) *Crime and Justice Bulletin*.

For a review of the literature on this subject see P Salmelainen 'Child neglect: Its causes and its role in delinquency' (1996) (33) *Crime and Justice Bulletin* 4-8.

id 5.

id 12.

NSW Community Services Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission Sydney 1996, 13.

id 8.

Vic Auditor General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 266. See paras 2.75-121 for the incidence of contact between the youth population in general and the juvenile justice system.

Survey Question 6.9. There were 208 respondents in detention. The 46 positive responses to this question made up 22% of all respondents in detention.

For a review of the literature on this subject see P Salmelainen 'Child neglect: Its causes and its role in delinquency' (1996) (33) *Crime and Justice Bulletin* 3-4.

ibid.

See paras 17.5-14.

See paras 17.5-14 in relation to systems abuse and other forms of neglect while in care.

AIHW *SAAP National Data Collection: Mid-year Report July-December 1996* AIHW Canberra 1997, 90, table 129.

Vic Auditor General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 263.

J Cashmore & M Paxman *Wards Leaving Care: A Longitudinal Study* Social Policy Research Centre Sydney 1996, 150. See also paras 2.32-38 for national statistics on school retention rates for the general youth population.

J Cashmore & M Paxman *Wards Leaving Care: A Longitudinal Study* Social Policy Research Centre Sydney 1996, iii. This paper also noted a similar UK study which showed that children in care were more likely to be unemployed, to lack educational qualifications, to be living in poverty, to change accommodation frequently and to be confused about their pasts and unsettled in their present relationships.

id 27.

id ii.

id 3.

SA Dept of Family and Community Services *IP Submission 110*.

S Wilson et al *Breaking the Cycle: Taking Responsibility for Independence* Children Australia Melbourne 1994, 25.

HREOC *Our Homeless Children: Report of the National Inquiry into Homeless Children* AGPS Canberra 1989; House of Representatives Standing Committee on Community Affairs *Report on Aspects of Youth Homelessness* AGPS Canberra 1995.

RP Barth 'On their own: The experiences of youth after foster care' (1990) 7 *Child and Adolescent Social Work Journal* 419.

NSW Community Services Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission Sydney 1996, 16-17.

ibid.

See paras 4.3-10.

C Croce 'Towards a national rural youth policy' (1994) *Transitions* 26.

ibid.

ibid.

SA Multicultural & Ethnic Affairs Commission *IP Submission 86*.

Multicultural Interest Group *IP Submission 137*.

ibid.

P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 18.

See para 18.120.

J Chan 'Police accountability in a multicultural society' (1995) 6(4) *Criminology Australia* 3.

See paras 4.52-53.

The differences between Indigenous and non-Indigenous speakers' English usage have been well documented: see para 18.114.

See paras 4.36-50 for a description of these processes and the links between them.

See para 2.47.

See para 2.68, table 2.16.

See paras 2.82-83, 2.85-86, 2.90, 2.97, 2.100, 2.118-119.

Aboriginal Legal Service of WA *IP Submission 75*. This point was extensively documented in the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997.

See para 2.9 for statistics on children with disabilities.

S Moran *IP Submission 73*.

C Flynn *Disability Discrimination in Schools* National Children's and Youth Law Centre Sydney 1997, 27.

Dept of Families, Youth and Community Care Minutes of Meeting Brisbane 31 July 1996.

C Flynn *Disability Discrimination in Schools* National Children's and Youth Law Centre Sydney 1997, 27.

See B Verdugo et al 'The maltreatment of intellectually handicapped children and adolescents' (1995) 19(2) *Child Abuse and Neglect* 205; Qld Advocacy *IP Submission 104*.

See NSWLRC Report 80 *People with an Intellectual Disability and the Criminal Justice System* NSWLRC Sydney 1996, 33-34.

Qld Advocacy *IP Submission 104*.

See NSWLRC Report 80 *People with an Intellectual Disability and the Criminal Justice System* NSWLRC Sydney 1996, 25-26.

id 25. This study used a definition of intellectual disability which included both the results of intelligence tests and social and adaptive skills.

SA Dept of Family and Community Services *IP Submission 110*.

Qld Advocacy *IP Submission 104*.

Australian Psychological Society *IP Submission 131*.

See paras 6.20, 7.22.

At the federal level alone those depts that deal with issues relating to children include the Dept of Health and Family Services, DEETYA, DSS, the Attorney-General's Dept, the Dept of Prime Minister and Cabinet and ATSIC. At the State and Territory level they include agencies with responsibility for juvenile justice, health, education and community services. See also para 3.31.

Australia's Report under the Convention on the Rights of the Child Attorney-General's Dept Canberra 1995 annexure 2, xxiv-xxviii. See also para 3.34.

eg Newcastle Practitioners' Forum 13 May 1996; Office of Juvenile Justice Minutes of Meeting Newcastle 14 May 1996; Youth Justice Coalition (WA) Minutes of Meeting Perth 1 July 1996; Perth Practitioners' Forum 3 July 1996; R Oakley Public Hearing Submission Kalgoorlie 4 July 1996; Aboriginal Justice Council (WA) Minutes of Meeting Perth 5 July 1996; Darwin Practitioners Forum 16 July 1996; H Burgess NT University Public Hearing Submission Darwin 17 July 1996; K Wright, Youth Accommodation and Support Service Public Hearing Submission Alice Springs 18 July 1996.

ALRC Report 10 Child Welfare ALRC 1981, 242.

HREOC Our Homeless Children: National Inquiry into Homeless Children AGPS Canberra 1989.

M Rayner The Commonwealth's Role in Preventing Child Abuse AIFS Melbourne 1994, 56, 61. This report has been released but not yet published.

J Cashmore, R Dolby & R Brennan Systems Abuse: Problems and Solutions NSW Child Protection Council Sydney 1994. The report highlighted, in particular, the problem of systems abuse in insensitive or neglectful practices by government agencies set up to assist children. The systems abuse documented included stresses due to delays in investigating or deciding placements for children, lack of information or services, inadequate or inaccessible services and lack of consistency or co-ordination of services. The report indicated that the care and protection system in NSW exhibited all of these features to some degree. See also paras 17.6-14.

AGPS Canberra 1995.

House of Representatives Standing Committee on Community Affairs Report on Aspects of Youth Homelessness AGPS Canberra 1995, 6. The report commented that '...policy development and administration of youth related services is ad hoc, fragmented and unco-ordinated...' and recommended a unified national approach to youth policy, including a national system for data and statistics collection and assessment and improved co-ordination between federal and State agencies in the area of education and youth affairs.

Wood Royal Commission Final Report Volume IV: The Paedophile Inquiry NSW Government Sydney 1997, 899.

ibid.

Newcastle Practitioners' Forum 13 May 1996.

J Cashmore, R Dolby & D Brennan Systems Abuse: Problems and Solutions NSW Child Protection Council Sydney 1994, 28-9.

A Nicholson 'Advancing children's rights and interests: The need for better inter-governmental collaboration' (1996) 26 University of WA Law Review 257; Nicholson CJ stated that what he found '...most remarkable is that fundamental differences exist across the States and Territories in such critical matters as how abuse or maltreatment is defined, the systems through which abuse notifications are investigated, the level and availability of primary, secondary and tertiary services and the relative emphasis on forensic investigation as contrasted with measures of service': 257.

J Taylor Leaving Care and Homelessness Brotherhood of St Laurence Melbourne 1990. This point was also emphasised in the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families which noted that the services and procedures for accessing personal and family records necessary to allow Indigenous people to reunite with their families differ markedly across States and Territories and are complex and confusing: *Bringing Them Home* HREOC Sydney 1997, 324-25.

S Crofton & K Kitchener Public Hearing Submission Kalgoorlie 4 July 1996; NSW Ombudsman *DRP Submission 80*.

See paras 4.32-50.

Perth Practitioners' Forum 3 July 1996. See also K Wright, Youth Accommodation and Support Service Public Hearing Submission Alice Springs 18 June 1996; Alice Springs Focus Group 19 July 1996.

Office of Juvenile Justice Minutes of Meeting Newcastle 14 May 1996.

K Wright, Youth Accommodation and Support Service Public Hearing Submission Alice Springs 18 July 1996.

Brisbane Focus Group 29 July 1996.

Youth Justice Coalition (WA) Minutes of Meeting Perth 1 July 1996.

ibid.

Adelaide Focus Group 29 April 1996.

Australian Association of Paediatric Teaching Centres Policies 1997: Office for Children Canberra 1997, 2.

See para 4.37.

See paras 4.32-50.

J Cashmore Public Hearing Submission Sydney 26 April 1996; S Turner Public Hearing Submission Sydney 26 April 1996; Office of Juvenile Justice Minutes of Meeting Newcastle 14 May 1996; Community Legal Centres Minutes of Meeting Melbourne 28 May 1996; Perth Practitioners' Forum 3 July 1996; J Owen & G Crowter, AAYPIC Public Hearing Submission Brisbane 31 July 1996; Confidential IP Submission 93.

Canberra Focus Group 6 May 1996; Wagga Wagga Focus Group 9 May 1996.

Youth Advocacy Centre IP Submission 120.

G Levine 'At the Children's Court' (1995) 8(9) Parity 9. Levine SM states that early intervention programs would greatly assist in reducing the number of cases in the children's court both in relation to offending and care and protection. The importance of addressing the underlying causes of criminal offending through preventive measures is being addressed by the recently formed NCAVAC: see paras 6.9-11. It is also discussed in overseas literature: see eg J Bright Crime Prevention in America: A British Perspective Office of International Criminal Justice University of Illinois Chicago 1992, 25 which points out that, as poverty is associated with a number of risk factors which, in turn, are linked to delinquency and adult offending, a crime prevention policy must have an anti-poverty component.

Survey Response 238.

LL Schweinhart, HV Barnes & DP Weikart Significant Benefits: The High/Scope Perry Preschool Study Through Age 27 High/Scope Press Ypsilanti, Michigan 1993, referred to in Audit Commission Misspent Youth...Young People and Crime Audit Commission Publications Abingdon UK 1996.

M Hedges 'Policy issues in responding to young offenders' Paper Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond Conference AIC Adelaide 26-27 June 1997, 6.

See paras 4.53-57.

The functions undertaken by these bodies are discussed in paras 3.54-55.

T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' Paper Children at Risk: Now and In the Future Australian Association of Family Lawyers and Conciliators Seminar Melbourne April 1997, 12-14. The pre-determined responses centre around the action that Human Services intend to take as a result of the investigation.

See paras 15.14-17.

S Willey Public Hearing Submission Hobart 30 May 1996; Community Legal Centres Minutes of Meeting Melbourne 28 May 1996; Youth Network of Tas IP Submission 134. See also paras 9.54-60.

This point was also made by A Nicholson 'Advancing children's rights and interests: The need for better inter-governmental collaboration' (1996) 26 University of WA Law Review 250.

National Children's and Youth Law Centre submission to NSW Legislative Council Standing Committee on Social Issues Inquiry into Children's Advocacy 1995, 7.

id 8.

M Rayner 'Advocacy for children' (1997) Reform ALRC forthcoming.

ibid.

Wood Royal Commission Final Report Volume IV: The Paedophile Inquiry NSW Government Sydney 1997.

Children's Commissioner of Queensland Paedophilia in Queensland Children's Commission of Queensland Brisbane 1997.

NSW Legislative Council Standing Committee on Social Issues Report 10 Inquiry into Children's Advocacy NSW Government Sydney 1996, 54.

M Rayner 'Advocacy for Children' (1997) Reform ALRC forthcoming.

See para 2.50 for unemployment statistics. The failure of the system to solve youth unemployment was discussed in M Hedges 'Policy issues in responding to young offenders' Paper Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond Conference AIC Adelaide 26-27 June 1997, 3.

Survey Question 64. There were 208 respondents who were asked this question. 113 of those young people responded to this question.

Survey Question 69(a), (b). There were 208 respondents who were asked this question. 68 of those young people responded to these questions.

Action for Children *DRP Submission* 55.

M Rayner 'Protection and promotion of the best interests of the child' Paper Children's Rights: The Next Step Conference Qld University of Technology & Defence for Children International Brisbane 3-5 April 1997, 11.

See para 6.47.

See rec 4.

See rec 9.

DEETYA *Draft Youth Bureau Business Plan* DEETYA Canberra May 1997, 4.

DEETYA *Annual Report 1995-96* AGPS Canberra 1996, 160, 175-6.

Dept of Health & Family Services *Youth Homelessness Pilot Program Information Sheet* 24 June 1997.

Dept of Health & Family Services *Youth Suicide in Australia: The National Youth Suicide Prevention Strategy* AGPS Canberra 1997, 17, 31-34.

id 3-4.

id 3.

ibid.

Personal communication Dept of Health & Family Services 12 September 1997.

NCAVAC Unit *Young People and Crime — General Fact Sheet No 6* Attorney-General's Dept Canberra 1997.

eg the Homeless Youth Project. See para 9.52.

NCAVAC Unit *NCAVAC Brochure* Attorney-General's Dept Canberra 1997.

NSW Cabinet Office *Information Brochure: Office of Children and Young People* 1997. See also NSW Cabinet Office *Corporate Document: Office of Children and Young People* as cited in Wood Royal Commission Final Report Vol IV: The Paedophile Inquiry NSW Government Sydney 1997, 899.

DEETYA *Draft Youth Bureau Business Plan* DEETYA Canberra May 1997, 12-15.

PM&C *Annual Report 1995-96* AGPS Canberra 1996, 53-57.

eg Church Network for Youth Justice *IP Submission* 189; Community Services Australia *IP Submission* 201; Meerlinga Young Children's Foundation *DRP Submission* 5; Coalition of Community Groups *DRP Submission* 10; Child Health Council of SA *DRP Submission* 47; Action for Children SA *DRP Submission* 55; National Children's and Youth Law Centre *DRP Submission* 59. See also para 5.12.

G Vimpani *Public Hearing Submission* Newcastle 14 May 1996; Family Court Registry Minutes of Meeting Newcastle 13 May 1996; Melbourne Practitioners' Forum 28 May 1996.

Child Health Council of SA *DRP Submission 47*.

Mental Health Legal Centre *DRP Submission 54*.

Australian Red Cross NSW Division *DRP Submission 42*. See also P Eastaugh *DRP Submission 29*; Kreative Kids *DRP Submission 35*; Education Centre against Violence *DRP Submission 43*; Federation of Community Legal Centres (Vic) *DRP Submission 72*; Defence for Children International *DRP Submission 74*; NSW Youth Justice Coalition *DRP Submission 91*. Note that the submissions from Federation of Community Legal Centres and Defence for Children International supported the establishment of both OFC and a Children's Commissioner.

eg G Vimpani *Public Hearing Submission* Newcastle 14 May 1996.

Australian Association of Paediatric Teaching Centres *Policies 1997: Office for Children* Canberra 1997, 4. This paper recommended that an Office for Children be established in PM&C and the Premier's or Chief Minister's Dept of each State and Territory. The office would perform monitoring, advice, research and advocacy functions in a manner similar to that envisaged for our OFC. Its recommendations, however, differ in that it recommended that the office be established by an Act of Parliament and be a small office of initially no more than 2-5 people, whereas the OFC recommended in this report will not have a statutory base and will have a staff of approximately 8-15 people. These recommendations were approved at an annual general meeting of the Association on 28 October 1996.

Macquarie University *Media Release* 18 August 1997. The specific recommendation was for a federal Office for Children to be attached to a Minister with an oversight role in establishing national goals, leaving implementation as a State and Territory responsibility. Its functions would include setting and monitoring national standards for all services for children, the establishment of a Council of federal and State Ministers with responsibility for children, evaluating every new federal, State and Territory policy through a child impact statement and establishing a National Centre for Research on Australian Children.

M Rayner 'Protection and promotion of the best interests of the child' *Paper* Children's Rights: The next step conference Queensland Institute of Technology & Defence for Children International Brisbane 3-5 April 1997, 11.

P Lipton & A Herzberg *Understanding Company Law 6th ed* The Law Book Company Sydney 1995, 6-7.

id 8-9.

The High Court held that the Cth did not have the power under s 51(xx) of the Constitution to pass the legislation: *New South Wales v Commonwealth* (1990) 8 ACLC 120.

P Lipton & A Herzberg *Understanding Company Law 6th ed* The Law Book Company Sydney 1995, 9.

Australian Securities Commission Act 1989 (Cth) s 1(2).

The Australian Securities Commission performs this educative function by releasing policy statements, practice notes, information booklets and media releases: P Lipton & A Herzberg *Understanding Company Law 6th ed* Law Book Co Sydney 1995, 16.

P Lipton & A Herzberg *Understanding Company Law 6th ed* Law Book Co Sydney 1995, 16.

Association of Independent Schools of WA *DRP Submission 19*; DEETYA *DRP Submission 60*; NT Government *DRP Submission 71*.

DEETYA *DRP Submission 60*.

ibid.

Child Health Council of SA *DRP Submission 47*; Action for Children SA *DRP Submission 55*; National Children's and Youth Law Centre *DRP Submission 59*.

Action for Children SA 'A Commissioner for Children in Australia' unpublished position paper, 2.

Child Health Council of SA *DRP Submission 47*.

See ch 7.

Child Health Council of SA *DRP Submission 47*.

Action for Children SA *DRP Submission 55*.

See recs 1, 2.

See paras 6.9-11.

See para 6.5.

See paras 5.39, 6.39.

See paras 6.38, 6.57-58.

See para 6.6.

DEETYA *Annual Report 1995-96* AGPS Canberra 1996, 160.

The Bureau currently has 50 staff in the National Office and 40 in the States and Territories.

DEETYA *Annual Report 1995-96* AGPS Canberra 1996, 160-61.

Office of Status of Women Internet Home Page — <http://www@dpmc.gov.au> current as at 30 July 1997.

PM&C *Annual Report 1995-96* AGPS Canberra 1996, 53. This figure represents the total of running and other program costs of \$5 583 000 less an adjustment of \$7 000 and less \$910 000 in grants to national women's organisations.

Ethnic Affairs Commission *Annual Report 1995-96* NSW Government Sydney 1996, 9-12.

id 84. This figure comprises employee related expenses of \$4 466 000 and other operating expenses of \$3 979 000.

See appendix C for detailed costings.

See para 6.43.

See appendix C for detailed costings.

Attorney-General's Dept *Annual Report 1995-96* AGPS Canberra 1996, 176.

The pilot project for young offenders was announced in the 1997-98 budget. It has been allocated \$1 million for 1997-98: Treasurer & Minister for Finance *Budget Strategy and Outlook 1997-98 Budget Paper No 1* AGPS Canberra 1997, 4.126.

See paras 5.24-31.

R Ludbrook *Why Australia Needs a Commissioner for Children — Discussion Paper* National Children's and Youth Law Centre Sydney 1994.

NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996.

eg R Ludbrook *Why Australia Needs a Commissioner for Children — Discussion Paper* National Children's and Youth Law Centre Sydney 1994. This report recommended the establishment of a federal Commissioner for Children and identified a number of functions which should be performed by a Commissioner. In February 1992 the SA Children's Interest Bureau convened a conference to consider ways of giving effect to CROC. The conference called on the federal Government and each of the State and Territory governments to establish under separate Acts of Parliament a Children's Commissioner and defined the functions of such Commissioners: see J Harvey, U Dolgopol & S Castell-McGregor *Implementing the UN Convention on the Rights of the Child in Australia* SA Children's Interest Bureau Adelaide 1993.

NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996 discussed a number of functions for an advocacy body. Other influential recommendations included those in ALRC Report 70 *Child Care for Kids Report* ALRC Sydney 1994 recs 31-35; AIFS *The Commonwealth's Role in Preventing Child Abuse* AIFS 1994 (unpublished but released); House of Representatives Standing Committee on Community Affairs *Report on Aspects of Youth Homelessness* AGPS Canberra

1995 recs 112-114; Wood Royal Commission *Final Report Volume IV: The Paedophile Inquiry* NSW Government Sydney 1997 ch 20. A number of submissions recommended the establishment of an advocacy body: see fn 37 below.

CROC is a declared instrument under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 11(1).

eg NSW Ombudsman *Report of the Inquiry into Juvenile Detention Centres* NSW Ombudsman Sydney 1996.

eg SA Children's Interest Bureau, Community Advocate of the ACT, Qld Children's Commissioner and NSW Community Services Commission.

J Redman, Deputy Chairperson SA Children's Interest Bureau Board Transcript Joint Standing Committee on Treaties *Inquiry into the Status of the UN Convention on the Rights of the Child* 4 July 1997 TR 725.

These areas included care and protection, family law, reproductive technology, environmental planning and school discipline: see S Castell-McGregor 'Checks and balances — A South Australian perspective' *Paper Summit on Children's Issues* Perth October 1995.

S Castell-McGregor 'Checks and balances — A South Australian perspective' *Paper Summit on Children's Issues* Perth October 1995, 6–7. Castell-McGregor points out that as a result of this there is no longer any provision for child advocates to attend reviews of children in state care.

id 4. The decision to reduce the functions of the Bureau has been the subject of considerable criticism: see eg NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996, 51–52.

Child Health Council of SA *DRP Submission* 47.

Attorney-General's Dept *Annual Report 1994–95* AGPS Canberra 1995, 180. The Office was established under the *Children's Services Act 1986* (ACT) and the *Community Advocate Act 1991* (ACT).

See *Child and Youth Advocacy Office* of the Community Advocate Canberra. The powers and functions of the ACT Community Advocate are also outlined in NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996, 46–47.

The Commissioner is a statutory appointment: *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) s 5(1).

Children's Commissioner and Children's Services Appeals Tribunals Act 1996 (Qld) s 8(f), (g). The Commissioner receives approximately 100 calls a day: 'Call for a children's agency' (1997) 8(6) *Committee Bulletin* 8.

Children's Commissioner and Children's Services Appeals Tribunals Act 1996 (Qld) s 8.

Children's Commissioner and Children's Services Appeals Tribunals Act 1996 (Qld) s 8(k). The restricted focus of the Commissioner has been criticised: see J Wight 'Children's Commissioner for Queensland' (1996) 4 *Rights Now!* 3. The Commissioner's focus is limited to services provided under *Adoption of Children Act 1964* (Qld), the *Child Care Act 1991* (Qld), *Children's Services Act 1991* (Qld), *Family Services Act 1987* (Qld) and *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) Sch 2.

The Commission's aims are '...changing the culture, quality and reputation of community services in NSW and empowering the consumers of these services': NSW Community Services Commission *IP Submission* 211.

ibid. See also NSW Community Services Commission *The Drift of Children into the Juvenile Justice System: Turning Victims Into Criminals* NSW Community Services Commission Sydney 1996.

Children, Young Persons and Their Families Bill 1997 (Tas) cl 79.

Children, Young Persons and Their Families Bill 1997 (Tas) cl 81.

Youth Advocacy Centre *IP Submission* 120. See also NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996, 47–49.

Attorney-General's Dept *The Justice Statement* Attorney-General's Dept Canberra 1995. Proposals for specialist legal advocates are made at recs 85–87.

See NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996.

An example of peer advocacy in the international context is the 'Article 12' Committee in the UK.

Friends of AAYPIC summer edition 1995–96.

The Ombudsman promotes and monitors consistency with CROC and provides the Swedish Government with an annual report. The report is also used to inform the Government's report to the UN Committee on the Rights of the Child.

There are also various non-government organisations in Sweden that undertake a significant amount of advocacy work for children. The most notable of these is the *Radda Barnen* or Save the Children, Sweden. This organization carries out advocacy and policy work on a wide range of issues including juvenile justice, child abuse and refugee children. Its work includes monitoring and disseminating information about CROC and working with members of parliament to ensure that its principles are reflected in legislation affecting children.

Ministry of Children and Family Affairs & Ministry of Foreign Affairs *The Rights of the Child: Norway's Initial Report to the United Nations Committee on the Rights of the Child* Ministry of Children and Family Affairs Oslo 1993, 18–19.

See *Children, Young Persons and Their Families Act 1989* (NZ) s 411. During 1994–95, 350 complaints were registered with the Children's Commissioner in areas such as education, health, police and court matters, and family law issues: Office of the Commissioner for Children *Annual Report for the Year Ended 30 June 1995* Office of the Commissioner for Children Wellington 1995.

NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996, 43–46 citing submission 55 from L O'Reilly, NZ Commissioner for Children.

eg the UK has the National Children's Bureau and the Children's Rights Office which monitors the application of CROC in the UK. The Children's Legal Centre provides telephone advice and information to young people on a wide range of issues such as family law, juvenile justice, school issues, child abuse and other matters. The USA relies on Children's Rights Incorporated, the American Bar Association Centre on Children and the Law, the Child Welfare League of America and the Children's Defence Fund. The role of these organisations is described in more detail in NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996, 39–43. Other international initiatives include an Ombudsman for the City of Jerusalem appointed in 1986. In Costa Rica a similar body, El Defensor de la Infancia, partly funded by UNICEF was established in 1987. The German Parliamentary Commission on Children's Affairs was established in 1988. Its main function is to provide comments on federal laws affecting children. The Kinder und Jugendanwalt in Vienna has had an advocacy role in relation to the welfare and education systems since 1991. Many of these initiatives are described in detail in American Bar Association Center on Children and the Law *Establishing Ombudsman Programs for Children and Youth: How Government's Responsiveness to its Young Citizens Can Be Improved* American Bar Association Center on Children and the Law Washington 1993. See also R Ludbrook *Why Australia Needs a Commissioner for Children — Discussion Paper* National Children's and Youth Law Centre Sydney 1994, 7.

eg J Usher Australian Catholic Social Welfare Commission 'Child protection bigger issue than pedophilia' *The Sydney Morning Herald* 24 September 1997, 15.

S Jeanes *Discussion Paper: Does Australia need a Commissioner for Children?* unpublished Adelaide 1996. A Nicholson 'Advancing children's rights and interests: The need for better inter-governmental collaboration' (1996) 26 *University of Western Australia Law Review* 255. The current Qld Commissioner for Children has also called for a Commissioner at the federal level and in each State: 'Call for children's agency' (1997) 8(6) *Committee Bulletin* 8.

eg Come-In Youth Resource Centre *IP Submission* 14; SA Children's Interest Bureau *IP Submission* 156; Oz Child Legal Service *IP Submission* 195; Australian Association of Social Workers *IP Submission* 207; Church Network for Youth Justice *IP Submission* 212; Burnside *IP Submission* 214; Meerlinga Young Children's Foundation *DRP Submission* 5; Coalition of Community Groups *DRP Submission* 10; Child Health Council of SA *DRP Submission* 47; Action for Children SA *DRP Submission* 55; National Children's and Youth Law Centre *DRP Submission* 59; Defence for Children International *DRP Submission* 74.

R Ludbrook *Why Australia Needs a Commissioner for Children — Discussion Paper* National Children's and Youth Law Centre Sydney 1994.

A Proposal for a Commissioner for Children Burnside Social Justice and Research Program Paramatta 1997.

Defence for Children International Australia Submission 120 to the Joint Standing Committee on Treaties *Inquiry into the Status of the UN Convention on the Rights of the Child* 1997.

See also fn 4 above concerning calls for systemic advocacy for children generally.

Childhood Matters: The Report of the National Commission of Inquiry into the Prevention of Child Abuse HMSO London 1996 recommended the appointment of a Minister for Children and the establishment of children's commissions throughout the UK. See also J Hirst 'A matter for us all' (1996) (October) *Community Care* 10.

R Ludbrook *Why Australia Needs a Commissioner for Children — Discussion Paper* National Children's and Youth Law Centre Sydney 1994, 11.

See paras 6.13-14.

S Jeanes *Discussion Paper: Does Australia need a Commissioner for Children?* unpublished Adelaide 1996. In November 1994 the Joint Standing Committee on Foreign Affairs and Trade recommended that the Attorney-General investigate the feasibility of establishing a Children's Ombudsman within HREOC: Joint Standing Committee on Foreign Affairs, Defence and Trade *A Review of Australia's Efforts to Promote and Protect Human Rights* AGPS Canberra 1994 rec 9.8.2. The Committee reinforced this recommendation in a 1996 report: Joint Standing Committee on Foreign Affairs, Defence and Trade *Human Rights and Equal Opportunity Commissioner and the Commonwealth Ombudsman: Report on Public Seminars 20 and 25 September 1996* AGPS Canberra 1997 recs 1-2. See also Burnside *IP Submission* 214. DEETYA *DRP Submission* 60 suggested that a 'more explicit reference to children under existing reporting structures' such as HREOC and the Cth Ombudsman was a preferable means of exercising advocacy, accountability and co-ordination functions.

Action for Children SA *DRP Submission* 55.

D Williams, Attorney-General and Minister for Justice *Media Release* 23 September 1997.

Action for Children SA *DRP Submission* 55 stressed the importance of the Commissioner having access to those within government who can bring about necessary changes, whether in law, policy or practice.

See paras 7.31-56.

See para 7.45.

Draft rec 12.3.

Child Health Council of SA *DRP Submission* 47.

eg Community Advocate in the ACT, NSW Community Services Commission and Qld Children's Commissioner: see paras 7.9, 7.11.

eg SA Children's Interest Bureau: see para 7.8.

eg ACT Community Advocate, Qld Children's Commissioner, NSW Community Services Commission and the proposed Tasmanian Children's Commissioner: see paras 7.9, 7.10, 7.12.

HREOC is an example of an organisation that has functions covering both complaint handling and systemic advocacy.

See para 4.18.

NSW Government *DRP Submission* 86.

ibid. See also NSW Ombudsman *DRP Submission* 80.

S Castell-McGregor 'Commissioners for Children: Lip service to the children's voice' (1997) 14 (July) *Australian Children's Rights News* 1.

SA Children's Interest Bureau *IP Submission* 156.

See also paras 7.48-56.

Some of these programs are discussed in paras 18.182-183.

C Flynn, J Delaney & C Hayter *Youth Advocacy and Court Support: Evaluation of the Illawarra Legal Centre Project* National Children's and Youth Law Centre Sydney 1994, 28.

NSW Legislative Council Standing Committee on Social Issues Report 10 *Inquiry into Children's Advocacy* NSW Government Sydney 1996, 206-207.

eg NSW Youth Justice Coalition *DRP Submission* 91.

Survey Questions 8(b), (c), (d).

For the 3 questions, the percentages who indicated that they would turn to their friends for assistance were 19.5%, 13.5% and 2.4% respectively.

See para 7.14.

Kids Help Line Internet Home Page — <http://www.squirrel.com.au/boystown/khlmenu.htm> current as at 31 July 1997.

LA Beards *DRP Submission* 6; Kreative Kids *DRP Submission* 35; Education Centre Against Violence *DRP Submission* 43; National Children's and Youth Law Centre *DRP Submission* 59.

See para 10.62.

See also paras 4.11-31.

See Federation of Community Legal Centres (Vic) *DRP Submission* 72.

eg a 13 year old girl who had asked to have a support person present during an interview with a representative and a Family Court counsellor was apparently pressured into being interviewed alone by comments such as 'Aren't you brave enough to talk to me on your own?': Children's Protection Society *IP Submission* 108.

J Owen & G Crowter, AAYPIC *Public Hearing Submission* Brisbane 31 July 1996.

Minimum standards for children involved in care and protection systems have been developed by the Standing Committee for Community Services and Income Security Administrators: see para 17.20.

National Children's and Youth Law Centre *DRP Submission* 59; Federation of Community Legal Centres (Vic) *DRP Submission* 72.

Survey Response 354.

J Sharp, Minister for Transport and Regional Development *Rebuilding Regional Australia* AGPS Canberra 1996.

S Smith 'Customer charters: The next dimension in consumer protection?' (1997) 22 *Alternative Law Journal* 138, 139 fn 11; D Goldsworthy 'The Citizens Charter in the UK' (1993) (74) *Bulletin of Public Administration* 89.

G Prosser, Minister for Small Business and Consumer Affairs *Media Release* 9 July 1997.

Dept of Industry, Science and Tourism *Putting Service First: Principles for Developing a Service Charter* Dept of Industry, Science and Tourism Canberra 1997.

863 The benefits flowing to consumers from the implementation of service charters should be complemented by the increased use of
864 benchmarking in the public sector: see Management Improvement Advisory Committee Report 21 *Raising the Standard: Benchmarking for*
865 *Better Government* AGPS Canberra 1996.
866 S Smith 'Customer charters: The next dimension in consumer protection?' (1997) 22 *Alternative Law Journal* 138, 140.
867 The Australian Competition and Consumer Commission also has a Service Charter: (1997) (9) *ACCC Journal* 70.
868 See also paras 4.16-19.
869 Kreative Kids *DRP Submission* 35; Education Centre Against Violence *DRP Submission* 43; Townsville Community Legal Service *DRP*
870 *Submission* 46; NT Government *DRP Submission* 71.
871 National Children's and Youth Law Centre *DRP Submission* 59 considered that support persons should be trained in advocacy, procedural
872 fairness and children's rights. The Inquiry does not consider training to be necessary in this area. The presence of a supportive carer or youth
873 worker should be sufficient to put the child more at ease. Where the role is performed by someone from the network of grassroots advocates
874 he or she will have had relevant training: see rec 9.
875 Kreative Kids *DRP Submission* 35.
876 Out of 80 federal depts that responded to a recent survey by the Cth Ombudsman less than 20% had internal complaints handling
877 mechanisms that would satisfy the Australian Standard: Cth Ombudsman *Annual Report 1996-97* Cth Ombudsman Canberra 1997, 3.
878 *Complaints Handling* AS 4269-1995 Standards Association of Australia Sydney 1995, 6.
879 *DRP Submission* 86; *DRP Submission* 80.
880 See discussion at paras 9.89-94.
881 The link between poverty and crime has been well documented: see eg A Daniel & J Cornwall *A Lost Generation?* The Australian Youth
882 Foundation Sydney 1993, 11, 16. See also para 4.40.
883 See eg DP Farrington 'Implications of criminal career research for the prevention of offending' (1990) 13 *Journal of Adolescence* 93, 109.
884 I O'Connor 'Models of juvenile justice' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26-
885 27 June 1997, 3.
886 There are a number of other family payments that benefit children but they fall outside the scope of this Inquiry. See paras 2.50-53 and table
887 2.14 for statistics on income support.
888 art 26(1).
889 *Student and Youth Assistance Act 1973* (Cth) s 65 (1)(g). In certain circumstances 15 year olds are eligible to receive YTA: s 65(3).
890 A young person is regarded as independent if, eg, she or he is a member of a couple for the purposes of s 4(2), (3), (6) of the *Social Security*
891 *Act 1991* (Cth), if she or he is an orphan or if she or he is an unaccompanied refugee: *Student and Youth Assistance Act 1973* (Cth) s 135, Sch
892 1 Pt 1 cl 2.
893 *Student and Youth Assistance Act 1973* (Cth) Pt 2.
894 eg Council of Single Mothers and Their Children *IP Submission* 124.
895 Adelaide Focus Group 29 April 1996; Newcastle Focus Group 13 May 1996; Darwin Focus Group 15 July 1996; Alice Springs Focus Group
896 19 July 1996; Rockhampton Focus Group 2 August 1996.
897 Alice Springs Focus Group 19 July 1996; Rockhampton Focus Group 2 August 1996.
898 Newcastle Focus Group 13 May 1996; Alice Springs Focus Group 19 July 1996.
899 See also A Daniel & J Cornwall *A Lost Generation?* Australian Youth Foundation Sydney 1993, 11-13.
900 Survey Response 101.
901 Survey Response 247.
902 *Commonwealth Services Delivery Agency Act 1997* (Cth). The Prime Minister officially re-named the Cth Services Delivery Agency as
903 Centrelink on 24 September 1997: J Newman, Minister for Social Security *Media Release* 24 September 1997.
904 eg Adelaide Focus Group 29 April 1996; Wagga Wagga Focus Group 9 May 1996; Darwin Focus Group 15 July 1996; A Borg *IP*
905 *Submission* 33. See also paras 5.6-16.
906 See rec 13.
907 A Vanstone, Minister for Employment, Education, Training and Youth Affairs *Media Release* 20 August 1996.
908 J Newman, Minister for Social Security & A Vanstone, Minister for Employment, Education, Training and Youth Affairs *Media Release* 17
909 June 1997.
910 *ibid.*
911 *ibid.*
912 Entitlements will vary within these groups according to marital status and/or number of dependents.
913 It is possible this particular test of independence will result in anomalies within and between couples on income support: Welfare Rights
914 Centre *Youth Allowance: Discussion Paper 1* Welfare Rights Centre Sydney 1997.
915 A parental means test will be applied to the CYA so that, eg, young people living at home will receive no income support once the family
916 income exceeds \$41 000. The introduction of the parental means test for unemployed recipients has been one of the more controversial
917 aspects of the CYA proposal: see eg ACOSS *Media Release* June 17 1997. However, it is probably not so significant for under 18s as YTA is
918 already subject to a parental means test and unemployed young people will not be eligible for CYA anyway: see para 9.30.
919 J Newman, Minister for Social Security & A Vanstone, Minister for Employment, Education, Training and Youth Affairs *Media Release* 17
920 June 1997. See also J Brough 'Families hit as youth dole axed' *The Sydney Morning Herald* 18 June 1997, 1.
921 Concern about the policy behind the CYA reform was expressed in A McNicol *DRP Submission* 39.
922 Community Services Australia *IP Submission* 201.
923 J Newman, Minister for Social Security & A Vanstone, Minister for Employment, Education, Training and Youth Affairs *Media Release* 17
924 June 1997.
925 A number of young people told us of the difficulties they have experienced when transferring between benefits. eg if a young person leaves
school, looks for work, is unsuccessful and then returns to school, his or her benefit is not currently automatically transferred from Austudy
to YTA and back again. Even if the child is only receiving one benefit, s/he can be required to pay back the money (with interest) if it has not
come from the right source: see Alice Springs Focus Group 19 July 1996; Rockhampton Focus Group 2 August 1996.
K Wright, Youth Accommodation and Support Service *Public Hearing Submission* Alice Springs 18 July 1996.
DSS *Evaluation of Youth Service Units* DSS Canberra 1996, i.
The services provided by Youth Service Units are complemented by those provided by the 70 Youth Access Centres throughout Australia.
The Centres assist young people to make the transition from education and training to appropriate careers. Priority is given to disadvantaged
young people including young offenders, state wards and homeless young people.
eg Tranby College Focus Group 10 June 1997.
Tranby College Focus Group 10 June 1997.
The utility of Youth Service Units was acknowledged by Kreative Kids *DRP Submission* 35; Townsville Community Legal Service *DRP*
Submission 46; Law Society of NSW *DRP Submission* 90.
ABS *National Aboriginal and Torres Strait Islander Survey: Australia's Indigenous Youth* AGPS Canberra 1996, 20.

id 21.

ALRC Report 31 *The Recognition of Aboriginal Customary Laws* Vol 1 AGPS Canberra 1986, 233. See also NSWLRC Research Report 7 *The Aboriginal Child Placement Principle* NSWLRC Sydney 1997, 34–36; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 545–546.

ALRC Report 31 *The Recognition of Aboriginal Customary Laws* Vol 1 AGPS Canberra 1986, 171.

See House of Representatives Standing Committee on Community Affairs *Report on Aspects of Youth Homelessness* AGPS Canberra 1995 recs 94–96. This proposal was supported by Kreative Kids *DRP Submission 35*; Townsville Community Legal Service *DRP Submission 46*; Law Society of NSW *DRP Submission 90*. The NSW Government *DRP Submission 86* was concerned that implementation may have significant cost implications.

The House of Representatives Standing Committee on Community Affairs has recommended that DSS thoroughly review the entitlements of Aboriginal and Torres Strait Islander family members, including extended family members, who are caring for a young person to ensure they are receiving their full income support entitlements: *Report on Aspects of Youth Homelessness* AGPS Canberra 1995 rec 95. The definition of dependent child in *Social Security Act 1991* (Cth) s 250(1)c has also been identified as problematic for Indigenous people claiming the sole parent pension.

Ngaanyatjarra, Pitjantatjara, Yankunytjatjara Women's Council *Looking After Children Grandmother's Way* Ngaanyatjarra, Pitjantatjara, Yankunytjatjara Women's Council Alice Springs 1991, 18.

ALRC Report 57 *Multiculturalism and the Law* ALRC Sydney 1992, 67.

J Newman, Minister for Social Security & A Vanstone, Minister for Employment, Education, Training and Youth Affairs *Media Release* 17 June 1997.

A Report on Aspects of Youth Homelessness AGPS Canberra 1995 rec 92.

eg Kreative Kids *DRP Submission 35*; Townsville Community Legal Service *DRP Submission 46*.

'[I]ncome support should include the added costs of travel and searching for work and...young people should not be forced to move away from families and friends to secure an income': Federation of Community Legal Centres (Vic) *DRP Submission 72*.

HREOC *Our Homeless Children: Report of the Inquiry into Homeless Children* AGPS Canberra 1989, 7. It is difficult to obtain accurate statistics on the number of Australian young people who are homeless at any particular time. Anecdotal evidence suggests that Indigenous young people, young people from non-English speaking backgrounds and gay and lesbian young people are over-represented in the homeless population: P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 175; Australian Centre for Lesbian and Gay Research *As Long As I've Got My Doona: A Report on Lesbian and Gay Youth Homelessness* Twenty-Ten Association Sydney 1995, 14–17. See also paras 2.54–57.

See also paras 4.40, 4.46; J Smith & I O'Connor 'Child abuse, youth homelessness and juvenile crime' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997.

This can also make it difficult for them to access a wide range of basic services. eg P Eastaugh *DRP Submission 29* pointed out that this problem arises in the health area because people under 18 are not eligible for their own Medicare card.

Federation of Community Legal Centres (Vic) *IP Submission 129*.

Tranby College Focus Group 10 June 1997.

Wagga Wagga Focus Group 9 May 1996.

Hobart Focus Group 30 May 1996.

Rockhampton Focus Group 2 August 1996. See also R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997 ch 7.

Social Security Act 1991 (Cth) Pt 2.15. Special Benefit is not subject to an assets test if the applicant is under 18: s 733(2)(a). As at May 1996, 2.9% of all Special Benefit recipients were aged under 16: *DSS Annual Report 1995–96* AGPS Canberra 1996, 266.

Social Security Act 1991 (Cth) s 739 provides that a person who is not a member of a couple, who has no dependent children, who cannot live at the parental home, who has no direct or indirect form of support and who is not receiving any other social security benefit qualifies as a 'SPB homeless person'. The fortnightly rate of a Special Benefit is at the discretion of the Secretary of DSS but currently it may not exceed the YTA rate: s 746(2).

This proposal was supported by Kreative Kids *DRP Submission 35*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; Law Society of NSW *DRP Submission 90*. See also HREOC *Our Homeless Children: Report of the National Inquiry into Homeless Children* AGPS Canberra 1989 rec 14.6.

This proposal (draft rec 4.8) was supported by Education Centre Against Violence *DRP Submission 43* and Law Society of NSW *DRP Submission 90*. Kreative Kids *DRP Submission 35*, Federation of Community Legal Centres (Vic) *DRP Submission 72* and NSW Government *DRP Submission 86* expressed concerns about the privacy implications of the recommendation. The Inquiry considers that as long as the information is collected anonymously and with consent young people's privacy should not be compromised. If de-identifying this information raises concerns about the validity of the data because of an inability to cross-match, consideration should be given to a more contained study.

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 550. See also para 9.58 regarding sexual orientation.

This proposal was supported by Kreative Kids *DRP Submission 35*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; Federation of Community Legal Centres (Vic) *DRP Submission 72*; Law Society of NSW *DRP Submission 90*.

See eg Tranby College Focus Group 10 June 1997.

Dept of Health and Family Services *DRP Submission 75*. The Prime Ministerial Youth Homeless Taskforce is due to present an interim report on the Program by October 1997.

NCAVAC Unit *Homeless Youth — Project Summary No 10* Attorney-General's Dept Canberra 1997.

ibid.

There is a separate agreement between the Cth and each of the States and Territories implementing the principles of the Protocol. DSS is working towards standardising the protocols nationally.

A de Jonge 'Some changing aspects of child rights in Australia — In and out of court' (1989) 3 *Journal of Social Welfare Law* 163, 172.

WA, SA, Qld and Tas have agreed to trial the project: J Ferrari 'At 15, the homeless allowance can be a trial' *The Australian* 31 July 1997, 3.

R Bennett, 20/10 Lesbian and Gay Youth Service *Public Hearing Submission* Sydney 26 April 1996.

See fn 70 above.

During the assessment period, the State family services dept is required to provide support for the young person although the level of this support is not specified.

Income Security Sub-Committee of the Standing Committee of Community Services and Income Security Administrators *Evaluation of the Homeless Youth Protocol* Health and Community Services Ministerial Council Secretariat Canberra 1996, 22.

id rec 6.

This proposal was supported by Australian Family Association (NSW) *DRP Submission 11*; Townsville Community Legal Service *DRP Submission 46*; Education Centre Against Violence *DRP Submission 43*; Law Society of NSW *DRP Submission 90*. Kreative Kids *DRP Submission 35* supported the proposal provided State depts receive sufficient resources and funding to undertake assessments.

From 13 December 1996 to 30 June 1997, 154 child visa applications were lodged in Australia: DIMA answer to Question on Notice at Estimates Hearing 11/6/97 table 6 — RESI 2 download of 2/7/97. In the same period 950 child visa applications and 149 adoption visa applications were lodged outside Australia. The majority of applications were lodged in Manila (155), Shanghai (97), Suva (79) Ho Chi Minh City (76) and Hong Kong (75). As at end of July 1997, 665 child visa applications and 79 of the adoption visa applications remained undecided: table 11 — MPMS run date 18/7/97.

arts 8–10, 22 of CROC are relevant to child migrants and refugees.

eg several submissions expressed concern about the impact that the public interest criteria, particularly the medical criteria, can have on child visa applications: Immigration Advice & Rights Centre *IP Submission 164*; Vic Government *IP Submission 213*.

Children can apply for a number of sub-classes of visa in their own right. Visa subclass 101 is available to dependent children, including certain adopted children, of Australian citizens and permanent residents, applying outside Australia: Migration Regulations 1994 reg 101.211. Visa subclass 802 is available to children living in Australia who are the dependent children of Australian citizens or permanent residents (including New Zealanders resident in Australia): Migration Regulations 1994 reg 802.211. Visa subclass 102 is available to children who have been adopted overseas or are to be adopted when they arrive in Australia: see para 9.73.

See the Citizenship Instructions issued by DIMA: ch 5.

This proposal was supported by Taxi Employees' League *DRP Submission 21*.

DIMA answer to Question on Notice at Estimates Hearing 11/6/97 table 16 — RESI 2 download 2/7/97; table 17 — MPMS data Migration Program Section 21/7/97.

DIMA answer to Question on Notice at Estimates Hearing 11/6/97 table 18 — RESI download 3/7/97. Care must be taken when interpreting this data since processing times can be inflated by a few old applications in categories where the total number of applications is small.

DIMA answer to Question on Notice at Estimates Hearing 11/6/97 attachment. Figures do not include adoption visa statistics.

ibid.

eg DIMA *Onshore Refugee Procedures Manual* DIMA Canberra 1996 topic 4.

s 252(1)(b). This provision also applies to people in immigration detention: s 252(1)(a). The *Migration Act 1958* (Cth) uses the term 'non-citizen' to refer to all persons who are not Australian citizens. For the sake of clarity that term will be used in this document although the Inquiry recognises that non-citizens will almost always be citizens for the purposes of another country's laws.

s 257(1).

s 257(2).

Crimes Act 1914 (Cth) Pt 1AA Div 4. See also paras 18.125-136.

Immigration (Guardianship of Children) Act 1946 (Cth) s 6. The Minister does not assume guardianship of children who enter Australia under the care of a parent, a relative over 21 years of age or an intending adoptive parent: *Immigration (Guardianship of Children) Act 1946* (Cth) s 4AAA(2).

See para 9.81.

K Cronin 'A primary consideration: Children's rights in Australian immigration law' (1996) 2(2) *Australian Journal of Human Rights* 195, 205–208. See also P Easteal 'Migrant youth and juvenile crime' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997, 158.

This is in contrast to the British Immigration Rules that allow children born in the UK to secure permanent residence where there has been a genuine transfer of parental responsibility to welfare authorities on the ground of the parent's inability to care for the child: Statement of Changes in Immigration Rules (House of Commons Paper No 251 of 1990). In other cases, the Home Secretary has discretion to permit temporary or permanent stay if the welfare arrangements for the child require it.

Refugee Council of Australia *DRP Submission 27*.

The NSW Dept of Community Services is reviewing the agreement it currently has with DIMA to upgrade the service provided to non-citizen children: NSW Government *DRP Submission 86*.

Migration Regulations 1994 reg 102.211(2).

Migration Regulations 1994 reg 102.211(3). See NSWLRC Research Report 6 *Intercountry Adoption and Parent Support Groups* NSWLRC Sydney 1997.

Migration Regulations 1994 reg 102.212.

See eg *Re Williamson* IRT decision V94/00938 Melbourne 29 May 1995; *Re Nobbs* IRT decision N92/01902 Sydney 18 October 1993.

J Ferrari 'Overseas adoptions easier' *The Australian* 31 July 1997, 3.

eg Migration Regulations 1994 reg 101.228.

See K Cronin 'A primary consideration: Children's rights in Australian immigration law' (1996) 2(2) *Australian Journal of Human Rights* 195, 198–9.

art 1. As amended by the 1967 Protocol.

G Van Bueren (ed) *International Documents on Children* Martinus Nijhoff Dordrecht 1993, 350.

eg to qualify for a refugee visa under subclass 200 the applicant must be subject to persecution in his or her home country and living in a country other than that home country (provided it is not Australia): Migration Regulations 1994 regs 200.221, 200.411. The Minister must be satisfied that there are compelling reasons for granting the applicant a permanent visa based on certain factors such as the degree of persecution to which the applicant is subject in his or her home country and the extent of the applicant's connection with Australia: Migration Regulations 1994 reg 200.222. People who are subject to persecution in their home country and who are still resident in that country may be eligible for a special humanitarian visa under subclass 201: Migration Regulations 1994 reg 201.221.

Immigration (Guardianship of Children) Act 1946 (Cth) s 6. See para 9.70.

To be granted a protection visa under subclass 866 the applicant must be a person to whom Australia has protection obligations in accordance with the UN Convention on the Status of Refugees and Protocol: Migration Regulations 1994 reg 866.221. In addition, the Minister must be satisfied that the grant of the visa is in the national interest: Migration Regulations 1994 reg 866.226.

See rec 13. In the UK an adviser is appointed from a government funded panel to assist unaccompanied minors seeking asylum. The adviser acts both as a support person and as an advocate.

DRP Submission 27.

Migration Act 1958 (Cth) s 189.

P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 20. Children born in Australia after August 1986 are only citizens if at the time of birth one of their parents was an Australian resident or citizen. This means that children born in immigration detention take on the nationality of their parents even though born on Australian soil: *Australian Citizenship Act 1948* (Cth) s 10(2)(a). However, a child can acquire Australian citizenship under s 10(2)(b) once he or she has spent the first 10 years of his or her life in Australia or if the Minister is satisfied (under s 23D) that he or she is not entitled to acquire another citizenship.

Unpublished data provided to the Inquiry by DIMA on 23 September 1997.

986 *Migration Act 1958* ss 72–76, 188–197.

987 D Sandor *DRP Submission 30*; Refugee Council of Australia *DRP Submission 27*.

988 *ibid*.

989 *Student and Youth Assistance Act 1973* (Cth) Pt 9 Div I for Austudy and YTA. *Social Security Act 1991* (Cth) Pt 6.1 for Special Benefit. On 20 March 1997 the federal Government announced that as part of a re-structuring of immigration review processes, internal review of visa application decisions will no longer be available: P Ruddock, Minister for Immigration and Multicultural Affairs *Media Release* 20 March 1997. Under the Migration Legislation Amendment Bill (No 4) 1997 Sch 1 the internal review unit of DIMA and the IRT will be amalgamated to form the Migration Review Tribunal.

990 *Student and Youth Assistance Act 1973* (Cth) s 308 for Austudy and YTA. *Social Security Act 1991* (Cth) s 1244 for Special Benefit.

991 See eg SSAT *IP Submission 40*.

992 eg Marrickville Legal Centre *IP Submission 221*.

993 *Student and Youth Assistance Act 1973* (Cth) Pt 9 Div 2 for Austudy and YTA. *Social Security Act 1991* (Cth) s 1245 for Special Benefit.

994 *Migration Act 1958* (Cth) ss 346, 411.

995 AGPS Canberra 1995 rec 87.

996 D Williams, Attorney-General and Minister for Justice *Media Release* 20 March 1997.

997 See R Creyke 'Administrative law: Developments under a Coalition Government' (1997) 48 *Admin Review* 13, 16.

998 Migration Legislation Amendment Bill (No 4) 1997 Sch 4. See also P Ruddock 'The broad implications for administrative law under the Coalition Government with particular reference to migration matters' (1997) 48 *Admin Review* 4, 12.

999 See eg M Seccombe 'Tribunals reversal a victory for Williams' *The Sydney Morning Herald* 14 July 1997, 5.

1000 For a discussion of the AAT's legalistic approach from a practitioner's perspective see T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61.

1001 Legal Aid & Family Services, Attorney-General's Dept *DRP Submission 83*.

1002 Note, however, that the Administrative Review Council recommended that all applications to a review tribunal should have to be made in writing but not in any prescribed form: Report 39 *Better Decisions: Review of Commonwealth Merits Review Tribunals* AGPS Canberra 1995 rec 55.

1003 A McNichol *DRP Submission 39* suggested that this could be a do-it-yourself kit similar to the tax pack released by the Australian Taxation Office each year to assist people to prepare their own income tax returns.

1004 Townsville Community Legal Service *DRP Submission 46* expressed serious concerns about ability of children to represent themselves in front of tribunals.

1005 This provision is complemented by art 13(1) of the International Covenant on Economic, Social and Cultural Rights which provides that everyone has the right to education.

1006 Only NSW has incorporated the right to an education in legislation: *Education Reform Act 1990* (NSW) s 4(1). All States and Territories allow parents to apply to teach their children at home.

1007 ABS unpublished data prepared for the Inquiry on 22 July 1997. See also paras 2.32–40. The proportion of young people attending government schools is higher than average among Indigenous families (89%), one parent families (81%) and families living outside metropolitan areas (80%): ABS *Focus on Families: Education and Employment* ABS Canberra 1994, 16.

1008 Attorney-General's Dept *DRP Submission 52* queried the relevance of recommendations on education to our terms of reference.

1009 House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 31.

1010 This was emphasised in House of Representatives Standing Committee on Community Affairs *Report on Aspects of Youth Homelessness* AGPS Canberra 1995 ch 10.

1011 Wagga Wagga Focus Group 9 May 1996; Hobart Focus Group 30 May 1996.

1012 Adelaide Focus Group 29 April 1996. See also A Daniel & J Cornwall *A Lost Generation?* Australian Youth Foundation Sydney 1993, 13.

1013 D Kemp, Minister for Schools, Vocational Education and Training *Media Release* 8 May 1997.

1014 It was supported in submissions, eg, G Vimpani *Public Hearing Submission* Newcastle 14 May 1996.

1015 Association of Heads of Independent Schools of Australia *IP Submission 128*; J Owen & G Crowter *AAYPIC Public Hearing Submission* Brisbane 31 July 1996; Rockhampton Focus Group 2 August 1996.

1016 art 42 of CROC requires States Parties to make the principles and provisions of the Convention widely known to adults and children alike. See also S O'Toole *Rights Education in Schools* National Children's and Youth Law Centre Sydney 1993 recs 2, 3.

1017 Survey Question 6.

1018 Survey Response 30.

1019 *DRP Submission 80*.

1020 This proposition has support in submissions: eg G Vimpani *Public Hearing Submission* Newcastle 14 May 1996; J Owen & G Crowter, *AAYPIC Public Hearing Submission* Brisbane 31 July 1996.

1021 eg Australian Family Association (WA) *IP Submission 125*.

1022 NSW Federation of School Community Organisations *IP Submission 97*; Youth Advocacy Centre *IP Submission 120*. See also R Ludbrook 'Children's rights in school education' in K Funder (ed) *Citizen Child: Australian Law and Children's Rights* AIFS Melbourne 1996, 93.

1023 This proposal was supported by Association of Heads of Independent Schools of Australia *DRP Submission 15*; Kreative Kids *DRP Submission 35*; Townsville Community Legal Service *DRP Submission 46*; NSW Ombudsman *DRP Submission 80*. Australian Secondary Principals' Association *DRP Submission 89* supported it in principle but was concerned about the resource ramifications.

1024 eg M Hogan, Catholic Education Office *Public Hearing Submission* Canberra 7 May 1996. See also P Mickelburgh 'Weapons rule in school' *Herald Sun* 31 August 1996, 21; B Donaghy 'Its a jungle out there' *The Sydney Morning Herald* 11 November 1996, 10; B Donaghy 'Rage in the playground' *The Sydney Morning Herald* 12 November 1996, 13; J Griffin 'Anti-lesbian/gay violence in schools' in G Mason & S Tomsen (eds) *Homophobic Violence* Hawkins Press Sydney 1997.

1025 House of Representatives Standing Committee on Employment, Education and Training *Sticks and Stones* AGPS 1994, 17. In response to this Report, Cth funded forums were held in most States and Territories in 1996 to identify and promote effective practices for combatting school violence.

1026 This need for a collaborative approach is reflected in the Australian Education Union policy on violence in schools as adopted at its 1994 annual federal conference.

1027 See B Howard et al, Charles Sturt University *Public Hearing Submission* Wagga Wagga 8 May 1996. See also T Knight 'Schools, delinquency and youth culture' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997, 92–93.

1028 K Rigby *Bullying in Schools: And What to do About It* Australian Council for Education Research Melbourne 1996, 52.

1029 J Griffin 'Anti-lesbian/gay violence in schools' in G Mason & S Tomsen (eds) *Homophobic Violence* Hawkins Press Sydney 1997, 107.

1030 See paras 10.52, 10.62.

1031 K Rigby 'Can adverse peer-relations at school drive children to suicide?' *Paper* 20th International School Psychology Colloquium University of Melbourne 15–19th July 1997, 20.

id 21.

A gay student in NSW is suing the Dept of School Education for damages. He alleges that the Dept failed to protect him against severe anti-gay vilification including death threats and violent assault: D Passey 'Gay pupil's victory — Now it's back to school' *The Sydney Morning Herald* 12 April 1997, 3.

An effective anti-bullying policy includes the school's stand in relation to bullying, a succinct definition of bullying with illustrations and information about the rights of children with respect to bullying at school, the responsibilities of children who witness incidents of bullying, what the school will do to counter bullying on the premises and an undertaking to evaluate the policy in light of its effects: K Rigby *Bullying in Schools: And What to do About It* Australian Council for Education Research Melbourne 1996, 131–135.

D Williams, Attorney-General and Minister for Justice *Media Release* 27 June 1997.

The pilot projects include Negotiating Young People's Use of Open Space and Working with Homeless Youth to Prevent Crime: D Williams, Attorney-General and Minister for Justice *Media Release* 27 June 1997.

NCAVAC Unit *Young People and Crime — General Fact Sheet No 6* Attorney-General's Dept Canberra 1997.

eg staff at Keira Technology High in NSW have implemented a policy covering sex-based harassment, racism, peer mediation and teacher training that has been effective in reducing harassment at the school: B Drury 'Learning together about fair play for all' *The Sydney Morning Herald* 30 June 1997, 10.

NSW Legislative Council Standing Committee on Social Issues Report 8 *A Report into Youth Violence in NSW* NSW Government Sydney 1995 rec 86.

P Harris *All Our Children: Child Poverty Policy Review No 4* Brotherhood of St Laurence Melbourne 1990, 10. See also C Chamberlain & D McKenzie 'School students at risk' (1996) 15(4) *Youth Studies Australia* 11.

NCAVAC Unit *Young People and Crime — General Fact Sheet No 6* Attorney-General's Dept Canberra 1997.

B Kerr *Public Hearing Submission* Kalgoorlie 4 July 1996; Aboriginal Justice Council (WA) Minutes of Meeting Perth 5 July 1996.

D Kemp, Minister for Schools, Vocational Education and Training *Media Release* 14 March 1997. The findings of the recent National School English Survey of primary school students have been controversial due to disagreement between the federal Government and the States and Territories about the benchmarks used in the survey. The Cth is planning to tie schools funding to literacy results: 'Schools told to improve or else' *The Sydney Morning Herald* 16 September 1997, 1.

13 May 1996.

See eg DP Farrington 'Implications of criminal career research for the prevention of offending' (1990) 13 *Journal of Adolescence* 93, 109.

See E Orr *Australia's Literacy Challenge: The Importance of Education in Breaking the Poverty Cycle for Australia's Disadvantaged Families* The Smith Family Sydney 1994.

D Kemp, Minister for Schools, Vocational Education and Training *Media Release* 14 March 1997.

HREOC *Our Homeless Children: National Inquiry into Homeless Children* AGPS Canberra 1989, 56–58; House of Representatives Standing Committee on Community Affairs *Report on Aspects of Youth Homelessness* AGPS Canberra 1995, 260–262.

G Levine SM 'At the Children's Court' (1995) 8(9) *Parity* 8, 9.

This proposal is supported by Townsville Community Legal Service *DRP Submission 46* and by NT Government *DRP Submission 71* provided there are no resource implications. Kreative Kids *DRP Submission 35* and Australian Secondary Principals' Association *DRP Submission 89* stressed that for such a recommendation to be effective there must be adequate community services to which young people can be referred for support and treatment.

Association of Independent Schools of Vic *DRP Submission 13*.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996 rec 11. A number of new programs have been established since the winding up of the STAR program but they target homeless young people specifically: see paras 9.50–51.

J Bright *Crime Prevention In America: A British Perspective* Office of International Criminal Justice University of Illinois Chicago 1992, 23.

B Kerr *Public Hearing Submission* Kalgoorlie 4 July 1996.

ibid.

Social Systems and Evaluation *Inter-Agency Community Centres Pilot Project: Interim Evaluation Report* unpublished NSW Dept of School Education 1996.

One Project initiative is the fun family reading program at Coonamble which aims: to provide children with a greater opportunity to develop their literacy and numeracy skills by school entry through parent involvement in pre-literacy and literacy-based activities; to strengthen parent/child relationships to prevent neglect and abuse and enhance children's educational and life potential; to empower the parents of young children to develop further their own literacy and that of their children. There are similar family support and parent education projects in the community sector, eg, Tresillian Family Care Centres: A Partridge, Tresillian Family Care Centres *Public Hearing Submission* Parramatta 7 August 1996.

Social Systems and Evaluation *Inter-Agency Community Centres Pilot Project: Interim Evaluation Report* unpublished NSW Dept of School Education 1996.

See para 5.19. See also J Bright *Crime Prevention In America: A British Perspective* Office of International Criminal Justice University of Illinois Chicago 1992, 32.

Social Systems and Evaluation *Inter-Agency Community Centres Pilot Project: Interim Evaluation Report* unpublished NSW Dept of School Education 1996, 30.

This proposal was supported by Australian Secondary Principals' Association *DRP Submission 89*.

This proposal was supported by SA Independent Schools Board *DRP Submission 31* although it considered that all students, not just those in government schools, should be covered by such programs. See also Kreative Kids *DRP Submission 35*; Townsville Community Legal Service *DRP Submission 46*, cf NT Government *DRP Submission 71*.

See eg C Flynn *Disability Discrimination in Schools: Students and Parents Speak Out* National Children's and Youth Law Centre Sydney 1997. See also Autistic Association of NSW *DRP Submission 40*.

eg M Wall *Public Hearing Submission* Perth 2 July 1996; S Moran *IP Submission 73*. The Inquiry is aware that there is a certain degree of controversy concerning the alleged over-diagnosis of Attention Deficit Hyper-Activity Disorder. See eg M Sweet 'Teachers may be real culprits for unruly children' *The Sydney Morning Herald* 30 July 1997, 1.

Disability Discrimination Act 1992 (Cth) s 22; *Anti-Discrimination Act* 1977 (NSW) s 49L; *Equal Opportunity Act* 1995 (Vic) s 37; *Anti-Discrimination Act* 1991 (Qld) ss 37–39; *Equal Opportunity Act* 1984 (SA) s 74; *Equal Opportunity Act* 1984 (WA) s 661; *Discrimination Act* 1991 (ACT) s 18; *Anti-Discrimination Act* 1992 (NT) s 29.

HREOC *Annual Report 1995–96* AGPS Canberra 1996, 104.

See also para 10.33.

ALRC Report 79 *Making Rights Count: Services for People with a Disability* ALRC Sydney 1996, 143–144.

id rec 28.

HREOC *Annual Report 1995–96* AGPS Canberra 1996, 108. Under *Disability Discrimination Act* 1992 (Cth) s 31 the Attorney-General can develop disability standards that are legally binding once they have been approved by both Houses of the Parliament.

See para 18.122 for a discussion of the likely over-representation of young people with some forms of disability in the juvenile justice system.

C Flynn *Disability Discrimination in Schools: Students and Parents Speak Out* National Children's and Youth Law Centre Sydney 1997 rec 1.

Bringing Them Home HREOC Sydney 1997, 552. See also para 10.52.

D Howard et al 'Aboriginal hearing loss and the criminal justice system' (1993) 3(65) *Aboriginal Law Bulletin* 9.

The Royal Commission into Aboriginal Deaths in Custody noted that the effects of hearing impairment on educational achievement had been commented on in evidence given about a number of deaths in custody: *National Report* Vol 2 AGPS Canberra 1991, 351. See para 10.62.

(1997) 19 *Working Together* 14.

DEETYA *National Aboriginal and Torres Strait Islander Education Policy* DEETYA Canberra 1989.

Reference Group for Overseeing the National Review of Education for Aboriginal and Torres Strait Islander People National Review of Education for Aboriginal and Torres Strait Islander Peoples: Summary and Recommendations AGPS Canberra 1994, 6.

art 28(1).

For an overview of the position in the various jurisdictions see Senate Employment, Education and Training References Committee *Not a Level Playground: The Private and Commercial Funding of Government Schools* Senate Printing Unit Canberra 1997, 11-18.

eg P Harris *All Our Children: Child Poverty Policy Review No 4* Brotherhood of St Laurence Melbourne 1990, 72; NSW Federation of School Community Organisations *IP Submission* 97. Income support is available to the families of some financially disadvantaged secondary students and to some independent students: see paras 9.20, 9.25-33.

Senate Employment, Education and Training References Committee *Not a Level Playground: The Private and Commercial Funding of Government Schools* Senate Printing Unit Canberra 1997, 46. See also Confidential *DRP Submission* 1.

Senate Employment, Education and Training References Committee *Not a Level Playground: The Private and Commercial Funding of Government Schools* Senate Printing Unit 1997, 55.

See SA Independent Schools Board *DRP Submission* 31.

I O'Connor 'Models of Juvenile Justice' *Paper Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond* AIC Conference Adelaide 26-27 June 1997, 3.

See Senate Employment, Education and Training References Committee *Not a Level Playground: The Private and Commercial Funding of Government Schools* Senate Printing Unit Canberra 1997 rec 4.

The assertion that financial contributions to government schools must not be discriminatory was supported by: SA Independent Schools Board *DRP Submission* 31; Kreative Kids *DRP Submission* 35; Townsville Community Legal Service *DRP Submission* 46. cf NT Government *DRP Submission* 71 that considered this a matter for individual schools to negotiate with parents.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 3.

eg Wagga Wagga Focus Group 9 May 1996.

Confidential *DRP Submission* 8.

Families and Friends for Drug Law Reform (ACT) *DRP Submission* 17.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 25.

Chronic truants can be defined as children who are absent without reason for 20% or more of school time: id 8.

id 25.

id 47-53.

See para 10.41. See also P Dwyer *Opting Out: Early School Leavers and the Degeneration of Youth Policy* National Clearinghouse for Youth Studies Hobart 1996, 17.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 41. See also National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 552; para 10.62.

Data provided to the Inquiry by Residential and Youth Services Section, SA Dept for Family and Community Services July 1997.

See also para 4.37.

J Bright *Crime Prevention In America: A British Perspective* Office of International Criminal Justice University of Illinois Chicago 1992, 40.

E Garry 'Truancy: First step to a lifetime of problems' (1996) *Juvenile Justice Bulletin* — US Dept of Justice 1.

See paras 10.22-25 regarding literacy.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 43.

Education Reform Act 1990 (NSW) s 122; *Education Act* 1972 (SA) s 80; *Education Act* (NT) s 31; *Child Welfare Act* (WA) s 138B(1)(b).

cl 35(2). Similar legislation exists in some overseas jurisdictions. eg in 1995 the US state of Oregon created legislative penalties for parents who fail to supervise children under 15 adequately: Oregon Revised Statutes 163.577. Irregular school attendance is *prima facie* evidence of failure to supervise: KA Kalvig 'Oregon's Parental Responsibility Acts' (1996) 75 *Oregon Law Review* 829, 832.

cl 35(1). The Inquiry has been informally advised that this provision will be amended in light of comments received during the consultation period for the Bill.

eg a School Attendance Panel (established under Sch 1) must have certified that all reasonable steps have been taken to secure attendance by the child: School Education Bill 1997 (WA) cl 36.

Disabilities Advisory Panels will be established whenever a parent seeks a review of an enrolment decision concerning a child with a disability: School Education Bill 1997 (WA) cl 83.

Div 5 Subdiv 3.

eg K Ashworth 'Truants, parents face heavy fines' *The West Australian* 20 June 1997, 21.

See KA Kalvig 'Oregon's Parental Responsibility Acts' (1996) 75 *Oregon Law Review* 829, 848.

This approach is supported by House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 29.

KA Kalvig 'Oregon's Parental Responsibility Acts' (1996) 75 *Oregon Law Review* 829, 842-43.

arts 28(2), 12.

R Ludbrook 'Children's rights in school education' in K Funder (ed) *Citizen Child: Australian Law and Children's Rights* AIFS Melbourne 1996, 90.

NSW and the ACT are the only jurisdictions that regulate discipline in the private sector by legislation to some extent: see para 10.77.

R Ludbrook 'Children's rights in school education' in K Funder (ed) *Citizen Child: Australian Law and Children's Rights* AIFS Melbourne 1996, 89.

id 109; House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 41-46; Brisbane Practitioners' Forum 29 July 1996.

R Ludbrook 'Children's rights in school education' in K Funder (ed) *Citizen Child: Australian Law and Children's Rights* AIFS Melbourne 1996, 109.

House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 41. See also Brisbane Practitioners' Forum 29 July 1996.

Wagga Wagga Focus Group 9 May 1996.

Perth Focus Group 1 July 1996; NSW Youth Justice Coalition *IP Submission 4*. These allegations are supported by the findings of House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 21.

National Children's and Youth Law Centre *IP Submission 12*; Federation of Parents and Teachers Associations of NSW *IP Submission 15*.

This proposal was supported by Kreative Kids *DRP Submission 35*; Autistic Association of NSW *DRP Submission 40*; Townsville Community Legal Service *DRP Submission 46*; NSW Ombudsman *DRP Submission 80*.

For a relatively recent summary of the legislation and policies governing school exclusion in each Australian State and Territory see House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996 appendices 5, 6.

J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre Sydney 1995, 20. See also S Britton, Youth Affairs Council of WA *Public Hearing Submission* Perth 2 July 1996.

Report of the Inquiry into Truancy and Exclusion of Children and Young People from School AGPS Canberra 1996 rec 3.

Draft rec 2.8.

eg G Vimpani *Public Hearing Submission* Newcastle 14 May 1996; Women's Advisory Council *DRP Submission 26*; P Eastaugh *DRP Submission 29*; Autistic Association of NSW *DRP Submission 40*; Townsville Community Legal Service *DRP Submission 46*; Australian Secondary Principals' Association *DRP Submission 89*. cf NT Government *DRP Submission 71* which considered discipline standards a matter for each jurisdiction.

J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre Sydney 1995 rec 1.

See NSW Legislative Council Standing Committee on Social Issues Report 8 *A Report into Youth Violence in NSW* NSW Government Sydney 1995 rec 82.

DRP Submission 59. See also J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre Sydney 1995 rec 7.

In this regard, evidence to this Inquiry, particularly at the Wagga Wagga Focus Group 9 May 1996 and the Perth Focus Group 1 July 1996, supported evidence to the House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 20.

eg a student in Vic who felt he or she had been unfairly excluded may be able to apply for judicial review under the *Administrative Law Act 1978* (Vic).

[1985] VR 270. In this case, Starke J granted an interlocutory injunction to restrain the expulsion of a student six weeks before his final exams. cf *Seymour v Swift* (1976) 10 ACTR 1.

This proposition was supported in submissions, eg, G Vimpani *Public Hearing Submission* Newcastle 14 May 1996.

J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre Sydney 1995, 15.

This is the natural justice principle of *audi alteram partem*, also known as the hearing rule, that provides that no one shall be condemned unheard: see R Douglas & M Jones *Administrative Law: Commentary & Materials* 2nd ed Federation Press Sydney 1996, 522–536; Townsville Community Legal Service *DRP Submission 46*.

The proposal that decisions to exclude should be reviewable was supported in evidence received during consultations: eg M Hogan, Catholic Education Office *Public Hearing Submission* Canberra 7 May 1996; Hobart Focus Group 30 May 1996; Brisbane Focus Group 29 July 1996; Brisbane Practitioners' Forum 29 July 1996; C Press *Public Hearing Submission* Rockhampton 1 August 1996; NSW Federation of School Community Organisations *IP Submission 97*; National Children's and Youth Law Centre *DRP Submission 59*. See also J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre 1995 rec 2. Federation of Community Legal Centres (Vic) *DRP Submission 72* considered that a right of review should exist for any exclusion longer than 5 days.

See also J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre 1995 rec 4. This will implement the natural justice principle of *nemo debet esse iudex in propria causa*, or the rule against bias, that no-one can be judge in his or her own cause: see R Douglas & M Jones *Administrative Law: Commentary & Materials* 2nd ed Federation Press Sydney 1996, 537–557; Townsville Community Legal Service *DRP Submission 46*.

Federation of Community Legal Centres (Vic) *DRP Submission 72*.

cl 89.

National Children's and Youth Law Centre *DRP Submission 59* considered that an advocate should be appointed for the child wherever an exclusion is proposed. The proposal for advocates was supported by Taxi Employees' League *DRP Submission 21*. See also J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre Sydney 1995 rec 3.

Dept of Education Qld *Community Accountability Conferencing: Trial Report* unpublished 1996, 1–2. See also F McElrea 'Student discipline and restorative justice' *Paper* Legal Research Foundation Seminar Auckland 19 March 1996; paras 18.45–50.

See para 18.34.

Dept of Education Qld *Community Accountability Conferencing: Trial Report* unpublished 1996, 8–13.

id v–vii.

eg S Harris, Youth and Community Combined Action *Public Hearing Submission* Rockhampton 1 August 1996; C Press *Public Hearing Submission* Rockhampton 1 August 1996.

See para 2.47.

Unpublished figures from the 1996 Census provided to HREOC by the ABS indicate that 60.6% of Indigenous children currently leave school when they are aged 16 or younger. The significance of this rate is not so much in its comparison with the rate for non-Indigenous children but in the fact that this represents a large proportion of all Indigenous children, 40.06% of whom are under 14 years of age (cf 21.33% of non-Indigenous children). See also paras 2.35–36.

The National Children's and Youth Law Centre will take on the duties of the National Aboriginal Youth Law Centre if its predicted de-funding goes ahead.

(1997) 5(1) *Rights Now!* 14.

National Children's and Youth Law Centre *DRP Submission 59* annexure 1. This link is confirmed by the recent report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families — 'Early entry into the juvenile justice system is nearly always associated with the alienation of the children from the education system': *Bringing Them Home* HREOC Sydney 1997, 555 citing *Submission 362*.

Cleary v Booth [1893] 1 QB 465; *Mansell v Griffin* [1908] 1 KB 160. The Model Criminal Code Officers Committee has recommended that teachers or other persons standing in the place of parents must have explicit parental authority to impose corporal punishment: *Model Criminal Code Discussion Paper Chapter 5 — Non Fatal Offences Against the Person* Attorney-General's Dept Canberra 1996, 106.

Education Reform Act 1988 (NSW) s 47(f); *Education Act 1937* (ACT) s 36. A non-government school can only be registered in NSW if its official policy relating to student discipline does not permit corporal punishment of students. The ACT legislation provides that in civil or criminal proceedings against a member of school staff arising out of physical force applied to a student it is not a defence that the force was applied to administer corporal punishment and was reasonable.

See para 10.57.

Australian College of Paediatrics *IP Submission 30*.

eg B Burt *IP Submission 92*; Youth Advocacy Centre *IP Submission 120*; Child Health Council *IP Submission 146*; Adelaide Central Mission *IP Submission 168*; Defence for Children International *IP Submission 204*; Australian Association of Social Workers *IP Submission 207*; Law Society of NSW *IP Submission 209*; Women's Advisory Council *DRP Submission 26*; Kreative Kids *DRP Submission 35*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; National Children's and Youth Law Centre *DRP Submission 59*; J Owen & G Crowter AAYPIC *Public Hearing Submission* Brisbane 31 July 1996. NT Territory Government *DRP Submission 71* supported the issue of corporal punishment being discussed at MCEETYA. The proposal was opposed by Australian Family Association (NSW) *DRP Submission 11* and MG Hains *DRP Submission 24*. The Association of Heads of Independent Schools of Australia *DRP Submission 15* supported the proposed ban on corporal punishment but did not support the suggestion that the Cth enforce the ban through conditions on financial grants.

See paras 2.25-28 for statistics on children's spending power and patterns.

Survey Response 129.

Survey Response 226.

Survey Response 352.

Adelaide Focus Group 29 April 1996; Canberra Focus Group 6 May 1996; Wagga Wagga Focus Group 9 May 1996.

Survey Question 12: 30.6% of respondents mentioned this problem. The other common complaints were that goods were over-priced (26.3%) and that shopkeepers were suspicious of them (11.3%).

Survey Response 65.

Adelaide Focus Group 29 April 1996; Community Legal Centres Minutes of Meeting Melbourne 28 May 1996.

Adelaide Focus Group 29 April 1996.

eg the NSW Dept of Consumer Affairs publishes *Fair Go!* which targets 16 to 18 year olds and includes information on consumer rights, using credit, product safety and making complaints: Dept of Consumer Affairs *Fair Go! Every Student's Guide to Fair Trading* Dept of Consumer Affairs Sydney 1994.

eg the Consumer Power interactive learning packages.

This proposal is supported by Taxi Employees' League *DRP Submission 21*; Women's Advisory Council *DRP Submission 26*; SA Independent Schools Board *DRP Submission 31*; NT Government *DRP Submission 71*; Consumer Affairs Qld *DRP Submission 81*.

See also recs 53, 57-59, 61, 64.

Dillon v Wood (1881) 2 NSW 298; *Rubinovich v Emmett* (1901) 27 VLR 265.

See paras 13.6-11.

There is considerable case law on the meaning of necessities. Generally it is interpreted to mean goods and services that are necessary to a minor, such as food, clothing, accommodation and employment: J Carter & DJ Harland *Contract Law in Australia* 3rd ed Butterworths Sydney 1996, 277-282.

eg a young person who has turned 16 can effect a life insurance policy: *Life Insurance Act 1945* (Cth) s 85. In Vic certain contracts by minors for the repayment of loans are valid: *Property Law Act 1958* (Vic) s 28B. In SA a court may approve a minor's contract rendering it binding: *Minors' Contracts (Miscellaneous Provisions) Act 1979* (SA) s 6.

Pt 3.

The proposal that the age of contractual capacity should be lowered is supported by Women's Advisory Council *DRP Submission 26*. NT Government *DRP Submission 71* supports a uniform age of contractual capacity. Recs 68-69 propose that children aged 16 and 17 be capable of litigating directly.

eg Medical Consumers' Association *IP Submission 163*; Mental Health Legal Centre *IP Submission 167*; NSW Health Care Complaints Commission *Submission IP 182*; Australian Association of Social Workers *IP Submission 207*.

eg in NSW complaints about legal practitioners are dealt with by the Legal Services Commissioner a statutory body established under the *Legal Profession Act 1987* (NSW) Pt 10 Div 2. A complaint about a medical practitioner can be made to the NSW Medical Board or the Health Care Complaints Commission. The Australian Medical Association deals with complaints against its members according to its by-laws.

V Marlow, Capricorn Youth Housing *Public Hearing Submission* Rockhampton 1 August 1996; S Willey *Public Hearing Submission* Hobart 30 May 1996.

One girl who participated in the Hobart Focus Group 30 May 1996 reported having to wait 18 months for public housing.

Canberra Focus Group 6 May 1996; V Marlow, Capricorn Youth Housing *Public Hearing Submission* Rockhampton 1 August 1996.

The limited scope of federal consumer protection law is a result of constitutional restrictions on the legislative power of the Cth. Only in limited circumstances are individual business people directly subject to the Trade Practices Act. While a claim for damages under Pt V of the Trade Practices Act will generally be against a corporation, s 6(4) allows consumers to bring actions against individual professionals who engage in misleading or deceptive conduct in the course of promotional activities in any of the Australian territories.

Fair Trading Act 1987 (NSW); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1985* (Vic); *Fair Trading Act 1987* (WA); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1992* (ACT).

s 82. This provision is mirrored in State and Territory fair trading legislation, eg, *Fair Trading Act 1987* (NSW) s 68. There are other remedies available under the Trade Practices Act, such as injunctions (s 80) and orders to disclose information or publish advertisements (s 80A), but an action for damages is the most likely avenue for any complainant acting in a personal capacity to pursue.

In consumer protection matters the ACCC gives priority to matters of national significance that adversely affect large numbers of people.

See para 13.6.

Australian Association of National Advertisers *IP Submission 132*; Townsville Community Legal Service *IP Submission 181*.

ALRC Report 68 Compliance with the *Trade Practices Act 1974* ALRC Sydney 1994, 39.

Wagga Wagga Focus Group 9 May 1996.

Consumer affairs agencies in States and Territories assist to resolve complaints about breaches of fair trading legislation. Often they will conduct mediation sessions to resolve the problem or assist the consumer in small claims before the appropriate court or tribunal.

Consumer Claims Tribunal Act 1987 (NSW); *Small Claims Tribunals Act 1973* (Vic); *Small Claims Tribunals Act 1973* (Qld); *Magistrates Court Act 1991* (SA); *Small Claims Tribunals Act 1974* (WA); *Magistrates Court (Small Claims Division) Act 1989* (Tas); *Small Claims Act 1974* (NT); *Small Claims Act 1974* (ACT).

Federal Bureau of Consumer Affairs *Audit of Consumer Protection Laws: First Report Identifying Inconsistencies, Gaps and Overlaps on Australian Consumer Protection Legislation* Federal Bureau of Consumer Affairs Canberra 1997. The Federal Bureau of Consumer Affairs has been re-structured as the Consumer Affairs Division of the Dept of Industry, Science and Tourism.

eg *Limitations of Actions Act 1936* (SA) s 45; *Limitation Act 1985* (ACT) s 30; *Limitation of Actions Act 1974* (Qld) s 29; *Limitation of Actions Act 1958* (Vic) s 23; *Limitation Act 1974* (Tas) s 26. See Halsbury's *Laws of Australia* Butterworths Sydney 1992 vol 3 ¶65–2245.

Vink v Schering Pty Ltd & Ors (No 1) (1991) ATPR ¶41–064.

Generally a cause of action accrues as soon as loss is first suffered: *Calmao Pty Ltd v Stradbroke Waters Co-owners Co-operative Society Ltd & Ors* (1989) ATPR ¶40–984. See recs 68–69 regarding child civil litigants' capacity in general.

This proposal is supported by Women's Advisory Council *DRP Submission 26*; NT Government *DRP Submission 71*; Consumer Affairs Qld *DRP Submission 81*.

These conditions include that goods and services be of merchantable quality and fit for their purpose: Pt V Div 1A.

Trade Practices Act s 75AD.

eg *Fair Trading Act 1987* (NSW) Pt 4; *Fair Trading Act 1989* (Qld) Pt 4; *Sale of Hazardous Goods Act 1977* (Tas); *Goods (Trade Descriptions) Act 1971* (Tas); *Consumer Affairs Act 1972* (Vic) Pt IV; *Fair Trading Act 1987* (WA) Pts V, VI; *Consumer Affairs and Fair Trading Act 1990* (NT) Pt IV; *Consumer Affairs Act 1973* (ACT) Pt IIIA; *Manufacturers' Warranties Act 1974* (SA).

This standard has been in place since 1989: Federal Bureau of Consumer Affairs *Safety Standard for Children's Toys* AGPS Canberra 1994.

A standard has been in place since 1986: Federal Bureau of Consumer Affairs *Safety Standard for Children's Floatation Toys and Swimming Aids* AGPS Canberra 1992.

A standard has been in place since 1978: Federal Bureau of Consumer Affairs *Safety Standards for Children's Nightclothes* AGPS Canberra 1994.

eg Dept of Fair Trading *IP Submission 157*. The *Toys and Children's Products Safety Ordinance 1993* (Hong Kong) is similarly proactive.

M Vranken *Fundamentals of European Civil Law* The Federation Press Sydney 1997, 144–146. On 19 July 1996 the European Union/Australia Mutual Recognition Agreement on Conformity Assessment was initialled. Once in operation the Agreement will reduce technical barriers to trade by allowing certain types of products manufactured in Australia to be assessed within Australia for conformity with EU regulatory standards and *vice versa*. Toys involving low voltage electrical equipment will be covered by the Agreement.

Council Directive 88/378/EEC (OJ 1988 L187/1) arts 1, 3.

Annexure II, art II(1)(e).

X Lewis 'The protection of consumers in European Community law' (1992) 12 *Yearbook of European Law* 139.

This proposal is supported by Taxi Employees' League *DRP Submission 21*; Women's Advisory Council *DRP Submission 26*; SA Independent Schools Board *DRP Submission 31*; Consumer Affairs Qld *DRP Submission 81*. The NT Government *DRP Submission 71* is in support provided there are no additional bureaucratic burdens for small business.

See para 11.33.

Dept of Industry, Science and Tourism *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* Dept of Industry, Science and Tourism Canberra 1997.

See S Smith 'Customer charters: The next dimension in consumer protection?' (1997) 22 *Alternative Law Journal* 138, 140.

See para 9.9.

Adelaide Focus Group 29 April 1996. This was also a major consumer problem identified by respondents to our survey, along with the fact that they are not taken seriously by banks: see Survey Questions 15–17. See also Anti-Discrimination Board of NSW *IP Submission 60*.

This proposal is supported by Taxi Employees' League *DRP Submission 21*.

The Ombudsman can help if the problem occurred, or first came to the consumer's attention, after May 1989 and the maximum financial loss is less than \$100 000. Credit unions and building societies are not dealt with by the Banking Industry Ombudsman but have developed their own industry schemes. For example, the Credit Union Dispute Reference Centre has 201 of the 268 credit unions signed up to it.

Similar services are provided by some States and Territories. eg the NSW Dept of Fair Trading funds a credit helpline program which is administered by the Wesley Mission and provides financial counselling to remote and isolated consumers throughout NSW.

Financial System Inquiry *Final Report* AGPS Canberra 1997, 31. The Australian Corporations and Financial Services Commission will combine roles currently performed by the Australian Securities Commission, the Insurance and Superannuation Commission and the Australian Payments System Council.

P Costello, Treasurer *Media Release* 2 September 1997.

Federal Bureau of Consumer Affairs *Discussion Paper: Advertising Directed at Children* Federal Bureau of Consumer Affairs Canberra 1994, 2. For detailed information on what kinds of programs children watch see ABA Monograph 4 'Cool' or 'Gross': *Children's Attitudes to Violence, Kissing and Swearing on Television* ABA Sydney 1995 and ABA Monograph 7 *Kids Talk TV: 'Super Wickid' or 'Dum'* ABA Sydney 1996.

In considering children's media rights it is important to take account not only of their right to be protected from harmful material but also of their right to be active participants in media services not just passive consumers: B Simpson *DRP Submission 16*. This right derives from various articles in CROC art 13 provides that children shall have the right to freedom of expression including freedom to seek, receive and impart information through any media of the child's choice (subject to necessary restrictions such as defamation laws). This must be read in conjunction with art 12 which gives children the right to express their views in matters affecting them and art 31 which enshrines the right to 'engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'.

Pt 9.

Children are defined in the CTS as those under 14 years of age. Programs classified 'P' (preschool children) can be shown between 7 am and 4.30 pm Monday to Friday. Programs classified 'C' (children) can be shown between 7 am and 8 am and between 4 pm and 8.30 pm Monday to Friday and 7 am to 8.30 pm on weekends and school holidays: CTS 1(1), ABA *Children's Television* ABA Sydney 1997, 22. Other suitable programs such as those rated 'G' (general) may also be shown at these times. B Simpson *DRP Submission 16* considered that the CTS should be of more general application and cover a broader range of programming to ensure that all children are exposed to appropriate, quality programs. It also considered that the CTS should reflect children's rights under CROC to participate in the media: see fn 63 above.

ABA *Australian Children's Television* ABA Sydney 1997 appendix.

s 3(j).

CTS 10(b), (c): ABA *Australian Children's Television* ABA Sydney 1997, 27.

ABA *DRP Submission 51*.

s 123(1). The Federation of Australian Commercial Television Stations cannot compel a member to comply with the code of practice but the ABA can impose a condition on a licensee requiring it to comply: s 44(2)(a). The ABA can also determine a program standard if it is satisfied that the code is not operating to provide appropriate community safeguards in certain areas including the protection of children from harm: s 125(1).

Under s 7 of the code, licensees have a maximum of 20 days to provide a substantive reply to a written complaint about a matter falling within the code.

s 2. Classified material must be broadcast in suitable time zones. A revised code has recently been submitted to the ABA for registration.

s 6.16. CTS 17–21: ABA *Australian Children's Television* ABA Sydney 1997, 29–30.

Special Broadcasting Service Act 1991 (Cth) s 10(1)(j).

s 2.6 of the general SBS program code states that 'SBS recognises its responsibility to carry its multicultural message to young people and includes appropriate programming in schedules as and when funds permit': SBS *Codes of Practice: Programming Policies* SBS Sydney 1996, 19.

See eg M Brown 'The portrayal of violence in the media: Impacts and implications for policy' (1996) (55) *Trends and Issues in Crime and Criminal Justice*; Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies *Report on the Portrayal of Violence in the Electronic Media* Senate Printing Unit Canberra 1997; W Josephson *Television Violence: A Review of the Effects on Children of Different Ages* Canadian Heritage Ottawa 1995.

Telecommunications Act 1996 (US) s 551(c); (1996) 2 *International Research Forum on Television and Children* 4.

The Committee, chaired by the Minister for Communications and the Arts, included the Minister for Primary Industries and Energy, the Minister for Health and Family Services, the Minister for Family Services, the Attorney-General and a Parliamentary secretary: R Alston, Minister for Communications and the Arts *Media Release* 8 May 1996.

R Alston, Minister for Communications and the Arts *Media Release* 9 July 1996.

Broadcasting Services Act 1992 (Cth) s 123(1)(a).

For information on the role of radio in young people's lives and the types of programs they listen to see ABA *Music, New Music and All That: Teenage Radio in the 90s* ABA Sydney 1996. See also ABA, Australia Council & Australian Record Industry Association *Youth and Music in Australia: A Review* ABA Sydney 1997.

eg Office of the Status of Women *IP Submission* 82; Australian Family Association (WA) *IP Submission* 125; Australian Family Association (NSW) *DRP Submission* 11; SA Independent Schools Board *DRP Submission* 31.

R Alston, Minister for Communications and the Arts & D Williams, Attorney-General and Minister for Justice *Media Release* 15 July 1997.

Report on the Regulation of On-Line Services Pt 3 Senate Printing Unit Canberra 1997 rec 6. See also ABA *Investigation into the Content of On-Line Services* ABA Sydney 1996, 104.

Wood Royal Commission *Final Report Vol V: The Paedophile Inquiry* NSW Government Sydney 1997 ch 16.

id rec 100.

id 1153.

ABA *Investigation into the Content of On-Line Services* ABA Sydney 1996, 93, ch 6.

id 75.

Classification (Publications, Films and Computer Games) Act 1995 (Cth) Sch.

Classification (Publications, Films and Computer Games) Act 1995 (Cth) Sch.

Certain material, such as publications that promote, incite or instruct in matters of crime or violence, will be refused classification (RC): *Classification (Publications, Films and Computer Games) Act 1995* (Cth) Sch.

In 1995 the ABA received 3 051 complaints, 91 of which alleged that material shown on commercial television was unsuitable for children: ABA *Your Say: A Review of Audience Concerns about Australia's Broadcast Media* ABA Sydney 1996, 10. There are no statistics available on how many complaints were made by young people but anecdotal evidence suggests it is generally less than 50 a year.

ss 148, 149.

Classification (Publications, Films and Computer Games) Act 1995 (Cth) s 42(1)(d).

Classification (Publications, Films and Computer Games) Act 1995 (Cth) s 43(1).

B Simpson *DRP Submission* 16.

A Darby 'Schools' anti-suicide programs 'risky' *The Sydney Morning Herald* 25 August 1997, 4.

The Australian Medical Association is in the process of drafting principles to assist broadcasters when classifying programs depicting youth suicide. Note also that the ABA recently upheld a complaint by the Australian Medical Association that an episode of *Beverly Hills 90210* that included a storyline about youth suicide had been incorrectly classified: (1997) 57 *ABA Update* 20.

See para 11.40.

See paras 11.40, 11.51. The Vic Government recently announced a parliamentary inquiry into the effects of television and video games on children's education and values: G Boreham & G Green 'Kennett orders inquiry into TV and children' *The Age* 19 September 1997, 1.

This proposal was supported by Australian Family Association (NSW) *DRP Submission* 11; Association of Heads of Independent Schools of Australia *DRP Submission* 15; Young Media Australia *DRP Submission* 22; Women's Advisory Council *DRP Submission* 26; P Eastaugh *DRP Submission* 29; SA Independent Schools Board *DRP Submission* 31. The ABA *DRP Submission* 51 pointed out the importance of taking into account earlier reviews of research when this task is undertaken.

Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies *Report on the Portrayal of Violence in the Electronic Media* Senate Printing Unit Canberra 1997, 42.

See also NSW Legislative Council Standing Committee on Social Issues Report 8 *A Report into Youth Violence in NSW* NSW Government Sydney 1995 rec 49.

National Children's and Youth Law Centre *DRP Submission* 59.

A recent survey conducted for the NSW Dept of Fair Trading found that misleading advertising is a major concern to consumers — 41% of respondents stated that they had been personally misled and 81% believed others had experienced this problem: Dept of Fair Trading *Lifting the Game: Summary of the Benchmark Survey of Consumer Issues in NSW* Dept of Fair Trading 1997, 5.

Survey Question 10.

Survey Response 121.

Final Report: Advertising Directed at Children Federal Bureau of Consumer Affairs Canberra 1995, 4. See also S Frith & B Biggins (eds) *Children and Advertising: A Fair Game?* New College Institute for Values Research, University of NSW Sydney 1994.

See eg Australian Association of National Advertisers *IP Submission* 132; Advertising Federation of Australia *IP Submission* 162; B Biggins *IP Submission* 197; B Biggins *IP Submission* 218.

Since 1 July 1997 advertising has been permitted on Pay TV: *Broadcasting Services Act 1992* (Cth) s 101(1). It is anticipated that it will be regulated by the Pay TV code of practice.

CTS 13(2): ABA *Australian Children's Television* ABA Sydney 1997, 29.

CTS 15: ABA *Australian Children's Television* ABA Sydney 1997, 29.

CTS 18(1): ABA *Australian Children's Television* ABA Sydney 1997, 29.

CTS 18(2): ABA *Australian Children's Television* ABA Sydney 1997, 29. See CTS 13–23 generally. s 6 of the Federation of Australian Commercial Television Stations' code of practice also sets out guidelines for advertising during children's programs.

ABA *Australian Children's Television* ABA Sydney 1997, 29.

See para 11.16.

Australian Association of National Advertisers *Media Release* 28 August 1997. See also A Hornery 'Complaints about ads to go before new body' *The Sydney Morning Herald* 29 August 1997, 7.

The need for an independent review body was also identified by: Women's Advisory Council *DRP Submission 26*; NT Government *DRP Submission 71*; Consumer Affairs Qld *DRP Submission 81*.

'[I]ndustry should...ensure that any complaints handling scheme is well publicised, easily accessible, efficient and fair and impartial. Information obtained through the process should be used to address systemic problems': Consumer Affairs Qld *DRP Submission 81*.

Federal Bureau of Consumer Affairs *Final Report: Advertising Directed at Children* Federal Bureau of Consumer Affairs Canberra 1995, 8. The Quebec approach is supported by Australian Family Association (WA) *IP Submission 125*; Association of Heads of Independent Schools of Australia *IP Submission 128*.

B Biggins *IP Submission 218*. The European Court of Justice has ruled that the Swedish law prohibiting television advertisements aimed at children under 12 is precluded by the Television Without Frontiers directive: (1997) (August) *Screen Digest* 189.

Radio and Television Act 1992 (Den) ss 16,18.

Radio and Television Act 1992 (Den) s 23(2).

Consumer Affairs Qld *DRP Submission 81*. Other documents of interest would be the guidelines on child friendly advertising produced by the Consumentenbond in the Netherlands as well as its report on the success of unconventional methods of advertising children's toys, food and entertainment.

DRP Submission 81.

See paras 4.36-41.

See paras 4.42-50.

The NSW Bar Association Rules note that '[a] barrister must not act as the mere mouthpiece of the client...and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's...desires where practicable': r 18.

Dey v Victorian Railway Commissioners (1948-49) 78 CLR 62. See B Cairns *Australian Civil Procedure* 4th ed LBC Information Services Sydney 1996, 351. At common law, children have traditionally been considered to be under a disability: see *Halsbury's Laws of England* 4th ed Butterworths London 1993 vol 5(2) 337.

See G Murray 'Brisbane Youth Advocacy Centre — Providing access to justice for young people'(1997) 1 *Flinders Journal of Law Reform* 261, 262-263. This raises the necessity for training of representatives of children in this jurisdiction. See paras 13.123-132.

G Murray 'Brisbane Youth Advocacy Centre — Providing access to justice for young people' (1997) 1 *Flinders Journal of Law Reform* 261, 261-262.

B Cairns *Australian Civil Procedure* 4th ed LBC Information Services Sydney 1996, 350.

O 16 r 18. See also Federal Court Rules O 43 r 1(1), (2) which are in very similar terms.

High Court Rules O 16 r 20(1). See also *Surrey Insurance Co Ltd v Nagy* [1968] SASR 437.

See B Cairns *Australian Civil Procedure* 4th ed LBC Information Services Sydney 1996, 350. District Courts or County Courts of the States and Territories will be referred to in this Report as district courts.

However, statistics are not available on this point.

See eg para 2.150. Family law issues are dealt with from para 13.22.

However, guardians *ad litem* who agree to defend litigation on behalf of a child, may obtain security for costs: *Murray v Kirkpatrick* (1940) 57 WN (NSW) 162.

Halsbury's Laws of England 4th ed Butterworths London 1993 vol 5(2) 876.

High Court Rules O 16 r 23; Federal Court Rules O 43 r 4(4).

High Court Rules O 16 r 25(2); Federal Court Rules O 43 r 2.

High Court Rules O 16 r 25(1); Federal Court Rules O 43 r 3. See also *In re Birchall* (1880) 16 Ch D 41, 42. If there is concern that the next friend is unfit to conduct the proceedings or that the proceedings are not being conducted for the benefit of the child, an inquiry may be held. Proceedings may be stayed and the next friend ordered to pay costs: *Dey v Victorian Railways Commissioners* (1948-49) 78 CLR 62.

See *Dey v Victorian Railways Commissioners* (1948-49) 78 CLR 62, 113.

eg *Rhodes v Swithenbank* (1889) 22 QBD 577, 579; *In re Taylor's Application* (1972) QB 369.

O 43 r 4(3).

O 16 r 20(2), 21(2).

eg Law Reform Committee of Judges (Vic) *IP Submission 64*; Qld Law Society *IP Submission 190*; Australian Association of Social Workers *IP Submission 207*.

Law Reform Committee of Judges (Vic) *IP Submission 64*.

ibid.

ibid.

O 43 r 11.

Burnside *IP Submission 214*; Townsville Community Legal Service *IP Submission 181*.

eg the Inquiry has heard of occasions where a migration agent acting as a guardian *ad litem* in Federal Court litigation may not be taken to have the same interests as the children.

See *P and P* (1992) FLC ¶92-615, 82,156.

Burnside *IP Submission 214*.

Sartori v MacLeod (1897) 22 VLR 498; *Yonge v Toynbee* (1910) 1 KB 215; *Cooper v Dummett* (1930) WN 248.

Mewburn v Mewburn (1934) 51 WN (NSW) 170; *Spellson v George* (1987) 11 NSWLR 300.

See *Gillick v Norfolk & Wisbech Area Health Authority* [1985] 3 All ER 402; *Secretary, Department of Health & Community Services v JMB & SMB* 15 Fam LR 392 (*Marion's case*).

National Legal Aid *DRP Submission 58*.

Cox CJ, Supreme Court of Tas letter 4 July 1997.

Letter 4 July 1997.

Letter 23 June 1997.

See para 13.13.

Cox CJ, Supreme Court of Tas letter 4 July 1997.

eg under State or Territory Statutes of Limitations. See rec 54 concerning time limitations in the *Trade Practices Act 1974* (Cth) Part V.

For a discussion of time limitations see *Halsbury's Laws of Australia* Butterworths Sydney 1992 vol 3 ¶65-2245.

O 70 r 7.

s 56(1).

Cox CJ, letter 4 July 1997. For decisions regarding security for costs see eg *Ramsey v Hartley* [1977] 2 All ER 673, 682; *Bellgrove v Marine & General Insurance Services Pty Ltd* (1996) 5 Tas R 409.

Cox CJ, letter 4 July 1997.

s 69C.

O 23 r 3(1).

The Family Court does not keep statistics about the numbers of children appearing as either plaintiffs or by a next friend or guardian *ad litem* but anecdotal evidence indicates that this is not common. *Pagliarella and Pagliarella* (1993) FLC ¶92–400 is an exception. See also the recent case of *In the Matter of an Application by the Children of L* (unreported) Family Court of Australia 30 January 1997 per Mushin J. Issues associated with children as parties in the Family Court are discussed in more detail at paras 16.58–60. In the UK, the Family Proceedings Rules 1991 allow a child to be independently represented if the court is satisfied that the child is mature enough to provide instructions: r 9.2A.

Amendments to the Family Law Act in 1995 refer to the representative for a child in this model of representation as a 'child's representative': s 68M(1). Prior to these amendments, the term used was 'separate representative': see fn 74.

Family Law Act s 68L(2).

Family Law Act s 68L(3).

Children's Protection Act 1993 (SA) s 48(1).

Children's Protection Act 1993 (SA) s 48(2). See Child Health Council of SA *IP Submission 146*.

Children's Protection Act 1993 (SA) s 46(1).

Children and Young Persons Act 1989 (Vic) s 21(1).

Children and Young Persons Act 1989 (Vic) s 20(2).

Children and Young Persons Act 1989 (Vic) s 20(9).

Vic Government *IP Submission 213*.

Children and Young Persons Act 1989 (Vic) ss 20–21.

s 167.

Children's Services Act 1986 (ACT) s 77(2).

Representatives are appointed pursuant to the *Children (Care and Protection) Act 1987* (NSW) s 66(2). See also NSW Dept of Community Services Legislation Review Unit *Review of the Children (Care and Protection) Act 1987 Discussion Paper 1: Law and Policy in Child Protection* NSW Dept of Community Services Sydney 1996, 70.

NSW Dept of Community Services Legislation Review Unit *Review of the Children (Care and Protection) Act 1987 Discussion Paper 1: Law and Policy in Child Protection* NSW Dept of Community Services Sydney 1996, 70.

Burnside *IP Submission 214*.

Children (Care and Protection) Act 1987 s 65(1).

s 39 (3).

See NT Legal Aid Commission letter 9 September 1997.

s 36(2).

T Schwass, SA Youth Court Minutes of Meeting 3 July 1996.

Qld Law Society *IP Submission 190*; Brisbane Practitioners' Forum 29 July 1996. See also table 2.17 in relation to legal aid grants in that jurisdiction.

cl 59(1).

Tas Government *IP Submission 210*.

cl 64.

In SA and in the Tas Bill: see paras 13.24 and 13.31 respectively.

See paras 13.26 and 13.27 respectively.

Under the Family Law Act s 68L, children may be separately represented. Such a representative is known as a 'child's representative' under s 68M of the Act. Prior to the introduction of the *Family Law Reform Act 1995* (Cth), these representatives were known as 'separate representatives'. This term has been applied in many of the care and protection jurisdictions around Australia. To distinguish representatives on the basis of best interests advocacy from other representatives, the Inquiry has chosen to refer to these representatives as 'best interests representatives'.

While the model may vary slightly between and within jurisdictions, this general discussion is gleaned from available material.

Demetriou and Demetriou (1976) FLC ¶90–102, 75,468: 'Counsel is appointed to assist the Court and consequently the child...'

Pagliarella v Pagliarella (1993) FLC ¶92–400. See also *Re K* (1994) FLC ¶92–461, 80,770.

F Castiglione 'Present difficulties of role conflict and accountability of the separate legal representative' *Fifth National Family Law Conference* Business Law Centre Perth 1992, 277.

B and R and the Separate Representative (1995) FLC ¶92–636, 82, 417.

Bennett and Bennett (1991) FLC ¶92–191. In that case, at 78,259, the court noted that the role of a separate representative is similar to that of counsel assisting a royal commission in that '...his or her duty is to act impartially but if thought appropriate to make submissions suggesting the adoption by the court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child'. See also A Nicholson 'Advancing children's rights and interests: The need for better inter-governmental collaboration' (1996) 26 *University of WA Law Review* 249.

Grice v R (1957) 11 DLR 699.

E Lecco 'Independent legal representation for children in custody and access cases: A commentary of Stobridge' (1996) 34 *Family and Conciliation Courts Review* 303, 307.

See *Bennett and Bennett* (1991) FLC ¶92–191, 78,258–78,259; *P and P* (1995) FLC ¶92–625, 82,157.

Family Court of Australia *Annual Report 1995–96* Family Court of Australia Sydney 1996, 59. See *B and R and the Separate Representative* (1995) FLC ¶92–636.

P and P (1995) FLC ¶92–616, 82,157.

KM Berck 'The role of the separate representative' PK Cooper (ed) *Family Law: Children* Blackstone Press Sydney 1993, 127.

E and E (1979) FLC ¶90–645, 75,466.

Bennett and Bennett (1991) FLC ¶92–191. See also *Demetriou and Demetriou* (1976) FLC ¶90–102, 75,468.

Pagliarella and Pagliarella (1993) FLC ¶92–400, 80,108; *Re K* (1994) ¶92–461, 80,770.

Pagliarella and Pagliarella (1993) FLC ¶92–400, 80,108; *Re K* (1994) FLC ¶92–461, 80,770; *Bennett and Bennett* (1991) FLC ¶92–191, 78,259.

Family Court of Australia *Representing the Child's Interests in the Family Court: Report to the Chief Justice of the Family Court of Australia* Family Court of Australia Brisbane 1996, 47. However, see para 13.58.

J Ryan, NSW Legal Aid Commission Minutes of Meeting Sydney 11 November 1996.

ibid. See also D Smith & J Rimmer Minutes of Meeting Brisbane 2 August 1996.

KM Berck 'The role of the separate representative' PK Cooper (ed) *Family Law: Children* Blackstone Press Sydney 1993, 131.

P and P (1995) FLC ¶92–615, 82,157.

42 USC 5101–5107 (1988) 4(b)(2)(G). In eight states, however, the appointment is discretionary: D Levine 'To assert children's rights or promote children's interests: How to achieve both goals' (1996) 64 *Fordham Law Review* 2023, 2025. See also RH Heartz 'Guardians ad litem in child abuse and neglect proceedings: Clarifying the roles to improve effectiveness' (1993) 27 *Family Law Quarterly* 327, 328.

RH Hartz 'Guardians ad litem in child abuse and neglect proceedings: Clarifying the roles to improve effectiveness' (1993) 27 *Family Law Quarterly* 327, 328.

id 344–346.

They have substantially greater contact with their clients than do legal representatives, they make more detailed inquiries as to the circumstances of the child and are more likely to submit written reports. They are, however, less likely to attempt to negotiate a settlement or mediate in a matter and are not able to provide effective legal representation in court: see D Levine 'To assert children's rights or promote children's needs: How to attain both goals' (1996) 64 *Fordham Law Review* 2023, 2027–8.

id 2025.

id 2029.

ibid.

ibid.

RH Hartz 'Guardians ad litem in child abuse and neglect proceedings' (1993) 27 *Family Law Quarterly* 327, 334.

For a discussion of the function of guardians in Britain see J Masson & M Shaw 'The work of guardians ad litem' (1988) 3 *Journal of Social Welfare Law* 164.

ie where no guardian *ad litem* has been appointed, the child has sufficient understanding to instruct a solicitor and wishes to do so, or it appears to the court that it is in the child's best interests to appoint a solicitor: *Children Act 1989* (UK) Pt IV.

C Jackson 'Reporting on children: The guardian ad litem, the court welfare officer and the Children Act 1989' (1992) 22 *Family Law* 252, 253. These panels were often staffed by local authority social workers who were basically being asked to review the decisions of their colleagues. It has been argued that the lack of true independence from the authority making the application creates a serious flaw in such a system: 255.

id 252.

Re S (A Minor) (Guardian Ad Litem/Welfare Officer) [1993] 1 FLR 110. In fact, court welfare officers have often acted as guardians *ad litem* in family law matters: C Jackson 'Reporting on children: The guardian ad litem, the court welfare officer and the Children Act 1989' (1992) 22 *Family Law* 252. A guardian *ad litem* and the court welfare officer may be involved simultaneously in some circumstances: see eg *L v L (Minors) (Separate Representation)* [1994] 1 FLR 156.

Family Proceedings Rules 1991 r 9.5(1).

These two applications of the principle are discussed at paras 16.6–16.

eg Defence for Children International *IP Submission 204*. See also S Holmes, Relationships Australia *Public Hearing Submission* Hobart 30 May 1996; D Smith & J Rimmer Minutes of Meeting Brisbane 2 August 1996.

DRP Submission 84.

Education Centre Against Violence *DRP Submission 43*. See also Adelaide Focus Group 29 April 1996.

(1994) FLC ¶92-461.

(1994) FLC ¶92-461, 80,777.

Australian Association of Social Workers *IP Submission 207*.

ibid.

eg Action for Children SA *IP Submission 189*; Defence for Children International *IP Submission 204*. See also S Castell-MacGregor 'Separate representation: A children's rights perspective' *Paper* First World Congress on Family Law and Children's Rights Sydney July 2–3 1993.

See EB Wells 'Unanswered questions: Standing and party status of children in custody and visitation proceedings' (1995) 13 *Journal of the American Academy of Matrimonial Lawyers* 95, 116; JR Spencer & R Flin *The Evidence of Children* Blackstone Press London 1990, 236.

EB Wells 'Unanswered questions: Standing and party status of children in custody and visitation proceedings' (1995) 13 *Journal of the American Academy of Matrimonial Lawyers* 95, 116.

See paras 4.4–9.

See M Rayner 'The right of the child to be heard and to participate in legal proceedings: Article 12 of the UN Convention on the Rights of the Child' *Paper* 1st World Congress on Family Law and Children's Rights Sydney 5–9 July 1993; C Smith 'Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103. See also *Re S (A Minor) (Independent Representation)* [1993] 3 All ER 36.

J Saunders *IP Submission 21*. See also R Gurr, President Community Services Appeals Tribunal Minutes of Meeting Sydney 9 August 1996.

Federation of Community Legal Centres (Vic) *IP Submission 129*; Defence for Children International *IP Submission 204*. See also Family Law Council *Involving and Representing Children in Family Law* Family Law Council Canberra 1996, 20–21.

Survey Question 25.

Family Law Act s 68F (2)(a). Research into systems abuse has indicated that one of the features of systems abuse is the 'lack of a voice for children': J Cashmore, R Dolby & D Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection Council Sydney 1994, 57–60.

C Sawyer 'The competence of children to participate in family proceedings' (1995) 7 *Child and Family Law Quarterly* 180, 194.

GB Melton *Child Advocacy: Psychological Issues and Interventions* Plenum New York 1983.

J Cashmore, R Dolby & D Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection Council Sydney 1994, 59.

J Cashmore & K Bussey 'Perceptions of children and lawyers in care and protection proceedings' (1994) 8 *International Journal of Law and the Family* 319, 332–333.

eg Dept for Women *IP Submission 215*; Marrickville Legal Centre *IP Submission 221*; National Children's and Youth Law Centre *IP Submission 222*; Bendigo Practitioners' Forum 31 May 1996.

National Children's and Youth Law Centre *IP Submission 222*.

L Read, Child and Adolescent Mental Health Service *IP Submission 174*.

Confidential oral submission 7 August 1997.

Geelong Rape Crisis Centre *IP Submission 151*. See also Youth Advocacy Centre *IP Submission 120*; Royal Children's Hospital Brisbane Minutes of Meeting Brisbane 29 July 1996; Adelaide Focus Group 29 April 1996; Bendigo Practitioners' Forum 31 May 1996.

Anonymous *IP Submission 180*.

Oz Child Legal Service *IP Submission 195*.

Feminist Lawyers *IP Submission 177*.

T Brown et al Monash University *IP Submission 47*. See para 15.1 for more detail on this study.

See S Castell-MacGregor 'Separate representation: A children's rights perspective' *Paper* 1st World Congress on Family Law and Children's Rights Sydney July 2–3 1993.

AD Lurie 'Representing the child-client — Kids are people too: An analysis of the role of the legal counsel to a minor' [1993] 6 *NYLS Journal of Human Rights* 205, 209.

In *Re K* (1994) FLC ¶92–461, 80, 770 the Family Court quoted *Re S (A Minor) (Independent Representation)* [1993] 3 All ER 36.

Re S (A Minor) (Independent Representation) [1993] 3 All ER 36.

F Castiglione 'Present difficulties of role conflict and accountability of the separate legal representative' *Fifth National Family Law Conference Business Law Centre Perth* 1992, 282.

(1979) FLC ¶90-645.

(1979) FLC ¶90-645, 78, 394.

E and E (1979) FLC ¶90-083, 78, 394.

SA Dept of Family & Community Services *IP Submission 110*. See also Geelong Rape Crisis Centre *IP Submission 151*. Parents Without Rights *IP Submission 32* also discussed this issue.

See para 13.34.

(1979) FLC ¶90-645, 78, 395.

See eg Royal Children's Hospital Brisbane Minutes of Meeting Brisbane 29 July 1996.

eg Geelong Rape Crisis Centre *DRP Submission 61*; T Brown et al Monash University *IP Submission 47*; SA Dept of Family & Community Services *IP Submission 110*; Family Services Council *IP Submission 122*; Australian Psychological Society *IP Submission 131*; Geelong Rape Crisis Centre *IP Submission 151*; SA Children's Interest Bureau *IP Submission 156*; Law Society of NSW *IP Submission 209*; Burnside *IP Submission 214*. See also Parents Without Rights *IP Submission 32*; Australian Association of Social Workers *IP Submission 207*.

Australian Psychological Society *IP Submission 131*.

Feminist Lawyers *IP Submission 177*.

SA Dept of Family & Community Services *IP Submission 110*. See also Parents Without Rights *IP Submission 32*.

F Castiglione 'Present difficulties of role conflict and accountability of the separate legal representative' *Fifth National Family Law Conference 8-12 September 1992 Business Law Education Centre Melbourne* 1992, 287.

See paras 13.44-47.

D Levine 'To assert children's rights or promote children's needs: How to attain both goals' (1996) 64 *Fordham Law Review* 2023, 2029.

AGPS Canberra 1989. See also TL Muhlhauser & DD Knowlton 'The "best interests team": Exploring the concept of a guardian *ad litem* team' [1995] 71 *North Dakota Law Review* 1021.

Family Law Council Canberra 1996.

id 31-33.

id 33.

Report 73 *For the Sake of the Kids: Complex Contact Cases and the Family Court* ALRC Canberra 1995, 51.

See para 13.116.

(1976) FLC ¶90-102.

Family Court of Australia *Annual Report 1994-95* Family Court of Australia Sydney 1995, 13.

Report to the Chief Justice of the Family Court of Australia Family Court of Australia Brisbane 1996.

Family Court of Australia *Representing the Child's Interests in the Family Court: Report to the Chief Justice of the Family Court of Australia* Family Court of Australia Brisbane 1996, 27-29.

id 31.

See eg D Levine 'To assert children's rights or promote children's needs: How to attain both goals' (1996) 64 *Fordham Law Review* 2023, 2028-2029.

See paras 13.24-25, 13.29.

Feminist Lawyers *IP Submission 177*.

Oz Child Legal Service *IP Submission 195*. See also AFPDRP *Submission 66*; Child Health Council of SA *IP Submission 146*; Defence for Children International *IP Submission 204*; E Travers, Future Echoes *Public Hearing Submission* Adelaide 1 May 1996; R Gurr, President Community Services Appeal Tribunal Minutes of Meeting Sydney 9 August 1996; Bendigo Practitioners' Forum 31 May 1996; Melbourne Practitioners' Forum 28 May 1996.

Law Council of Australia *DRP Submission 84*.

Qld Law Society *IP Submission 190*. A similar argument could be made in relation to the care and protection jurisdiction.

LE Shear 'Children's lawyers in California Family Law Courts: Balancing competing policies and values regarding questions of ethics' (1996) 34 *Family and Conciliation Courts Review* 275.

id 267.

J Cashmore 'Making legal processes work for children' (1997) 71 *Reform* forthcoming.

AM Levy 'Many facets of child custody consultation' quoted in E Lecco 'Independent legal representation for children in custody and access cases: A case commentary of Stobridge' (1996) 34 *Family and Conciliation Courts Review* 303, 313.

Case no 86 J 3561 (Circuit Ct Cook County, Juvenile Division).

LE Shear 'Children's lawyers in California Family Law Courts: Balancing competing policies and values regarding questions of ethics' (1996) 34 *Family and Conciliation Courts Review* 275, 294.

American Bar Association *Standards of Practice of Lawyers Who Represent Children in Abuse and Neglect Cases* 5 February 1996, B-3.

See the discussion from para 13.49.

BA Green & B Dohrn 'Foreword: Children and the ethical practice of law' (1996) 64 *Fordham Law Review* 1281, 1287.

The scope and functions of the child's representative have been considered by the Family Court: see paras 13.33-41. See also Law Society of NSW *Family Law Advisory Code of Practice* which was intended to be of material assistance but not to override any prevailing principles of law or system of case management: Law Society of NSW Sydney 1993, 1. This does not deal with standards for children's representatives specifically.

IP Submission 129.

This is discussed in more detail at para 13.127.

(1996) 64 *Fordham Law Review* 1301.

5 February 1996 Pt I A-1.

See paras 13.33-41.

The particular application of this duty in relation to the representation of children is discussed at paras 13.96-101.

See paras 13.49-64.

'Recommendations of the Conference on Ethical Issues in the Legal Representation of Children' (1996) 64 *Fordham Law Review* 1301.

The particular standards that apply to these cases are discussed at paras 13.93-95.

Many of these standards draw upon the American experience of the development of standards for representatives: see 'Recommendations of the Conference on Ethical Issues in the Legal Representation of Children' (1996) 64 *Fordham Law Review* 1301-1323.

G Murray 'Brisbane Youth Advocacy Centre — Providing access to justice for young people' (1997) 1 *Flinders Journal of Law Reform* 261.

'Report of the working group on the allocation of decision making' (1996) 64 *Fordham Law Review* 1325, 1333.

See Melbourne Practitioners' Forum 29 May 1996. See also Demetriou and Demetriou (1976) FLC ¶90-102; *E and E* (1979) FLC ¶90-645.

See para 13.58.

(1980) FLC ¶90–850. See also *Hutchings v Clarke* (1993) 16 Fam LR 452. If the best interests principle is taken not to apply to issues of procedure in the Family Law Act since the introduction of the *Family Law Reform Act 1995* (Cth), as has been mooted, the currency of this principle may be in doubt. This is discussed at para 16.12-13 and rec 135 is made to clarify the issue.

[1972] 19 FLR 112.

[1972] 19 FLR 112, 114.

Few submissions addressed this issue but those that did supported the proposition that privilege should lie: eg Geelong Rape Crisis Centre *IP Submission 151*.

See eg Office of the DPP NSW *Prosecution Guidelines* Sydney DPP NSW December 1995.

National Children's and Youth Law Centre *DRP Submission 59*.

ibid.

Berry Street *IP Submission 159*. See also Child Health Council of SA *IP Submission 146*; SA Children's Interest Bureau *IP Submission 156*.

See *Pagliarella and Pagliarella* (1993) FLC ¶92–400.

The Texan Family Code provides that a party may apply to have an 'attorney *ad litem*' removed where there is concern that the attorney lacks objectivity: at 107.006. It has been suggested that this provision provides fuel for obstructive parties and '...raises more questions and creates more issues than were contemplated when this provision was proposed': J Guiberteau & L Motheral 'The changing role of guardian and attorney ad litem' (1995) 58 *Texas Bar Journal* 955, 958.

There was some support for this conclusion: eg Attorney-General's Dept *IP Submission 178*.

National Children's and Youth Law Centre *DRP Submission 59*.

The Inquiry makes this recommendation with the recognition that capped legal aid funding is in any event prompting the withdrawal, in some cases, of the child representative from family law proceedings: see para 13.142.

(1994) FLC ¶92–461.

(1994) FLC ¶92–461, 80,773–775.

(1994) FLC ¶92–461, 80,776.

Guardianship Act 1968 (NZ) s 30. For a discussion of the NZ system of representation of children in family law matters, see M Cochrane 'The team approach to separate representation — the New Zealand perspective' *Family Court of Australia Second National Conference Papers* Family Court of Australia 1996, 345.

Feminist Lawyers *IP Submission 177*. See also Burnside *IP Submission 124*.

SA Dept of Family & Community Services *IP Submission 110*. cf Parents Without Rights *IP Submission 32* which suggested that the categories need to be better defined '...so that parents can understand why a separate representative needs to be appointed in the first place. Separate representatives should never be appointed, if possible.'

(1994) FLC ¶92–461, 80,775.

See para 13.114. rec 142 proposes that the timing of reports be reviewed.

See Case Management Guidelines No 1 of 1997 ch 2.

Attorney-General's Dept *IP Submission 178*; Burnside *IP Submission 214*.

Case Management Guidelines No 1 of 1997 ch 1.11(f) .

See Form 69.

Family Law Council *Involving and Representing Children in Family Law* Family Law Council Canberra 1996 rec 7.

See paras 16.35–40.

D Smith 'The right of the child to be heard — The Family Court's response' *The Competitive Edge 29th Australian Legal Convention* Law Council of Australia Canberra 1995, 293.

Family Court of Australia Chief Justice's Chambers *DRP Submission 64*.

See rec 141.

Report 73 ALRC Canberra 1995, 49–51.

Family Court of Australia Brisbane 1996, 60.

See paras 17.75–86, recs 178–180.

In which case, rec 72 applies.

See rec 70.

Australian Psychological Society *IP Submission 131*. See also M Rayner 'The right of the child to be heard and to participate in legal proceedings: Article 12 of the UN Convention on the Rights of the Child' *Paper 1st World Congress on Family Law and Children's Rights* Sydney 5–9 July 1993.

eg National Children's and Youth Law Centre *IP Submission 12*; T Brown et al Monash University *IP Submission 47*; B Burt *IP Submission 92*; SA Dept of Family and Community Services *IP Submission 110*; J Benfer et al *IP Submission 119*; Council of Single Mothers and Their Children *IP Submission 124*; Child Health Council of SA *IP Submission 146*; SA Children's Interests Bureau *IP Submission 156*; Berry Street *IP Submission 159*; Australian Association of Social Workers *IP Submission 207*.

IP Submission 12.

eg Berry Street *IP Submission 159*; Alice Springs Focus Group 19 July 1996.

Australian Association of Social Workers *IP Submission 207*.

IP Submission 110. See also SA Children's Interest Bureau *IP Submission 156*.

Council of Single Mothers and Their Children *IP Submission 124*; Brisbane Practitioners' Forum 29 July 1996.

National Children's and Youth Law Centre *DRP Submission 59*.

Family Law Section Law Council of Australia, National Legal Aid & College of Law *A Child's Voice: National Training Program for the Separate Representatives of Children Appointed Under the Family Law Act in the Family Court of Australia* Family Law Section Law Council of Australia, National Legal Aid & College of Law Canberra 1996.

T Brown et al Monash University *IP Submission 47*.

Course materials Bachelor of Laws Litigation Course Flinders University 1996 Handouts 5, 6. See also Action for Children SA *IP Submission 189*.

G Quinlivan, Qld Legal Aid Minutes of Meeting Brisbane 30 July 1996.

D Sandor *DRP Submission 30*.

National Children's and Youth Law Centre *DRP Submission 59*.

See para 13.138.

National Children's and Youth Law Centre *IP Submission 12*.

ibid. Four specialist positions were funded under *The Justice Statement* Attorney-General's Dept Canberra 1995, 113.

NSW Youth Justice Coalition *IP Submission 4*.

ibid.

See table 2.17.

Legal Aid and Family Services, Attorney-General's Dept *DRP Submission 83*.

1544 ibid.
 1545 (1996) FLC ¶92-675, 83,083.
 1546 *In the Matter of an Application by the Children of L* (unreported) Family Court of Australia 30 January 1997 per Mushin J. See TJ Mulvaney & Co *DRP Submission 25*.
 1547 *DRP Submission 83*.
 1548 *Inquiry Into Children's Advocacy Report* 10 NSW Government Sydney 1996, 100.
 1549 Family Court of Australia *Annual Report 1994-95* Family Court of Australia 1995, 13. This suggestion received support in submissions: Townsville Community Legal Service *DRP Submission 46*; National Children's and Youth Law Centre *DRP Submission 59*.
 1550 *DRP Submission 83*.
 1551 (1996) FLC ¶92-675, 83,035.
 1552 National Legal Aid *DRP Submission 58*.
 1553 *Involving and Representing Children in Family Law* Family Law Council Canberra 1996, 46.
 1554 *Commonwealth Guidelines: Legal Assistance in Respect of Matters Arising under Commonwealth Laws* Sch 3 Guideline 1.3 August 1997.
 1555 *Guardianship Act 1968* (NZ) s 30(7).
 1556 Family Law Council *Involving and Representing Children in Family Law* Family Law Council Canberra 1996, 47-8.
 1557 Report 75 ALRC Sydney 1995, 81.
 1558 M Cochrane 'The team approach to separate representation — the New Zealand perspective' *Family Court of Australia Second National Conference Papers* Family Court of Australia Sydney 1996, 351.
 1559 National Legal Aid *DRP Submission 58*.
 1560 Chief Justice's Chambers *DRP Submission 64*.
 1561 *In the Matter of an Application by the Children of L* (unreported) Family Court of Australia 30 January 1997, 4 per Mushin J. This case is also discussed at para 13.137.
 1562 TJ Mulvaney & Co *DRP Submission 25*. See also Family Law Reform and Assistance Association *DRP Submission 48*.
 1563 Chief Justice's Chambers *DRP Submission 64*. This matter is taken up at paras 16.58-60 and rec 152 made.
 1564 NSW Child Protection Council *Position Paper on the Use of Closed Circuit Television for Child Witnesses* NSW Child Protection Council Sydney 1994, 1. See also para 4.10.
 1565 See para 14.6.
 1566 See para 14.10.
 1567 See para 14.13.
 1568 See para 14.12.
 1569 Children may also give evidence in criminal proceedings on their own behalf when they are the accused.
 1570 See paras 4.6, 4.13. See also paras 9.91-92 for a discussion of the proposed Administrative Review Tribunal which is to replace the various tribunals mentioned.
 1571 J Turner, President Oz Child *Public Hearing Submission* Melbourne 29 May 1996; Tranby College Focus Group 10 June 1997; L Gunawan *IP Submission 135*; Anonymous *IP Submission 180*.
 1572 arts 3, 12.
 1573 art 39. The term 'all appropriate measures' should include all legal measures necessary to promote physical and psychological recovery of child victims while the child is giving evidence. This view is supported by the considerations of the 1988 Working Group that the original wording of the article 'all appropriate legal, administrative and other measures' was superfluous since the term 'all measures' sufficed to cover any of the measures that could be taken: S Deitrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* Martinus Nijhoff Dordrecht 1992, 455.
 1574 art 19.
 1575 I Coleman 'Children and the Law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996.
 1576 See ch 16 for a discussion of the ways in which children participate in family law proceedings other than by giving evidence.
 1577 Letter from S Chetty, Principal Member RRT and accompanying unpublished reports prepared for the Inquiry 5 May 1997.
 1578 Questionnaires completed at the request of the Inquiry.
 1579 Letter from G Hall, Operations Manager SSAT 30 December 1996.
 1580 ibid.
 1581 In 1995-96, there were 103 applications lodged with the SSAT for review of decisions concerning YTA, 67 of which were finalised. There were also 1 418 applications regarding Austudy (although it is possible that some of these applications were lodged by parents): Letter from G Hall, Operations Manager SSAT and accompanying reports prepared for the Inquiry 2 October 1996.
 1582 Letter from J Matthews, President AAT 9 September 1996.
 1583 End Child Prostitution in Asian Tourism *DRP Submission 67*.
 1584 s 4.
 1585 As defined in the Act's dictionary.
 1586 *Social Security Act 1991* (Cth) s 1270; *Administrative Appeals Tribunal Act 1975* (Cth) s 33; *Migration Act 1958* (Cth) ss 353, 420.
 1587 R Wearing *Monitoring the Impact of the Crimes (Family Violence) Act 1987* La Trobe University Melbourne 1992, 257, 361.
 1588 A Scottish study of children aged between 11 and 15 showed that 33% had seen a car broken into during the last nine months, 24% had witnessed a housebreaking and 64% had seen someone injured in a fight: R Kinsey & I Loader 'Myth of the mindless hooligan' *Scotland on Sunday* 14 January 1990. A NZ study of 259 children aged 11 to 13 showed that 51% had seen adults fight with one another, 26% had seen other children being punched, kicked, beaten or hit by an adult, and 20% had seen someone hurt or threatened by a weapon: G Maxwell & J Carrol-Lind 'Children's experiences as witnesses of violence' (1997) 22 *Children* 12.
 1589 Vic DPP *Annual Report of Operations: Office of Public Prosecutions 1995-96* Vic DPP Melbourne 1996, 49.
 1590 Letter from S Trembath, Youth Justice Manager Qld Dept of Families, Youth and Community Care 21 March 1997.
 1591 Letter from Acting Principal Registrar WA Supreme Court 15 November 1996. Note that under the *Evidence Act 1906* (WA) there is a presumption that all 'affected child' witnesses (essentially those who are victims of alleged crime and who are under 16) in certain criminal proceedings will give evidence via CCTV or use a screen unless the judge finds, after application by the prosecutor, that the child is able and willing to give evidence in the presence of the defendant: ss 106N, 106O. See also paras 14.46, 14.103 for a fuller discussion of these sections of the Act.
 1592 S Bellett *Agency Referrals to Child Victim Witness Service* unpublished document prepared for the Inquiry on 25 August 1997.
 1593 Letter from Registrar Supreme Court Office Law Courts of the ACT 8 August 1996.
 1594 ibid.
 1595 Letter from Registrar Supreme Court of NT 3 March 1997.
 1596 ibid.
 1597 SA Office of Crime Statistics *Crime and Justice in South Australia 1994* SA Attorney-General's Dept Adelaide 1995 table 4.3.

ibid.

Derived from Tas Dept of Justice *Annual Report 1995–96* Tas Dept of Justice Hobart 1996, 39.

Judicial Commission of NSW *Child Sexual Assault* Judicial Commission of NSW Sydney 1997, 11.

Letter from Principal Legal Officer WA Dept of Family and Children's Services 7 April 1997.

Letter from Director of Youth and Family Services Tas Dept of Community and Health Services 15 May 1997.

ibid.

Letter from M Brooks, Deputy Prothonotary Supreme Court of Vic 13 February 1997; Letter from M Reischbieth, Registrar Supreme Court of NT 3 March 1997; Letter from A Towill, Registrar ACT Supreme Court 8 August 1996; Letter from K Toogood, Registrar Qld Supreme Court at Brisbane 24 January 1997. Children's involvement in civil proceedings as litigants is discussed at paras 13.6–21.

See table 2.26.

eg a case was described to the Inquiry in which a 14 year old girl gave evidence before a tribunal in proceedings to revoke a doctor's licence to practise medicine, under circumstances similar to those in a criminal trial: NSW Health Care Complaints Commission *IP Submission 182*. s 4.

Evidence Act 1995 (NSW).

J Heydon *Evidence: Cases and Materials* 2nd ed Butterworths London 1984, 84.

R v Brasier (1779) 1 Leach 199. This view was adopted by the High Court in *Cheers v Porter* (1931) 46 CLR 52 and has been followed in *R v Brown* (1977) Qd R 220 (CCA) and *R v Schlaefer* (1992) 57 SASR 423 (CCA).

R v Braiser (1779) 1 Leach 199; *Omychund v Barker* (1744) 1 Atk 21.

M Aronson & J Hunter *Litigation: Evidence and Procedure* 5th ed Butterworths Sydney 1995, 740.

DPP v Hester (1973) AC 296; *DPP v Kilbourne* (1973) AC 729; *R v Schlaefer* (1992) 61 A Crim R 1.

D Byrne & J Heydon *Cross on Evidence* Aust ed Butterworths Sydney 1996, para 15 140.

M Aronson & J Hunter *Litigation: Evidence and Procedure* 5th ed Butterworths Sydney 1995, 740, 744.

JR Spencer 'The English legal system' in K Murray & DA Gough (eds) *Intervening in Child Sexual Abuse* Scottish Academic Press Edinburgh 1991, 89.

JR Spencer & R Flin *The Evidence of Children: The Law and the Psychology* Blackstone Press London 1990, 238.

ibid.

ibid.

S Ceci & M Bruck 'Suggestibility of the child witness: A historical review and synthesis' (1993) 113 *Psychological Bulletin* 403, 434.

D Poole & L White 'Tell me again and again: Stability and change in the repeated testimonies of children and adults' in M Zaragoza et al (eds) *Memory and Testimony in the Child Witness* Sage Publications Thousand Oaks 1995, 24; JR Spencer & R Flin *The Evidence of Children: The Law and the Psychology* Blackstone Press London 1990, 249–251.

D Poole & L White 'Tell me again and again: Stability and change in the repeated testimonies of children and adults' in M Zaragoza et al (eds) *Memory and Testimony in the Child Witness* Sage Publications Thousand Oaks 1995, 30–31. See also C Brainerd & P Ornstein 'Children's testimony: the developmental backdrop' in J Doris (ed) *The Suggestibility of Children's Recollections* American Psychological Association Washington 1990.

S Ceci & M Bruck 'Suggestibility of the child witness: A historical review and synthesis' (1993) 113 *Psychological Bulletin* 403, 434. See also G Davies et al 'Close encounters of the witness kind: Children's memory for a simulated health inspection' (1989) 80 *British Journal of Psychology* 415; J Bringham et al 'Accuracy of children's eyewitness identifications in a field setting' (1986) 7 *Basic and Applied Social Psychology* 295. The rate of error appears to be directly related to the complexity of the questions posed: G Goodman et al 'Child sexual and physical abuse: Children's testimony' in S Ceci et al (eds) *Children's Eyewitness Memory* Springer-Verlag New York 1987, 1; MA King & JC Yuille 'Suggestibility and the child witness' in S Ceci et al (eds) *Children's Eyewitness Memory* Springer-Verlag New York 1987, 24.

WS Cassel & DF Bjorklund 'Age differences and suggestibility of eye witnesses' *Paper* Children's Memory for Real World Events: Implications for Testimony Symposium conducted at annual meeting of the Conference on Human Development April 1992.

G Goodman et al 'Children's concerns & memory: Issues of ecological validity in the study of children's eyewitness testimony' in R Fivush & J Hudson (eds) *Knowing and Remembering in Young Children* Cambridge University Press Cambridge 1990, 249; G Davies et al 'Close encounters of the witness kind: Children's memory for a simulated health inspection' (1989) 80 *British Journal of Psychology* 415.

G Davies et al 'Close encounters of the witness kind: Children's memory for a simulated health inspection' (1989) 80 *British Journal of Psychology* 415; J Bringham et al 'Accuracy of children's eyewitness identifications in a field setting' (1986) 7 *Basic and Applied Social Psychology* 295.

S Lindsay & M Johnson 'Reality monitoring and suggestibility: Children's ability to discriminate among memories from different sources' in S Ceci et al (eds) *Children's Eyewitness Memory* Springer-Verlag New York 1987, 103–107. In these studies, however, the actions performed bore little resemblance to the typical events of a crime and, combined with the fact that children were instructed to imagine rather than using spontaneous imagination, the applications of this research to child witnesses is limited. eg, children were asked to touch their nose or imagine touching their nose, to watch a girl touch her nose or to imagine the girl touching her nose: JR Spencer & R Flin *The Evidence of Children: The Law and the Psychology* Blackstone Press London 1990, 258.

JR Spencer & R Flin *The Evidence of Children: The Law and the Psychology* Blackstone Press London 1990, 259.

id 270.

ibid.

ibid.

K Bussey et al 'Lies and secrets: Implications for children's reporting of sexual abuse' in G Goodman & B Bottoms (eds) *Child Victims, Child Witnesses: Understanding and Improving Testimony* Guilford Publications New York 1993, 154–155.

S Ceci & M Bruck 'Suggestibility of the child witness: A historical review and synthesis' (1993) 113 *Psychological Bulletin* 403, 425–427.

K Saywitz 'Improving children's testimony: The question, the answer and the environment' in M Zaragoza et al (eds) *Memory and Testimony in the Child Witness* Sage Publications Thousand Oaks 1995, 113, 121–122.

ibid.

See also G Goodman et al 'Children's concerns & memory: Issues of ecological validity in the study of children's eyewitness testimony' in R Fivush & J Hudson (eds) *Knowing and Remembering in Young Children* Cambridge University Press Cambridge 1990, 249; G Davies et al 'Close encounters of the witness kind: Children's memory for a simulated health inspection' (1989) 80 *British Journal of Psychology* 415, 425; MA King & J Yuille 'Suggestibility and the child witness' in S Ceci et al (eds) *Children's Eyewitness Memory* Springer-Verlag New York 1987, 24.

eg I Wallace *IP Submission 85*; Barwon Adolescent Taskforce *IP Submission 188*.

Vic Police *IP Submission 45*. See also D Elder 'Investigation and prosecution of child sexual abuse' (1991) 19 *Western State University Law Review* 283.

See para 17.9-6.

eg I Wallace *IP Submission 85*; Youth Advocacy Centre *IP Submission 120*.

Draft rec 5.2.

eg SA Independent Schools Board *DRP Submission 31*; Victims Rights & Civil Rights Project *DRP Submission 33*; Kreative Kids *DRP Submission 35*; Autistic Association of NSW *DRP Submission 40*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; Qld Police Service *DRP Submission 56*; National Children's and Youth Law Centre *DRP Submission 59*; Geelong Rape Crisis Centre *DRP Submission 61*; AFP *DRP Submission 66*; NT Government *DRP Submission 71*; Federation of Community Legal Centres (Vic) *DRP Submission 72*; WA Ministry of Justice *DRP Submission 73*; NSW Government *DRP Submission 86*; Law Society of WA *DRP Submission 88*.

eg G Vimpani *IP Submission 31*; Ethnic Communities Council of Tas *IP Submission 67*; H Taylor Qld DPP *IP Submission 102*; Children's Protection Society *IP Submission 108*; L Gunwan *IP Submission 135*; Barwon Adolescent Taskforce *IP Submission 188*; Oz Child Legal Service *IP Submission 195*.

eg *Protocol between Territory Health Services and Northern Territory Police: Guidelines and Procedures for a Co-ordinated Response to Child Maltreatment in the NT Territory Health Services and NT Police Darwin 1995*; *Crimes Act 1958* (Vic) s 464 9(e). Only the ACT formally requires all child witnesses to be interviewed in the presence of an adult, usually their parent. However, where a parent is suspected of involvement in the alleged offence or of exerting undue influence over the child, or is unavailable or unwilling to be present, an independent adult is appointed. This person will not necessarily be known to the child and is usually a government social worker, school teacher or counsellor or a person from the office of the Community Advocate: ACT Attorney General *IP Submission 194*.

eg J Evans *IP Submission 59*; J Benfer, E Drew & K Shepherd *IP Submission 119*; Law Institute of Vic, Children & Youth Issues Committee *IP Submission 173*; WA Ministry of Justice *DRP Submission 73*; Kreative Kids *DRP Submission 35*; Tranby College Focus Group 10 June 1997; Hobart Focus Group 30 May 1996.

Protocol between Territory Health Services and Northern Territory Police: Guidelines and Procedures for a Co-ordinated Response to Child Maltreatment in the NT Territory Health Services and NT Police Darwin 1995.

NSW Child Protection Council 'Joint Investigation Teams update' (1997) 18 *NSW Child Protection Council News 2*.

NSW Government *DRP Submission 86*.

Wood Royal Commission *Final Report Vol IV: The Paedophile Inquiry* NSW Government Sydney 1997, 948.

Vic Auditor-General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 172.

id 173–178.

Vic Parliament Crime Prevention Committee *Combating Child Sexual Assault: An Integrated Model* Vic Government Printer Melbourne 1995, 132.

ibid.

Vic Auditor-General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 190.

A Anderson & M McMaken 'Implementing child advocacy: A rationale and a basic blueprint' (1991) 41 *Juvenile and Family Court Journal* 1, 3–5; Letter from C Wilson, Director National Children's Advocacy Centre USA 3 June 1997.

ibid.

ibid. See paras 14.53, 14.95–100 for a discussion of the benefits of counselling and witness support.

A Anderson & M McMaken 'Implementing child advocacy: A rationale and a basic blueprint' (1991) 41 *Juvenile and Family Court Journal* 1, 3–5; Letter from C Wilson, Director National Children's Advocacy Centre USA 3 June 1997.

eg Children's Protection Society *IP Submission 108*; J Benfer, E Drew & K Shepherd *IP Submission 119*; Liverpool Sexual Assault Service *IP Submission 145*; S Castell-McGregor *IP Submission 152*; AFP *DRP Submission 66*; WA Ministry of Justice *DRP Submission 73*; Federation of Community Legal Centres (Vic) *DRP Submission 72*.

eg LA Beards, *DRP Submission 6*; P Eastaugh *DRP Submission 29*; National Legal Aid *DRP Submission 58*; National Children's and Youth Law Centre *DRP Submission 59*; AFP *DRP Submission 66*.

eg Oz Child Legal Service *IP Submission 195*; Woden Valley Hospital, Child At Risk Assessment Unit *IP Submission 196*; P Eastaugh *DRP Submission 29*; AFP *DRP Submission 66*.

eg the Video and Audio Taped Evidence Project in Victoria envisions interviews of children conducted by police being taped and presented in magistrates' and children's courts as the child's evidence in chief, as well as being used in the Family Court and the Crimes Compensation Tribunal: Vic Police *IP Submission 45*. A similar program operates in Qld: Wood Royal Commission *Final Report Volume V: The Paedophile Inquiry* NSW Government Sydney 1997, 1093.

eg Confidential *IP Submission 93*; H Taylor, DPP Qld *IP Submission 102*; J Benfer, E Drew & K Shepherd *IP Submission 119*.

M Bruck & S Ceci 'My child would never say that: The accuracy of mothers' memories of conversations with their preschool children' *Paper Emmet Francoeur Montreal Children's Hospital Conference Montreal* 6 April 1997, 30–33.

H Elias & K McFarlane 'Legal and clinical issues in videotaping' in K Murray & D Gough (eds) *Intervening in Child Sexual Abuse* Scottish Academic Press Edinburgh 1991, 130.

ibid.

The British Home Office has developed guidelines for the interview and its recording: *Memorandum of Good Practice* Home Office London 1992.

A Kapardis *Psychology and Law* Cambridge University Press Cambridge 1997, 99.

eg *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) s 106H; *Evidence Amendment (Children and Special Witnesses) Act 1995* (Tas) s 122F; *Evidence Act (Amendment) Act 1988* (SA) s 6; *Evidence Act 1977* (Qld) s 93A; *Evidence Act 1958* (Vic) s 37B.

See paras 14.110–111.

H Elias & K McFarlane 'Legal and clinical issues in videotaping' in K Murray & D Gough (eds) *Intervening in Child Sexual Abuse* Scottish Academic Press Edinburgh 1991, 132.

id 132–134.

D Whitcomb 'When the victim is a child: Past hope, current reality and future promise of legal reform in the United States of America' in J Spencer et al (eds) *Children's Evidence in Legal Proceedings: An International Perspective — Papers from the International Conference on Children's Evidence Cambridge 26–28 June 1989* J Spencer Kent 1989, 144.

eg Children's Protection Society *IP Submission 108*; M Forrester *IP Submission 116*.

eg L Gunawan *IP Submission 135*; Geelong Rape Crisis Centre *IP Submission 151*; S Castell-McGregor *IP Submission 152*.

N Donkers, Geelong Rape Crisis Centre *Public Hearing Submission* Melbourne 29 May 1996.

This suggestion was made by J Cashmore *Speech* National DPP Victim Services Seminar Sydney 3 July 1997.

s 106I(1). *Evidence Act 1977* (Qld) s 21A also seems to provide for this option, although it does not seem to have been used at all.

Information on the use of this provision was provided orally by S Butler, Perth Law Courts Listings Manager 20 August 1997.

s 106K(5).

See paras 14.117–118 for a discussion of these problems. The CCTV room in the Perth Central Courts, from which all children give evidence during these pretrial hearings, is located in the same area of the courthouse as the Child Victim Witness Service, and has a separate entrance. As a result, it is possible to avoid any chance encounters between the child and the accused.

See paras 14.20, 14.52 for a discussion of the problems caused by delays.
eg Children's Protection Society *IP Submission 108*; Brisbane Practitioners' Forum 29 July 1996.
D Bereton & J Willis 'Evaluating the committal' in J Vernon (ed) *The Future of Committals: Proceedings of a Conference Held 1–2 May 1990* AIC Canberra 1991, 8.
The witnesses' answers also provide ammunition for the defence at trial, should the answers at trial differ to any extent, however trivial, from those at committal: J Johnson 'A case for abolition' in J Vernon (ed) *The Future of Committals: Proceedings of a Conference Held 1–2 May 1990* AIC Canberra 1991, 92.
D Bereton & J Willis 'Evaluating the committal' in J Vernon (ed) *The Future of Committals: Proceedings of a Conference Held 1–2 May 1990* AIC Canberra 1991, 17.
id 18.
Defence counsel may use the committal to get an advance view of a witness' answers to certain questions, find out the 'buttons' that can be pushed to a witness' detriment and determine which questions get the answers most helpful to the defence case: J Johnson 'A case for abolition' in J Vernon (ed) *The Future of Committals: Proceedings of a Conference Held 1–2 May 1990* AIC Canberra 1991, 92. A minority view of this process is that it actually 'prepares' the witness for trial: see M Weinberg 'A prosecution perspective' in J Vernon (ed) *The Future of Committals: Proceedings of a Conference Held 1–2 May 1990* AIC Canberra 1991, 141. Yet one commentator suggested that this belief is like 'suggesting that one should attend one's dentist to have a tooth extracted some months prior to the extraction proper': A Paterson 'The future of committals: The victim/witness point of view' in J Vernon (ed) *The Future of Committals: Proceedings of a Conference Held 1–2 May 1990* AIC Canberra 1991, 137.
J Johnson 'A case for abolition' in J Vernon (ed) *The Future of Committals: Proceedings of a Conference Held 1–2 May 1990* AIC Canberra 1991, 92.
ibid.
eg the *Magistrates' Court Act 1989* (Vic) provides for paper committals (in the form of hand-up briefs) and permits the calling of a witness to give oral evidence only when the defendant gives the required notice that the attendance of a witness is requested. The court, on its own motion or on application of the informant, may disallow the attendance of a witness where it is satisfied that it would be frivolous, vexatious or oppressive in all circumstances to require the witness to attend the committal proceeding: Sch 5, ss 2, 3.
eg the *Justices Act 1902* (NSW) provides for paper committals and states that although the accused may apply for the personal appearance of a witness at the committal hearing, where the alleged offence 'involves violence' and the witness is the alleged victim, the Magistrate should not direct the witness to appear unless there are special reasons why the alleged victim should attend the proceedings to give oral evidence: s 48EA.
eg *Justices Act 1921* (SA) s 106: where the witness at a committal hearing is a child, the witness' statement may be in the form of a written statement taken down by a member of the police force at an interview with the child and verified by affidavit of the police officer as an accurate record of the child's oral statements or in the form of a video-taped record of the interview accompanied by an affidavit of the police officer who was present at the interview that it is a complete record of the interview. However, where the written or video-taped statement is accepted in evidence and the defendant has notified the prosecution 7 days in advance that she or he seeks the personal attendance of the child witness or if the judicial officer is satisfied that there is good reason for excusing the failure to give notice, the witness must appear for oral examination. If the witness was the victim of alleged sexual offences, the witness need not appear unless the judicial officer is satisfied that there are special reasons for the oral examination of the alleged victim. See also *Justices Act 1902* (WA) s 69 (2a).
eg the *Magistrates' Court Act 1930* (ACT) seems to actually require the presence of child witnesses at committals, as written statements are not admissible in evidence at committals where the statement is made by a child under the age of 14: s 90AA.
eg in Qld, as a general rule witnesses are required to give evidence in person at committals, although the *Justices Act 1886* permits the admission into evidence of written statements by witnesses. These written statements are only admitted if the prosecution and defence agree to their admission: Qld Criminal Justice Commission *Evaluation of Brisbane Central Committals Project* Qld Criminal Justice Commission Brisbane 1996, 9. Children Protection Society *IP Submission 108* stated that despite the paper committal procedures in Vic, it is still common practice that most children are required to give evidence at committals.
See I Wallace *IP Submission 85*; Confidential *Public Hearing Submission* Canberra 7 May 1996; N Donkers, Geelong Rape Crisis Centre *Public Hearing Submission* Melbourne 29 May 1996; C Emmerson *Public Hearing Submission* Brisbane 31 July 1996.
Confidential *Public Hearing Submission* Melbourne 29 May 1996.
Confidential *Public Hearing Submission* Brisbane 31 July 1996.
Draft rec 5.5.
Kreative Kids *DRP Submission 35*; Autistic Association of NSW *DRP Submission 40*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; Qld Police Service *DRP Submission 56*; AFP *DRP Submission 66*; NT Government *DRP Submission 71*; Federation of Community Legal Centres (Vic) *DRP Submission 72*; WA Ministry of Justice *DRP Submission 73*; NSW Government *DRP Submission 86*.
J Cashmore *The Evidence of Children* Judicial Commission of NSW Sydney 1995, 56–57.
eg in Qld once a sexual assault matter has been committed for trial, if the offender is in custody or the victim is a child, the matter is given a number one listing in the courts in an attempt to ensure that the least possible delay is experienced by the parties. However, in practice, backlogs mean that children still wait six months before the case in which they are a witness is heard. This six month delay is above and beyond the delays already experienced as a consequence of the police investigation and the committal process: H Taylor, DPP Qld *IP Submission 102*.
J Cashmore *The Evidence of Children* Judicial Commission of NSW Sydney 1995, 57.
ibid.
See para 14.20.
See rec 94.
H Taylor, DPP Qld *IP Submission 102*.
For a discussion of the arguments against pretrial counselling see A Cossins & R Pilkinton 'Balancing the scales: The case for the inadmissibility of counselling records' (1996) 19(2) *University of NSW Law Journal* 227.
H Taylor, DPP Qld *IP Submission 102*; Children's Welfare Association of Vic *IP Submission 138*; ACT Attorney-General *IP Submission 194*.
H Taylor, DPP Qld *IP Submission 102*; Children Protection Society *IP Submission 108*; J Benfer, E Drew & K Shepherd *IP Submission 119*; S Castell-McGregor *IP Submission 152*; SA Victim Support Service *IP Submission 185*.
NSW Health Care Complaints Commission *IP Submission 182*; ACT Attorney-General *IP Submission 194*.
eg NY *Criminal Procedure Law* s 60.76 (rape crisis counsellor-client privilege). This provision provides for *in camera* review of counselling records upon the application of the accused, where the accused feels that disclosure of such records is necessary 'under the constitutions of the United States or of New York'. Even more expansive privileges are conferred in civil cases: NY *Civil Practice Law and Rules* ss 4507 (psychologist-patient privilege), 4508 (social worker-client privilege), 4510 (rape crisis counsellor-client privilege). These privileges are, however, not applicable in care and protection proceedings: NY *Family Court Act* s 1046.

Evidence Amendment (Confidential Communications) Bill 1997 (NSW). This bill has been criticised however. The discretion given to judges to allow evidence of confidential communications might provide little protection for child victim witnesses, as history shows that judges give great weight to an accused's right to adduce all relevant evidence. There is also a risk that stereotypes and myths about children, particularly where the allegations involve sexual assault, will affect the exercise of the discretion by judges and magistrates. In addition, no guarantee of confidentiality can be given to the alleged victim at the time of counselling as there is no way of predicting the circumstances in which the discretion will be exercised: A Cossins 'Contempt or confidentiality?' (1996) 21 *Alternative Law Journal* 223, 224–225.

Evidence Amendment (Confidential Communications) Bill 1997, Div 1B cl 126H.

Evidence Amendment (Confidential Communications) Bill 1997 (NSW) Div 1B cl 126K.

Law Reform Commission of WA Report 90 *Report on Professional Privilege for Confidential Communications* Law Reform Commission of WA Perth 1993, 40–41.

Under 12 years: *Evidence Act 1929* (SA) s 12; *Evidence Act 1906* (WA) s 106B. Under 14 years: *Evidence Act 1958* (Vic) s 23; *Evidence Act 1910* (Tas) s 122B. Under 18 years: *Evidence Act 1977* (Qld) s 19.

M Aronson & J Hunter *Litigation: Evidence and Procedure* 5th ed Butterworths Sydney 1995, 741. See *R v Brown* (1977) Qd R 220; *R v Schlaefer* (1992) 57 SASR 423. However, unlike in SA, in Qld the judge may look to expert evidence on the issue of a child's competence: *Evidence Act 1977* (Qld) s 9A.

R v Braiser (1779) 1 Leach 199; *Omychund v Barker* (1744) 1 Atk 21.

Evidence Amendment (Children and Special Witnesses) Act 1995 (Tas) s 122B; *Acts Amendment (Evidence of Children and Others) 1992* (WA) s 106B. See also *Attorney-General's Reference No 2 of 1993* (1994) 4 Tas R 26.

Evidence Amendment (Children and Special Witnesses) Act 1995 (Tas) s 122B; *Acts Amendment (Evidence of Children and Others) 1992* (WA) s 106B. See also *Attorney-General's Reference No 2 of 1993* (1994) 4 Tas R 26; *Re R v Mansell* (unreported) Tas Court of Criminal Appeal 1 March 1994.

s 12.

s 13(1).

s 13(3).

See K Saywitz 'Improving children's testimony: The question, the answer and the environment' in M Zaragoza et al (eds) *Memory and Testimony in the Child Witness* Sage Publications Thousand Oaks 1995, 113.

Evidence Amendment (Children and Special Witnesses) Act 1995 (Tas) s 122C; *Evidence Act 1929* (SA) s 12; *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) s 106C; *Evidence Act 1977* (Qld) s 9; *Oaths Act 1867* (NT) s 25A; *Evidence Act 1995* (NSW) s 13; *Evidence Act 1958* (Vic) s 23.

eg *Evidence Act 1958* (Vic) s 23; *Evidence Act 1929* (SA) s 12.

s 13(2).

M Aronson & J Hunter *Litigation: Evidence and Procedure* 5th ed Butterworths Sydney 1995, 742.

s 13(7).

M Aronson & J Hunter *Litigation: Evidence and Procedure* 5th ed Butterworths Sydney 1995, 742.

id 739.

ss 18, 19.

However, children do not generally give evidence in the Family Court and leave of court is required before a child may be called as a witness: see para 16.55.

s 18(6), (7).

Evidence Act s 164; *Evidence Act 1995* (NSW) s 164; *Evidence Act 1958* (Vic) s 23(2A); *Evidence Act 1939* (NT) s 9C; *Evidence Act 1977* (Qld) s 9(2), (3); *Evidence Act 1906* (WA) s 106D; *Evidence Act 1910* (Tas) s 122D. However, in SA corroborative evidence is still required for unsworn evidence from a child: *Evidence Act 1927* (SA) s 12(3). In practice, where a case involves child witnesses under the age of seven, who are considered unable to give sworn evidence, the need for corroborative evidence means that the alleged offender will not be charged or that charges will be withdrawn, and this person may then be free to seek contact with the child should he or she be a parent: SA Victim Support Service *IP Submission 185*.

See para 14.18 for a discussion of the traditional common law requirement of a warning regarding the evidence of children.

R Pattenden *The Judge, Discretion and the Criminal Trial* Clarendon Press Oxford 1982, 151.

Evidence Act 1906 (WA) s 106D; Criminal Code (Tas) s 122D; *Evidence Act 1939* (NT) s 9C.

Evidence Act 1958 (Vic) s 23(2A).

Evidence Act 1929 (SA) s 12a.

Evidence Act 1995 (Cth) s 165; *Evidence Act 1995* (NSW) s 165.

s 165(1)(c). But see *R v Vella* (unreported) NSW Court of Criminal Appeal 1 August 1997 which dismissed an appeal from a decision where no warning was given. The judge was not required to warn the jury regarding the evidence of a 10 year old complainant, even though such a warning was requested, because the evidence was not 'inherently unreliable'.

s 165(2) of each Act.

eg T Coyne *IP Submission 80*; I Wallace *IP Submission 85*.

R v Revesz (unreported) WA Court of Criminal Appeal 18 October 1996.

ibid.

eg T Coyne *IP Submission 80*; I Wallace *IP Submission 85*; M Forrester *IP Submission 116*; S Castell-McGregor *IP Submission 152*; SA Victim Support Service *IP Submission 185*.

(1987) 39 A Crim R 315.

id 322.

NSW Dept for Women *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* NSW Dept for Women Sydney 1996, 188.

In *Longman v R* (1989) 168 CLR 79 the High Court stated that, in exercising a discretion to comment on the evidence, judges should not convey a message to the jury that complainants of sexual offences are generally unreliable and untrustworthy as a class of witnesses. Rather judges should encourage the jury to make their own evaluation of the evidence of the witness 'in light of common human experience': 89 per Brennan, Dawson, Toohey JJ. Many allegations and behaviours of child victims of abuse may not fall within 'common human experience': see para 14.76. We do not suggest that this formula be followed in child abuse trials.

Oz Child Legal Service *IP Submission 195*.

See *Evidence Act* s 102.

A Kapardis *Psychology and Law* Cambridge University Press Cambridge 1997, 179.

See *R v C* (1993) 60 SASR 467.

eg *Re F (The Court)* (1996) 83 A Crim R 502 (NSW); *R v C* (1993) 70 A Crim R 378 (SA); *R v Johnson* (unreported) Vic Court of Criminal Appeal 8 Dec 1994; *R v Ingles* (unreported) Tas Court of Criminal Appeal 4 May 1994.

s 80.

It has been argued that human behaviour in general is not transparent and that expert psychological evidence should be admitted whenever it is both relevant and potentially helpful to a jury in explaining aspects of human behaviour that may not be easily understood by common sense alone: A Kapardis *Psychology and Law* Cambridge University Press Cambridge 1997, 179.

id 183.

Expert evidence on patterns of children's disclosures in abuse cases or the effects of child abuse on children's behaviour or demeanour in or out of court may meet the broad test for relevance in s 55 of the Evidence Act and therefore be admissible under s 56. It may, however, be excluded under s 135 or s 137.

eg *R v J* (1994) 75 A Crim R 522 (Vic).

s 108(3) permits only the admission of prior consistent statements to rehabilitate a witness after cross-examination reveals a prior inconsistent statement or alleges that the evidence was fabricated, reconstructed or suggested to the witness by another person.

eg where a child has a particularly flat and disconnected attitude while testifying about horribly traumatic experiences, expert evidence about the child's behaviour in court may be necessary to prevent a judge or a jury from assuming that, because the child was not distressed while testifying, the event could not have happened.

The *Evidence Act 1908* (NZ) may be an appropriate model. This legislation permits, in cases concerning child sexual assault, expert opinion on the intellectual attainment, mental capability and emotional maturity of the complainant, the general development level of children of the same age group as the complainant and whether any evidence given during the proceedings regarding the complainant's behaviour is consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

It was suggested in some submissions that expert witnesses on these issues should be 'neutral' so as to limit the number of people who interview the child witness: B Nurcombe, Director Child and Adolescent Psychiatry, Royal Brisbane Hospital *IP Submission 94*; J Benfer, E Drew & K Shepherd *IP Submission 119*; SA Victim Support Service *IP Submission 185*; Geelong Rape Crisis Centre *DRP Submission 61*. However, video-taping the initial interviews and statements of the child can counteract this problem as any expert retained by either the prosecution or the defence could view the video-tapes of interviews rather than conduct personal interviews: see paras 14.39-44.

See Evidence Act s 59(1). Under the Evidence Act s 60 hearsay evidence that is admitted for a purpose other than to prove the fact asserted in the representation, eg for showing the maker's state of mind at a particular point, is now also admitted for all purposes, including proof of the fact asserted: see ALRC Report 26 *Evidence Vol 1* AGPS Canberra 1985, 375. However, the trial judge has a discretion to limit the use of such evidence pursuant to s 136.

See ALRC Report 26 *Evidence Vol 1* AGPS Canberra 1985, 362-370.

See Evidence Act s 55. In deciding whether to allow evidence of prior complaint in through this section, the judge may exercise a discretion to exclude it if the probative value outweighs the danger that the evidence may unfairly prejudice a party, be misleading or confusing or cause or result in a waste of time: ss 135, 137. See also NSW Dept for Women *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* NSW Dept for Women Sydney 1996, 214-215.

eg Mother's Support Group *IP Submission 59*; T Coyne *IP Submission 143*; SA Victim Support Service *IP Submission 185*.

See Evidence Act s 72.

See Evidence Act s 66 (2).

Evidence of recent complaint is not admissible to prove that the acts alleged actually occurred: *R v Ugle* (1989) 167 CLR 647. As first-hand hearsay statements of a witness, made when the incident was fresh in the mind of the witness, are admissible in criminal proceedings under s 66 of the federal and NSW Evidence Acts, this exception may go further than the recent complaint doctrine, allowing the admission of evidence of recent complaint to prove the fact in issue: ALRC Report 26 *Evidence Vol 1* AGPS Canberra 1985, 383. See NSW Dept for Women *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* NSW Dept for Women Sydney 1996, 199-219 for a description of the common law recent complaint doctrine and the problems faced by sexual assault victims in its application.

Evidence Act 1977 (Qld) s 93A.

See paras 17.59-60.

See para 16.30.

(1990) 2 SCR 531. In this case, a doctor was charged with sexually assaulting a three and a half year old child during an examination. He was acquitted after the trial judge found the child, then aged four and a half, incompetent to give unsworn evidence and refused to allow evidence of the child's statements to her mother 15 minutes after the alleged incident. The Ontario Court of Appeal found that the trial judge had wrongly applied the test for sworn evidence when he found the child incompetent to give unsworn evidence and that the child's statement fell into the hearsay exception for contemporaneous and spontaneous declarations. It ordered a new trial. The doctor's appeal from that order to the Supreme Court of Canada was dismissed when the court affirmed that the trial judge had applied the wrong test for competence to give unsworn evidence. The court went on to find that the child's statement did not fall into the hearsay exception for contemporaneous statements, but rather into a new hearsay exception declared by the court.

id 546. However, the 'necessity' requirement was not limited to these circumstances,. In addition, 'reasonably reliable' was not limited to those circumstances that have traditionally been associated with reliable hearsay (ie contemporaneous and spontaneous statements) but is to be determined by taking into account the context in which the statement was made.

R v P (J) (1992) 74 CCC(3d) 276 (Quebec Court of Appeal) aff'd (1993) 1 SCR 469. The child in this case was two and a half at the time of the incident and five at the time of trial.

See *Khan v College of Physicians and Surgeons of Ontario* (1992) 9 OR(3d) 641 (Ontario Court of Appeal). This case involved the same accused and child witness as in *R v Khan* (See fn 213 above), this time in disciplinary proceedings for professional misconduct. The Disciplinary Committee of the College of Physicians and Surgeons of Ontario had admitted into evidence both the child's evidence as well as testimony by child's mother about the child's statements to her. The Committee's order that the doctor's licence to practice medicine be revoked was overturned by the Ontario Divisional Court and appeal was then taken to the Ontario Court of Appeal, which reinstated the revocation order. A more restrictive approach is taken, however, in the case of older children: see *R v Aguilar* (1992) 10 OR(3d) 266 (Ontario Court of Appeal).

We note that Evidence Act s 65 may permit the admission of hearsay statements by children in criminal trials in circumstances similar to those in *R v Khan* (see fn 213 above). However, the child must be 'unavailable' before such statements will be admissible under that section. The Act's dictionary defines a person as unavailable if the person is dead, is not competent to give evidence about a fact, cannot be found or cannot be compelled to give evidence. *Khan's* necessity test sets out a much broader set of circumstances for the admissibility of a child's statements. In addition, *Khan's* reasonable reliability test may also be broader than the high probability of reliability test in s 65(2)(c).

s 97.

s 97(1). The court has power to dispense with the notification requirement under s 100(1).

Evidence Act s 101(2). Recently a majority of the High Court determined that a more restrictive rule of admissibility should be applied at common law: *Pfennig v R* (1995) 182 CLR 461. Applying the principles set out in *Hoch v R* (1988) 165 CLR 292, the court held that similar fact and propensity evidence will be admissible if 'there is no reasonable view of the evidence consistent with the innocence of the accused' (484). McHugh J in his dissent preferred a test of admissibility that balanced the probative strength of the evidence against the degree of risk of an unfair trial if the evidence were allowed. This test is reflected in Evidence Act s 101.

(1995) 182 CLR 461.

CK Maxwell 'Tendency and coincidence evidence — Exclusionary rules, part 1' (1996) 3(8) *Crim Law News* 62, 64.
s 98.
s 98(1). The court has power to dispense with the notification requirement under s 100(1).
Evidence Act s 101(2).
Evidence Act s 98(2).
See CK Maxwell 'Tendency and coincidence evidence — Exclusionary rules, part 2' (1996) 3(10) *Crim Law News* 78.
See *Hoch v R* (1988) 165 CLR 292; *De Jesus v R* (1986) 61 ALR 1.
(1988) 165 CLR 292.
Tendency and coincidence evidence may also be necessary where the prosecution wants to demonstrate a pattern of abusive behaviour by the alleged offender towards one child victim. The intention is to show that the crime that is the subject of the proceedings did not occur in a vacuum but is part of a 'guilty passion': see *R v Beserick* (1993) NSWLR 510; *R v Harvey* (unreported) NSW Court of Criminal Appeal 3 September 1996. There is a possibility that this kind of evidence falls foul of the tendency rule, although courts seem willing to admit it: eg *Ware v R* (unreported) Qld Court of Criminal Appeal 7 March 1987; *R v Harvey* (unreported) NSW Court of Criminal Appeal 3 September 1996.
(1986) 68 ALR 1.
(1988) 165 CLR 292.
Confidential *DRP Submission 18*.
Malcolm CJ, WA Supreme Court *IP Submission 101*.
ibid.
PACT *IP Submission 154*.
Confidential Minutes of Meeting Sydney 5 November 1996.
M Forrester *IP Submission 116*; C Eastwood *IP Submission 160*.
M Forrester *IP Submission 116*; C Eastwood *IP Submission 160*; Confidential *DRP Submission 18*.
LA Beards *DRP Submission 6*.
see T Coyne *IP Submission 80*; I Wallace *IP Submission 85*.
ibid.
Kreative Kids *DRP Submission 35*.
Qld Criminal Justice Commission *Evaluation of the Brisbane Central Committals Project* Qld Criminal Justice Commission Brisbane 1996, 1.
eg D Bereton & J Willis *The Committal in Australia* ALJA Melbourne 1990; Access to Justice Advisory Committee *Access to Justice: An Action Plan* National Capital Printing Canberra 1994, 420.
eg Oz Child Legal Service *IP Submission 195*; Youth Advocacy Centre *IP Submission 120*.
Youth Advocacy Centre *IP Submission 120*.
ibid.
PACT *IP Submission 154*; SA Victim Support Service *IP Submission 185*. However, the SA Victim Support Service is not directed specifically to child witnesses.
Youth Advocacy Centre *IP Submission 120*.
S Bellett Minutes of Meeting Sydney 2 July 1997.
ibid.
Defence counsel have been known to subpoena support workers and their files for these reasons: Youth Advocacy Centre *IP Submission 120*.
S Bellett Minutes of Meeting Sydney 2 July 1997.
Most jurisdictions also prohibit someone who is a witness in the case from being another witness' court companion.
Acts Amendment (Evidence of Children and Others) Act 1992 (WA) s 106E; *Evidence Act 1977* (Qld) s 21A(2); *Evidence Act 1929* (SA) s 13(2); *Evidence Act 1939* (NT) s 21A(2); *Crimes Act 1990* (NSW) s 405CA; *Evidence Amendment (Children and Special Witnesses) Act* (Tas) s 122E; *Evidence Act 1958* (Vic) s 37C(3).
Confidential *DRP Submission 18*.
A Kapardis *Psychology and Law* Cambridge University Press Cambridge 1997, 97.
H Taylor, DPP Qld *IP Submission 102*.
eg Confidential *Public Hearing Submission* Brisbane 31 June 1996.
ALRC Report 63 *Children's Evidence: Closed Circuit TV* ALRC Sydney 1992, 24. Other proceedings that may be intimidating for child witnesses include those before such tribunals as a medical practitioners' licence review board, victim compensation tribunals, anti-discrimination or human rights tribunals etc.
Crimes Amendment (Children Evidence) Act 1996 (NSW) s405D. A personal assault is defined to include offences against the person, offences such as stalking, intimidation with intent to cause fear for personal safety, contravening an apprehended violence order, child abuse and the intent or attempt to commit these offences: s 405C.
Acts Amendment (Evidence of Children and Others) Act 1992 (WA) s 106N; *Evidence Amendment (Children and Special Witnesses) Act 1995* (Tas) s 122G; *Evidence (Closed Circuit Television) Act 1991* (ACT) s 4A.
eg *Evidence Act 1939* (NT) s 21A(2); *Evidence Act 1977* (Qld) s 21A(2); *Evidence Act 1929* (SA) s 13(9), (10).
ALRC Report 63 *Children's Evidence: Closed Circuit TV* ALRC Sydney 1992, 3.
id 4.
S Ryan *Public Hearing Submission* Parramatta 7 August 1996.
ALRC Report 63 *Children's Evidence: Closed Circuit TV* ALRC Sydney 1992, 7; ACT Attorney-General *IP Submission 194*.
WA Police Service *IP Submission 136*.
Victim's Rights & Civil Rights Project *DRP Submission 33*.
C O'Grady *Child Witnesses and Jury Trials: An Evaluation of the Use of CCTV and Removable Screens in Western Australia* WA Ministry of Justice Perth 1996, iii–iv.
ibid. In fact, a particular benefit for children who gave evidence by CCTV during this study was that they were seldom interrupted by judges and lawyers with requests to speak up or repeat answers.
Youth Advocacy Centre *IP Submission 120*.
ibid.
ibid.
Oz Child Legal Service *IP Submission 195*.
ALRC Report 63 *Children's Evidence: Closed Circuit TV* ALRC Sydney 1992.
J Cashmore 'Problems and solutions in lawyer-child communication' (1991) 15 *Criminal Law Journal* 193, 194. See also M Brennan & R Brennan *Strange Language: Child Victims Under Cross-Examination* 3rd ed Charles Sturt University Riverina 1988, 10; H Taylor, DPP Qld *IP Submission 102*; Darwin Practitioners' Forum 16 July 1996.

These problems may be compounded when questioning is conducted by an unrepresented party and that party is a person who has allegedly assaulted or harmed the child witness. Although this situation occurs rarely, shrinking legal aid budgets may mean that more parties to criminal or civil proceedings go unrepresented in the future: National Legal Aid *DRP Submission* 58.

M Brennan 'The discourse of denial: Cross-examining child victim witnesses' (1995) 23 *Journal of Pragmatics* 71, 73.

J Cashmore 'Problems and solutions in lawyer-child communication' (1991) 15 *Criminal Law Journal* 193, 194; M Brennan & R Brennan *Strange Language: Child Victims Under Cross-Examination* 3rd ed Charles Sturt University Riverina 1988, 10.

see J Cashmore 'Problems and solutions in lawyer-child communication' (1991) 15 *Criminal Law Journal* 193; M Brennan 'The discourse of denial: Cross-examining child victim witnesses' (1995) 23 *Journal of Pragmatics* 71; M Brennan & R Brennan *Strange Language: Child Victims Under Cross-Examination* 3rd ed Charles Sturt University Riverina 1988.

see J Cashmore 'Problems and solutions in lawyer-child communication' (1991) 15 *Criminal Law Journal* 193; M Brennan 'The discourse of denial: Cross-examining child victim witnesses' (1995) 23 *Journal of Pragmatics* 71; M Brennan & R Brennan *Strange Language: Child Victims Under Cross-Examination* 3rd ed Charles Sturt University Riverina 1988.

See para 14.21 for a discussion of problems of interviewing techniques and children's answers.

see E Levy *Examination of Witnesses in Criminal Cases* Thompson Professional Publishing Ontario 1991, 235. This publication is designed to be a guide for young lawyers on how to conduct the examination of witnesses. The author specifically proposes the use of these techniques when questioning child witnesses, using the child's subsequent confusion to trigger assumptions that children are unreliable, untruthful, inaccurate witnesses.

H Taylor, DPP Qld *IP Submission* 102; Royal Children's Hospital, Minutes of Meeting 29 July 1996.

M Brennan & R Brennan *Strange Language: Child Victims Under Cross-Examination* 3rd ed Charles Sturt University Riverina 1988, 3.

Confidential *Public Hearing Submission* Brisbane 31 July 1996.

eg Royal Children's Hospital Minutes of Meeting Brisbane 29 July 1996; Darwin Practitioners' Forum 16 July 1996; J Evans *IP Submission* 59.

M Brennan 'The discourse of denial: Cross-examining child victim witnesses' (1995) 23 *Journal of Pragmatics* 71, 72.

One young person who spoke to the Inquiry stated that while giving evidence he felt most unprotected from the crown prosecutor: Confidential Minutes of Meeting Sydney 5 November 1996.

eg *Acts Amendment (Evidence of Children and Others) Act* 1992(WA) s 106A.

National Legal Aid *DRP Submission* 58; National Children's and Youth Law Centre *DRP Submission* 59; Law Council of Australia *DRP Submission* 84; NSW Government *DRP Submission* 86.

The Evidence Act s 29(2) permits this upon application by the party calling the witness. There are special circumstances where a child should be permitted to give evidence in narrative format: see paras 14.125, 14.126.

J Benfer, E Drew & K Shepherd *IP Submission* 119; L Gunawan *IP Submission* 135. S Castell-McGregor *IP Submission* 152; Anonymous *IP Submission* 180; SA Victim Support Service *IP Submission* 185; J Mogridge & M Hood, Women & Children's Hospital Minutes of Meeting Adelaide 30 April 1996; T Donald, Women and Children's Hospital *Public Hearing Submission* Adelaide 1 May 1996; Royal Children's Hospital Minutes of Meeting Brisbane 29 July 1996.

Brandy v HREOC (1995) 183 CLR 245; *Dietrich v R* (1992) 177 CLR 292.

eg Evidence Act and Evidence Act 1995 (NSW) ss 26, 41; Evidence Act 1939 (NT) s 21B; Evidence Act 1977 (Qld) s 21(2); Evidence Act 1929 (SA) s 25; Evidence Act 1906 (WA) s 26; Evidence Act 1977 (Tas) s 103; Evidence Act 1958 (Vic) s 54.

eg Vic Bar Rules of Conduct r 6.1; Qld Bar Association *Queensland Barristers' Rules* r 35(c); Law Society of NSW & NSW Bar Association *Professional Conduct and Practice Rules* Advocacy r 35; Qld Law Society *Solicitor's Handbook* para 4.08; Law Society of SA *Professional Conduct Rules* r 16.3(a); Law Society of the ACT *Guide to Professional Conduct and Etiquette* para 12.8(a); Law Society of the NT *Professional Conduct Rules* r 16.9; Law Society of WA *Professional Conduct Rules* r 13.8(a). See also Law Council of Australia *National Professional Blueprint: Model Rules of Professional Conduct and Practice Proposed for Adoption in each Australian State and Territory* Law Council of Australia Canberra 1997 r 17.21(c).

Royal Children's Hospital Minutes of Meeting Brisbane 29 July 1996; Darwin Practitioners' Forum 16 July 1996; S Ryan *Public Hearing Submission* Parramatta 7 August 1996.

M Aronson & J Hunter *Litigation: Evidence and Procedure* 5th ed Butterworths Sydney 1995, 742; Ministerial Advisory Committee on Equity Matters *DRP Submission* 41.

R Pattenden *Judicial Discretion and Criminal Litigation* 2nd ed Oxford University Press Oxford 1990, 116.

A Kapardis *Psychology and Law* Cambridge University Press Cambridge 1997, 97.

eg I Wallace *IP Submission* 85.

Confidential *Public Hearing Submission* Brisbane 31 July 1996.

Victim Impact Statements have been criticised, particularly in homicide cases, as an attempt to place different values on the lives of different victims and a suggestion that such values should influence the sentence that a person receives: see J Curtin & A Dean 'Judge slams flawed victims law' *The Sydney Morning Herald* 28 May 1997.

See M Walsh 'Interactional styles in the courtroom: An example from northern Australia' in J Gibbons (ed) *Language and the Law* Longman House Essex 1994, 231.

D Eades 'A case of communicative clash: Aboriginal English and the legal system' in J Gibbons (ed) *Language and the Law* Longman House Essex 1994, 242.

id 242–244.

id 246–248.

See M Walsh 'Interactional styles in the courtroom: An example from northern Australia' in J Gibbons (ed) *Language and the Law* Longman House Essex 1994, 225.

K Laster & V Taylor *Interpreters and the Legal System* Federation Press Sydney 1994, 163.

See generally Access to Justice Advisory Committee *Access to Justice: An Action Plan* AGPS Canberra 1994; ALRC Report 57 *Multiculturalism and the Law* ALRC Sydney 1992.

eg Access to Justice Advisory Committee *Access to Justice: An Action Plan* AGPS Canberra 1994; ALRC Report 57 *Multiculturalism and the Law* ALRC Sydney 1992; Qld Criminal Justice Commission *Aboriginal Witnesses in Queensland's Criminal Courts* Qld Criminal Justice Commission Brisbane 1996.

See NSWLRC Report 80 *People with an Intellectual Disability and the Criminal Justice System* NSWLRC Sydney 1997, 253–279; Qld Advocacy *IP Submission* 104.

See NSWLRC Report 80 *People with an Intellectual Disability and the Criminal Justice System* NSWLRC Sydney 1997, 253–279.

N Walker-Perry & L Wrightsman *The Child Witness: Legal Issues and Dilemmas* Sage Publications Newbury Park 1991, 12–13.

ibid. This case did not go to trial as the defendant eventually pleaded guilty.

M Brennan *IP Submission* 219.

ibid.

See NSWLRC Report 80 *People with an Intellectual Disability and the Criminal Justice System* NSWLRC Sydney 1997, 271.

ibid.

Youth Advocacy Centre *IP Submission 120*; Oz Child Legal Service *IP Submission 195*. See also P Ambikapathy 'The use of a watching brief as a legal tool for the protection of child witnesses in the criminal justice process' in J Vernon (ed) *Children as Witnesses: Proceedings of a Conference held 3–5 May 1988* AIC Canberra 1991, 117.

See P Ambikapathy 'The use of a watching brief as a legal tool for the protection of child witnesses in the criminal justice process' in J Vernon (ed) *Children as Witnesses: Proceedings of a Conference held 3–5 May 1988* AIC Canberra 1991, 117; Confidential Minutes of Meeting Sydney 5 November 1996.

eg one young person told the Inquiry that he felt he needed his own solicitor when he gave evidence in a criminal trial, as the crown prosecutor not only did not protect him from defence counsels' hostile questioning but also engaged in similar practices himself: Confidential Minutes of Meeting 5 November 1996.

In particular, our recommendations concerning the presumption that all child witnesses will give evidence by CCTV or from behind a screen, the training of prosecutors, judges and magistrates in child development and language, and a more interventionist approach to questioning on the part of judges should have an impact on the prevalence of these problems: see recs 108–110.

See ch 16.

See ch 17.

See ch 18.

T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' *Paper Children at Risk: Now and in the Future* Australian Association of Family Lawyers and Conciliators Seminar Melbourne April 1997, 4. In this chapter, this study will be referred to as the Family Court child abuse study.

id 2.

O Jessep & R Chisholm 'Children, the Constitution and the Family Court' (1985) 8 *University of NSW Law Journal* 152, 182.

Child Welfare Practice and Legislation Review *Report: Equity and Social Justice for Children, Families and Communities* Vic Government Melbourne 1984, 329.

Re Karen and Rita (1995) 19 Fam LR 528, 556.

Constitution s 109. See PH Lane *An Introduction to the Australian Constitutions* 6th ed Law Book Company Sydney 1994, 83. There are also areas of concurrent power: see PH Lane *An Introduction to the Australian Constitutions* 6th ed Law Book Company Sydney 1994, 83.

s 51 (xxi), (xxii).

J Seymour 'The role of the Family Court of Australia in child welfare matters' (1992) 21 *Federal Law Review* 1, 8–10.

ibid. *Secretary Department of Health and Community Services v JMB and SMB* (1992) 15 Fam LR 392 (*Marion's case*) also deals with this matter in detail.

All entitled the *Jurisdiction of Courts (Cross-vesting) Act 1987* except the *Jurisdiction of Courts (Cross-vesting) Act 1993*(ACT) (the cross-vesting legislation). One of the effects of this legislation in relation to family law appears to be that the Family Court may exercise the residual *parens patriae* jurisdiction of State and Territory Supreme Courts for ex-nuptial children by assuming that jurisdiction under the cross-vesting scheme: J Seymour 'The role of the Family Court of Australia in child welfare matters' (1992) 21 *Federal Law Review* 1, 27. A current High Court challenge to this scheme is discussed at para 15.28.

s 5 of the cross-vesting legislation.

s 8 of the cross-vesting legislation.

Commonwealth Powers (Family Law — Children) Act 1986 (NSW); *Commonwealth Powers (Family Law — Children) Act 1986* (Vic); *Commonwealth Powers (Family Law — Children) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas); *Commonwealth Powers (Family Law — Children) Act 1990* (Qld). (the Commonwealth powers legislation). The Cth passed legislation in the form of the *Family Law Amendment Act 1987* (Cth).

See s 3(2) of the State and Territory Commonwealth powers legislation.

Tas and NSW have introduced the *Commonwealth Powers (Family Law) Amendment Act 1994* (Tas) and the *Commonwealth Powers (Family Law — Children) Amendment Act 1996* (NSW) respectively. That legislation adds s 3(2A) to the primary legislation which allows an order under the Family Law Act to be made while a child is under a care and protection order if the Minister of the Crown responsible for the administration of the relevant care and protection legislation or someone authorised on his or her behalf consents in writing. The Family Law Act s 69ZK(1)(b) accepts that the reference of power may be brought into force by way of proclamation pursuant to s 69ZF of the Act. See also *Children and Young Persons Act 1989* (Vic) ss 103, 114.

Attorney-General's Dept *DRP Submission 52*. See para 15.47.

Vic Dept of Human Services *Discussion Paper: Resolving Cross-jurisdictional Problems in Child Protection* Dept of Human Services Melbourne 1996.

id 10.

id 9.

id 8.

id 20.

id 19.

id 9.

This example is based on a case study discussed at Jurisdictional Responsibilities for Children — Identifying the Options Workshop Monash City Premises Melbourne 23 July 1997.

See para 17.61.

Family Law Act s 69ZK. See also s 69ZF and para 15.5. cf *Children and Young Persons Act 1989* (Vic) s 114 which allows, by consent, a Family Court order to replace a permanent care order.

See paras 15.14–17.

See eg *Re Karen and Rita* (1995) 19 Fam LR 528, 556. See also Qld Law Society *IP Submission 190*.

Law Institute of Vic Family Law Section *IP Submission 173*.

In the matter of KMF and CJMcP (unreported) Family Court of Australia Sydney 2 May 1995 per Lindenmayer, Finn & Joske JJ.

Family Law Act s 69ZK(1).

See *F and M1 & M2* (1994) FLC ¶92–493, 81,125–126.

Family Law Act s 67ZA. Officers may also report suspected ill-treatment of or psychological harm to a child: s 67ZA(3).

Family Law Act s 67Z.

A notification as defined by the Family Court may not be accepted by the relevant dept as a notification for the purposes of its legislation although this varies from jurisdiction to jurisdiction: see para 17.36 for a discussion of investigation processes.

For a discussion of the debate and recent research see M Hume 'Study of child sexual abuse allegations within the Family Court of Australia' in *Enhancing Access To Justice: Second National Conference Papers* Family Court of Australia Sydney 1996, 205–212. On the information available, it appears that allegations of child abuse made in the course of Family Court proceedings are no more likely to be fabricated and should be taken equally as seriously as all allegations on their merits. Preliminary findings of the Family Court child abuse study indicated

that false allegations as determined by the Court '...were on the low side, some 8%, a figure similar to that in child abuse notifications to child protection agencies...': T Brown et al Monash University *IP Submission* 47. See also T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' *Paper Children at Risk: Now and in the Future Australian Association of Family Lawyers and Conciliators Melbourne* 1997, 9.

A study of 1991–92 cases in the Adelaide registry found that '...the rate of unsubstantiated allegations of child abuse made within the context of Family Court proceedings is not significantly higher than the rate of unsubstantiated allegations of child sexual abuse within the normal population': M Hume 'Study of child sexual abuse allegations within the Family Court of Australia' in *Enhancing Access to Justice: Second National Conference Papers* Family Court of Australia Sydney 1996, 210. See also Education Centre Against Violence *DRP Submission* 43 which pointed out that children are more likely to lie to cover up abuse than to make false allegations. See paras 2.60–64 for statistics about abuse and neglect notifications to family services depts. In the US context see K C Faller 'Possible explanations for child sexual abuse allegations in divorce' (1991) 61 *American Journal of Orthopsychiatry* 86. This study found that false allegations accounted for between 15–25% of allegations.

T Brown et al 'Problems and solutions in the management of child abuse allegations in custody and access disputes in the Family Court of Australia' *Paper Second World Congress on Family Law and the Rights of Children and Youth San Francisco* June 1997, 13.

Australian Association of Social Workers *IP Submission* 207. See also *Kreative Kids DRP Submission* 35 which noted that this myth '...results in allegations being minimised, going unreported or not being investigated'.

T Brown et al 'Problems and solutions in the management of child abuse allegations in custody and access disputes in the Family Court of Australia' *Paper Second World Congress on Family Law and the Rights of Children and Youth San Francisco* June 1997, 5.

ibid. However, the dept may take some action in relation to the notification that does not involve court proceedings: see T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' *Paper Children at Risk: Now and in the Future Australian Association of Family Lawyers and Conciliators Melbourne* 1997, 13.

T Brown et al 'Problems and solutions in the management of child abuse allegations in custody and access disputes in the Family Court of Australia' *Paper Second World Congress on Family Law and the Rights of Children and Youth San Francisco* June 1997, 5.

T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' *Paper Children at Risk: Now and in the Future Australian Association of Family Lawyers and Conciliators Melbourne* 1997, 15. Family reports prepared by the Family Court Counselling Service were followed in 76% of cases: 15.

T Brown et al Monash University *IP Submission* 47.

T Brown et al 'Problems and solutions in the management of child abuse allegations in custody and access disputes in the Family Court of Australia' *Paper Second World Congress on Family Law and the Rights of Children and Youth San Francisco* June 1997, 6.

J Cashmore, R Dolby & D Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection Council Sydney 1994. See paras 17.6–14 for a discussion of systems abuse.

'Breaking down the borders' *Herald Sun* (first edition) 25 November 1996, 40.

See para 15.5.

Secretariat of National Aboriginal & Islander Child Care *IP Submission* 56.

See paras 17.93–94 for a discussion of the Principle.

See paras 2.63–64 for statistics on Indigenous over-representation in care and protection systems.

Law Society of NSW *IP Submission* 209. See also A Wyndam & S Parker, Woden Valley Hospital Child at Risk Assessment Unit *Public Hearing Submission* Canberra 7 May 1996. See also paras 15.32, 15.43.

North Qld Women's Legal Service *DRP Submission* 45. See paras 15.32, 15.42 for a discussion of support for the transfer of jurisdiction for dealing with care and protection matter to the Family Court.

Re Z (1997) 20 Fam LR 651, 661 per Nicholson CJ & Frederico J.

These notifications are made under Family Law Act s 67ZA and s 67Z respectively.

Family Court of Australia *Annual Report 1995–96* Family Court of Australia Sydney 1996, 72. This number increased from 396 notifications in the previous year: Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 80. There were also 87 notifications from the counselling staff of the Family Court of WA to the relevant dept in 1995–96: Family Court of Australia *Annual Report 1995–96* Family Court of Australia Sydney 1996, 72. In addition, an unknown number of notifications were passed by the Family Court to the dept from parties. The Vic family services dept received 237 notifications from the Family Court in total in the year 1994–95: Vic Government *IP Submission* 213. There were 131 notifications from counselling staff to the Vic dept in the year 1994–95: Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 72. The balance of notifications received by the dept from the court would be notifications from parties passed to the dept by the Family Court.

D Halligan, Judicial Registrar Family Court of Australia Minutes of Meeting Paramatta 1 November 1996. See also Family Court of Australia *Representing the Child's Interests in the Family Court: A Report to the Chief Justice of the Family Court of Australia* Family Court of Australia Brisbane 1996, 55.

Family Court of Australia *Outcomes Report* unpublished October 1996.

T Brown et al 'Problems and solutions in the management of child abuse allegations in custody and access disputes in the Family Court of Australia' *Paper Second World Congress on Family Law and the Rights of Children and Youth San Francisco* June 1997, 2–3. By the time of the trial, the proportion of children's cases involving an allegation of child abuse had reduced to one third as a result of settlement at the prehearing conference.

id 2.

T Brown et al Monash University *IP Submission* 47. A 1988 study of 129 US cases found that less than 2% of contested custody and visitation cases involved an allegation of child abuse: N Thoennes, J Pearson & P Tjaden *Allegations of Sexual Abuse in Custody and Visitation Disputes* Association of Family and Conciliation Courts Research Unit Washington 1988.

Vic Dept of Human Services *Discussion Paper: Resolving Cross Jurisdictional Problems in Child Protection* Dept of Human Services Melbourne 1996, 6. This is not the full extent, however, of those children who are adversely affected by the geographical limits of jurisdiction. eg a child may not have been placed with an appropriate relative because that relative was outside the jurisdiction.

Draft rec 6.1.

The High Court case *Gould v Brown (in the capacity as liquidator of Amann Aviation Pty Ltd (in liq))* is an appeal from the reported decision of *BP Australia Ltd v Amann Aviation Pty Ltd; Cortaus Ltd (in liq) v Larken Ltd and ors; Southern Steel Suppliers Pty Ltd v Favelle Favco Holdings Pty Ltd* (1996) 137 ALR 447.

BP Australia Ltd v Amann Aviation Pty Ltd; Cortaus Ltd (in liq) v Larken Ltd and ors; Southern Steel Suppliers Pty Ltd v Favelle Favco Holdings Pty Ltd (1996) 137 ALR 447, 447.

Re Chapman and Jansen (1990) 13 Fam LR 853, 866.

HA Finlay, AJ Bradbrook & RJ Bailey-Harris *Family Law: Cases, Materials and Commentary* 2nd ed Butterworths Sydney 1993, 94. See also GJ Moloney & S McMaster *Cross-vesting of Jurisdiction: A Review of the Operation of the National Scheme* AIJA Melbourne 1992, 148.

One such case was *Re Karen and Rita* (1995) 19 Fam LR 528. While the use of the cross-vesting arrangements assisted the resolution of this very difficult matter, there were protracted delays resulting from the jurisdictional difficulties and problems with information sharing and co-operation between jurisdictions.

Under s 8 of the cross-vesting legislation of the States. The Family Law Rules O 31A provide that an application must be made and filed with a supporting affidavit and that such applications can only be heard by a judge. The NSW Supreme Court Rules require that an application for transfer of proceedings under the cross-vesting legislation must be made by way of motion after an application has been filed. Except in Tas and NSW where matters can be dealt with the written consent of the Minister or his or her delegate: see paras 15.5, 15.47.

The number of matters transferred under the scheme is very small: GJ Moloney and S McMaster *Cross-vesting of Jurisdiction: A Review of the Operation of the National Scheme* AIJA Melbourne 1992, appendix 1, tables C, D, E.

AGPS Canberra 1988.

id 30ff.

GJ Moloney & S McMaster *Cross-vesting of Jurisdiction: A Review of the Operation of the National Scheme* AIJA Melbourne 1992, 120.

eg Taxi Employees' League *DRP Submission 21*; P Eastaugh *DRP Submission 29*; Kreative Kids *DRP Submission 35*; Copelen Child and Family Services *DRP Submission 37*; North Qld Women's Legal Service *DRP Submission 45*; Townsville Community Legal Service *DRP Submission 46*; AFP *DRP Submission 66*.

DRP Submission 37.

DRP Submission 79. See also MG Hains *DRP Submission 24*; Law Council of Australia *DRP Submission 84*. The Education Centre Against Violence *DRP Submission 43* noted that '[a]lthough multiple hearings can have an adverse effect on children, cross-vesting may not be the ideal way to proceed'. Some other submissions preferred a transfer of power to the Cth: see para 15.42.

Family Law Council *Child Sexual Abuse* AGPS Canberra 1988, 33.

It is possible that a prohibition may not work if a person takes action on care and protection concerns in the Family Court under the Family Court's statutory welfare jurisdiction or the cross-vested *parens patriae* jurisdictions of State and Territory courts. For a discussion of the *parens patriae* jurisdiction see J Seymour 'Parens patriae and wardship powers: Their nature and origins' (1994) 14 *Oxford Journal of Legal Studies* 159.

DRP Submission 86.

Some jurisdictions have confidentiality provisions that are interpreted narrowly and that would have implications for such a cross-vesting scheme: see eg *Re Z* (1997) 20 Fam LR 651.

See HA Finlay, AJ Bradbrook & RJ Bailey-Harris *Family Law: Cases, Materials & Commentary* 2nd ed Butterworths Sydney 1993, 87.

s 11. See P Nygh *Conflict of Laws in Australia* 6th ed Butterworths Sydney 1995, 92–96.

s 8(1).

See paras 17.59–60.

It may also be worth considering whether domestic violence legislation should be included in matters to be cross-vested in this scheme. This remains an area of difficulty for the appropriate resolution of family law matters. The differences between the approaches in State and Territory domestic violence legislation and the Family Law Act s 68K also should be explored: see North Qld Women's Legal Service *DRP Submission 45*. However the Inquiry has not considered this matter in detail as it is beyond the terms of reference.

Kreative Kids *DRP Submission 35*.

Family Law Act s 67ZA.

Family Law Act s 67Z.

Family Law Act s 60D (1).

Family Law Act s 67ZA(3).

See paras 17.37–38.

The Inquiry recommends that consistent definitions of abuse and neglect be developed and legislated in all jurisdictions under the national standards for care and protection: see rec 172.

DRP Submission 86.

This is a different situation from a court making orders other than those applied for by a dept as suggested at rec 172 because in these cases the dept would have decided some action was necessary in the case.

DRP Submission 86.

Family Law Act s 69N(2). See paras 15.61–70 for a discussion of the magistracy in family law.

Family Law Council *Child Sexual Abuse* AGPS Canberra 1988, 35.

DRP Submission 45.

DRP Submission 58.

The development of expertise requires a substantial degree of consistency in care and protection legislation. As noted in one submission, '[w]ithout overarching Federal legislation...maintenance of consistency could not be ensured': Burnside *IP Submission 214*. See also paras 17.61–64, rec 172. The scheme will also require the judiciary and magistracy to become more proactive in their adjudication of matters: see rec 173.

For a discussion of the inherent power of superior courts see J Crawford *Australian Courts of Law* 3rd ed Oxford University Press Melbourne 1993, 131.

This transfer would be available under s 51(xxxvii) of the Constitution and gives power to legislate in the area. The cross-vesting scheme merely purports to vest jurisdiction in courts to hear matters.

IP Submission 95.

Qld Law Society *IP Submission 190*.

Law Institute of Vic Family Law Section *IP Submission 173*.

Darwin Practitioners' Forum 16 July 1996.

Burnside *IP Submission 214*. See also North Qld Women's Legal Service *DRP Submission 45*; SA Children's Interest Bureau Board *DRP Submission 79*; Canberra Practitioners' Forum 6 May 1996; Newcastle Practitioners' Forum 13 May 1996; Bendigo Practitioners' Forum 31 May 1996; Perth Practitioners' Forum 3 July 1996.

eg Children's Court Melbourne *IP Submission 51*.

eg Darwin Community Legal Centre *Public Hearing Submission* Darwin 17 July 1996; Perth Practitioners' Forum 3 July 1996; Qld Legal Aid Minutes of Meeting Brisbane 30 July 1996.

eg Children's Court Melbourne *IP Submission 51*. rec 132 is intended to address this issue.

Confidential *IP Submission 93*. See also MG Hains *DRP Submission 24*; Perth Practitioners' Forum 3 July 1996.

See RD Lumb & GA Moens *The Constitution of the Commonwealth of Australia* 5th ed Butterworths Sydney 1995, 281–284.

See para 15.28.

Commonwealth Powers (Family Law) Amendment Act 1994 (Tas); *Commonwealth Powers (Family Law — Children) Amendment Act 1996* (NSW).

2006 In the event of the failure of the cross-vesting scheme this arrangement could be extended to allow the Family Court to hear matters under State and Territory care and protection legislation. This proposal would survive any failure of the cross-vesting scheme because it represents a limited reference of legislative power to the Cth under s 51(xxxvii) of the Constitution. It does not merely allow the Family Court to exercise State jurisdiction.

2007 National Legal Aid *DRP Submission 58*.

2008 This allows courts of summary jurisdiction to exercise federal family law jurisdiction. Courts of summary jurisdiction cannot exercise jurisdiction in relation to parenting orders without the consent of the parties, however, and may not exercise jurisdiction under Family Law Act s 60G. Courts of summary jurisdiction have been described as those courts that '...have exclusive power to hear and determine complaints of simple offences — that is, statutory offences which are expressed to be triable summarily or which are not expressed to be triable on indictment': J Crawford *Australian Courts of Law* 3rd ed Oxford University Press Melbourne 1993, 94. The provision arises from the Constitution s 77 (iii) and the *Judiciary Act 1903* (Cth) s 39. See J Crawford *Australian Courts of Law* 3rd edition Oxford University Press Melbourne 1993, 38 for a discussion of the arrangement.

2009 For a discussion of the history of the arrangements concerning, and of the extent of, the *parens patriae* and welfare jurisdictions see J Seymour 'Parens patriae and wardship powers: Their nature and origins' (1994) 14 *Oxford Journal of Legal Studies* 159; J Seymour 'The role of the Family Court of Australia in child welfare matters' (1992) 21 *Federal Law Review* 1.

2010 (1994) 120 ALR 545.

2011 See also Family Law Council *Comments on the Report of the Joint Select Committee on the Operation and Interpretation of the Family Law Act* Family Law Council AGPS Canberra 1993, 33.

2012 See para 15.60.

2013 In Vic appeals on matters of fact are heard by the district court and on matters of law by the Supreme Court: *Children's and Young Persons Act 1989* (Vic) ss 116, 117.

2014 Family Law Council *Child Sexual Abuse* AGPS Canberra 1988, 34.

2015 Chief Justice's Chambers *DRP Submission 64*.

2016 The Family Court may receive as evidence any evidence given, including any affidavit filed or exhibit received, in the original hearing: Family Law Act s 96(4).

2017 See rec 132.

2018 See issue 7.10.

2019 J Saunders *IP Submission 21*; Townsville Community Legal Service *IP Submission 181*; Church Network for Youth Justice *IP Submission 212*; Burnside *IP Submission 214* supported the proposal. cf Barnardos Australia *IP Submission 95*; SA Department of Family & Community Services *IP Submission 110*; Law Institute of Vic Family Law Section *IP Submission 173*; Australian Association of Social Workers *IP Submission 207*; NT Government *IP Submission 223*.

2020 D Sandor *DRP Submission 30*. See also Taxi Employees' League *DRP Submission 21*; Copelen Child and Family Services *DRP Submission 37*; North Qld Women's Legal Service *DRP Submission 45*; National Legal Aid *DRP Submission 58*. cf MG Hains *DRP Submission 24*; Kreative Kids *DRP Submission 35*; NT Government *DRP Submission 71*; Law Council of Australia *DRP Submission 84*.

2021 J Fogarty *Protective Services for Children in Victoria* Dept of Human Services and Health Melbourne 1993, 150.

2022 id 150–151.

2023 See Family Law Act s 96(4).

2024 Family Law Act s 96.

2025 Family Law Act s 96(2).

2026 Family Law Act s 96(1).

2027 See CCH Australia *Australian Family Law: Court Handbook* Sydney 2071.

2028 Family Law Act s 69J(2).

2029 rec 139 relates to Family Court counselling and dispute resolution services.

2030 *Children's Court Act 1987* (NSW); *Children's Court of Western Australia Act 1988* (WA); *Children's Court Act 1992* (Qld); *Children and Young Persons Act 1989* (Vic); *Child Welfare Act 1960* (Tas); *Youth Court Act 1993* (SA).

2031 North Qld Women's Legal Service *DRP Submission 45*.

2032 Darwin Practitioners' Forum 16 July 1996. See also eg National Legal Aid *DRP Submission 58*; Copelen Child and Family Services *DRP Submission 37*.

2033 Federation of Community Legal Centres (Vic) *IP Submission 129*.

2034 Australian Association of Social Workers *IP Submission 207*.

2035 eg J Saunders *IP Submission 21*; H Wingate *IP Submission 28*; Catholic Education Office *IP Submission 38*; Association of Heads of Independent Schools *IP Submission 55*; Children's Protection Society *IP Submission 108*; Youth Advocacy Centre *IP Submission 120*; Fitzroy Legal Service *IP Submission 126*; Federation of Community Legal Centres (Vic) *IP Submission 129*; Law Institute of Vic Family Law Section *IP Submission 173*; Townsville Community Legal Service *IP Submission 181* & *DRP Submission 46*; Barwon Adolescent Taskforce *IP Submission 188*; Qld Law Society *IP Submission 190*; Church Network for Youth Justice *IP Submission 212*; Kreative Kids *DRP Submission 35*; North Qld Women's Legal Service *DRP Submission 45*; Melbourne Practitioners' Forum 28 May 1996; Canberra Practitioners' Forum 6 May 1996; Wagga Wagga Practitioners' Forum 9 May 1996.

2036 *DRP Submission 71*.

2037 *DRP Submission 86*.

2038 Family Law Council *Magistrates in Family Law: An Evaluation of the Exercise of Summary Jurisdiction to Improve Access to the Family Law* AGPS Canberra 1995, 2.

2039 Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 24. See also Taxi Employees' League *DRP Submission 21*; Kreative Kids *DRP Submission 35*; North Qld Women's Legal Service *DRP Submission 45*; Townsville Community Legal Service *DRP Submission 46*; Women's Legal Service *DRP Submission 68*; SA Children's Interest Bureau Board *DRP Submission 79*; Canberra Practitioners' Forum 6 May 1996. The Family Court of WA has instituted a system whereby registrars are able to sit as stipendiary magistrates under the *Stipendiary Magistrates' Act 1957* (WA): *Family Court Act (1975)* WA s 23(1). These magistrates are thereby able to exercise the federal family jurisdiction conferred on State courts of summary jurisdiction by the Family Law Act.

2040 Attorney-General's Dept *DRP Submission 52*.

2041 See paras 15.64–65.

2042 I Pike, NSW Chief Magistrate Minutes of Meeting Sydney 5 December 1996.

2043 eg SA Dept of Family and Community Services *IP Submission 110*; J Benfer, E Drew & K Shepherd *IP Submission 119*; Federation of Community Legal Centres (Vic) *IP Submission 129*; SA Children's Interest Bureau *IP Submission 156*; Berry Street *IP Submission 159*; Law Institute of Vic Family Law Section *IP Submission 173*; Townsville Community Legal Service *IP Submission 181*; Community Services Australia *IP Submission 201*; Australian Association of Social Workers *IP Submission 207*; North Qld Women's Legal Service *DRP Submission 45*; G Vimpani *Public Hearing Submission* Newcastle 14 May 1996; Melbourne Practitioners' Forum 28 May 1996; Newcastle Practitioners' Forum 13 May 1996.

Australian Psychological Society *IP Submission 131*.
Community Services Australia *IP Submission 201*.
Training is equally important for counselling, mediation and report writing staff and indeed for all court staff who are likely to have contact with children: see paras 16.24-25, recs 137-138. Issues of training for legal representatives in family law and care and protection matters are addressed at paras 13.123-132, recs 84-86.
In 1993, 48 055 children were involved in a divorce of their parents: D De Vaus & I Wolcott *Australian Family Profiles: Social and Demographic Patterns* AIFS Melbourne 1997, 32. See also paras 2.70-74.
The jurisdiction of the Family Court is discussed in ch 15. For a philosophical and policy history of the Family Court see L Star *Counsel of Perfection: The Family Court of Australia* Oxford University Press Melbourne 1996.
See paras 16.31-32.
Particularly with the introduction of the *Family Law Reform Act 1995* (Cth).
See paras 15.61-70 for a discussion of the role of magistrates in family law.
In remote areas there is no access to such assistance at all while metropolitan courts and major rural circuits may be able to access some Family Court resources.
art 3.
s 43.
Prior to 11 June 1996, the principle was known as the 'welfare principle'. It is discussed further in the context of representation at ch 13.
s 60B(1).
s 68F(2). See para 16.15.
Children's Services Act 1986 (ACT) s 5; *Children (Care and Protection) Act 1987* (NSW) s 55(a); *Children's Services Act 1965* (Qld) s 52(2); *Children's Protection Act 1993* (SA) s 4; *Community Welfare Act 1983* (NT) s 9; *Community Services Act 1970* (Vic) s 41. The proposed Tas legislation, the Children, Young People and their Families Bill (1997), also is intended to contain such a provision: cl 8(2)(a). See also Tas Government *IP Submission 210*.
JL Dolgin 'Why has the best interests standard survived?: The historic and social context' (1996) 16 *Children's Legal Rights Journal* 1, 2.
RH Mnookin 'Child custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 260.
M Rayner 'Protection and promotion of the best interests of the child' *Paper Children's Rights: The Next Step Conference* Brisbane 3-5 April 1997, 9.
See JL Dolgin 'Why has the best interests standard survived?: The historic and social context' (1996) 16 *Children's Legal Rights Journal* 1, 3.
id 6.
eg Feminist Lawyers *IP Submission 177*. However, there was some limited disagreement with the proposition: eg Parents Without Rights *IP Submission 32* suggested that '...the judiciary and the legal professions are not qualified to decide what is in the best interests of the child. We believe that only parents, with guidance from properly trained counsellors, are the best ones to make the decision as to what is in the best interests of their own children'.
This issue is discussed in more detail at paras 16.18-22, 16.27-61.
s 65E.
ie location orders (s 67L), recovery orders (s 67V), orders relating to the welfare of the child (s 67ZC(2)) and some orders relating to adoption (s 60G(2)) although the Family Court's jurisdiction is limited in this regard. Adoption remains largely a matter of State and Territory jurisdiction. The *Adoption of Children Act 1965* (NSW) has recently been the subject of review by the NSWLRC Report 81 *Review of the Adoption of Children Act 1965* (NSW) NSWLRC Sydney 1997.
These are outlined in Family Court Act s 68F(2). See also para 16.15.
Family Law Act s 68F(3). The court may also register a parenting plan, discussed in detail at paras 15.48-54, when it considers it appropriate to do so in the best interests of the child: s 63E(3). In those cases, the court may, but need not, consider the matters outlined in s 68F(2) of the Act.
Family Law Act s 64(1). The *Family Law Reform Act 1995* (Cth) replaced the term 'welfare' with the phrase 'best interests'. It was not intended to change the meaning of the requirement: see Hansard (H of R) 30 May 1991, 4455.
See R Chisholm 'Assessing the impact of the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 183.
ibid.
ibid.
ibid.
art 3.
Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353.
art 3.
See para 16.11.
Family Law Act Pt VII Div 7.
s 66J.
s 68F(2).
eg Federation of Community Legal Centres (Vic) *IP Submission 129*; SA Children's Interest Bureau *IP Submission 156*; Burnside *IP Submission 214*.
See para 16.11.
See para 15.51.
Family Law Act ss 62C, 62F.
Family Law Act Pt III Div 4.
Family Law Act Pt III Div 4 Subdiv A.
Family Law Act Pt III Div 5 Subdiv B. Arbitration is rarely used in the Family Court at present.
At least one substantive issue is settled during the voluntary stage of counselling in close to 75% of cases: Office of the Chief Executive, Family Court of Australia *Submission to the Joint Standing Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, Term of Reference (a)* Family Court of Australia Sydney 1992. See also D Smith *TR Submission 46*. However, this is not to suggest that these processes are responsible for an amicable settlement of an entire dispute: Society for the Best Interests of the Child *DRP Submission 34*.
In relation to mediation, the position seems little different from that in NZ where it has been noted that '[a]lthough most family mediators do not seek directly the views of children in the mediation process, some have advocated the limited involvement of children in mediation to ascertain their wishes and to provide a check that parents' arrangements are in accord with the children's wishes': J Pryor & F Seymour 'Making decisions about children after parental separation' (1996) 8 *Child and Family Law Quarterly* 240.
ibid. See also D Bagshaw 'Children of divorce in Britain and the United States: Current issues in relation to child custody and access' (1992) 6 *Australian Journal of Family Law* 32.

2092 F Garwood *Children in Conciliation: A Study of the Involvement of Children of the Lothian Family Conciliation Service* Scottish Association of Family Conciliation Services Edinburgh 1989. See also D Bagshaw 'Children of divorce in Britain and the United States: Current issues in relation to child custody and access' (1992) 6 *Australian Journal of Family Law* 32; Working Party Report *Giving Children a Voice in Mediation* National Family Mediation Council 1995.

2093 *IP Submission 178*.

2094 eg Disability Services Office SA *IP Submission 205*; Law Society of NSW *IP Submission 209*.

2095 *IP Submission 178*.

2096 *DRP Submission 65*.

2097 *IP Submission 207*.

2098 Relationships Australia *DRP Submission 70*.

2099 Draft rec 8.3.

2100 Attorney-General's Dept *DRP Submission 52*.

2101 See Legal Aid & Family Services, Attorney-General's Dept *Research Consultancy in Family and Child Counselling and Family and Child Mediation Terms of Reference* unpublished 1997.

2102 Attorney-General's Dept *DRP Submission 52*.

2103 *DRP Submission 70*.

2104 See D Williams 'Family Law — Future directions' *Speech* National Press Club Canberra 15 October 1996, 20ff.

2105 Attorney-General's Dept *Delivery of Primary Dispute Resolution Services in Family Law* Attorney-General's Dept Canberra 1997.

2106 Attorney-General's Dept *DRP Submission 52*.

2107 Chief Justice's Chambers Family Court of Australia *DRP Submission 64*.

2108 Chief Justice's Chambers Family Court of Australia *DRP Submission 64*. APS is the Australian Psychologists' Society. AASW is the Australian Association of Social Workers.

2109 See Attorney-General's Dept *IP Submission 178*.

2110 See ch 15 for a discussion of the Family Court's involvement in dealing with allegations of child abuse.

2111 Training for legal representatives and judicial officers in family law are addressed at recs 84-86, 134.

2112 Draft rec 8.4.

2113 See para 16.23.

2114 The Family Court supported the recommendation in principle subject to the outcome of the Attorney-General's review: Chief Justice's Chambers Family Court of Australia *DRP Submission 64*.

2115 A Banning 'Children as witnesses in the Family Court' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1991, 199.

2116 RE Emery *Renegotiating Family Relationships* Guildford Press New York 1994, 137. See also Australian Psychological Society *IP Submission 131*.

2117 See paras 16.55-57.

2118 The Family Law Act makes it clear that children should not be required to express any wishes: s 68H.

2119 See eg Defence For Children International *IP Submission 204*; Feminist Lawyers *IP Submission 177*; Family Court of Australia *Representing the Child's Interests in the Family Court of Australia: Report to the Chief Justice of the Family Court of Australia* Family Court of Australia Brisbane 1996, 62.

2120 Law Society of NSW *IP Submission 209*.

2121 I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 2.

2122 art 12(2).

2123 The Evidence Act applies to the Family Court wherever the Family Law Act is silent on evidentiary matters: Evidence Act s 8(1). Family Law Act s 100A suspends the operation of the hearsay rule in relation to proceedings under Pt VII of the Act which deals specifically with matters relating to children. The court may give whatever weight to hearsay evidence it thinks fit: s 100A(2). See ch 14 for a discussion of general rules of evidence.

2124 The principle that the best interests of the child are paramount has been determined to apply to the admissibility of evidence: *Hutchings v Clarke* (1993) 16 Fam LR 452; *Benson v Hughes* (1994) 17 Fam LR 761. See also *S and P* (1990) FLC ¶92-159. The principle has also been applied to the question of whether to exercise jurisdiction and to restrain a person from bringing proceedings: *ZP and PS* (1994) 17 Fam LR 600; *Monticelli and McTiernan* (1995) 19 Fam LR 108. The Inquiry is satisfied that the best interests principle should continue to apply where relevant in procedural matters. Rec 135 is intended to broaden the application of the principle.

2125 Representation of children is discussed in ch 13.

2126 eg Federation of Community Legal Centres (Vic) *IP Submission 129*; Oz Child Legal Service *IP Submission 195*.

2127 LL Schwartz 'Enabling children of divorce to win' (1994) 32 *Family and Conciliation Courts Review* 80.

2128 See *In the Marriage of Wood* (1976) 11 ALR 657, 661. See also *Watson ex parte Armstrong* (1976) 136 CLR 248.

2129 *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485, 498. See also *In the Marriage of Lonard* (1976) 2 Fam LR 11, 116. We do not propose to make detailed comments or recommendations about the adversarial system in children's cases in this Inquiry as the ALRC is presently reviewing the adversarial system of litigation in the Family Court.

2130 In *In the Marriage of Bartlett* (1994) 17 Fam LR 405, 413 the Full Court noted that in deciding children's cases the court has a positive obligation to make orders reflecting the paramountcy of the welfare of the child.

2131 This recommendation is particularly important in the light of the recommendations made in relation to the representation of children in the Family Court: see ch 13.

2132 See *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 363, 373-374.

2133 Family Law Rules O 30 r 5.

2134 *In the Marriage of Lonard* (1976) 2 Fam LR 11, 116.

2135 K Murray 'Consideration of the child witness in the Family Court' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1988, 192. Several appeals have dealt with the limits of the court's ability to intervene or comment on proceedings: eg *Separate Representative v JHE and GAW* (1993) FLC ¶92-376 and *Stiffle and Stiffle* (1988) FLC ¶91-977.

2136 ALRC Sydney 1997.

2137 The procedures are complemented by a case management system. Cases are assigned to a particular 'track' according to their degree of complexity. Complex cases are referred to a judge manager while more straightforward matters are referred to trial as soon as possible: Family Court Case Management Guidelines No 1 of 1997 ch 6.

2138 Family Court of Australia *Annual Report 1994-95* Family Court of Australia Sydney 1995, 3.

2139 K Derkley 'Reform or fiasco: The Family Court's new procedures may backfire, lawyers say' (1996) 70(3) *Law Institute Journal* 8, 9.

2140 Family Court of Australia *Annual Report 1994-95* Family Court of Australia Sydney 1995, 2.

2141 I Kennedy 'Simplified procedures — The new regime' 11(1) *Australian Family Lawyer* 20.

2142 This decision should be made at the first directions hearing: see rec 78.

I Kennedy 'Simplified procedures — The new regime' 11(1) *Australian Family Lawyer* 20.
Family Law Act s 62G(1), (2). See also s 55A(2).
Family Court statistics quoted in D Smith *TR Submission* 46. See also Attorney-General's Dept *IP Submission* 178.
I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 12.
ibid.
T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' *Paper* Children at Risk: Now and in the Future Australian Association of Family Lawyers and Conciliators Seminar Melbourne April 1997, 15.
T Brown et al Monash University *IP Submission* 47.
Oz Child Legal Service *IP Submission* 195.
para 8.17.
It is important to remember that a family report may not adequately discharge the obligation under CROC to provide children who desire to participate directly in proceedings with an opportunity to be heard as required by art 12(2). Some submissions to the Inquiry raised this issue: eg Youth Advocacy Centre *IP Submission* 20; Burnside *IP Submission* 214.
See eg J Benfer, E Drew & K Shepherd *IP Submission* 119; Coalition of Community Groups *DRP Submission* 10.
J Benfer, E Drew & K Shepherd *IP Submission* 119.
Draft rec 8.11.
Family Court Case Management Guidelines No 1 of 1997 para 8.11. These guidelines also provide that family reports should not be ordered at the first directions hearing except in exceptional circumstances or where child abuse has been alleged: No 1 of 1997 para 2.12.
eg Family Law Reform and Assistance Association *DRP Submission* 48; National Legal Aid *DRP Submission* 58; Australian Psychological Society *IP Submission* 131; Oz Child Legal Service *IP Submission* 195.
'...the intervention of independent evidence in the form of a Family Report at the interim stage will, in many cases, see the unsuccessful party accept the interim order and avoid an ongoing dispute. For this category of cases, early intervention would represent a better targeting of finite Court resources and more appropriately place the wishes of children before the court': Law Society of NSW *IP Submission* 209.
eg Australian Psychological Society *IP Submission* 131; Oz Child Legal Service *IP Submission* 195.
DRP Submission 64.
See Chief Justice's Chambers Family Court of Australia *DRP Submission* 64; National Legal Aid *DRP Submission* 58.
See eg SA Children's Interest Bureau *IP Submission* 156; Chief Justice's Chambers Family Court of Australia *DRP Submission* 64. See also ALRC Report 73 *For the Sake of the Kids: Complex Contact Cases and the Family Court* ALRC Sydney 1995 paras 3.34–38.
National Legal Aid *DRP Submission* 58.
See rec 70.
Family Law Rules O 30A r 3(1).
Family Law Rules O 30A r 3(2).
Family Law Act s 102B.
Chief Justice's Chambers Family Court of Australia *DRP Submission* 64.
DRP Submission 58.
Evidence to the Inquiry is that these family reports are generally useful: see para 16.36.
See para 16.24.
DRP Submission 64.
s 102B. See also Family Law Rules O 30B.
Hansard (H of R) 30 May 1991, 4455.
Family Law Act s 102A.
s 102A(1), (2). However, evidence of such examinations may be admitted if the court is satisfied that it relates to relevant matters on which the evidence already before the court is inadequate, that the court will not be able to determine the proceedings properly without the evidence and that the welfare of the child is likely to be served by the admission of the evidence: s 102A(4).
However, in particular cases the court should perhaps consider making an order that a child not be further examined or interviewed. In these circumstances, it would be possible to commence contempt proceedings against a party who violates the order.
eg Confidential oral submission 7 August 1997. See also paras 14.27–31.
s 102A (3).
Family Law Act s 102A(3)(e).
Draft rec 8.13.
DRP Submission 48.
Under Family Law Act s 102A(3)(e).
See para 16.30 for a discussion of whether the best interests principle applies to matters of procedure under the Family Law Act.
Family Law Act s 63C(1).
Family Law Act s 63C(2).
Family Law Act ss 63B, 63C(2).
Family Law Act s 63E.
Family Law Act s 63E(2)(b). The court may vary provisions in the plan only if it considers the variation required in the best interests of the child: s 63F. The court may also set aside a plan if it considers that the concurrence of a party was obtained by fraud, duress or undue influence: s 63H(1)(a).
Except where they involve a child and a third party ie other than a biological parent: Family Law Act s 63F. See also s 63G.
Family Court of Australia *Outcomes Report* unpublished October 1996. However, it may be that there are more parenting plans being registered in State or Territory magistrates courts in their exercise of family law jurisdiction. Statistics are not available on this issue.
The original recommendation upon which parenting plans were based did not envisage that they would be registered but would be '...flexible and capable of easy alteration to meet the changing needs of the child': Family Law Council *Patterns of Parenting After Separation* AGPS Canberra 1992, 42.
B Hughes *The Registration of Parenting Plans: Section 63E of the Family Law Reform Act 1995* unpublished September 1996, 4.
DRP Submission 59. See also Women's Legal Service *DRP Submission* 68.
A McNicol *DRP Submission* 39.
Attorney-General's Dept *DRP Submission* 52. This draft recommendation also received support from the Taxi Employees' League *DRP Submission* 21.
DRP Submission 58.
IP Submission 178.
DRP Submission 52.

It has been suggested to the Inquiry that where parenting plans are prepared with the assistance of a counsellor, the counsellor could consider asking to speak to the children the subject of the plan to ensure they understand the arrangement proposed: Australian Psychological Society *IP Submission 131*.

O 23 r 5(5), (6).

I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 1. In the early case of *Foley and Foley* (1978) FLC ¶90–511, 77 680 the Family Court listed factors to consider in determining whether a child should give evidence including whether the evidence is reasonably available from an alternative source and the maturity of the child.

Cooper and Cooper (1980) FLC ¶90–870, 75, 509.

Kreative Kids *DRP Submission 35*.

The Family Law Act specifically states that children may institute proceedings for parenting orders (s 65C), maintenance orders (s 66F) and any other order under the Act unless a contrary intention appears (s 69C(2)).

SA Minister for Family and Community Services *IP Submission 110*.

ibid.

DRP Submission 61.

O 23 r 5. Generally, interviews in chambers are conducted in the presence of a counsellor from the Family Court Counselling Service: J Treyvaud 'Consideration of the child witness in the Family Court — A Victorian perspective' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1988, 196.

Family Law Rules O 23 r 5(4).

J Treyvaud 'Consideration of the child witness in the Family Court — A Victorian perspective' in J Vernon (ed) *Children as Witnesses* AIC Canberra 1988, 196.

I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar 9 September 1996, 1.

However, Community Services Australia *IP Submission 201* suggested it could be a useful tool if conducted within appropriate guidelines. The SA Children's Interest Bureau *IP Submission 156* suggested that children have clear notions of the power of judges and report they want to tell the person who will make the decision.

Demetriou and Demetriou (1976) FLC ¶90–102.

DRP Submission 58. Relationships Australia *DRP Submission 70* also expressed concern that judges may not have the appropriate expertise and training to hear children's views and interpret their wishes.

National Children's and Youth Law Centre *DRP Submission 59* agreed with the proposal.

eg Aboriginal Legal Service of WA *IP Submission 75*; Oz Child Legal Service *IP Submission 195*. In this regard see particularly National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997.

A Nicholson 'Family Court initiatives with Aboriginal and Torres Strait Islander communities' (1995) 3(76) *Aboriginal Law Bulletin* 15. It is estimated that between 1883 and 1969 in NSW one in six Indigenous children were taken from their parents: ALRC Report 31 *The Recognition of Aboriginal Customary Laws* AGPS Canberra 1986, 234–235. See also National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing them Home* HREOC Sydney 1997, 36–37. This report cites studies that place the extent of removal higher than this.

See para 2.5.

Family Law Act s 68F(2)(f).

In that case the court noted that '[t]he history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are, too, unique. Evidence which makes reference to these types of experiences and struggles...addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child...': *B and R and Separate Representative* (1995) FLC ¶92–461.

A Nicholson 'Family Court initiatives with Aboriginal and Torres Strait Islander communities' (1995) 3(76) *Aboriginal Law Bulletin* 15. To this end, judicial officers and court staff have been or are to be provided with cross-cultural awareness training and a component of the child representative training course concerns representation of Indigenous children: *National Training Program for the Separate Representatives of Children Appointed under the Family Law Act in the Family Court of Australia* College of Law, Law Council of Australia & Legal Aid Commission Canberra 1996. In addition, several Aboriginal family consultants have been appointed in the NT and in North Qld: Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 7.

See eg Chief Justice's Chambers Family Court of Australia *DRP Submission 64*.

See P Grose 'An Indigenous imperative: The rationale for the recognition of Aboriginal dispute resolution mechanisms' (1995) 12(4) *Mediation Quarterly* 327.

Chief Justice's Chambers Family Court of Australia *DRP Submission 64*.

DRP Submission 58.

DRP Submission 43. See also P Eastaugh *DRP Submission 29*.

Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 9–10, 18.

Report 57 *Multiculturalism and the Law* ALRC Sydney 1992, 89. It was anticipated that the plans would outline what the service does or proposes to do to identify and overcome barriers to the use of the service.

A Fair Go For All: Report on Migrant Access and Equity AGPS Canberra 1996.

id 48.

id 88.

Chief Justice's Chambers Family Court of Australia *DRP Submission 64*.

Australian National Audit Office *Use of Justice Statement Funds and Financial Position: Family Court of Australia* Audit Report No 4 1996–97 AGPS Canberra 1996, 9.

For a fuller discussion of the exercise of federal jurisdiction by courts of summary jurisdiction, see ch 15.

Family Court of Australia *Annual Report 1994–95* Family Court of Australia Sydney 1995, 7.

Family Law Rules O 30 r 2AAA.

Family Law Rules O 30 r 2AAA(3), (4).

Chief Justice's Chambers Family Court of Australia *DRP Submission 64*.

See rec 80.

See recs 130, 132.

Mental Health Legal Centre *DRP Submission 54* suggested that '...the recommendations should [deal with] the needs and rights, including resources and supports required, by children and young people with any disabilities. The scope for addressing service and support needs in the context of family law proceedings should be explored'.

See para 16.41.

(1994) FLC ¶92-461, 80, 758. One criterion suggests that a representative be appointed '[w]here there are issues of significant medical, psychiatric or psychological illness...in relation to either party or a child' (80,774). This would ensure that many children with disabilities would be provided with a representative. There is also provision for a representative to be appointed in relation to applications in the court's welfare jurisdiction (80, 775). This is discussed later in this section.

Family Law Act s 67ZC.

Family Law Rules O 23B r 1; *Secretary, Dept of Health & Community Services v JMB & SMB* (1992) 15 Fam LR 392 (*Marion's case*); *P v P* (1994) 17 Fam LR 457.

As a result of constitutional limitations, the court can only exercise this power in relation to young women who are the children of a marriage or ex-nuptial young women resident in the Territories. However, see rec 123.

S Brady 'Invasive and irreversible: The sterilisation of intellectually disabled children' (1996) 21 *Alternative Law Journal* 160, 163.

H Carter 'Disabled girls "illegally sterilised"' *The Advertiser* 15 April 1997; M Sweet 'Court warns doctors on illegal sterilisation' *The Sydney Morning Herald* 16 April 1997. See also S Brady 'The extended jurisdiction — Potential hearing impairments in the legal process' *Paper* 29th Australian Legal Convention Law Council of Australia Brisbane 24–28 September 1995, 106.

J Ford 'The sterilisation of young women with an intellectual disability: A comparison between the Family Court of Australia and the Guardianship Board of NSW' (1996) 10(3) *Australian Journal of Family Law* 236.

P Eastaugh *DRP Submission* 29.

O 23B r 5.

See S Brady 'The extended jurisdiction — Potential hearing impairments in the legal process' *Paper* 29th Australian Legal Convention Law Council of Australia Brisbane 24–28 September 1995, 107.

Draft rec 8.23.

Education Centre Against Violence *DRP Submission* 43; the Autistic Association of NSW *DRP Submission* 40; S Brady *DRP Submission* 49.

Family Law Council *Sterilisation and Other Medical Procedures on Children* AGPS Canberra 1994, 62.

DRP Submission 58.

See eg S Brady 'Invasive and irreversible: The sterilisation of intellectually disabled children' (1996) 21 *Alternative Law Journal* 160, 162. See also S Brady *IP Submission* 153.

Brenda House *DRP Submission* 65 noted that '...caution must be exercised when considering the opinion of an intellectually disabled teenager...Their wishes may be a long way from reality'.

Family Law Rules O 23B r 7.

Autistic Association of NSW *DRP Submission* 40; Mental Health Legal Centre *DRP Submission* 54; S Brady *DRP Submission* 49.

Autistic Association of NSW *DRP Submission* 40.

S Brady *DRP Submission* 49. See also rec 123.

See eg *GWV & CMW* (unreported) Family Court of Australia 21 January 1997.

O 23B.

S Brady *DRP Submission* 49.

The Family Court has held that a child's representative should generally be appointed in matters under the court's welfare jurisdiction and particularly under the special medical procedures provisions: *Re K* (1994) ¶92-461, 80,775.

Throughout this chapter the term 'children in care' will be used to indicate those children who are in out-of home care placements as well as children whose guardianship has been transferred to the state.

See paras 4.42-50.

G Angus & L Golley *Children under Care and Protection Orders Australia 1993-94* AIHW Child Welfare Series 15 AGPS Canberra 1995, 1.

A Broadbent & R Bentley *Children on Care and Protection Orders Australia 1995-96* Child Welfare Series 18 AIHW Canberra 1997, 4. See also paras 2.65-57.

G Angus, C Dunn & H Moyle *Children Under Care and Protection Orders Australia 1994-95* AIHW Child Welfare Series 15 AGPS Canberra 1996, 6-10.

Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision 1997* Industry Commission Melbourne 1997, 547. Note that the number of children in out-of-home care on 30 June 1996 was actually greater, as the numbers provided by Qld and NT counted only those children on legal orders.

Children from economically disadvantaged families come to the notice of the care and protection system at a greater than average rate. Care should be taken in interpreting such a statistic. See M James 'Child abuse and neglect: Incidence and prevention' *Issues in Child Abuse Prevention No 1* National Child Protection Clearing House Canberra 1994. See also W O'Brien 'Effective work with vulnerable families: The experience of the Alys Key Family Care Demonstration Project 1986-89' in G Calvert, A Ford & P Parkinson (eds) *The Practice of Child Protection: Australian Approaches* Hale & Iremonger Sydney 1992.

See table 2.16, para 2.68.

Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Service Provision 1997* Industry Commission Melbourne 1997, 547. See also para 2.68.

J Cashmore, J Dolby & D Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection Council Sydney 1994, 11.

Australian Association of Social Workers *IP Submission* 207.

eg NSW: M Gliksman 'Kids: Losers in DOCS disaster' *The Sydney Morning Herald* 30 January 1997, 17; M Gliksman 'Have a heart to save a child' *The Sydney Morning Herald* 2 December 1996, 15; A Horin 'Child protection delay' *The Sydney Morning Herald* 2 December 1996, 15; A Patty 'Homeless kids behind bars' *Sun Herald* 3 November 1996, 12; M Ogg 'Children at risk, says DOCS chief' *The Sydney Morning Herald* 5 September 1996, 17; A Horin 'Foster carers escape scrutiny' *The Sydney Morning Herald* 27 August 1996, 6. eg Vic: 'Protecting our vulnerable children' *Herald Sun* 25 November 1996, 40; M Coffey 'Call for child death probe' *Herald Sun* 30 October 1996, 12; M Coffey 'Protection worker lashes out' *Herald Sun* 29 October 1996, 8. eg SA: N Williams 'Child protection system failing under pressure' *The Advertiser* 15 November 1996, 7. eg Qld: D Alford 'State probe into children under care' *Courier Mail* 28 May 1996, 10; M Ware 'Family Services "lose" boy twice in one week' *Courier Mail* 9 April 1996, 3. eg WA: 'Child deaths covered up' *The West Australian* 3 June 1996, 10; V Gould 'Care system extends abuse' *The West Australian* 23 May 1996, 42. eg ACT: A Contractor 'Urgent meeting sought on welfare of wards' *The Canberra Times* 2 April 1996, 3.

eg Family Support Services Association of NSW *IP Submission* 72; L McKeon & A Brown *IP Submission* 140; Berry Street *IP Submission* 159; Law Institute of Vic *IP Submission* 173; Australian Association of Social Workers *IP Submission* 207; Darwin Community Legal Service and Top End Women's Legal Service *IP Submission* 202; Confidential *IP Submission* 215; Marrickville Legal Centre *IP Submission* 221; National Children's and Youth Law Centre *IP Submission* 222.

See ch 15. This contact is in addition to the likelihood that some children in care will come into adverse contact with the legal system.

Australian Association of Social Workers *IP Submission* 207.

For a description of the 'not my responsibility' and the 'pillar to post' syndromes associated with these failings see J Cashmore, R Dolby & D Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection Council Sydney 1994, 28–29.

See paras 5.6–16.

Marrickville Legal Centre *IP Submission 221*.

IP Submission 211. See also Australian Association of Social Workers *IP Submission 207*. A report by the NSW Child Protection Council indicates that the care and protection system in NSW exhibited all these features to some degree: J Cashmore, R Dolby & R Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection Council Sydney 1994.

NSW Community Services Commission *IP Submission 211*.

J Cashmore & M Paxman *Longitudinal Study of Wards Leaving Care* Social Policy Research Centre & NSW Dept of Community Services Sydney 1996, ii. See also J Owen *Every Childhood Lasts a Lifetime: Personal Stories from the Frontline of Family Breakdown* AAYPIC Brisbane 1996, vii.

J Cashmore & M Paxman *Longitudinal Study of Wards Leaving Care* Social Policy Research Centre & NSW Dept of Community Services Sydney 1996, ii.

D Berridge *Paper Foster Care Workshop ACWA Conference Wollongong October 1992* quoted in J Cashmore, J Dolby & D Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection Council Sydney 1994, 103. See also House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 48–49.

J Cashmore & M Paxman *Longitudinal Study of Wards Leaving Care* Social Policy Research Centre & NSW Dept of Community Services Sydney 1996; J Cavanagh *Getting an Education in Care* Children in Residential Care Research Project Evaluation Report 1995 quoted in House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 48. See also HREOC *Our Homeless Children: Report of the National Inquiry into Homeless Children* AGPS Canberra 1989 for a national picture.

J Cavanagh *Getting an Education in Care* Children in Residential Care Research Project Evaluation Report 1995 quoted in House of Representatives Standing Committee on Employment, Education and Training *Report of the Inquiry into Truancy and Exclusion of Children and Young People from School* AGPS Canberra 1996, 48.

ibid.

HREOC *Our Homeless Children: Report of the National Inquiry into Homeless Children* AGPS Canberra 1989. See also para 4.46. Submissions to the Inquiry indicated that little appears to have changed since that report: eg see Youth Network of Tasmania *IP Submission 134*; Dept of Health and Family Services *IP Submission 179*.

NSW Community Services Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission Sydney 1996; Vic Auditor General's Office *Protecting Victoria's Children: The Role of the Department of Human Services* Vic Government Printer Melbourne 1996, 266. See also paras 4.42–50; K Carrington 'The welfare/ justice nexus' in J Mason (ed) *Child Welfare Policy* Hale & Iremonger Sydney 1993.

Of 208 respondents who were in detention, 113 answered this question. The 46 respondents who indicated they had been involved in child welfare proceedings represent 22% of all respondents in detention.

NSW Youth Justice Coalition *IP Submission 4*.

art 27(1).

art 19(1).

art 19(2). See also art 25.

art 20.

art 12.

eg Family Support Services Association of NSW *IP Submission 72*; L McKeon & A Brown *IP Submission 140*; Berry Street *IP Submission 159*; Law Institute of Vic *IP Submission 173*; Darwin Community Legal Service and Top End Women's Legal Service *IP Submission 202*; Australian Association of Social Workers *IP Submission 207*; Confidential *IP Submission 215*; National Children's and Youth Law Centre *IP Submission 222*.

eg income support, education, child care, health care and family law.

See para 2.68.

For a history of attempts to develop nationally consistent data see P Zabar & G Angus *Child Abuse and Neglect: Reporting and Investigation Procedures in Australia 1994* AIHW Child Welfare Series 8 AGPS 1995, 63–4.

Health and Community Services Ministerial Council Canberra December 1995.

Standing Committee of Community Services and Income Security Administrators *Baseline Out-of-Home Care Standards* Health and Community Services Ministerial Council Canberra December 1995, 1.

The proposal for the forum, to be called *Face to Face*, is being developed by AAYPIC.

Barnardos Australia *IP Submission 95*.

See M Rayner *The Commonwealth's Role in Preventing Child Abuse* AIFS Melbourne 1994, 67. This report has been released but not yet published.

ibid.

The ACT Attorney-General indicated a willingness to participate in consultation on uniform legislation: *IP Submission 194*.

See para 17.20.

SA Dept of Family and Community Services & Future Echoes *Commitments in Care: A Charter* SA Dept of Family and Community Services & Future Echoes Adelaide 1997, 1.

Standing Committee of Community Services and Income Security Administrators *Baseline Out-of-Home-Care Guidelines* Health and Community Services Ministerial Council Canberra December 1995.

L Voight & S Tregeagle *Effective Child Protection* Monograph 19 Barnardos Australia Sydney 1995, 5.

Primary prevention aims to stop abuse before it starts by targeting members of the community through broad based programs to raise awareness of the problem and provide support services. Secondary prevention programs are aimed at reducing the incidence of abuse and neglect by appropriately identifying families who are more likely to abuse or neglect their children and providing them with support and services to resolve their problems: see G Calvert 'Using mass media campaigns to prevent child sexual assault in New South Wales' in G Calvert, A Ford & P Parkinson (eds) *The Practice of Child Protection: Australian Approaches* Hale & Iremonger Sydney 1992.

M Rayner *The Commonwealth's Role in Preventing Child Abuse* AIFS Melbourne 1994. This report has been released but not yet published.

Draft rec 9.7.

DRP Submission 75.

J Moylan, Minister for Family Services *Media Release* 9 September 1997.

A Broadbent & R Bentley *Child Abuse and Neglect Australia 1995–96* Child Welfare Series 17 AIHW Canberra 1997, 2.

id 11.

id 2.

2326 P Zabar & G Angus *Child Abuse and Neglect: Reporting and Investigation Procedures in Australia 1994* AIHW Child Welfare Series 8
 2327 AGPS Canberra 1994, 6.

2328 Allocation of a case to the 'child at risk' category is only available in Qld, WA, Tas and the ACT. This category is used to cover those
 2329 situations where abuse or neglect cannot be substantiated but the dept has grounds to suspect that abuse or neglect may have occurred or may
 2330 be likely to occur in the future and that continued involvement is warranted. Other States and Territories may assign these cases to either the
 2331 substantiated or unsubstantiated categories: id 15–16.

2332 See para 2.60.

2333 See table 2.15.

2334 There are indications that the introduction of mandatory reporting may direct resources to investigation procedures from prevention programs
 2335 and support for families and children: P Mendes 'The historical and political context of mandatory reporting and its impact on child
 2336 protection practice in Victoria' (1996) 49 *Australian Social Work* 4. See also A Broadbent & R Bentley *Child Abuse and Neglect Australia
 2337 1995–96* Child Welfare Series 17 AIHW Canberra 1997, 28.

2338 *Children (Care and Protection) Act 1987* (NSW) s 22; *Children and Young Persons Act 1989* (Vic) s 64; *Health Act 1937* (Qld) s 76K;
 2339 *Children's Protection Act 1993* (SA) s 11; *Child Protection Act 1974* (Tas) s 8; *Community Welfare Act 1983* (NT) s 14; *Children's Service
 2340 Act 1986* (ACT) s 103(2).

2341 Disability Services Office *IP Submission* 205.

2342 L Voight & S Tregeagle *Effective Child Protection* Monograph 19 Barnardos Australia 1996, 2.

2343 eg Action for Children SA *IP Submission* 189; Disability Services Office *IP Submission* 205.

2344 See P Mendes 'The historical and political context of mandatory reporting and its impact on child protection practice in Victoria' (1996)
 2345 49(4) *Australian Social Work* 25.

2346 *ibid.*

2347 See paras 2.60, 2.65.

2348 See paras 18.45–55 for a discussion of family group conferencing in the juvenile justice context.

2349 P Marsh 'Partnership, child protection and family group conferences — The New Zealand *Children, Young Persons and Their Families Act
 2350 1989*' (1994) 6 *Journal of Child Law* 109, 110.

2351 id 110–112. The conference may also be conducted after court proceedings have begun, upon referral by the court, in order to facilitate an
 2352 agreement on an acceptable outcome.

2353 id 112–113.

2354 PA Swain 'Letting the family decide? Family Group Conferences and Pre-Hearing Conferences in Victoria's child protection system' (1996)
 2355 7 *Alternative Dispute Resolution Journal* 234.

2356 *ibid.*

2357 PA Swain *Safe in Our Hands — The Evaluation Report of the Family Decision-Making Project* Mission of St James and St John Melbourne
 2358 1993, 6.

2359 Vic Government *IP Submission* 213.

2360 *Children's Protection Act 1993* (SA) Pt 5.

2361 *Children's Protection Act 1993* (SA) Pt 5 Div 1.

2362 Pt 5 Div 1.

2363 *Children and Young Person's Act 1989* (Vic) s 82A.

2364 *Children and Young Person's Act 1989* (Vic) s 82A.

2365 *Children and Young Person's Act 1989* (Vic) s 82A(4).

2366 *Children and Young Person's Act 1989* (Vic) s 82A(5).

2367 P Lagay et al *To Seek the Best Possible Outcomes — An Evaluation of a Pilot Program of Pre-Hearing Conferences in the Family Division
 2368 of the Children's Court of Victoria* University of Melbourne School of Social Work Melbourne 1994 section 5.

2369 eg NSW Community Services Commission *IP Submission* 211; G Campbell *DRP Submission* 9; Family Support Services Association of
 2370 NSW *DRP Submission* 32; Kreative Kids *DRP Submission* 35.

2371 eg Women's Legal Service *DRP Submission* 68; NSW Government *DRP Submission* 86. In private family law disputes it has been suggested
 2372 that alternative dispute resolution is not appropriate where there is a history of violence, child abuse or sexual abuse, a fear of violence, a
 2373 serious personal pathology or where counselling or therapy might be required or the parties may reach an agreement that disadvantages an
 2374 unsuspecting third party: G Clarke & I Davies 'Mediation — When is it not an appropriate dispute resolution process' (1992) 3 *Alternative
 2375 Dispute Resolution Journal* 78. Research on mediation in private family law disputes indicates, on the other hand, that some domestic
 2376 violence victims believe that mediation represents a positive experience of empowerment and can assist in reaching a fair and reasonable
 2377 agreement: Keys Young *Research/Evaluation of Family Mediation Practice and the Issue of Violence* Legal Aid & Family Services,
 2378 Attorney-General's Dept Canberra 1996, ii–iii.

2379 PA Swain 'Letting the family decide: Family Group Conferences and Pre-Hearing Conferences in Victoria's child protection system' (1996) 7
 2380 *Alternative Dispute Resolution Journal* 233.

2381 Neither the Family Group Conference nor the pre-hearing conference schemes in Victoria require or specifically countenance the
 2382 participation of the children concerned although in both their participation is possible. In SA the child is to be invited to the family care
 2383 conference unless the convenor believes the child's presence to be contrary to his or her best interests.

2384 eg Women's Legal Service *DRP Submission* 68.

2385 Dept of Human Services (Vic) *The Evaluation of Family Groups Conferences — August 1995: Results and Discussion* Dept of Human
 2386 Services (Vic) Melbourne 1995, 18.

2387 Adelaide Focus Group 29 April 1996; Newcastle Focus Group 13 May 1996; Perth Focus Group 1 July 1996; Alice Springs Focus Group 19
 2388 July 1996. See also paras 13.55–58.

2389 Australian Association of Social Workers *IP Submission* 207.

2390 Legal representation of children in these and other legal processes involved in care and protection matters is discussed in ch 13.

2391 For a discussion of these concerns in the context of the Belgian Flemish Mediation Committee, which must attempt to reach a solution
 2392 between social workers and families before care and protection concerns about a child are brought to court, see B Luckock et al 'The Belgian
 2393 Flemish child protection system — Confidentiality, voluntarism and coercion' (1997) 9 *Child and Family Law Quarterly* 101, 106.

2394 *Children's Services Act 1986* (ACT) s 5; *Children (Care and Protection) Act 1987* (NSW) s 55(a); *Children's Services Act 1965* (Qld) s
 2395 52(2); *Children's Protection Act 1993* (SA) s 4; *Community Welfare Act 1983* (NT) s 9; *Community Services Act 1970* (Vic) s 41. The Tas
 2396 Government proposes to introduce a similar provision: *Children, Young People and their Families Bill 1997* cl 8(2)(a). See also Tas
 2397 Government *IP Submission* 210.

2398 See NSW Government *DRP Submission* 86.

2399 *ibid.*

2400 The NSW Government suggested that such research be included in the proposed evaluation: *DRP Submission* 86.

2401 G Brewer & P Swain *Where Rights are Wronged* National Children's Bureau of Australia Notting Hill 1993, 5.

2369 The Inquiry received a good deal of commentary on whether the care and protection jurisdiction is appropriately placed in State and Territory
 2370 children's courts or whether it should be integrated with the Family Court. This issue is discussed in ch 15.
 2371 eg J Benfer, E Drew & K Shepherd *IP Submission 119*; L Gunawan *IP Submission 135*; S Castell-McGregor *IP Submission 152*; J Mogridge
 2372 & M Hood, Women & Children's Hospital Minutes of Meeting Adelaide 30 April 1996; Royal Children's Hospital Minutes of Meeting
 2373 Brisbane 29 July 1996.
 2374 NSW Community Services Commission *IP Submission 211*. See paras 17.81-84 for a discussion of reviews.
 2375 See paras 13.121-122.
 2376 Moreover, there may be constitutional difficulties in transferring care and protection proceedings to an administrative decision-maker. In
 2377 *Kable v Director of Public Prosecutions for NSW* (1996) 138 ALR 577 the High Court left open the question of whether State and Territory
 2378 courts are bound by the strictures of ch III of the Constitution.
 2379 See R Hetherington et al *Protecting Children: Messages from Europe* Russel House Publishing Dorset 1997.
 2380 See eg paras 17.45-47.
 2381 eg Children (Care and Protection Act) 1987 (NSW) s 70(1); *Children and Young Person's Act 1989* (Vic) s 82(1); *Children's Protection Act*
 2382 *1993* (SA) s 45(1); *Community Welfare Act 1983* (NT) s 40.
 2383 eg *Children (Care and Protection) Act 1987* (NSW) s 70(3); *Children and Young Person's Act 1989* (Vic) s 82(1)(d); *Children's Protection*
 2384 *Act 1993* (SA) s 45(1) *Community Welfare Act 1993* (NT) s 39(2).
 2385 Darwin Community Legal Service and Top End Women's Legal Service *IP Submission 202*.
 2386 Children's Court of Vic *IP Submission 51*.
 2387 For a summary of the various non-guardianship orders available around Australia see G Angus, C Dunn & H Moyle *Children Under Care*
 2388 *and Protection Orders Australia 1994-95* AIHW Child Welfare Series 15 AGPS Canberra 1996, 34-44 .
 2389 id 34.
 2390 WA Dept of Family and Children's Services Perth 1996.
 2391 A Bainham *Children: The Modern Law* Family Law Bristol 1994, 48.
 2392 eg *Children's Services Act 1965* (Qld) s 52; *Community Welfare Act 1983* (NT) s 43(2); *Children's Services Act 1986* (ACT) s 80(2);
 2393 *Children (Care and Protection) Act 1987* (NSW) s 72(1)(c); *Children's Protection Act 1993* (SA) s 38(2).
 2394 See para 15.5.
 2395 eg *Children (Care and Protection) Act 1987* (NSW) ss 58(1A), 76(3) and *Children's Protection Act 1993* (SA) ss 23, 39 impose restrictions
 2396 on length of adjournments and the time for determination of applications; *Community Welfare Act 1983* (NT) s 44 prescribes maximum
 2397 lengths of adjournments and s 40 requires the court to endeavour '...to ensure that proceedings are not protracted'.
 2398 eg Family Support Services Association of NSW *IP Submission 72*; Barnardos Australia *IP Submission 95*; Federation of Community Legal
 2399 Centres (Vic) *IP Submission 129*; L McKeon & A Brown *IP Submission 140*; Berry Street *IP Submission 159*; Law Institute of Vic *IP*
 2400 *Submission 173*; Townsville Community Legal Service *IP Submission 181*; Australian Association of Social Workers *IP Submission 207*;
 2401 Burnside *IP Submission 214*. See J Cashmore, R Dolby & D Brennan *Systems Abuse: Problems and Solutions* NSW Child Protection
 2402 Council Sydney 1994, 94.
 2403 G Humphries *IP Submission 194*.
 2404 See ALRC IP 20 *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System* ALRC Sydney 1996 ch 6 for
 2405 a discussion of case management.
 2406 *Uniform Rules for the Family Court 22* New York Court Rules and Regulations s 205.3.
 2407 *Uniform Rules for the Family Court 22* New York Court Rules and Regulations s 205.3.
 2408 A Bainham *Children: The Modern Law* Family Law Bristol 1994, 59.
 2409 See para 4.20-22 for more general discussion of children's understanding of legal processes.
 2410 Some of these children may have been too young to understand or participate in the proceedings.
 2411 E Travers, Future Echoes *Public Hearing Submission* Adelaide 1 May 1996.
 2412 J Cashmore & M Paxman *Wards Leaving Care: A Longitudinal Study* Social Policy Research Centre & NSW Dept of Community Services
 2413 Sydney 1996, 11.
 2414 G Angus, C Dunn & H Moyle *Children Under Care and Protection Orders Australia 1994-95* AIHW Child Welfare Series 15 AGPS
 2415 Canberra 1996, 9.
 2416 *ibid*.
 2417 A Broadbent & R Bentley *Children Under Care and Protection Orders Australia 1995-96* Child Welfare Series 18 AIHW Canberra 1996,
 2418 31-34. Note that the figures do not include SA statistics, which were unavailable. In addition, the living arrangements for a large number of
 2419 children on non-guardianship orders were unknown.
 2420 *IP Submission 207*.
 2421 *ibid*.
 2422 This is the preference in CROC and in some care and protection legislation: eg *Children's Protection Act 1993* (SA) s 3; Children, Young
 2423 Persons and their Families Bill 1997 (Tas) cl 8.
 2424 G Angus, C Dunn & H Moyle *Children Under Care and Protection Orders Australia 1994-95* AIHW Child Welfare Series 15 AGPS
 2425 Canberra 1996, 10.
 2426 *id* 14.
 2427 *id* 10.
 2428 *id* 12, 14.
 2429 See NSW Dept of Community Services *Review of the Children (Care and Protection) Act 1987 Discussion Paper 1: Law and Policy in*
 2430 *Child Protection* NSW Dept of Community Services Sydney 1996, 96.
 2431 A high proportion of children in care may be in care for less than two years: see Steering Committee for the Review of Commonwealth/State
 2432 Service Provision *Report on Government Service Provision 1997* Industry Commission Melbourne 1997 fig 10.6.
 2433 Draft rec 9.13.
 2434 See paras 17.81-84 for a discussion of reviews of case plans.
 2435 See paras 17.81-84 for a discussion of reviews of orders.
 2436 See rec 164.
 2437 We distinguish here between reviews of case plans and reviews of orders made by the court. This is a distinction that is not made, or is less
 2438 relevant, in some jurisdictions.
 2439 CROC art 25.
 2440 G Brewer & P Swain *Where Rights are Wronged* National Children's Bureau of Australia Notting Hill 1993, 14.
 2441 *ibid*.
 2442 *Children (Care and Protection) Act 1987* (NSW) Pt 7.
 2443 NSW Community Services Commission Annual Report 1995-96 NSW Community Services Commission Sydney 1996, 10-11.

2419 See ACT Attorney-General's Dept Annual Report 1994–95 Attorney-General's Dept Canberra 1995, 183; *Children's Services Act 1987* (ACT) s 89.

2420 Vic Government *IP Submission 213*. See *Children and Young Persons Act 1989* (Vic) s 121.

2421 *Children and Young Persons Act 1989* (Vic) ss 91, 106.

2422 *Children and Young Persons Act 1989* (Vic) s 122.

2423 *Children and Young Persons Act 1989* (Vic) ss 99–102, ss 107–108.

2424 New York Family Court Act s 1055(b) (orders of placement in foster care), s 1057 (orders of supervision).

2425 New York Family Court Act ss 1055, 1055–a.

2426 A Bainham *Children: The Modern Law* Family Law Bristol 1993, 367–386.

2427 For a discussion of review processes in the UK see *Halsbury's Laws of England* Butterworths London 1993 vol 5(2) paras 1181–1188. See also Review of Children's Cases Regulations 1991 Sch 2.

2428 UK Dept of Health *Patterns and Outcomes in Child Placement* HMSO London 1991, 93.

2429 E Travers, Future Echoes *Public Hearing Submission* Adelaide 1 May 1996, 5.

2430 See para 13.119, rec 82.

2431 See para 7.9.

2432 See rec 172.

2433 eg *Children's Services Act* (Qld) s 51; *Community Welfare Act 1983* (NT) s 48 (although this legislation also adds that any person interested in the welfare of, or acting at the request of or on behalf of, the child may also make such applications).

2434 See eg *Children's Protection Act 1993* (SA) s 40; *Children (Care and Protection) Act 1987* (NSW) s 75; *Children, Young Persons and Their Families Bill 1997* (Tas) cl 48.

2435 See also the proposed Children's Commissioner in Tas which was to be introduced with the passage of the Children's Young Persons and their Families Bill 1997.

2436 J Cashmore & M Paxman *Wards Leaving Care: A Longitudinal Study* Social Policy Research Centre & NSW Dept of Community Services Sydney 1996, i.

2437 id ii.

2438 HREOC *Our Homeless Children: Report of the National Inquiry into Homeless Children* AGPS Canberra 1989, 112–3.

2439 See para 4.49.

2440 National Children's and Youth Law Centre *IP Submission 12*.

2441 eg National Children's and Youth Law Centre *IP Submission 12*; Law Institute of Vic, Family Law Section *IP Submission 173*.

2442 E Travers, Future Echoes *Public Hearing Submission* Adelaide 1 May 1996.

2443 See paras 4.43–44.

2444 See NSW Community Service Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission Sydney 1996, 16–17.

2445 s 51(xxvi).

2446 See paras 2.63–64, 2.68, 4.59.

2447 Secretariat of National Aboriginal & Islander Child Care Melbourne 1995, 4.

2448 AIFS Melbourne 1994, 47.

2449 *Bringing Them Home* HREOC Sydney 1997.

2450 eg *Children (Care and Protection) Act 1987* (NSW) s 87; *Community Welfare Act 1983* (NT) s 69.

2451 See para 14.34 for a discussion of these teams in Qld.

2452 B Butler 'Aboriginal child protection' in G Calvert, A Ford & P Parkinson (eds) *The Practice of Child Protection: Australian Approaches* Hale & Iremonger Sydney 1992, 18.

2453 NSW Dept of Community Services Draft Paper: Strategic Directions in Child Protection NSW Dept of Community Services Sydney 1995, 15.

2454 eg Aboriginal Legal Service of WA *IP Submission 75*; Action for Children *IP Submission 189*.

2455 *ibid*.

2456 Aboriginal Legal Service of WA *IP Submission 75*.

2457 Secretariat of the National Aboriginal & Torres Strait Islander Child Care *IP Submission 56*; Federation of Community Legal Centres (Vic) *IP Submission 129*. Differences include the involvement in child rearing of extended family members and the lack of emphasis on '...material comfort, discipline and training for their children; rather the emphasis is on values such as the expression of warmth, affection and acceptance': ALRC Report 31 *The Recognition of Aboriginal Customary Laws* AGPS Canberra 1986, 171. See also paras 9.38–39.

2458 *Bringing Them Home* HREOC Sydney 1997.

2459 P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 47.

2460 Dept of Health and Family Services *DRP Submission 75*.

2461 B Szwarc *Changing Particular Care: A National Survey of Children in Non-Government Substitute Care in Australia* National Children's Bureau of Australia Notting Hill 1992, 36.

2462 Draft rec 9.23.

2463 Dept of Health and Family Services *DRP Submission 75*.

2464 *ibid*.

2465 eg Disability Services Office *IP Submission 205*.

2466 *ibid*.

2467 See para 4.65.

2468 Dept of Health and Family Services *DRP Submission 75*.

2469 eg *Children (Care and Protection) Act 1987* (NSW) s 73(1)(a) (orders may only be made if the child is under 16); *Children and Young Person's Act 1989* (Vic) s 3 (a child is person under 17 years of age or under 18 if there is a continuing care and protection order); *Child Welfare Act 1960* (Tas) s 3 (a child is person under 17 years of age).

2470 See HREOC *Our Homeless Children: Report of the National Inquiry into Homeless Children* AGPS Canberra 1989, 85.

2471 *ibid*.

2472 eg *Children and Young Persons Act 1989* (Vic) s 71 (either a child or the person having custody of a child may apply to court on grounds of irreconcilable differences); *Children (Care and Protection) Act 1987* (NSW) s 57(1) (the person having custody of a child may apply to court on grounds of irretrievable breakdown); *Child Welfare Act 1960* (Tas) s 33 (a parent may bring a child before court on allegations that the child is uncontrollable).

2473 See paras 17.48–54.

2474 eg '...young people who have contact with the child welfare system are more likely to come into contact with the juvenile justice system': National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC

Sydney 1997, 499. See also NSW Community Services Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission Sydney 1996.

See eg paras 10.21, 10.52-53.

See paras 18.63-65, 18.67.

C Cunneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne 1995, 101. See also S Mukherjee 'The dimensions of juvenile crime' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997.

S Cohen *Folk Devils and Moral Panic: The Creation of the Mods and Rockers* Martin Robertson Oxford 1980. See also M Cain *Recidivism of Juvenile Offenders in New South Wales* NSW Dept of Juvenile Justice Sydney 1996, 7; K Buttrum 'Juvenile justice: What works and what doesn't!' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26-27 June 1997, 2; para 4.13.

M Findlay, S Odgers & S Yeo *Australian Criminal Justice* Oxford University Press Melbourne 1994, 264.

K Buttrum 'Juvenile justice: What works and what doesn't!' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26-27 June 1997, 2.

See eg paras 19.50-64.

P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 153.

M Cain *Recidivism of Juvenile Offenders in New South Wales* NSW Dept of Juvenile Justice Sydney 1996, 1.

id 1. See also I O'Connor 'Models of juvenile justice' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26-27 June 1997, 5.

I O'Connor 'Models of juvenile justice' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26-27 June 1997, 5.

K Freeman 'Young people and crime' (1996) (32) *Crime and Justice Bulletin* 2.

P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 153.

s 20C provides that a child who is charged with or convicted of a federal offence in a State or Territory court may be 'tried, punished or otherwise dealt with' as if the offence were against a law of the State or Territory.

s 29.

s 71.

s 76B.

s 89.

eg *Student and Youth Assistance Act 1973* (Cth) s 49.

Statistics on the number of federal offenders are largely unavailable as most State and Territory police services do not record federal offences separately. However, see paras 2.79, 2.88.

The Riyadh Guidelines, adopted by the UN in 1990, advocate the development of social policies aimed at diverting young people from the juvenile justice system.

Beijing Rules r 30 emphasises the need for juvenile justice policy formulation to be based on appropriate research and review of trends.

Several jurisdictions have already developed general legislative principles for dealing with juvenile offenders: *Juvenile Justice Act 1992* (Qld) s 4; *Young Offenders Act 1994* (WA) s 7. Note also the juvenile justice principles contained in the *Young Offenders Act 1989* (Can) s 3. 'Efforts shall be made to establish, in each national jurisdiction, a set of laws rules and provisions specifically applicable to juvenile offenders...': r 2.3. In addition, the National Inquiry into the Removal of Aboriginal and Torres Strait Islander Children From Their Families recently recommended the negotiation of national legislation establishing minimum standards of treatment for all Indigenous children in a number of areas including juvenile justice: *Bringing Them Home* HREOC Sydney 1997 recs 44, 53a, 53b.

eg Australian Association of Social Workers *IP Submission 207*; Kreative Kids *DRP Submission 35*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; Federation of Community Legal Centres (Vic) *DRP Submission 72*; SA Children's Interest Bureau *DRP Submission 79*; NSW Youth Justice Coalition *DRP Submission 91*.

Qld Police Service *DRP Submission 56*; NT Government *DRP Submission 71*; WA Ministry of Justice *DRP Submission 73*.

See para 20.29.

art 40(3)(a) of CROC requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law. It does not propose a particular age for this presumption.

Crimes Act s 4M. This provision was introduced by the *Crimes Amendment Act 1995* (Cth) s 4 to overcome the anomaly of children being liable for prosecution for federal offences at different ages in different jurisdictions: *Hansard* (H of R) 1 March 1995, 1336. See also *Criminal Code Act 1995* (Cth) Sch Pt 2.3, 7.1. The age of criminal responsibility recommended in the Model Criminal Code is 10: Criminal Law Officers Committee of SCAG *Final Report: Chapter 2 General Principles of Criminal Responsibility* AGPS 1993, 35.

Criminal Code (Qld) s 29(1); *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Young Offenders Act 1993* (SA) s 5; *Children and Young Persons Act 1989* (Vic) s 127; Criminal Code (WA) s 29; Criminal Code (NT) s 38(1); *Children's Services Act 1986* (ACT) s 27(1); Criminal Code (Tas) s 18(1). The Tas Government has announced its intention to raise the age of criminal responsibility to 10 as part of the reforms in the Youth Justice Bill 1997 cl 3.

Children and Young Persons Act 1933 (UK) s 50.

Criminal Procedure (Scotland) Act 1975 (UK) s 170. In Ireland the age of criminal responsibility is governed by the common law: eg *Goodbody v Waterford Corporation* [1953] Ir Jur Rep 39; *Cashman v Cork Co Council* [1959] Ir Jur Rep 7; *Monagle v Donegal Co Council* [1961] Ir Jur Rep 47. The Children Bill 1996 which proposed raising the age of criminal responsibility in Ireland to 10 years has lapsed.

Criminal Code (Can) s 13.

Crimes Act 1961 (NZ) s 21.

However, civil law countries do not recognise the *doli incapax* principle: see para 18.17.

C Dadomo & S Farran *The French Legal System* Sweet & Maxwell London 1996, 76.

General Civil Code (Norway) s 46; Criminal Code (Denmark) s 15. For a list of the ages of criminal responsibility in Council of Europe countries see P Cavadino 'Goodbye doli, must we leave you?' (1997) 9 *Child and Family Law Quarterly* 165, 171.

UN Committee on the Rights of the Child *Report of the Committee on the Rights of the Child: Sixth to Eleventh Sessions* UN New York 1996, 73, 76.

Letter to the Australian Government from the Committee on the Rights of the Child 10 February 1997.

eg National Children's and Youth Law Centre *DRP Submission 59*; SA Children's Interest Bureau *DRP Submission 79*; NSW Youth Justice Coalition *DRP Submission 91*.

Crimes Act s 4N; Criminal Code (Tas) s 18(2); Criminal Code (WA) s 29; Criminal Code (Qld) s 29(2); *Children's Services Act 1986* (ACT) s 27(2); Criminal Code (NT) s 38(2). In NSW, SA and Vic the presumption continues to be based on the common law: eg *IPH v Chief Constable of New South Wales* [1987] Crim LR 42. *Doli incapax* also applies in NZ: *Crimes Act 1961* (NZ) s 22.

A recent decision of the House of Lords restated the principle after a lower English court had determined it was obsolete: *C (A Minor) v DPP* [1996] AC 1. See P Blazey-Ayoub 'Doli incapax' (1996) 20 *Criminal Law Journal* 34. The President of the Children's Court of Qld, McGuire

J, recently recommended that the principle of *doli incapax* be abolished in that State: Children's Court of Qld *Third Annual Report 1995–96* Children's Court of Qld Brisbane 1997, 29–46.

Attorney-General's Dept *Review of Commonwealth Criminal Law: Interim Report — Principles of Criminal Responsibility and Other Matters* AGPS Canberra 1990 rec 8.15.

eg evidence of admissions to prior convictions adduced during a record of interview has been held by the SA Supreme Court to be admissible to rebut *doli incapax*: *R v M* [1977] 16 SASR 589. This is in contrast to the UK decision in *C v DPP* [1996] AC 1, 34 in which Lord Lowry stated that a child defendant ought not to be put in a worse position than an adult by having evidence of his or her previous convictions admitted unless they can be admitted under a generally applicable evidentiary principle, eg, if the defendant has put his or her character in issue.

C v DPP [1996] AC 1, 36 per Lord Lowry.

P Cavadino 'Goodbye doli, must we leave you?' (1997) 9 *Child and Family Law Quarterly* 165, 170.

This proposal had support in submissions: eg Juvenile Justice Advisory Council of NSW *DRP Submission 53*; NSW Youth Justice Coalition *DRP Submission 91*.

Juvenile Justice Act 1983 (NT) s 3; *Children and Young Persons Act 1989* (Vic) s 3(1); *Child Welfare Act 1960* (Tas) s 3(1); *Juvenile Justice Act 1992* (Qld) s 5. The NT Government *DRP Submission 71* is satisfied with the existing position. The Tas Government proposes raising the age to 18: Youth Justice Bill 1997 cl 3.

This is consistent with art 1 of CROC which provides that 'child' means every person under 18 years of age.

DRP Submission 46. The proposal is also supported by NSW Youth Justice Coalition *DRP Submission 91*.

eg Criminal Code (Qld) s 215; *Crimes Act 1900* (ACT) s 92E(2); Criminal Code (Tas) s 45; *Criminal Law and Consolidation Act 1935* (SA) s 49; *Crimes Act 1958* (Vic) s 46. In some jurisdictions there is a different age of consent where the accused has a position of authority or trust in relation to the victim. eg in SA the age of consent is 18 in cases of sexual relations between a child and a guardian, principal or teacher: s 49(5).

Crimes Act 1900 (NSW) ss 66C, 78K; Criminal Code (NT) ss 128, 129.

Criminal Code (Qld) s 208. The *Criminal Code Act 1995* (Qld) which amended these provisions has never been proclaimed.

Criminal Code (WA) ss 320, 321, 322A. It is probable that s 322A is invalid due to *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4 which protects persons over 18 from interference in their private sexual lives.

D Leary, Come-In Youth Resource Centre *Public Hearing Submission* Sydney 26 April 1996.

R Bennett, 20/10 Lesbian and Gay Youth Service *Public Hearing Submission* Sydney 26 April 1996.

Final Report Vol 5 AGPS Canberra 1977, 210.

Model Criminal Code Officers Committee of SCAG *Discussion Paper: Chapter 5 Sexual Offences Against the Person* Model Criminal Code Officers Committee of SCAG 1996, 103.

'The Commission recommends that consideration be given to the introduction of legislation under which the common age of consent is set at 16 years, subject to exceptions in relation to child prostitution and to adults standing in special relationships, in each of which cases it should be set at 18 years': *Final Report Vol V: The Paedophile Inquiry* NSW Government Sydney 1997 rec 81.

id 1079–1080.

K Wimshurst & R Homel 'The primary prevention of juvenile crime' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997.

M Findlay, S Odgers & S Yeo *Australian Criminal Justice* Oxford University Press Melbourne 1994, 266.

I O'Connor 'Models of juvenile justice' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26–27 June 1997, 1.

B Howard et al *Public Hearing Submission* Wagga Wagga 8 May 1996.

R White 'The business of youth crime prevention' in P O'Malley & A Sutton (eds) *Crime Prevention in Australia: Issues in Policy and Research* Federation Press Sydney 1997, 166.

R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997, 58.

The main types of criminal activity engaged in for money were theft and drug dealing: 57.

id 60.

Steeetwize Comics is a national youth information service based in Sydney. Since 1984 it has been producing and distributing educational comics to people who are not easily reached by other agencies or strategies such as those with low levels of literacy, young people in rural and remote areas, young people with disabilities and young gay men and lesbians: *IP Submission 111*. The Crime Prevention Division of the NSW Attorney-General's Dept has recently funded Steetwize Comics to prepare a comic concerning crime prevention aimed at children 12 to 13 year olds.

This potential for the criminal justice system to 'creep' into more children's lives through crime reduction strategies is examined in D Palmer & R Walters 'Crime prevention camps for youth 'at risk': Blurring the boundaries of care and control' in C Simpson & R Hil (eds) *Ways of Resistance: Social Control and Young People in Australia* Hale & Iremonger Sydney 1995.

Australian Red Cross (NSW Division) *DRP Submission 42*.

See paras 19.24–25, 20.128–137.

These models and their applications were discussed in detail in ALRC Sentencing Research Paper 11 *Sentencing Young Offenders* AGPS Canberra 1988 ch 4. See also J Wundersitz 'Juvenile Justice' in K Hazlehurst (ed) *Crime and Justice: An Australian Textbook in Criminology* LBC Information Services Sydney 1996, 118–123; I O'Connor 'Models of juvenile justice' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997.

D Palmer & R Walters 'Crime prevention camps for youth 'at risk': Blurring the boundaries of care and control' in C Simpson & R Hil (eds) *Ways of Resistance: Social Control and Young People in Australia* Hale & Iremonger Sydney 1995, 161.

See F McElrea 'Restorative justice — the New Zealand Youth Court: A model for development in other courts?' (1994) 4 *Journal of Judicial Administration* 33. See also H Zehr *Changing Lenses: A New Focus for Crime and Justice* Herald Press Scottsdale 1990.

J Wundersitz 'Pre-court diversion: The Australian experience' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997, 281. The increased focus on the victims of crime is not limited to juvenile justice. eg adult victim-offender conferencing has recently been trialled in NSW. These meetings between victims and offenders occur after the conclusion of court proceedings and are seen as a way of giving both parties an opportunity to deal with the emotional and moral effects of crime: M Riley 'Victim shakes robber's hand' *The Sydney Morning Herald* 3 June 1997, 6.

R Sarre 'Juvenile justice in South Australia: An update' (1994) 5(4) *Criminology Australia* 13, 15.

See para 18.45.

eg Palestinian society has a tradition of 'Sulha', a process of mediation between the victim, the offender and the families of the victims and offenders: D Fattel 'Two conferences on juvenile justice: Tel Aviv, 27–28 March 1995 and East Jerusalem, 29–31 March 1995' (1996) 4 *The International Journal of Children's Rights* 89, 93. See also South African Law Commission IP 9 *Juvenile Justice* South African Law Commission Pretoria 1997, 34–35. NZ has been a world leader in juvenile justice diversion: see para 18.46.

This is consistent with Beijing Rules r 11.1 which provide that consideration should be given to dealing with juvenile offenders without resorting to formal trial. For an overview of pre-court diversion see J Wundersitz 'Pre-court diversion: The Australian experience' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997. See paras 2.80-83 for statistics on diversionary schemes.

M Findlay, S Odgers & S Yeo *Australian Criminal Justice* Oxford University Press Melbourne 1994, 267.

K Buttrum 'Juvenile justice: What works and what doesn't!' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26-27 June 1997, 5.

See J Seymour *Dealing with Young Offenders* Law Book Company Sydney 1988, 233-243.

This is consistent with the general trend in common law countries. 'In both New Zealand and the UK, cautioning has now become the accepted and most widely used option to deal with the majority of young offenders.': H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 55.

id 56.

Juvenile Justice Act 1992 (Qld) Pt 2 Div 2; *Young Offenders Act 1994* (WA) Pt 5 Div 1; *Young Offenders Act 1993* (SA) s 6. *Young Offenders Act 1997* (NSW) Pt 4. Pt 3 of the NSW Act regulates police warnings. The Tas Government proposes to give informal and formal cautions a legislative basis: Youth Justice Bill 1997 cls 8, 10.

Juvenile Justice Act 1992 (Qld) s 13(1).

Juvenile Justice Act 1992 (Qld) s 13(2).

Juvenile Justice Act 1992 (Qld) s 14(1). Administering a caution may involve the child apologising to the victim if the police officer considers it is appropriate, the child is willing and the victim agrees to participate in the procedure: s 16.

Juvenile Justice Act 1992 (Qld) s 17.

Qld Police Service *Submission 56*.

Juvenile Justice Act 1992 (Qld) ss 18M-18O.

Young Offenders Act 1994 (WA) s 22B.

Young Offenders Act 1994 (WA) s 22.

Young Offenders Act 1994 (WA) s 24.

Young Offenders Act 1993 (SA) s 6.

Young Offenders Act 1997 (NSW) s 19.

Young Offenders Act 1997 (NSW) s 20(3).

Young Offenders Act 1997 (NSW) s 30(2).

M Mackay *Victorian Criminal Justice System Fails ATSI Youth: Discussion Paper* Monash University Koorie Research Centre Melbourne 1996, 9. See also National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 513-16.

National Report vol 4 AGPS Canberra 1991 rec 240a.

Guidelines on cautioning were supported by D Sandor *DRP Submission 30*; Kreative Kids *DRP Submission 35*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; NSW Youth Justice Coalition *DRP Submission 91*. cf NT Government *DRP Submission 71* which considered that police discretion should not be restricted.

Conferencing as a sentencing option is discussed at paras 19.29-33.

See J Wundersitz 'Juvenile justice' in K Hazlehurst (ed) *Crime and Justice: An Australian Textbook in Criminology* LBC Information Services Sydney 1996, 137-141.

Children, Young Persons and Their Families Act 1989 (NZ). See I Hassall 'Origin and development of family group conferences' in J Hudson et al (eds) *Family Group Conferences: Perspectives on Policy and Practice* Federation Press Sydney 1996. Under the NZ model, conferences are convened by Youth Justice Co-ordinators and involve the offender, his or her family including whanau (extended Maori family), a police youth aid officer and the victim if amenable. For an overview of the way the NZ model works in practice see: T Stewart 'Family groups conferences with young offenders in New Zealand' in J Hudson et al (eds) *Family Group Conferences: Perspectives on Policy and Practice* Federation Press Sydney 1996; G Maxwell & A Morris 'The New Zealand model of family groups conferences' in C Alder & J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* AIC Canberra 1994.

See DB Moore & TA O'Connell 'Family conferencing in Wagga Wagga: A communitarian model of justice' in C Alder & J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* AIC Canberra 1994.

eg D Sandor 'The thickening blue wedge in juvenile justice (1993) 18 *Alternative Law Journal* 104.

Young Offenders Act 1997 (NSW) Pt 5.

Young Offenders Act 1993 (SA) Pt 2 Div 3.

Young Offenders Act 1993 (SA) s 9(1). See J Wundersitz 'Family conferencing in South Australia' in C Alder & J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* AIC Canberra 1994.

Youth Justice Bill 1997 (Tas) Pt 2 Div 3.

Young Offenders Act 1994 (WA) Pt 5 Div 2, 3. WA juvenile justice teams were piloted from 1993 and given a legislative basis in 1994. See M Hakiha 'Youth justice teams and the family meeting in Western Australia: A trans-Tasman analysis' in C Alder & J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* AIC Canberra 1994.

WA Police Service *IP Submission 136*. See paras 2.117-121 and table 19.1 for details of detention rates in the States and Territories.

Juvenile Justice Act 1992 (Qld) Pt 1C.

Juvenile Justice Act 1992 (Qld) ss 18M-18P.

See para 18.39. See also paras 19.117-127.

J Wundersitz 'Pre-court diversion: The Australian experience' *Paper* The Second National Outlook Symposium: Violent Crime, Company Crime and Public Policy AIC Conference Canberra 3-4 March 1997, 9.

See para 19.30.

eg Youth Advocacy Centre *IP Submission 120*; Townsville Community Legal Service *IP Submission 181*. See also D Sandor 'The thickening blue wedge in juvenile justice' (1993) 18 *Alternative Law Journal* 104; J Wundersitz 'Pre-court diversion: The Australian experience' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997, 278-280.

Law Society of NSW *IP Submission 209*.

See J Seymour *Dealing with Young Offenders* Law Book Company Sydney 1988, 261-270.

Tangentyere Council *Public Hearing Submission* Alice Springs 18 July 1996.

Practitioners' Forum Perth 3 July 1996; Fremantle Community Youth Service *IP Submission 6*; Law Society of NSW *IP Submission 209*.

B Howard et al *Public Hearing Submission* Wagga Wagga 8 May 1996; Fremantle Community Youth Service *IP Submission 6*; Youth Advocacy Centre *IP Submission 120*; Law Society of NSW *IP Submission 209*.

Australian Association of Social Workers *IP Submission 207*.

NT Government *DRP Submission 71*; WA Ministry of Justice *DRP Submission 73*.

eg D Sandor *DRP Submission* 30; Kreative Kids *DRP Submission* 35; Townsville Community Legal Service *DRP Submission* 46; Juvenile Justice Advisory Council of NSW *DRP Submission* 53; Qld Police Service *DRP Submission* 56; NSW Youth Justice Coalition *DRP Submission* 91.

Attorney-General's Dept *IP Submission* 178.

ss 39(2), 68(2), (3).

In *Newman v A (a child)* (1992) 9 WAR 14 the Supreme Court of WA held that a federal offender could not be dealt with by a children's panel (a diversionary scheme for first offenders that preceded juvenile justice teams) because it was not competent to exercise federal jurisdiction.

eg SA Dept of Family and Community Services *IP Submission* 110; Townsville Community Legal Service *IP Submission* 181; Australian Association of Social Workers *IP Submission* 207; Law Society of NSW *IP Submission* 209; Church Network for Youth Justice *IP Submission* 212; NSW Youth Justice Coalition *DRP Submission* 91; Adelaide Practitioners' Forum 30 April 1996.

Another option may be for court proceedings to be adjourned pending the outcome of the conference allowing the court to take the conferencing result into account when disposing of the matter: see para 19.29-33.

eg J Wundersitz *The South Australian Juvenile Justice System: A Review of its Operation* Office of Crime Statistics Adelaide 1996, 89-92. See para 2.83 for further statistics.

For a fuller discussion of pre-trial diversion and Indigenous young offenders see ALRC Report 31 *The Recognition of Aboriginal Customary Laws* vol 1 AGPS Canberra 1986, 344-350.

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 521.

id 525.

One of the better adaptations of conferencing to Indigenous community is the community justice groups in some Qld communities: id 526.

C Cunneen 'Indigenous young people and juvenile crime' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997.

This phenomenon has been documented in much juvenile justice research conducted during the last decade: eg I O'Connor & P Sweetapple *Children in Justice* Longman Melbourne 1988, 16-29; R White 'Street life: Police practices and youth behaviour' in R White & C Alder (eds) *The Police and Young People in Australia* Cambridge University Press Melbourne 1994; H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995; C Cunneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne 1995, 198-216.

Adelaide Focus Group 29 April 1996; Canberra Focus Group 6 May 1996; Rockhampton Focus Group 2 August 1996. This view is supported by others, eg, Central Australian Aboriginal Child Care Service *Public Hearing Submission* 18 July 1996; A Borg *IP Submission* 33; Alice Springs Youth Accommodation and Support Service *DRP Submission* 91.

H Blagg & M Wilkie 'Young people and policing in Australia: The relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 134, 138.

id 134.

Survey Response 688.

Survey Response 520. See also R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997, 115-122.

Tranby College Focus Group 10 June 1997.

Darwin Focus Group 15 July 1996; Alice Springs Focus Group 19 July 1996; Rockhampton Focus Group 2 August 1996.

Allegations of Indigenous children being taken bush by police against their will were the basis for the initial complaints in the Pinkenba case: D Eades 'Cross-Examination of Aboriginal children' (1995) 3(75) *Aboriginal Law Bulletin* 10.

Rockhampton Focus Group 2 August 1996.

Survey Response 192.

Survey Response 169.

Tranby College Focus Group 10 June 1997.

Canberra Focus Group 6 May 1996; Darwin Focus Group 15 July 1997; Alice Springs Focus Group 19 July 1996. See also SA Children's Interest Bureau *DRP Submission* 79.

Survey Response 186.

H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 191-207.

See R White 'The business of youth crime prevention' in P O'Malley & A Sutton (eds) *Crime Prevention in Australia: Issues in Policy and Research* Federation Press Sydney 1997, 167; H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995 ch 3; R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997, 66-73; H Blagg & M Wilkie 'Young people and policing in Australia: The relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 134, 137.

Hobart Focus Group 30 May 1996; Perth Focus Group 1 July 1996; Darwin Focus Group 15 July 1996; Alice Springs Focus Group 19 July 1996.

Darwin Focus Group 15 July 1996; Alice Springs Focus Group 19 July 1996.

Hobart Focus Group 30 May 1996. Young people in the Darwin Focus Group 15 July 1996 said that police seem to have some individuals under surveillance, keeping records of their personal details and movements in public spaces in a kind of log book.

W Jones, Qld Legal Aid *Public Hearing Submission* Rockhampton 1 August 1996.

Survey Response 53.

Survey Response 22.

See R White 'Regulating youth space' (1997) 22 *Alternative Law Journal* 30, 31. Townsville Community Legal Service *DRP Submission* 46 gave the example of a group of eight children who were allegedly banned from the public shopping mall in Townsville city early in 1996.

s 37B.

s 37A.

s 37B(6).

R White 'Regulating youth space' (1997) 22 *Alternative Law Journal* 30, 31. See also G Murray 'Public spaces — The visibility of NESB young people and bowlers' (1996) 21 *Alternative Law Journal* 80.

R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997, 123. See also Tranby College Focus Group 10 June 1997.

R White 'Regulating youth space' (1997) 22 *Alternative Law Journal* 30, 32.

See R White 'The business of youth crime prevention' in P O'Malley & A Sutton (eds) *Crime Prevention in Australia: Issues in Policy and Research* Federation Press Sydney 1997, 174-175.

See NCAVAC Unit *Young People's Use of Public Space — Project Summary No 9* Attorney-General's Dept Canberra 1997.

This proposal was supported by Youth Advocacy Centre *DRP Submission 14*; Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; Qld Police Service *DRP Submission 56*; NSW Youth Justice Coalition *DRP Submission 91*. The proposal was also supported by the WA Ministry of Justice *DRP Submission 73* although it does not support the suggested implementation strategy but considers that guidelines should be a matter for each State or Territory.

R White, G Murray & N Robins *Negotiating Youth-Specific Public Areas: A Guide for Youth and Community Workers, Town Planners and Local Councils* Australian Youth Foundation Sydney 1996, 15–17.

Child Welfare Act 1947 (WA) s 138B(1).

S Boyle 'Whose identity crisis?' (1994) 5 *Polemic* 5. cf K Moran *DRP Submission 57*. ss 11–12.

See eg T O'Sullivan 'City of fear' (1995) 20 *Alternative Law Journal* 94.

A Hoy 'Mayors hail law to let police nab youths' *The Sydney Morning Herald* 12 March 1997, 6.

Pt 3 Div 1.

Pt 3 Div 2.

s 14(3).

s 19(3).

s 18(b).

Pt 4.

Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; National Children's and Youth Law Centre *DRP Submission 59*; Law Society of NSW *DRP Submission 90*; NSW Youth Justice Coalition *DRP Submission 91*. The NT Government *DRP Submission 71* opposed repealing such legislation because it considers it would interfere with police use of other legislative powers. NSW Government *DRP Submission 86* stated that '[l]aws dealing with the prevention of crime by young people are a matter for the States and Territories'.

Currently, young offenders in Vic, SA, WA and the NT can be subject to individual curfews as a condition of certain orders: *Children and Young Person's Act 1989* (Vic) ss 144(3)(d), 159(4)(e), 164(3), 172(3); *Young Offenders Act 1993* (SA) s 26; *Young Offenders Act 1994* (WA) s 73(2); *Juvenile Justice Act 1983* (NT) s 53(1)(d)(iv). Youth curfews are common in US cities: KA Kalvig 'Oregon's Parental Responsibility Acts' (1996) 75 *Oregon Law Review* 829 fn 7.

C Ryan 'Territory looks at electronic bracelets to keep track of children' *The Sydney Morning Herald* 10 September 1997, 2. See also Street Safety Bill 1996 (NSW).

R White 'Regulating youth space' (1997) 22 *Alternative Law Journal* 30, 31. See also R White 'Ten arguments against youth curfews' (1996) 15(4) *Youth Studies Australia* 28.

eg CROC art 15.

r 12.1.

Vic Police *Youth Policy Statement: Background* Youth Advisory Unit Melbourne 1997 10.

The NSW Police Service is in the process of introducing dedicated Youth Liaison Officers. A training unit to be included in the police curriculum is also being developed: Juvenile Justice Advisory Council of NSW *DRP Submission 53*. Community liaison officers within the Qld Police Service liaise with a variety of organisations including those targeting youth: Qld Police Service *DRP Submission 56*. The NT Government *DRP Submission 71* submitted that dedicated youth officers would not be cost-effective given the size of the Territory. It considered programs such as the School Based Constable Scheme to be adequate.

These proposals are supported by Kreative Kids *DRP Submission 35*; Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; AFP *DRP Submission 66*; NSW Youth Justice Coalition *DRP Submission 91*. cf NT Government *DRP Submission 71* which considered the resource implications too great.

Cth Ombudsman *The Interaction Between the Australian Federal Police and the Youth in the ACT: Own Motion Investigation* Cth Ombudsman Canberra 1997, 5.

id rec 1.

Survey Response 107.

See recs 207, 216–17, 228.

eg in NSW proceedings against children must generally be by way of summons: *Children (Criminal Proceedings) Act 1987* (NSW) s 8. A similar provision appears in AFP General Instruction 13. s 128 of the *Children and Young Persons Act 1989* (Vic) limits the circumstances in which the court will issue a charge and warrant to arrest rather than a bare summons. See also *Juvenile Justice Act 1992* (Qld) s 23; WA Commissioner's Orders and Procedures J105; Tasmanian Police Commissioner's Standing Orders and Instructions s 106.4; NT Police General Order C3, 6.1.

DRP Submission 66. There are similar provisions and proposals in other jurisdictions: eg *Juvenile Justice Act 1992* (Qld) s 20(2); Youth Justice Bill 1997 (Tas) cl 24.

eg H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 77. See also paras 2.84–85 for statistics.

id 88. The Wood Royal Commission recently recommended the development of strategies to ensure that arrest is used as the intervention of last resort in regard to all suspects: *Final Report Vol II: Reform* NSW Government 1997 rec 137.

See H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 77.

See Qld Criminal Justice Commission *Defendants' Perceptions of the Investigation and Arrest Process* Qld Criminal Justice Commission Brisbane 1996, 17; H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 87–88.

See Qld Criminal Justice Commission *Defendants' Perceptions of the Investigation and Arrest Process* Qld Criminal Justice Commission Brisbane 1996, vi.

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 516–518.

M Mackay *Victorian Criminal Justice System Fails ATSI Youth: Discussion Paper* Monash University Koorie Research Centre Melbourne 1996, 9.

J Wundersitz *The South Australian Juvenile Justice System: A Review of its Operation* Office of Crime Statistics Adelaide 1996, 204.

National Report vol 4 AGPS Canberra 1991 rec 239. There is a 'widespread failure to implement this recommendation': Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner *Indigenous Deaths in Custody 1989–1996* ATSIIC Canberra 1996, 78.

C Cunneen & D McDonald *Keeping Aboriginal and Torres Strait Islander People Out of Custody: Evaluation of the Implementation of the Recommendations of the Royal Commission Into Aboriginal Deaths in Custody* ATSIIC Canberra 1997, 178–179.

ABS 1994 *National Aboriginal and Torres Strait Islander Survey: Employment Outcomes for Indigenous Australians* ABS Canberra 1995, 2. See also paras 18.139–146 regarding police accountability.

Final Report Vol II: Reform NSW Government Sydney 1997 rec 139.

Church Network for Youth Justice *IP Submission 212*; Oz Child Legal Service *IP Submission 195*.

r 10.1. The same principle is contained in UN Standard Minimum Rules for the Treatment of Prisoners r 92.

Juvenile Justice Act 1983 (NT) s 30; *Juvenile Justice Act 1992* (Qld) s 22(a); *Young Offenders Act 1993* (SA) s 14(2)(c); *Children's Services Act 1986* (ACT) s 32. s 35 of the *Children's Services Act 1986* (ACT) requires police to notify parents of any charges being laid against a child. As well as notifying parents of a child's arrest, Qld police must notify them of any attendance notice or summons served on a child: *Juvenile Justice Act 1992* (Qld) ss 28(a), 32(2)(a).

See eg WA Commissioner's Order J111.

Cth Ombudsman *The Interaction Between the Australian Federal Police and the Youth in the ACT: Own Motion Investigation* Cth Ombudsman Canberra 1997, 21.

See H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 89–90.

Pt 1C.

s 23A(5).

Crimes Act s 23A(2).

Murphy v R (1985) 158 CLR 596. See also *Leeth v R* (1992) 174 CLR 455.

Crimes Act s 23F.

The right to silence is guaranteed by CROC art 40(2)(b)(iv) and ICCPR art 14(3)(g).

eg *Summary Offences Act 1953* (SA) s 79A(3)(b); *Crimes Act* (Vic) s 464A(3); *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(5). In NSW, evidence of statements made during police questioning is taken to be obtained improperly and may be excluded if the caution was not given prior to questioning: *Evidence Act 1995* (NSW) s 139.

eg Oz Child Legal Service *IP Submission 195*; Wagga Wagga Focus Group 9 May 1996; Darwin Focus Group 15 July 1996; Darwin Practitioners' Forum 16 July 1996; K Wright, Alice Springs Youth Accommodation and Support Service *Public Hearing Submission* Alice Springs 18 July 1996.

H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 115.

Crimes Act s 23V.

Crimes Act 1900 (NSW) s 424A(2).

Criminal Law (Detention and Interrogation) Act 1995 (Tas) s 8(2). There are similar provisions in SA, Vic and WA: *Summary Offences Act 1953* (SA) s 74D; *Crimes Act 1958* (Vic) s 464H; *Criminal Code* (WA) s 570D. The Qld Police Service Operational Procedures Manual states that it is policy for all interviews of child suspects to be electronically recorded: 5.6.16.

eg Townsville Community Legal Service *DRP Submission 46*; National Children's and Youth Law Centre *DRP Submission 59*; NSW Youth Justice Coalition *DRP Submission 91*. See also National Inquiry into the Removal of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997 rec 53b r 8.

DRP Submission 71.

DRP Submission 73.

The Wood Royal Commission recently recommended the supply of hand-held recorders to investigators to record dealings with suspects before formal interview: *Final Report Vol II: Reform* NSW Government Sydney 1997 rec 118.

ss 23G, 23K(1).

Police Questioning of Young People: The Role of the Independent Adult — Discussion Paper National Children's and Youth Law Centre Sydney 1994, 3.

s 23K(3).

Several jurisdictions have a provision that applies to all police interviews of young people: *Crimes Act 1958* (Vic) s 464(E); *Summary Offences Act 1953* (SA) s 79A. In addition, the *Young Offenders Act 1993* (SA) s 7 provides that an independent person must be present for the signing of a confession. In the NT and the ACT the requirement that a parent or independent person be present at interview applies only if the child has been charged with a serious offence: *Juvenile Justice Act 1983* (NT) s 25; *Children's Services Act 1986* (ACT) s 30. In NSW a statement from a child is not admissible in proceedings unless an independent adult was present at interview: *Children (Criminal Proceedings) Act 1987* (NSW) s 13. In Qld the same rule applies if the child has been charged with an indictable offence: *Juvenile Justice Act 1992* (Qld) s 36.

eg young people are critical of the performance of some Justices of the Peace in this role because they usually tell children to assist the police by answering their questions: Brisbane Focus Group 29 July 1996.

An interview friend can be excluded from the interrogation of an alleged federal offender if he or she interferes with it: Crimes Act s 23K(2). cf the Australian Youth Foundation which considers that the interview friend should act as an advocate for the child '[i]n order to balance the inherent asymmetry of power relationships and to provide advice at what is, in reality, the moment in the justice process when guilt or innocence are [sic] established. Simple neutrality is not enough': H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 119.

See K Warner 'The legal framework of juvenile justice' in R White & C Alder (eds) *The Police and Young People in Australia* Cambridge University Press Melbourne 1994.

H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 120.

National Legal Aid *DRP Submission 58* suggested that this continues to happen at some police stations.

Hobart Focus Group 30 May 1996; Tranby College Focus Group 10 June 1997.

Perth Focus Group 1 July 1996.

This proposal is supported by R Ludbrook *Police Questioning of Young People: The Role of the Independent Adult — Discussion Paper* National Children's and Youth Law Centre Sydney 1994, 1, 23–25. cf Law Society of NSW *DRP Submission 90* which considers that the interview friend should be a responsible person approved by the suspect's parent/s or a legal practitioner.

Under the *Children, Young Persons and Their Families Act 1989* (NZ) s 222(1) young suspects can nominate any adult to act as an interview friend. If a child refuses to nominate someone a police officer can nominate any adult other than a police officer to perform the role.

DRP Submission 52.

eg Federation of Community Legal Centres (Vic) *DRP Submission 72*. The NT Government *DRP Submission 71* considered this level of formalisation unnecessary.

D Sandor *DRP Submission 30*.

The guide prepared by the WA Police could be used as a starting point: WA Commissioner's Orders and Procedures J206.

In some jurisdictions police are already required to maintain a list of adults willing to act as interview friends. eg Children (Criminal Proceedings) Regulation 1995 (NSW) reg 6.

Youth Advocacy Centre *DRP Submission 14*; D Sandor *DRP Submission 30*; National Children's and Youth Law Centre *DRP Submission 59*; Federation of Community Legal Centres (Vic) *DRP Submission 72*; NSW Ombudsman *DRP Submission 80*. The NT Government *DRP Submission 71* acknowledged that there may be a conflict of interest in police training interview friends although it considers that formal selection and training should not be necessary.

The National Children's and Youth Law Centre *DRP Submission 59* considered that legal practitioners and child psychologists should have input in the training.

This proposal was supported by Autistic Association of NSW *DRP Submission 40* and Mental Health Legal Centre *DRP Submission 54*.
 See para 18.116.
 s 23C(4)(a).
 s 23D. These time limit provisions were introduced in 1991 in response to the 1990 review of federal criminal law: *Hansard* (H of R) 15 November 1990, 4222.
 s 23C(7)(a).
 s 23C(7)(e).
 See paras 18.160-162. In SA no suspect may be questioned for longer than 8 hours: *Summary Offences Act 1953* (SA) s 78(2)(a).
 The Crimes Amendment (Police Detention Powers After Arrest) Bill 1996 (NSW) proposes enabling police to detain a person, including children, after arrest for a maximum period of 4 hours or 12 hours with a detention warrant. The Wood Royal Commission recommended that the Bill be enacted as soon as possible: *Final Report Vol II: Reform NSW Government* Sydney 1997 rec 135.
 The WA Ministry of Justice *DRP Submission 73* considered that interview time limits should be at the discretion of the relevant police service.
 For a fuller discussion of police interrogation of Indigenous suspects see ALRC Report 31 *Recognition of Aboriginal Customary Law* vol 1 AGPS Canberra 1986 ch 22.
 D Eades 'Cross-examination of Aboriginal children: The Pinkenba case' (1995) 3(75) *Aboriginal Law Bulletin* 10, 11. See also D Mildren 'Redressing the imbalance against Aboriginals in the criminal justice system' (1997) 21 *Criminal Law Journal* 7.
 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 518.
R v Anunga and ors (1976) 11 ALR 412, 415. The Court suggested that the *Anunga* rules could apply equally to interviews with people from non-English speaking backgrounds: 413.
 D Eades 'Cross-examination of Aboriginal children: The Pinkenba case' (1995) 3(75) *Aboriginal Law Bulletin* 10.
 s 23H(7). This provision was inserted in 1991 and implements the Royal Commission into Aboriginal Deaths in Custody *National Report* vol 4 AGPS Canberra 1991 rec 244.
 Crimes Act ss 23J, 23K(3)(c).
 Legal Practitioners' Forum 16 July 1996; V McLintock *Public Hearing Submission* Darwin 17 July 1996; D Dalrymple *Public Hearing Submission* Darwin 17 July 1996; Central Australian Aboriginal Child Care Service *Public Hearing Submission* Alice Springs 18 July 1996; Tranby College Focus Group 10 June 1997. The Australian Reconciliation Convention recently expressed its support for the right of Aborigines and Torres Strait Islanders, who do not have English as a first language, to have interpreters in the justice system: (1997) 19 *Walking Together* 13.
 'Aboriginal English is the dialect of English spoken by most Aborigines today in its different varieties throughout the country': D Eades 'Aboriginal English on trial: The case for Stuart and Condren' in D Eades (ed) *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* University of NSW Press Sydney 1995, 148. See para 14.125 and rec 117 regarding interpreters in court.
 While this provision does not refer specifically to Indigenous offenders it gives indirect effect to another of the *Anunga* rules.
 The Royal Commission into Aboriginal Deaths in Custody recommended that governments take more steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts: *National Report* vol 3 AGPS Canberra 1991 rec 100.
 For an overview of the status of the *Anunga* rules in the States and Territories see R Goldflam 'Silence in court! Problems and prospects in Aboriginal legal interpreting' in D Eades *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* University of NSW Press Sydney 1995, 28, 32–36.
 eg I Nowland *Public Hearing Submission* Wagga Wagga 8 May 1996; Darwin Practitioners' Forum 16 July 1996.
 J Saunders *IP Submission 21*; Parliamentary Commissioner for Administrative Investigations *IP Submission 41*; Aboriginal Legal Service of WA *IP Submission 75*; Townsville Community Legal Service *IP Submission 181*; Australian Society of Social Workers *IP Submission 207*; Law Society of NSW *IP Submission 209*.
 See para 2.85.
 'Even those who appear to have English fluency may be socialised not to offend adult authority figures and may be compliant in terms of agreeing with police definitions of events': H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 122. See also Race Discrimination Commissioner *Juvenile Justice and Young People of NESB Background: Discussion Paper* HREOC Sydney 1994; P Eastaer 'Migrant youth and juvenile crime' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997; J Chan 'Policing youth in ethnic communities: Is community policing the answer?' in R White & C Alder (eds) *The Police and Young People in Australia* Cambridge University Press Melbourne 1994.
 H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995, 123.
 This reflects obligations under international law: eg CROC art 40(2)(b)(vi); ICCPR art 14(1).
 Attorney-General's Dept Report: *Access to Interpreters in the Australian Legal System* AGPS Canberra 1991, 79.
Crimes Act 1958 (Vic) s 464D; *Summary Offences Act 1953* (SA) ss 79A(1)(b)(ii), 83A; *Crimes Act 1900* (ACT) s 354.
 There is provision for such interpreting assistance for federal suspects under the Crimes Act s 23N.
 For a discussion of the relationship between learning and intellectual disabilities and criminality see S Hayes 'Learning and intellectual disabilities and juvenile offending' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997.
 HREOC *Report of the National Inquiry into the Human Rights of People with Mental Illness* vol 2 AGPS Canberra 1993, 634. See also S Scarlett *IP Submission 27*.
 NSWLRC Report 80 NSWLRC Sydney 1996 rec 41. See also rec 6(a) regarding guidelines for identifying people with an intellectual disability.
 id 38.
 id rec 6(c).
 Crimes Act s 3ZJ(6). Material must be destroyed 12 months after it is taken if proceedings have not been instituted in regard to the offence, or have been discontinued: s 3ZK(1). Identification material must also be destroyed if the suspect is acquitted of the offence or is found guilty but no conviction is recorded: s 3ZK(2).
 Crimes Act s 3ZJ(10).
 Crimes Act s 3ZJ(9).
 Crimes Act s 3ZJ(8).
Children's Services Act 1986 (ACT) s 36 (2).
Crimes Act 1900 (NSW) s 353AA; *Juvenile Justice Act 1983* (NT) s 31(2A). See also *Police Administration Act 1978* (NT) s 146. In Vic a court order is only required if either the child suspect or his or her parent/guardian does not consent to the material being taken: *Crimes Act 1958* (Vic) s 464L(2).
 SA Police General Order 3360/7.
Criminal Process (Identification and Search) Act 1976 (Tas) s 3(1).

2770 *Juvenile Justice Act 1992* (Qld) s 10(4).
 2771 cl 23WA(1).
 2772 cl 23WA(1).
 2773 cl 23WC. Before making such an order a magistrate must be satisfied of all the matters listed in cl 23WT, eg, that there are reasonable grounds to suspect the person of the offence and that the procedure is justified in all the circumstances. Forensic procedures must be carried out in private by a dentist or doctor as appropriate although prints can be taken by a police officer: cls 23WI, 23XM(1). A child cannot consent to a forensic procedure: cl 23WE(1).
 2774 cl 23WX(2), (6).
 2775 cl 23XC(2).
 2776 Federation of Community Legal Centres (Vic) *DRP Submission 72* strongly supported any proposal to require a court order to take prints from a child: 'The process of fingerprinting etc is likely to stigmatise the young person as much as any other forensic procedure.' Some government and police submissions did not support the proposed reforms: Qld Police Service *DRP Submission 56*; NT Government *DRP Submission 71*.
 2777 Kreative Kids *DRP Submission 35*.
 2778 Crimes Act s 3ZE. A frisk search is defined as 'a search conducted by quickly running the hands over the person's outer garments and examining any clothes that have been voluntarily removed': s 3C(1).
 2779 Crimes Act s 3ZF. An ordinary search is defined as a search of a person or articles in that person's possession and may include requiring the person to remove his or her overcoat, coat, jacket, gloves, shoes or hat: s 3C(1).
 2780 Crimes Act s 3ZH(2).
 2781 Crimes Act ss 3C(1), 3ZI(1)(g).
 2782 Crimes Act s 3ZI(1)(a), (b).
 2783 Crimes Act s 3ZI(1)(e). Note that there are also special requirements for identification parades involving suspects aged 10 to 17: s 3ZN.
 2784 Crimes Act s 3ZI(1)(f). These limitations were introduced in 1994 to implement recommendations of the 1990 review of federal criminal law: *Hansard* (H of R) 17 November 1993, 3030.
 2785 *Summary Offences Act 1953* (SA) s 81. The position is similar in NSW: *Crimes Act 1900* (NSW) s 353A(1).
 2786 *Police Administration Act 1978* (NT) s 144(1), (3). The position is similar in Qld: Criminal Code (Qld) s 259.
 2787 *Crimes Act 1958* (Vic) s 464(2).
 2788 *Crimes Act 1958* (Vic) s 464U(2).
 2789 Rockhampton Focus Group 2 August 1996.
 2790 Perth Focus Group 1 July 1996.
 2791 H Blagg & M Wilkie *Young People and Police* Australian Youth Foundation Sydney 1995, 99.
 2792 ALRC Report 82 *Integrity: But Not by Trust Alone* — AFP & NCA *Complaints and Disciplinary Systems* ALRC Sydney 1996, 397–398.
 2793 See S Payne 'Women and the criminal justice system' (1990) 2(46) *Aboriginal Law Bulletin* 9, 11.
 2794 This view was supported by National Children's and Youth Law Centre *DRP Submission 59*; NSW Youth Justice Coalition *DRP Submission 91*. It was opposed by some government and police submissions. The NT Government *DRP Submission 71* considered that legislation to this effect would fetter police discretion unnecessarily and make the process too cumbersome. The Qld Police Service *DRP Submission 56* considered that requiring a court order for a strip search of a child suspect will risk the destruction of evidence.
 2795 *Police Act 1892* (WA) s 53A; *Police Administration Act 1978* (NT) s 128(1).
 2796 *Bringing Them Home* HREOC Sydney 1997, 494.
 2797 This position is supported by NSW Ombudsman *DRP Submission 80*.
 2798 Adelaide Focus Group 29 April 1996; Canberra Focus Group 6 May 1996; Hobart Focus Group 30 May 1996; Perth Focus Group 1 July 1996; Rockhampton Focus Group 2 August 1996. See also R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation Sydney 1997, 115–122; H Blagg & M Wilkie 'Young people and policing in Australia: The relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 134, 139; A Daniel & J Cornwall *A Lost Generation?* Australian Youth Foundation Sydney 1993, 18.
 2799 Brisbane Practitioners' Forum 29 July 1996.
 2800 Canberra Focus Group 6 May 1996; Perth Focus Group 1 July 1996; Hobart Focus Group 30 May 1996; Brisbane Focus Group 29 July 1996; Rockhampton Focus Group 2 August 1996; Tranby College Focus Group 10 June 1997; A Borg *IP Submission 33*. See also A Daniel & J Cornwall *A Lost Generation?* Australian Youth Foundation Sydney 1993, 18.
 2801 Vic Police *Youth Policy Statement: Background* Youth Advisory Unit Melbourne 1997, 13.
 2802 ALRC Report 82 *Integrity: But Not by Trust Alone* — AFP & NCA *Complaints and Disciplinary Systems* ALRC Sydney 1996 rec 6. This would also implement the Royal Commission into Aboriginal Deaths in Custody proposal that an independent body be established to investigate complaints against police: *National Report* vol 4 AGPS Canberra 1991 rec 226a.
 2803 All States and Territories have mechanisms for members of the public to complain about police behaviour or treatment that are available to adults and children. The process usually involves investigation by an internal complaints unit with provision for external review by an ombudsman or similar body. In Qld complaints against police are investigated by the Criminal Justice Commission: *Criminal Justice Act 1989* (Qld).
 2804 This proposal is supported by Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; Qld Police Service *DRP Submission 56*; NSW Youth Justice Coalition *DRP Submission 91*. cf NT Government *DRP Submission 71*.
 2805 eg Juvenile Justice Boards of Management were established in the NT to give independent, critical advice to the Territory Government on juvenile justice issues. Board members are entitled to make unannounced inspections of police lockups and detention centres. Young people can call members directly: *Juvenile Justice Act 1983* (NT) Pt III. See also Juvenile Justice Board of Management: Southern Region *Annual Report 1994/95* Dept of Correctional Services Darwin 1995.
 2806 This proposal is supported by NSW Youth Justice Coalition *DRP Submission 91*.
 2807 *IP Submission 75*. This proposal is consistent with HREOC *Report of the National Inquiry into Racist Violence in Australia* AGPS Canberra 1991 rec 20.
 2808 The High Court has held that in deciding whether to exclude evidence on this basis the court must balance 'the desirable goal of bringing to conviction the wrongdoer' against the avoidance of 'the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law': *Bunning v Cross* (1978) 141 CLR 54, 74 per Stephen, Aicken JJ. This approach is reflected in the Evidence Act s 138.
 2809 Qld Police Service *DRP Submission 56*; NT Government *DRP Submission 71*. The proposed reform was supported by: Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; National Legal Aid *DRP Submission 58*; NSW Youth Justice Coalition *DRP Submission 91*.
 2810 D Sandor *DRP Submission 30*.

'...any abuse of police power must *at least* result in the evidence so obtained being inadmissible': H Blagg & M Wilkie 'Young people and policing in Australia: The relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 134, 145.

This proposal complements the recent recommendation of the Wood Royal Commission that prosecution review committees be established in each police region to review major prosecutions that have failed in circumstances suggestive of serious police incompetence or malpractice, including cases where judicial criticism is made of the integrity and conduct of the police concerned or where the DPP delivers an adverse report on the quality of the police investigation, co-operation or conduct: *Final Report Vol II: Reform* NSW Government Sydney 1997 rec 150.

'...from the available statistical evidence it is clear that, typically, children's hearings proceed by way of a guilty plea...': N Naffine 'Children in the Children's Court' (1992) 6 *International Journal of Law and the Family* 76, 85; C Cunneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne 1995, 218–219.

See eg Community Legal Centres Minutes of Meeting Melbourne 28 May 1996.

See para 18.104.

s 23G(1)(b).

Summary Offences Act 1953 (SA) s 79A(1)(b)(i); *Crimes Act 1958* (Vic) s 464C(1)(b).

eg *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a)(iv).

Alice Springs Focus Group 19 July 1996.

Darwin Focus Group 15 July 1996.

eg Parliamentary Commissioner for Administrative Investigations *IP Submission 41*; Youth & Family Service *IP Submission 158*; Disability Services Office *IP Submission 205*; Law Society of NSW *IP Submission 209*; Townsville Community Legal Service *DRP Submission 46*; Qld Police Service *DRP Submission 56*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; NSW Ombudsman *DRP Submission 80*; NSW Youth Justice Coalition *DRP Submission 91*. cf NT Government *DRP Submission 71*.

See National Legal Aid *DRP Submission 58*.

Shaw v R (1991) 57 A Crim R 425, 447.

See D Sandor *DRP Submission 30*.

See para 18.165.

In some other Australian jurisdictions, such as family law, there are training prerequisites for legal practitioners: see para 13.130.

See eg N Naffine 'Children in the Children's Court' (1992) 6 *International Journal of Law and the Family* 76, 86–88.

Such a service could be achieved by expanding the telephone advice function of the various legal aid commissions: Legal Aid & Family Services, Attorney General's Dept *DRP Submission 83*. Additional funding to these bodies would be required.

See fn 69 above.

Qld Police Service *DRP Submission 56*; WA Ministry of Justice *DRP Submission 73*.

eg Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; National Children's and Youth Law Centre *DRP Submission 59*; Federation of Community Legal Centres (Vic) *DRP Submission 72*; NSW Youth Justice Coalition *DRP Submission 91*; Tranby College Focus Group 10 June 1997.

See paras 19.3, 19.47–48, 20.1 regarding the consequences of detaining young people.

art 37(b); r 13.1.

Bail Act 1992 (ACT) ss 13, 14(2); *Bail Act 1982* (NT) s 16; *Bail Act 1978* (NSW) s 17; *Bail Act 1980* (Qld) ss 7, 13; *Bail Act 1985* (SA) ss 5(1)(e), 13; *Justices Act 1959* (Tas) s 34 and *Bail Act 1994* (Tas) s 5; *Bail Act 1977* (Vic) s 10; *Bail Act 1982* (WA) ss 6, 15.

The Inquiry's recommendations about bail were supported by: Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; NSW Youth Justice Coalition *DRP Submission 91*.

See Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 rec 81.

The WA Ministry of Justice *DRP Submission 73* considered that measures such as curfews can be beneficial in strengthening the role of parents. The NT Government *DRP Submission 71* considered that curfews are preferable to bail refusal and a valid way of protecting the community.

Judiciary Act 1903 (Cth) s 68(1). In most States and Territories there are special procedures regarding bail for children: *Child Welfare Act 1960* (Tas) s 19(1); *Children and Young Persons Act 1989* (Vic) s 129(2); *Children (Criminal Proceedings) Act 1987* (NSW) s 9; *Juvenile Justice Act 1983* (NT) s 33; *Juvenile Justice Act 1992* (Qld) s 39; *Bail Act 1982* (WA) Sch 1 Pt C cl 2; *Young Offenders Act 1994* (WA) s 19(2); *Children and Young Persons Act 1989* (Vic) s 129(7).

In SA and the ACT adult bail conditions apply to children. In SA a youth who is refused bail must be detained in an appropriate place, out of contact with adult detainees: *Young Offenders Act 1993* (SA) ss 14, 15. The *Bail Act 1992* (ACT) s 26 sets out the conditions under which bail may be granted to children.

Child Welfare Act 1960 (Tas) s 19(1); *Children and Young Persons Act 1989* (Vic) s 129(2).

Children (Criminal Proceedings) Act 1987 (NSW) s 9.

Juvenile Justice Act 1983 (NT) s 33. See also *Police Administration Act 1978* (NT) ss 137, 138.

Juvenile Justice Act 1992 (Qld) s 39(1).

Juvenile Justice Act 1992 (Qld) s 39(2), (3). These options are also available to a court hearing a child's bail application under s 42.

Bail Act 1982 (WA) Sch 1 Pt C cl 2.

Young Offenders Act 1994 (WA) s 19(2).

Young Offenders Act 1994 (WA) s 49.

Children and Young Persons Act 1989 (Vic) s 129(7).

See J Saunders *IP Submission 21*; Church Network for Youth Justice *IP Submission 212*.

See eg Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990, 281; C Cunneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne 1995, 167–168.

Adelaide Central Mission *IP Submission 168*.

Letter from Y Blacher, Director Youth and Family Services 23 June 1997.

The safe houses are staffed 24 hours a day, 7 days a week and provide constant supervision for all service users: SA Aboriginal Child Care Agency *Public Hearing Submission* Adelaide 1 May 1996. Similar programs exist in other jurisdictions, eg, the Aboriginal Bail Support Program in Dubbo in rural NSW.

This proposal is supported by NSW Ombudsman *DRP Submission 80*.

DRP Submission 59; *DRP Submission 91*.

Wagga Wagga Practitioners' Forum 9 May 1996; S Hill, Registrar Minutes of Meeting Wagga Wagga 10 May 1996.

The Tasmanian Police Commissioner's Standing Orders and Instructions provide that a child must be released into the custody of a parent: s 106.8(4). National Legal Aid *DRP Submission 58* considered that the statutory duty should lie with the relevant welfare authority rather than the police. The Inquiry considers that generally referral to the relevant family services dept will discharge the police officer's duty of care.

2858 Royal Commission Into Aboriginal Deaths in Custody *National Report* vol 4 AGPS Canberra 1991 rec 242. eg a survey of all cases finalised
in the Magistrate's Court of SA in 1995 found that at their final court appearance 14.3% of Indigenous suspects were detained in custody
compared with 8% of non-Indigenous suspects: J Wundersitz et al *Aboriginal People and the Criminal Justice System: Report 1* SA
2859 Attorney-General's Dept Adelaide 1997, 52. See also J Saunders *IP Submission 21*.
C Cunneen & D McDonald *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of
the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* ATSIC Canberra 1997, 184.
2860 AIC submission to National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing
Them Home* HREOC Sydney 1997, 493. Nationally, Indigenous young people are 26 times more likely to be held in police custody than non-
Indigenous juveniles: 492.
2861 *National Report* vol 2 AGPS Canberra 1991 rec 62.
2862 C Cunneen & D McDonald *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of
the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* ATSIC Canberra 1997, 170–174. See also National
Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney
1997, 489–542.
2863 J Saunders *IP Submission 21*; Tas Government *IP Submission 210*.
2864 Oz Child Legal Service *IP Submission 195*; Tas Government *IP Submission 210*.
2865 SA Dept of Family and Community Services *IP Submission 110*.
2866 Canberra Focus Group 6 May 1996.
2867 Australian Association of Social Workers *IP Submission 207*; Darwin Focus Group 15 July 1996.
2868 See paras 18.163–164.
2869 See paras 20.101–102 and rec 271 concerning Australia's reservation to CROC art 37(c).
2870 *Children and Young Persons Act 1989* (Vic) s 130(1).
2871 Children and Young Persons General (Police Gaols) Regulations 1996 (Vic).
2872 *Children and Young Persons Act 1989* (Vic) s 130(2)(a), (b).
2873 *Young Offenders Act 1994* (WA) s 21(1).
2874 WA Commissioner's Orders and Procedures J115.
2875 At the Adelaide Practitioners' Forum 30 April 1996 it was suggested that as a matter of policy young people should always be remanded in
their home area. See also Vic Police Minutes of Meeting Melbourne 27 May 1996.
2876 eg in Alice Springs young people are remanded either at Alice Springs Police Station or in isolation cells at Alice Springs Correctional
Centre: Alice Springs Youth Accommodation and Support Service *DRP Submission 92*.
2877 See para 20.42.
2878 The NSW Youth Justice Coalition has recommended that a network of community-based refuges specially resourced to accept young
remandees should be established: *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 rec 176.
2879 The Inquiry understands that it is proposed that the NSW DPP take over all summary prosecutions in that State, including juvenile justice
matters.
2880 D Sandor *DRP Submission 30*.
2881 In South Africa there is no formal legislative framework for diversion of juvenile offenders and the chief mechanism is withdrawals of
charges by prosecutors: South African Law Commission IP 9 *Juvenile Justice* South African Law Commission Pretoria 1997, 34.
2882 See N Naffine & J Wundersitz 'Negotiating justice in the Children's Court' (1991) 2(4) *Criminology Australia* 21.
2883 r 14.2.
2884 NSW Ombudsman *DRP Submission 80*. See also paras 4.20–22, 14.110–115, 19.81–87.
2885 *Children (Criminal Proceedings) Act 1987* (NSW) s 12; *Juvenile Justice Act 1992* (Qld) s 58(2).
2886 *Children's Services Act 1986* (ACT) s 6; *Children and Young Persons Act 1989* (Vic) s 23 although this is limited to ensuring that the child
understands orders made by the court.
2887 eg Perth Focus Group 1 July 1996. See also para 4.24.
2888 N Naffine 'Children in the Children's Court' (1992) 6 *International Journal of Law and the Family* 76, 90. For an overview of the changing
role of children's courts see J Seymour 'Children's courts in Australia: Their current role and functions' in A Borowski & I O'Connor (eds)
Juvenile Crime, Justice and Corrections Longman Sydney 1997.
2889 See rec 227.
2890 Hobart Focus Group 30 May 1996; Rockhampton Focus Group 2 August 1996. See also Central Australian Aboriginal Child Care Service
Public Hearing Submission Alice Springs 18 July 1996.
2891 Marrickville Legal Centre *IP Submission 221*.
2892 See paras 18.114–115.
2893 See D Mildren 'Redressing the imbalance against Aboriginals in the criminal justice system' (1997) 21 *Criminal Law Journal* 7, 12–17.
2894 eg Darwin Focus Group 15 July 1996.
2895 G Cumes *IP Submission 169*.
2896 See Australian Association of Social Workers *IP Submission 207*.
2897 Wagga Wagga Practitioners' Forum 9 May 1996.
2898 Children's Welfare Association *IP Submission 138*.
2899 eg G Cumes *IP Submission 169*; Australian Association of Social Workers *IP Submission 207*.
2900 R Blackmore *Children's Court and Community Welfare in NSW* Longman Cheshire Melbourne 1989, 40. See also R Sullivan *Children in the
Children's Court: Youth Experiences of NSW Children's Courts* National Children's and Youth Law Centre Sydney 1993 recs 7.17–7.18.
2901 Youth Advocacy Centre *IP Submission 120*; Burnside *IP Submission 214*.
2902 See M Forrester *IP Submission 116*. See also R Sullivan *Children in the Children's Court: Youth Experiences of NSW Children's Courts*
National Children's and Youth Law Centre Sydney 1993 recs 7.4–7.16.
2903 R Gibson 'Court children use casino, says lawyer' *The Age* 29 July 1997, A4.
2904 This proposal is supported by Townsville Community Legal Service *DRP Submission 46*.
2905 NT Government *DRP Submission 71*.
2906 r 22.1.
2907 r 22.2.
2908 *Children's Court Act 1987* (NSW); *Children's Court of Western Australia Act 1988* (WA); *Children's Court Act 1992* (Qld); *Children and
Young Persons Act 1989* (Vic); *Child Welfare Act 1960* (Tas); *Youth Court Act 1993* (SA).
2909 eg J Saunders *IP Submission 21*; Catholic Education Office *IP Submission 38*; Association of Heads of Independent Schools *IP Submission*
55; Children's Protection Society *IP Submission 108*; Youth Advocacy Centre *IP Submission 120*; Fitzroy Legal Service *IP Submission 126*;
Barwon Adolescent Taskforce *IP Submission 188*; Church Network for Youth Justice *IP Submission 212*.

S Detrick 'The theme day of the Committee on the Rights of the Child on the administration of juvenile justice' (1996) 4 *The International Journal of Children's Rights* 95, 97.

This proposal is supported by Townsville Community Legal Service *DRP Submission 46* and WA Ministry of Justice *DRP Submission 73*. See also Canberra Practitioners' Forum 6 May 1996; R Sullivan *Children in the Children's Court: Youth Experiences of NSW Children's Courts* National Children's and Youth Law Centre Sydney 1993 recs 7.23–7.26.

eg Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *DRP Submission 53*; National Children's and Youth Law Centre *DRP Submission 59*.

eg Townsville Community Legal Service *IP Submission 46*; Juvenile Justice Advisory Council of NSW *IP Submission 53*.

eg Kreative Kids *DRP Submission 35*; Autistic Association of NSW *DRP Submission 40*; Townsville Community Legal Service *DRP Submission 46*; Juvenile Justice Advisory Council of NSW *IP Submission 53*.

Under the Crimes Act s 16A(2)(n) the matters which must be taken into account when passing sentence include 'the prospect of rehabilitation of the person'. The objectives of the *Juvenile Justice Act 1992* (Qld) include recognising the importance of '...the provision of services designed to (i) rehabilitate children who commit offences; and (ii) reintegrate children who commit offences into the community.' (s 3(e)). That Act sets out principles of juvenile justice which include that a child who commits an offence should be '...punished in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways': s 4(e)(ii). s 3(1) of the *Young Offenders Act 1993* (SA) provides that 'the object of this Act is to secure for youths who offend against the criminal law the care, correction and guidance necessary for their development into responsible and useful members of the community and proper realisation of their potential'. Under s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) the principles to which courts are to have regard include '(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance; (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption; (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home'. s 5(1) of the *Children's Services Act 1986* (ACT) provides '[i]n any proceedings...against or concerning or affecting a child...the court shall...seek to procure for the child such care, protection, control or guidance as will best lead to the proper development of the personality of the child and to the child's becoming a responsible and useful member of the community'. s 4 of the *Child Welfare Act 1960* (Tas) provides 'each child suspected of having committed, charged with, or found guilty of an offence shall be treated, not as a criminal, but as a child who is, or may have been, misdirected or misguided'. The objectives of the *Young Offenders Act 1994* (WA) include '...rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens' and '...to integrate young persons who have committed offences into the community': s 6(e). The Act also provides '...punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially responsible ways': s 7(j). The preamble to the *Juvenile Justice Act 1983* (NT) refers to '...the intention that juveniles be dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where appropriate, by means of admonition and counselling) and to extend to juveniles the same rights and protections before the law as apply to adults in similar circumstances'.

art 40(4).

art 37(b).

art 12.

CROC art 40(1) refers to 'the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. art 40(4) emphasises the desirability of non-custodial options for dealing with child offenders. See para 19.3.

C Cunneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne 1995, 101–102. See also paras 4.13, 18.3.

Survey Response 39.

Survey Response 73.

Survey Response 180.

Survey Response 211.

See paras 19.99–101, 19.105–116.

Standards were proposed in draft rec 10.1.

Education Centre Against Violence *DRP Submission 43*; Townsville Community Legal Service *DRP Submission 46*.

s 20C(1).

Crimes Act Pt 1B Div 5.

Crimes Act Pt 1B Div 9.

Townsville Community Legal Service *IP Submission 181*; Church Network for Youth Justice *IP Submission 212*.

R v Paull (1990) 20 NSWLR 427.

Attorney-General's Dept *IP Submission 178*.

(1992) 174 CLR 451.

Leeth v The Commonwealth of Australia (1992) 174 CLR 455, 468.

id 470.

id 92.

The scope of s 117 of the Constitution was also discussed by the High Court in the earlier decision of *Street v Queensland Bar Association* (1989) 168 CLR 29.

Federal DPP *TR Submission 110*.

Attorney-General's Dept *IP Submission 178*.

See paras 18.56–57.

Australian Association of Social Workers *IP Submission 207*.

SA Dept of Family and Community Services *IP Submission 110*.

eg *Juvenile Justice Act 1992* (Qld) s 109 outlines a number of factors that courts must consider in sentencing young people. NSW and ACT law also provide principles to be applied in sentencing children: *Children (Criminal Proceedings) Act 1987* (NSW) s 6; *Children's Services Act 1986* (ACT) s 5.

Townsville Community Legal Service *IP Submission 181*; Australian Association of Social Workers *IP Submission 207*.

Church Network for Youth Justice *IP Submission 212*.

ibid.

Aboriginal Legal Service of WA *IP Submission 75*.

See fn 4 above.

Community Services Australia *IP Submission 100*. This submission also pointed to WA as having high detention rates. This was so two to three years ago but since that time WA's detention rates for juvenile offenders have decreased: see para 18.48.

recs 236 and 247 address this in part by providing for training for magistrates.

Youth Advocacy Centre *DRP Submission 14*.

Law Society of NSW *IP Submission 209*.

2954 C Coumarelos *Juvenile Offending: Predicting Persistence and Determining the Cost Effectiveness of Intervention* NSW Bureau of Crime
 2955 Statistics and Research Sydney 1994, 105. This showed that 67% of the sample did not re-appear in the children's court after their first
 2956 appearance. See also para 18.4.
 2957 See para 18.4.
 2958 M Cain *Recidivism of Juvenile Offenders in New South Wales* NSW Dept of Juvenile Justice Sydney 1996, 1.
 2959 id 2.
 2960 P Salmelainen *The Correlates of Offending Frequency: A Study of Juvenile Theft Offenders in Detention* NSW Bureau of Crime Statistics
 2961 and Research Sydney 1995, 9-17.
 2962 Australian Association of Social Workers *IP Submission 207*.
 2963 Church Network for Youth Justice *IP Submission 212*.
 2964 SA Dept of Family and Community Services *IP Submission 110*.
 2965 ibid.
 2966 D Sandor *DRP Submission 30*.
 2967 (1988) 38 A Crim R 92.
 2968 eg this is expressly provided in the *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1); *Children and Young Persons Act 1989* (Vic) s
 2969 137; *Children's Services Act 1986* (ACT) ss 47, 49A. The *Juvenile Justice Act 1992* (Qld) s 19 also provides that a court can dismiss a charge
 2970 even where a child has pleaded guilty, if the court is satisfied that the child should have been cautioned instead of charged.
 2971 eg *Children's Services Act 1986* (ACT) ss 47, 49A.
 2972 Crimes Act s 20; *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1); *Children and Young Persons Act 1989* (Vic) s 137; *Children's*
 2973 *Services Act 1986* (ACT) ss 47, 49A; *Young Offenders Act 1993* (SA) s 23; *Young Offenders Act 1994* (WA) ss 67-70; *Juvenile Justice Act*
 2974 *1983* (NT) s 53; *Juvenile Justice Act 1992* (Qld) s 120; Youth Justice Bill 1997 (Tas) cls 51-53, 54-56.
 2975 The use of conferencing schemes in the sentencing process is discussed in NSWLRC Report 79 *Sentencing* NSWLRC Sydney 1996, 295.
 2976 Crimes Act s 18; *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1); *Children and Young Persons Act 1989* (Vic) s 137; *Children's*
 2977 *Services Act 1986* (ACT) ss 47, 49A; *Young Offenders Act 1993* (SA) s 23; *Young Offenders Act 1994* (WA) ss 118-123; *Juvenile Justice*
 2978 *Act 1983* (NT) s 53; *Juvenile Justice Act 1992* (Qld) s 120; Youth Justice Bill 1997 (Tas) cls 57-64.
 2979 eg *Children's Services Act 1986* (ACT) ss 47, 49A; *Juvenile Justice Act 1992* (Qld) s 122.
 2980 *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1); *Children (Community Service Orders) Act 1987* (NSW); *Children and Young*
 2981 *Persons Act 1989* (Vic) s 155B; *Young Offenders Act 1993* (SA) s 23; *Young Offenders Act 1994* (WA) ss 73-97; *Juvenile Justice Act 1983*
 2982 (NT) s 53; *Juvenile Justice Act 1992* (Qld) s 120; Youth Justice Bill 1997 (Tas) cls 69-78. Note that Vic, SA, NT and Qld have imposed
 2983 limits on the number of hours to be ordered.
 2984 eg *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1); *Children and Young Persons Act 1989* (Vic) s 137; *Children's Services Act*
 2985 *1986* (ACT) ss 47, 49A; *Juvenile Justice Act 1983* (NT) s 53; *Juvenile Justice Act 1992* (Qld) s 120; Youth Justice Bill 1997 (Tas) cls 65-68.
 2986 eg Crimes Act ss 20BS-20BY.
 2987 eg *Children and Young Persons Act 1989* (Vic) s 137.
 2988 eg *Young Offenders Act 1994* (WA) ss 73-97. An intensive community based order which allows for more intensive supervision conditions
 2989 is also provided for in ss 98-117.
 2990 eg *Children's Services Act 1986* (ACT) s 47(1)(h) — such an order usually involves attending an attendance centre and being subject to the
 2991 control, direction and supervision of the Director or authorised person whilst engaging in work, education, training or other activities which
 2992 the Director considers to be in the best interests of the child.
 2993 eg *Young Offenders Act 1993* (SA) s 23. The section provides that the home detention order should not exceed six months.
 2994 eg *Children and Young Persons Act 1989* (Vic) s 156 — weekend detention at a youth residential or youth training centre.
 2995 eg *Children and Young Persons Act 1989* (Vic) s 137.
 2996 eg *Children and Young Persons Act 1989* (Vic) s 137.
 2997 Crimes Act s 18; *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1); *Children and Young Persons Act 1989* (Vic) s 137; *Children's*
 2998 *Services Act 1986* (ACT) ss 47, 49A; *Young Offenders Act 1993* (SA) s 23; *Young Offenders Act 1994* (WA) ss 118-123; *Juvenile Justice*
 2999 *Act 1983* (NT) s 53; *Juvenile Justice Act 1992* (Qld) s 120; Youth Justice Bill 1997 (Tas) cls 79-89. Note that State and Territory laws use
 3000 different terms to describe custodial orders and the centres for children who have received a custodial order. In this Report these centres are
 3001 called detention centres and the sentences are called detention orders.
 2954 eg *Juvenile Justice Act 1983* (NT) s 53; *Children's Services Act 1986* (ACT) ss 47, 49A; *Young Offenders Act 1993* (SA) s 23; *Juvenile*
 2955 *Justice Act 1992* (Qld) s 120; Youth Justice Bill 1997 (Tas) cl 81. Note that a number of jurisdictions limit the period of detention to be
 2956 served.
 2957 eg *Children (Criminal Proceedings) Act 1987* (NSW) Pt 2 Div 4; *Young Offenders Act 1993* (SA) s 23; *Juvenile Justice Act 1992* (Qld) s
 2958 121.
 2959 Residents of Malmsbury Youth Training Centre Minutes of Meeting Bendigo 31 May 1996.
 2960 Telephone advice provided by the ACT Office of Community Advocate on 10 July 1997.
 2961 NSWLRC Report 79 *Sentencing* NSWLRC Sydney 1996, 298-299.
 2962 id 299.
 2963 The relationship between poverty and juvenile offending is discussed in C Cunneen & R White *Juvenile Justice: An Australian Perspective*
 2964 Oxford University Press Melbourne 1995, 116-134.
 2965 The question of monetary penalties for juvenile offenders is discussed further in J Seymour *Dealing with Young Offenders* The Law Book
 2966 Company Sydney 1988, 337-344.
 2967 E Moore 'Custodial programs and transition to the community: A review of policy and program reforms in Australia and New Zealand'
 2968 (1991) 3 *Current Issues in Criminal Justice* 193; R Blackmore 'The Sentencing Act and the Children's Court' (1992) 3 *Current Issues in*
 2969 *Criminal Justice* 337.
 2970 M Cain *An Evaluation of Parole Orders and Court Specified Parole Supervision* Office of Juvenile Justice NSW Sydney 1993, 5.
 2971 Law Society of NSW *IP Submission 209*.
 2972 Church Network for Youth Justice *IP Submission 212*.
 2973 Townsville Community Legal Service *IP Submission 181*; Church Network for Youth Justice *IP Submission 212*.
 2974 A Commadeur & M Bayliss 'Youth Attendance Orders' in J Vernon & S McKillop (eds) *Preventing Juvenile Crime* AIC Canberra 1991, 152.
 2975 R Blackmore 'The Sentencing Act and the Children's Court' (1992) 3 *Current Issues in Criminal Justice* 337.
 2976 ibid.
 2977 Law Society of NSW *IP Submission 209*.
 2978 Youth Court of SA *IP Submission 100*.
 2979 J Wundersitz *The South Australian Juvenile Justice System: A Review of its Operation* Office of Crime Statistics Adelaide 1996, 173.
 2980 id 210.

id 15–16. The report suggested that the State Government consider establishing a single agency to oversee community service orders. It acknowledged that this approach needed careful consideration as it could lead to 'contamination', that is, less serious offenders dealt with at the conference level may be 'contaminated' by contact with the more serious offenders for whom the Family and Community Service programs are designed.

Community Services Australia *IP Submission 201*.

ibid.

K Higgins (1996) (77) *Persons in Juvenile Corrective Institutions* — AIC unpublished.

P Boss et al (eds) *Profile of Young Australians* Churchill Livingstone Melbourne 1995, 155.

K Higgins (1996) (77) *Persons in Juvenile Corrective Institutions* — AIC unpublished.

ibid.

C Cunneen & R White *Juvenile Justice: An Australian Perspective* Oxford University Press Melbourne 1995, 231.

Juvenile Justice Act 1992 (Qld) s 125.

Children's (Criminal Proceedings) Act 1987 (NSW) s 33; *Children and Young Persons's Act 1989* (Vic) s 138.

NSW Dept of Juvenile Justice *White Paper: Breaking the Cycle: New Directions for Juvenile Justice in NSW* NSW Dept of Juvenile Justice Sydney 1994, 11–12.

National Children's and Youth Law Centre *IP Submission 12*; Aboriginal Legal Service of WA *IP Submission 75*; Qld Police Service *IP Submission 176*; Townsville Community Legal Service *IP Submission 181*; Oz Child Legal Service *IP Submission 195*; Confidential *IP Submission 215*.

Survey Response 148.

Survey Response 185.

Juvenile Justice Act 1992 (Qld) s 121(3)(b). Previously the maximum penalty which could be imposed for murder was 14 years imprisonment.

Juvenile Justice Act 1992 (Qld) s 114A.

eg Church Network for Youth Justice submission to Dept of Attorney-General and Justice Qld on proposed changes to the *Juvenile Justice Act 1992* (Qld) on behalf of Catholic Social Response, Catholic Archdiocese of Brisbane June 1996. See also para 18.39.

Young Offenders Act 1994 (WA) ss 126–128.

Juvenile Justice Act 1983 (NT) ss 53AH-AM.

D Burke, Attorney-General NT *Ministerial Statement on the Criminal Justice System and Victims of Crime* Legislative Assembly 20 August 1996.

Juvenile Justice Act 1983 (NT) ss 53AE-AG.

Criminal Code (WA) s 401(4).

Chester v R (1988) 165 CLR 611, 618.

DPP v DCJ (a Child) (unreported) Children's Court of WA 10 February 1997 per Fenbury AD.

id 5. The Judge also held that this would be contrary to the principles of juvenile justice set out in *Young Offenders Act 1994* (WA) s 7.

DPP v RJM (a Child) (unreported) Children's Court of WA 19 March 1997 per Fenbury AD.

DPP v DMP (a Child) (unreported) Children's Court of WA 10 February 1997 per Fenbury AD.

See paras 19.105–116 for further discussion on the particular disadvantage faced by Indigenous young people in relation to sentencing. The disproportionate impact of mandatory detention legislation on Indigenous juveniles was also highlighted in National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC 1997, 528–530.

Confidential *DRP Submission 78*.

ibid.

ibid.

(unreported) Full Court of the Supreme Court of NT 20 June 1997 per Martin CJ, Angel and Mildren JJ. In the other case, *McMillan v Pryce* (unreported) Full Court of the Supreme Court of NT 20 June 1997, the majority of the court held that the legislation did not have retrospective effect so that offences committed before 8 March 1997 will not be included in applying the legislation: per Martin CJ, Angel and Mildren JJ.

per Mildren J, 2.

Trennery v Bradley (unreported) Full Court of the Supreme Court of NT 20 June 1997 per Martin CJ, 13.

CROC art 40(2)(v); ICCPR art 4(5).

See paras 19.43–44.

See para 19.47.

Feminist Lawyers *IP Submission 177*.

ibid.

Oz Child Legal Service *IP Submission 195*.

Youth Advocacy Centre *IP Submission 120*.

Autistic Association of NSW *DRP Submission 40*.

Youth Advocacy Centre *IP Submission 120*.

Oz Child Legal Service *IP Submission 195*.

Children's Protection Society *IP Submission 108*; Education Centre Against Violence *DRP Submission 43*.

Youth Court of SA *IP Submission 100*.

Juvenile Justice Advisory Council of NSW *DRP Submission 53*.

Aboriginal Legal Service of WA *IP Submission 75* supported this proposal.

J Saunders *IP Submission 21*; AFP *IP Submission 155*; Townsville Community Legal Service *IP Submission 181*; Community Services Australia *IP Submission 201*; Australian Association of Social Workers *IP Submission 207*; Law Society of NSW *IP Submission 209*.

Townsville Community Legal Service *IP Submission 181*; Law Society of NSW *IP Submission 209*.

Criminal Law (Sentencing) Act 1988 (SA) s 8; *Young Offenders Act 1993* (SA) s 32(1).

Children (Criminal Proceedings) Act 1987 (NSW) s 25.

Children and Young Persons Act 1989 (Vic) s 52.

Australian Association of Social Workers *IP Submission 207*.

SA Dept of Family and Community Services *IP Submission 110*.

Community Services Australia *IP Submission 201*.

Law Society of NSW *IP Submission 209*.

Brisbane Focus Group 29 July 1996.

D Sandor *DRP Submission 30*.

Federation of Community Legal Centres (Vic) *DRP Submission 72*.

Youth Advocacy Centre *IP Submission 120*; Townsville Community Legal Service *IP Submission 181*.

See paras 18.180-184 for further discussion of the child's understanding of criminal proceedings.
 Burnside *IP Submission 214*.
 Church Network for Youth Justice *IP Submission 212*.
 Burnside *IP Submission 214*.
 Newcastle Focus Group 13 May 1996.
ibid.
 See para 18.155, rec 227.
 Oz Child Legal Service *IP Submission 195*.
ibid.
 Youth Court of SA *IP Submission 100*; Confidential *IP Submission 215*.
 Oz Child Legal Service *IP Submission 195*.
 Australian Association of Social Workers *IP Submission 207*.
 Confidential *IP Submission 215*.
ibid.
 HREOC *National Inquiry into the Human Rights of People with Mental Illness* AGPS Canberra 1993 vol 2, 634.
 Intellectual Disability Services Council *IP Submission 186*.
 Mental Health Legal Centre *IP Submission 167*.
 Wagga Wagga Practitioners' Forum 9 May 1996.
 Oz Child Legal Service *IP Submission 195*.
ibid.
ibid.
 Youth Advocacy Centre *IP Submission 120*.
 eg Oz Child Legal Service *IP Submission 195*.
 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC 1997, 528.
 See paras 18.191-195, recs 235-237.
 See paras 19.99-101.
 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC 1997, 528.
 eg ALRC Report 31 *The Recognition of Aboriginal Customary Laws* AGPS Canberra 1986; ALRC Report 44 *Sentencing* AGPS Canberra 1988; Royal Commission into Aboriginal Deaths in Custody *National Report* vol 4 AGPS Canberra 1991; Aboriginal and Torres Strait Islander Social Justice Commissioner *Fourth Report* AGPS Canberra 1996; Aboriginal and Torres Strait Islander Social Justice Commissioner *Indigenous Deaths in Custody 1989 to 1996* ATSIC Canberra 1996.
 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC 1997 recs 44, 45a.
 id based on rec 46a.
 id based on rec 46b.
 id based on rec 48.
 id based on rec 49.
 Attorney-General's Dept *DRP Submission 52*.
 Royal Commission into Aboriginal Deaths in Custody *National Report* vol 4 AGPS Canberra 1991 rec 62.
 id rec 92.
 id rec 94.
 Oz Child Legal Service *IP Submission 195*.
 Aboriginal Legal Service of WA *IP Submission 75*.
ibid.
 Royal Commission into Aboriginal Deaths in Custody *National Report* vol 4 AGPS Canberra 1991 rec 237.
 eg *Children (Criminal Proceedings) Act 1987* (NSW) s 14; *Criminal Records Act 1991* (NSW); *Young Offenders Act 1994* (WA) s 55; *Juvenile Justice Act 1983* (NT) s 89; *Criminal Records (Spent Convictions) Act 1992* (NT) s 6; *Juvenile Justice Act 1992* (Qld) s 124. Each of these statutes to varying degrees limits the imposition or retention of a criminal record in relation to children.
 SA Dept of Family and Community Services *IP Submission 110*.
 Survey Response 335.
 Survey Response 71.
 Survey Response 99.
 eg E C Orr *IP Submission 91* favoured destruction of records when the child reaches the age of 18; Australian Association of Social Workers *IP Submission 207* favoured retention of criminal records for a maximum period of two years from the last conviction.
 Youth Court of SA *IP Submission 100*.
Juvenile Justice Legislation Amendment Act 1996 (Qld) s 41 inserted a new s 114A into the *Juvenile Justice Act 1992* (Qld). See paras 18.39, 18.49, 19.51.
 Youth Advocacy Centre *IP Submission 120*; Townsville Community Legal Service *IP Submission 181*; Church Network for Youth Justice *IP Submission 212*; S Harris, Co-ordinator Youth and Community Combined Action *Public Hearing Submission* Rockhampton 1 August 1996.
 Draft rec 11.3.
ibid.
DRP Submission 66.
 NT Government *DRP Submission 71*. See also *Criminal Records (Spent Convictions) Act 1992* (NT) s 6.
 Education Centre Against Violence *DRP Submission 43*.
Children (Criminal Proceedings) Act 1987 (NSW) s 38. This is mandatory in respect of a finding of not guilty or if the court dismisses the charge and discretionary with regard to other circumstances.
 Youth Advocacy Centre *IP Submission 120*.
 AFP *DRP Submission 66*.
 See paras 18.2, 19.47-48.
 See paras 20.26-29.
 Senate Employment Education and Training References Committee *Report of the Inquiry into Education and Training in Correctional Facilities* Senate Employment Education and Training References Committee Canberra 1996.
 NSW Ombudsman *Inquiry into Juvenile Detention Centres* NSW Ombudsman Sydney 1996.
 Terms of Reference (vi).

See paras 18.6–7.

See para 18.8.

In addition, ICCPR contains similar provisions of a more general nature. art 7 provides that no-one shall be subjected to cruel, inhuman or degrading treatment or punishment. art 10(1) provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. art 10(3) provides that the essential aim of detention should be the 'reformation and social rehabilitation' of detainees and that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

art 37(c).

r 26.1.

eg *Children (Detention Centres) Act* 1987 (NSW); *Children (Detention Centres) Regulation* 1995 (NSW); *Juvenile Justice Act* 1992 (NT); *Juvenile Justice Act* 1992 (Qld); *Young Offenders Act* 1993 (SA); *Children and Young Persons Act* 1989 (Vic); *Young Offenders Act* 1994 (WA); *Young Offenders Regulations* 1994 (WA); *Children's Services Act* 1986 (ACT); *Child Welfare Act* 1960 (Tas).

eg *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997; *Management Philosophy of the Juvenile Justice Directorate* WA Ministry of Justice Perth 1993.

Juvenile Justice Centres Operational Procedures Manual NSW Dept of Juvenile Justice Sydney 1997; *Juvenile Justice Centre Operations Manual* Vic Dept Health and Community Services Melbourne 1994; *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide 1997; *Juvenile Justice Procedures Manual* (draft) NT Correctional Services Darwin 1997; Quamby Youth Detention Centre *Policy and Procedures Manual* ACT Youth Justice Services Canberra 1997; *Ashley Detention Centre Procedures Manual* (draft) Tas Dept of Community and Health Services Hobart 1997; Programme Outlines for Longmore Detention Centre, Rangeview Remand Centre and Riverbank Detention Centre Perth. Note that NSW, Tas, WA, NT and ACT are currently in the process of updating their manuals. Tas and NT provided manuals in draft form to the Inquiry. WA and Qld were not able to provide updated manuals to the Inquiry and NSW and ACT provided only completed sections. Where updated manuals were not provided, regard was had to other available policies and guidelines previously provided to the Inquiry by those jurisdictions.

eg *Juvenile Justice Act* 1992 (Qld) s 203; *Children (Detention Centres) Act* 1987 (NSW) ss 14–15; *Juvenile Justice Act* 1992 (NT) s 64; *Children's Services Act* (ACT) s 58. In some jurisdictions the manager is referred to as the Chief Executive, eg, *Juvenile Justice Act* 1992 (Qld) s 203 or Superintendent, eg, *Children (Detention Centres) Act* 1987 (NSW) ss 14–15.

See paras 20.39–40.

See paras 19.4, 19.50–64.

eg SA Dept of Family and Community Services *IP Submission 110*; Townsville Community Legal Service *IP Submission 181*; Law Society of NSW *IP Submission 209*; Church Network for Youth Justice *IP Submission 212*.

Law Society of NSW *IP Submission 209*.

Townsville Community Legal Service *IP Submission 181*.

Open Door Youth Foundation *IP Submission 200*.

J McGuire & P Priestley 'Reviewing what works: Past, present and future' in J McGuire *What Works: Reducing Reoffending — Guidelines from Research and Practice* John Wiley & Sons Urchester 1996, 11.

Townsville Community Legal Service *IP Submission 181*.

Children's Court of Qld *Third Annual Report 1995–96* Children's Court of Qld Brisbane 1996, 50. See also *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 27.

See para 19.2.

eg in Vic the legislation simply states that determination of sentences must take into account the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance but does not specify the need to rehabilitate the child: *Children and Young Persons Act* 1989 (Vic) s 139. See also *Children (Detention Centres) Act* 1987 (NSW) s 4.

eg in Qld the principles of juvenile justice in the legislation state that it is said that the child should be punished in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways: *Juvenile Justice Act* 1992 (Qld) s 4. The aim of rehabilitation has been obscured further by amendments to this legislation that place community protection as a priority ahead of rehabilitation: *Juvenile Justice Legislation Amendment Act* 1996 (Qld) s 4.

eg *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997; *Management Philosophy of the Juvenile Justice Directorate* WA Ministry of Justice Perth 1993; 'Juvenile Justice Mission Statement and Objectives' in *Juvenile Justice Centre Operations Manual* vol 1 Vic Dept of Health and Community Services Melbourne 1994.

eg Riverbank Detention Centre and Longmore Detention Centre Program booklets, WA; *New Directions for Juvenile Justice: Specialist Support Services* Vic Dept of Health and Community Services Melbourne June 1995 Pub No 92/0123.

eg Aboriginal Legal Service of WA *IP Submission 75*; Aboriginal Justice Council of WA *IP Submission 79*; Youth Advocacy Centre *IP Submission 120*; Federation of Community Legal Centres (Vic) *IP Submission 129*; Townsville Community Legal Service *IP Submission 181*; Law Society of NSW *IP Submission 209*; Church Network for Youth Justice *IP Submission 212*.

Survey Question 68. There were 208 young people in detention who were asked this question. 101 of those young people responded to this question.

Townsville Community Legal Service *IP Submission 181*. See also P Reberger *Public Hearing Submission* Sydney 26 April 1996.

Management Philosophy of the Juvenile Justice Directorate WA Ministry of Justice Perth 1993.

See paras 4.13, 19.50–64. The WA camp is discussed further in P Omaji 'Critical issues in managing youth offenders: A review of Western Australia's recent initiatives' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond Conference AIC Adelaide 26–27 June 1997, 21–2.

L Atkinson 'Boot Camps and justice: A contradiction in terms?' (1995)(46) *Trends and Issues in Crime and Criminal Justice* 5.

See also paras 4.13, 18.3, 19.4.

id 2–5.

National Report vol 3 AGPS Canberra 1991 recs 168–170.

E Della Torre *Covenant on Civil and Political Rights: Submission on Australia's Compliance* National Children's and Youth Law Centre Sydney 1994.

P Russo, Juvenile Custodial Services WA Ministry of Justice Letter 2 October 1997.

L Atkinson 'Juvenile corrective institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 414.

A Wells 'New directions in juvenile justice in WA' *Paper* Juvenile Crime and Juvenile Justice: Toward 2000 and Beyond Conference Adelaide 26–27 June 1997, 9–11: the centre provides intensive treatment in areas such as problem-solving abilities, relapse prevention strategies and victim empathy.

This was recommended in NSW by Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 recs 12, 97.

See paras 4.13, 18.3, 19.4.

3164 L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman
 Melbourne 1997, 402.
 3165 QOC Standards SA Dept of Family and Community Services Adelaide May 1996, 2; Design Guidelines for Juvenile Justice Facilities in
 Australia and New Zealand Vic Dept of Health and Community Services Melbourne May 1996, 9–10.
 3166 The QOC Standards and Design Guidelines were also developed with reference to the UN Rules for the Protection of Juveniles Deprived of
 their Liberty and the Beijing Rules. In addition, the QOC standards were developed with reference to the Riyadh Guidelines and the Design
 Guidelines with reference to UN Standard Minimum Rules for the Treatment of Prisoners and Related Recommendations.
 3167 Royal Commission into Aboriginal Deaths in Custody *National Report* AGPS Canberra 1991. See QOC Standards SA Dept of Family and
 Community Services Adelaide May 1996, 2; Design Guidelines Vic Dept of Health and Community Services Melbourne May 1996, 9–10.
 3168 See Design Guidelines Vic Dept of Health and Community Services Melbourne May 1996, 9–10; *QOC Standards* SA Dept of Family and
 Community Services May 1996, 2.
 3169 These matters are discussed in detail later in this chapter.
 3170 See para 18.10, recs 192, 193.
 3171 eg the Design Guidelines and both the endorsed and draft QOC Standards have been explicitly referred to in *Ashley Detention Procedure*
Manual (draft) Tas Dept of Community and Health Services Hobart 1997; *Quamby Youth Detention Centre Policy and Procedure Manual*
 ACT Youth Justice Services Canberra 1997; *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective
 Services Commission Brisbane 1997. Other jurisdictions appear to reflect the underlying philosophy of the standards without making explicit
 reference to them, eg, *Detention Procedures Manual* (draft) NT Correctional Services Darwin 1997. Other jurisdictions are in the process of
 re-drafting their manuals.
 3172 See paras 20.143–151.
 3173 eg Townsville Community Legal Service *IP Submission 181*; Australian Association of Social Workers *IP Submission 207*; Church Network
 for Youth Justice *IP Submission 212*.
 3174 eg Church Network for Youth Justice *IP Submission 212*; NSW Government *DRP Submission 86*. See also M Maneschi 'Juvenile "Justice"
 Centres — False Labelling?' *Paper Children and the Law — Where's the Justice?* Conference Sydney 28 April 1997, 3.
 3175 SA Dept of Family and Community Services *IP Submission 181*; WA Ministry for Justice *IP Submission 184*; Vic Government *IP*
Submission 213; NT Government *DRP Submission 40*.
 3176 eg Juvenile Justice Regulation 1993 (Qld) reg 11.
 3177 Similar recommendations were made in Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney recs
 13, 61.
 3178 IP 17.
 3179 eg one of the comics, *Doing Time*, informs children in detention of complaints procedures and lists contact numbers for the legal aid
 commission, ombudsman and other bodies: R Jones *Doing Time* Streetwise Comics Sydney 1997.
 3180 A new centre in Perth is planned which will hold up to 200 children. See L Atkinson 'Juvenile correctional institutions' in A Borowski & I
 O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 409.
 3181 Some, eg Kariang in NSW, are high security while others, eg Cobham, Worimi, Riverina, Reiby and Minda in NSW, are medium security
 and others, eg Keelong, Mt Penang and Broken Hill in NSW, are minimum security institutions: L Atkinson 'Juvenile correctional
 institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 408–9.
 3182 eg in Vic the Melbourne Juvenile Justice Centre caters for males aged 15 to 16, Malmsbury Juvenile Justice Centre for 17 to 20 year old
 males and Parkville Youth Residential Centre for 10 to 20 year old females and 10 to 14 year old males. In WA, Longmore Detention Centre
 is for males up to 15 years old and females up to 17 years old and Riverbank Detention Centre is for males aged 16 and 17: L Atkinson
 'Juvenile correctional institutions' in A Borowski & I O'Connor *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 408–9.
 3183 eg Don Dale Centre in the NT, Magill Training Centre in SA, Ashley Youth Detention Centre in Tas and Quamby Juvenile Detention Centre
 in the ACT. The ACT and Tas have only one juvenile detention centre each: L Atkinson 'Juvenile correctional institutions' in A Borowski &
 I O'Connor *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 408–9.
 3184 L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman
 Melbourne 1997, 409. The Wilderness Work Camp Detention Centre in NT is located 170 kilometres from Darwin. There was a centre in
 Alice Springs until 1991.
 3185 See paras 20.117–118.
 3186 WA Ministry of Justice *IP Submission 184*.
 3187 *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 22–23.
 3188 L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman
 Melbourne 1997, 409.
 3189 L Maher 'Policy and trends in relation to juvenile detention' (1991) 3 *Current Issues in Criminal Justice* 185.
 3190 NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, iv.
 3191 id iii–ix.
 3192 eg Aboriginal Legal Service of WA *IP Submission 75*; Aboriginal Justice Council of WA *IP Submission 79*; Youth Advocacy Centre *IP*
Submission 120; Townsville Community Legal Service *IP Submission 181*; Australian Association of Social Workers *IP Submission 207*;
 Church Network for Youth Justice *IP Submission 212*.
 3193 Youth Advocacy Centre *IP Submission 120*.
 3194 Church Network for Youth Justice *IP Submission 212*.
 3195 Personal Communication Corrective Services Commission Qld 17 September 1997.
 3196 Guiding Principles 1.30–1.36, 15–16.
 3197 Design Guidelines May 1996 Guidelines 5.508–6.709.
 3198 Draft QOC Standards 7.4.1–7.4.6.
 3199 NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, 281.
 3200 *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 rec 208.
 3201 eg *Quamby Detention Centre Policy & Procedures Manual* ACT Youth Justice Services Canberra 1997— development of the plan must
 commence during the first week of custody and be accompanied by weekly monitoring and full reviews each month; *Secure Care Standard*
Procedures SA Dept of Family and Community Services Adelaide 1997— a draft case plan is to be prepared and presented at a case
 planning meeting held within 4 weeks of the young person receiving their order, review by a Youth Worker every 2 weeks and a formal
 review every 8 weeks.
 3202 *Juvenile Justice Centre Operations Manual* Vic Dept of Health and Community Services Melbourne 1994.
 3203 Townsville Community Legal Service *IP Submission 181*.
 3204 Law Society of NSW *IP Submission 209*.
 3205 Federation of Community Legal Centres (Vic) *IP Submission 129*.
 3206 NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, 284–287.

Draft Standards 2.1.2; 2.2.1–2.2.4; 2.3.1; 2.4.9–2.4.12.

Draft Standards 2.4.12–2.4.13.

This is supported by NSW Ombudsman *DRP Submission 80*; NSW Government *DRP Submission 86*.

The Integrated Approach: The Philosophy and Directions of Juvenile Detention Qld Corrective Services Commission Brisbane 1997, 20.

eg *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide 1997.

See paras 4.52–53, 20.117–118.

Gay and lesbian young people experience particular problems stemming from discrimination, vilification and violence. They also have higher rates of suicide: Burnside *IP Submission 214*. See also para 9.58, rec 22.

See paras 4.42–50.

See para 20.127.

See paras 4.58–60, 20.119–124.

CROC art 28.

UN Rules for the Protection of Juveniles Deprived of their Liberty arts 38, 39.

T Cairney et al 'Literacy and youth' in L Atkinson & S Gerull (eds) *National Conference on Juvenile Detention* AIC Canberra 1993, 164.

eg Rangeview Remand Centre, Riverbank Detention Centre and Longmore Detention Centre Program Manuals; attachment to WA Ministry of Justice *IP Submission 184*.

Senate Employment, Education and Training References Committee *Report of the Inquiry into Education and Training in Correctional Facilities* Senate References Committee Canberra 1996, 52–53.

id 51. See also paras 10.52–62.

eg Australian Association of Social Workers *IP Submission 207*; Law Society of NSW *IP Submission 209*.

Australian Association of Social Workers *IP Submission 207*.

Church Network for Youth Justice *IP Submission 212*.

Law Society of NSW *IP Submission 209*.

Focus Group Canberra 6 May 1996.

I Graham 'Managing cultural diversity — the NSW experience' in L Atkinson & S Gerull *National Conference on Juvenile Detention* AIC Canberra 1994, 41–42. See also Senate Employment, Education and Training References Committee *Report of the Inquiry into Education and Training in Correctional Facilities* Senate References Committee Canberra 1996, 52.

Senate Employment, Education and Training Reference Committee *Report of the Inquiry into Education and Training in Correctional Facilities* Senate References Committee Canberra 1996, 51.

eg Rangeview Remand Centre, Riverbank Detention Centre and Longmore Detention Centre Program Manuals: attachment to WA Ministry of Justice *IP Submission 184*.

eg *ibid*; Vic Government *IP Submission 213*.

B Baikie 'Programming for Aboriginal youth in custody: What works and barriers to success' *Paper Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond Conference* AIC Adelaide 26–27 June 1997, 4–8.

eg Aboriginal Legal Service of WA *IP Submission 75*; Church Network for Youth Justice *IP Submission 212*.

Townsville Community Legal Service *IP Submission 181*.

SA Dept of Family and Community Services *IP Submission 110*; Australian Association of Social Workers *IP Submission 207*.

Australian Association of Social Workers *IP Submission 207*.

Standards 3.2; 3.4; 3.10–3.12; 3.16; 3.18–3.21; 3.23. The specified needs of detainees include age, gender, duration of stay, cultural diversity, specific learning needs, interests and vocational capacities.

Standard 3.2 fulfils the objectives of CROC art 12. The standards also meet a number of the UN Rules for the Protection of Juveniles Deprived of their Liberty. They provide for access to appropriate educational programs under r 39. Standard 3.4 partially fulfils r 38 and Standard 3.23 fulfils r 42.

Standards 3.2, 3.16.

eg Office of Juvenile Justice Minutes of Meeting Newcastle 14 May 1996.

Standards 1.1–1.17; 4.1–4.27; 5.1–5.21. The standards emphasise that the young person is to be informed of the screening and assessment process.

Standards 5.1–5.3.

eg Children (Detention Centres) Regulation 1995 (NSW) reg 26; *Ashley Youth Detention Centre Manual* (draft) Tas Community and Health Services Hobart 1997; *Detention Centre Procedures Manual* (draft) NT Corrective Services Darwin 1997.

eg Children (Detention Centres) Regulation 1995 (NSW) reg 27; *Secure Standard Procedures* SA Dept of Family and Community Services Adelaide 1997 procedure 25.

Detention Procedures Manual NT Corrective Services Darwin 1997; Don Dale Youth Detention Centre Minutes of Meeting Darwin 16 July 1996; *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide 1997 procedure 25. Some procedures manuals did not have a written policy in relation to phone calls: eg *Juvenile Justice Centre Operations Manual* vol 1 Vic Dept of Health and Community Services Melbourne 1994.

Detention Centre Procedures Manual (draft) NT Corrective Services Darwin 1997.

Under *Children (Detention Centres) Act 1987* (NSW) s 21(1) these punishment options include a caution, restriction for participation in sport or recreation for up to 4 days, additional duties for up to 7 days or confinement for up to 3 hours, or for those over 16, up to 12 hours.

eg *Juvenile Justice Act 1992* (Qld) s 214(2); Children (Detention Centres) Regulation 1995 (NSW) regs 19, 28; *Detention Procedures Manual* NT Corrective Services Darwin 1997; *Secure Care Standard Procedures* SA Dept Family and Community Services Adelaide 1997 procedure 25.

eg *Quamby Youth Detention Centre Policy and Procedures Manual* ACT Youth Services Canberra Pt 5.6.1; *Detention Procedures Manual* (draft) NT Corrective Services Darwin 1997.

Draft QOC Standards 3.1.1, 3.1.4, 3.1.8.

The standards provide that policies and procedures are to be accessible to ethnic groups, either in their own language or through provision for access to interpreter services (3.1.8); that community organisations and specialist community workers from Aboriginal and ethnic groups are to be encouraged to visit young detainees (3.2.3); access to an interpreter service is to be sought when required for families and young people from a non English speaking background (3.2.4); contact between young people and their families is to be facilitated if distance prohibits visiting (3.2.5).

eg the standards provide that visits are to be allowed to occur outside normal visiting hours when it is deemed to be in the best interests of the young person and/or of their visitor (3.4.2). This was also recommended by NSW Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 rec 56.

NSW Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 rec 58.

Federation of Ethnic Communities' Councils of Australia *Background Paper on Ethnic Youth* Federation of Ethnic Communities' Councils of Australia Sydney 1991, rec (ii).

eg *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 29; *Secure Care Standard Procedures* SA Dept Family and Community Services Adelaide procedure 26; *Draft Complaints Handling Policy and Procedures* NSW Dept of Juvenile Justice Sydney 1997.

eg Youth Advocacy Centre *IP Submission 120*; Church Network for Youth Justice *IP Submission 212*.

NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 2 NSW Ombudsman Sydney 1996, 513–514.

id xiii–xiv.

Juvenile Justice Centre Operational Procedures Manual NSW Dept of Juvenile Justice Sydney 1997.

eg Youth Advocacy Centre *IP Submission 120*; WA Ministry of Justice *IP Submission 184*; Church Network for Youth Justice *IP Submission 212*.

Townsville Community Legal Service *IP Submission 181*.

eg Youth Advocacy Centre *IP Submission 120*; Church Network for Youth Justice *IP Submission 212*.

Youth Advocacy Centre *IP Submission 120*.

Draft QOC Standards 1.2.7, 1.2.11, 1.2.12, 1.4.2–1.4.7. Persons to whom the young person can make the complaint are said to include (but not be limited to) official visitors, ombudsman, visiting magistrates, welfare officers (social workers), ministers of religion and members of parliament.

Draft QOC Standards 1.3.1–1.3.4.

eg Standards 1.1.1–1.2.13 appear to be consistent with art 12(2) of CROC, Standards 1.2.7 and 1.3.1–1.3.4 appear to fulfil the basis requirements of r 24 of the 1990 UN Rules and Standard 1.4.2 appears to be consistent with r 75, 76, 78.

See rec 267.

See rec 256.

eg *Children (Detention Centres) Act 1987* (NSW) s 21. In Tas, permitted punishments include cancellation of leave: *Ashley Detention Manual* (draft) Tas Dept Community Services and Health Hobart 1997 Pts 14.5–6.

eg *Children (Detention Centres) Act 1987* (NSW) s 22; *Juvenile Justice Act 1992* (NT) s 66; *Juvenile Justice Centres Operations Manual* Vic Dept of Health and Community Services Melbourne 1994 Pt 3.6; Juvenile Justice Regulation 1993 (Qld) reg 13(3); *Secure Care Standard Procedures* SA procedure 13; *Ashley Youth Detention Centre Manual* (draft) Tas Dept Community and Health Services Hobart 1997 Pt 24.3.

Children (Detention Centres) Regulation 1995 (NSW) regs 37, 38; *Juvenile Justice Centres Operations Manual* vol 1 Vic Dept of Health and Community Services Melbourne 1994 Pt 3.6; *Quamby Youth Detention Centre Policy and Procedures Manual* ACT Youth Justice Services Canberra Pt 1.4; *Ashley Youth Detention Centre Manual* (draft) Tas Dept Community and Health Services Hobart 1997 Pt 3.8. The Vic Manual emphasises that force is not permitted in response to verbal abuse, failure to comply with instructions or breach of centre rules.

eg *Children (Detention Centres) Act 1987* (NSW) s 22(1)(d); *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide 1997 procedures 13, 19.

eg *Children (Detention Centres) Act 1987* (NSW) s 22(1)(f); *Ashley Youth Detention Centre* (draft) Tas Dept of Community and Health Services Hobart 1997 Pt 3.8.

Juvenile Justice Regulation 1993 (Qld) reg 13(3); *Ashley Youth Detention Centre Manual* (draft) Tas Dept Community and Health Services Hobart 1997 Pt 3.8.

Children (Detention Centres) Act 1987 (NSW) ss 33, 37A; *Young Offenders Act 1994* (WA) s 173.

eg Oz Child Legal Service *IP Submission 195*; Church Network for Youth Justice *IP Submission 212*.

Youth Advocacy Centre *IP Submission 120*.

NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, xiii.

ibid.

ibid.

Draft QOC Standards 6.3.1–6.3.11.

Standards, 6.5.1–6.5.7.

eg *Children (Detention Centres) Act 1987* (NSW) s 19.

eg a detainee who assaults a staff member in SA can be placed on a separation program for a minimum of three and a maximum of seven days, depending on the severity of the incident: *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide procedure 13.

eg *Children (Detention Centres) Act 1987* (NSW) s 19(2); Juvenile Justice Regulation 1993 (Qld) reg 16; *Juvenile Justice Centre Operations Manual* vol 1 Vic Dept of Health and Community Services Melbourne 1994 Pt 3.8; *Ashley Youth Detention Centre Manual* (draft) Tas Dept Community and Health Services Hobart 1997 Pt 3.7.

Quamby Youth Detention Centre Policy and Procedures Manual ACT Youth Justice Services Canberra 1997. Note that in this case the isolation is limited to 5 minutes.

eg Juvenile Justice Regulation 1993 (Qld) reg 16(3): isolation for more than 2 hours requires the centre manager's approval, for more than 12 hours, the notification of the chief executive, and for more than 24 hours the approval of the chief executive; *Juvenile Justice Centre Operations Manual* vol 1 Vic Dept of Health and Community Services Melbourne 1994: periods of between 2 to 6 hours, must be authorised by the CEO, from 6 to 12 hours by the Regional Director and from 12 to 24 hours by the Secretary; *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide 1997 procedures 7, 15: isolation of detainees aged between 12 to 14 must be approved by the unit manager and isolation of detainees 15 and over up to 24 hours must be approved by the unit manager or, if from 24 to 48 hours, by the Director.

eg *Juvenile Justice Centres Operations Manual* vol 1 Vic Dept of Health and Community Services Melbourne 1994 provides for observation every 15 minutes; *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide procedure 6 provides observation every 5 minutes.

Children (Detention Centres) Act 1987 (NSW) s 21(2)(b).

Children (Detention Centres) Act 1987 (NSW) s 21(1): confinement is limited to 3 hours for detainees under 16 and 12 hours for those over 16.

eg Juvenile Justice Regulation 1993 (Qld) reg 16(3) provides that a staff member must not isolate a child for more than 12 hours overnight.

eg *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide 1997 procedures 7, 15: detainees aged between 12 to 14 cannot be isolated for more than 24 hours, those over 15 years cannot be isolated for more than 48 hours.

Quamby Youth Detention Centre Policy and Procedures Manual (draft) ACT Youth Justice Services Canberra 1997 Pt 4.10.

NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, xii–xiii.

r 67.

Draft QOC Standards 6.4.1–6.4.6.

Earlier draft of the QOC Standards provided to the Inquiry, Standard 6.4.2.

eg *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide procedure 7; *Children (Detention Centres) Act 1987* (NSW) s 19(3); Juvenile Justice Regulation 1993 (Qld) reg 16(5). The NSW Act also requires that the superintendent of the centre shall

forward copies of the record to the detainee and the Director-General within 24 hours of the isolation: *Children (Detention Centres) Act 1987* (NSW) s 19(3).

eg *Juvenile Justice Centres Operational Manual* NSW Dept of Juvenile Justice Sydney 1997.

This is supported by D Sandor *DRP Submission 30*.

eg *Children (Detention Centres) Act* (NSW) ss 33, 37A; *Juvenile Justice Act 1992* (Qld) s 219; *Juvenile Justice Act 1992* (NT) s 91. The period of imprisonment for these offences ranges from 3 months to a year.

eg *Juvenile Justice Act 1992* (NT) s 91.

This discretion is noted in *Children (Detention Centres) Act 1987* (NSW) s 37A which states that a breach of conditions of leave can be dealt with as misbehaviour rather than as an offence.

Young Offenders Act 1994 (WA) s 170. These include disobeying a rule, using insulting or threatening language, making a false or frivolous complaint, an act or omission of insubordination or misconduct subversive of the order of the centre or behaviour of an disorderly or riotous manner.

Young Offenders Act 1994 (WA) s 171.

Young Offenders Act 1994 (WA) s 172(2).

In some jurisdictions this right is legislatively recognised: eg *Juvenile Justice Act 1992* (NT) s 40; *Juvenile Justice Act* (Qld) s 66.

eg in NSW, when serious offences such as assault are referred to the police no opportunity is provided by the centre for the detainee to speak to a lawyer or contact anyone for advice during this time: M Maneschi 'Juvenile "Justice" Centres —False Labelling *Paper Children* and the Law: Where's the Justice? Conference Sydney 28 April 1997, 7.

Young Offenders Act 1994 (WA) s 174(3). *Young Offenders Regulations 1995* (WA) reg 39 also provides that a suitable person other than a legal practitioner can assist and represent the young offender at the disciplinary hearing. This prohibition on legal representation applies despite the fact that the procedure is very similar in nature to judicial proceedings: reg 40.

Young Offenders Act 1994 (WA) s 173: punishment for a detention centre offence includes altering the earlier release day of the detainee. An order of the superintendent is limited to 3 days, and to 14 days if made by a visiting justice.

Youth Advocacy Centre *IP Submission 120*; Townsville Community Legal Service *IP Submission 181*.

SA Dept of Family and Community Services *IP Submission 110*.

Oz Child Legal Service *IP Submission 195*.

See para 20.8.

r 24.

Draft QOC Standards 6.1.1–6.1.5.

Standard Guidelines for Corrections in Australia Corrective Services Ministers' Conference 1994 Guidelines 5.37–5.39.

Juvenile Justice Centres Operational Manual NSW Dept of Juvenile Justice Sydney 1997; *Ashley Youth Detention Centre Manual* Tas Dept of Community and Health Services Hobart 1997.

Draft QOC Standard 1.4.3.

See para 18.172.

eg *Children (Detention Centres) Act 1987* (NSW) s 8A; *Juvenile Justice Act 1992* (NT) ss 71-72; *Young Offenders Act 1994* (WA) ss 166-167; *Juvenile Justice Act 1992* (Qld) ss 204-205.

eg *Juvenile Justice Act 1992* (NT) s 72; *Children (Detention Centres) Act 1987* (NSW) s 8A(4); *Children's Services Act 1986* (ACT) s 19A; *Young Offenders Act 1994* (WA) s 167.

eg *Children (Detention Centres) Act 1987* (NSW) s 8A.

Juvenile Justice Act 1992 (Qld) s 204.

Juvenile Justice Act 1992 (Qld) s 205(2); *Juvenile Justice Act 1992* (NT) s 73.

Young Offenders Act 1994 (WA) s 167.

eg *Children (Detention Centres) Act 1987* (NSW) s 8A; *Young Offenders Act 1994* (WA) s 169.

eg *Juvenile Justice Act 1992* (NT) s 70; *Children (Detention Centres) Act 1987* (NSW) s 7.

Northern Australia Aboriginal Legal Service Minutes of Meeting Darwin 16 July 1996.

NSW Youth Justice Coalition *Kids in Justice: a Blueprint for the 90s* Youth Justice Coalition Sydney 1990, 185.

NSW Government *DRP Submission 86*.

NSW Ombudsman *DRP Submission 80*.

NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, xiv.

Draft QOC Standards 1.4.2, 1.4.6.

Standard Guidelines for Corrections in Australia Corrective Services Ministers' Conference 1994 Guidelines 3.2, 3.3.

NSW Ombudsman *DRP Submission 80*.

NSW Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 recs 203, 216.

NT Government *DRP Submission 71*. See draft rec 11.15.

eg D Reberger *Public Hearing Submission* Sydney 26 April 1996; Oz Child Legal Service *IP Submission 195*.

Survey Question 67. 208 young people in detention were asked this question. 121 of those young people responded to this question.

See para 18.172. See also Don Dale Centre Minutes of Meeting Darwin 16 July 1996: the Inquiry was told that young people are frequently held on remand in police cells for one to two days before they have access to a solicitor and that this access is usually only given just prior to their court hearing.

See paras 19.35–38. This point was emphasised by D Sandor *DRP Submission 30*.

eg *Secure Care Standard Procedures* SA Dept Family and Community Services Adelaide 1997 procedure 24; *Quamby Youth Detention Centre Policy and Procedures Manual* ACT Youth Justice Services Canberra Pt 5.6.

Draft QOC Standards 3.1.5, 3.4.2.

NSW Legal Aid Commission *Juvenile Justice Visiting Legal Service: Evaluation* NSW Legal Aid Commission Sydney 1996, 1.

NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, xiv.

NSW Legal Aid Commission *Juvenile Justice Visiting Legal Service Evaluation* NSW Legal Aid Commission Sydney 1996, 2.

J Egan, Central Support Office NSW Dept of Juvenile Justice Letter 27 August 1997. The working party includes officers from the NSW Dept of Juvenile Justice, the NSW Attorney-General's Dept, the NSW Legal Aid Commission and the Juvenile Justice Advisory Council of NSW.

Legal Aid & Family Services, Attorney-General's Dept *DRP Submission 83*. Provision of a Detention Centres Legal Service in NSW was also recommended by NSW Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 rec 181.

See para 20.106.

Design Guideline 5.508.

Cited in *Australia's Report under the Convention on the Rights of the Child* Attorney-General's Dept Canberra 1995, 345.

Australia's Report under the Convention on the Rights of the Child Attorney-General's Dept Canberra 1995, 356–378.

3354 This is recognised in *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission
Brisbane 1997, 16.

3355 See D Sandor *DRP Submission* 30. See also para 19.47.

3356 eg H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995 rec 22.

3357 *Children (Criminal Proceedings) Act* 1987 (NSW) s 19 provides for young people up to 21 years to serve their sentence at a detention centre.
In Vic, Malmsbury Youth Training Centre caters for young men aged between 17 and 21 and Parkville Detention Centre holds 10 to 20 year
old females and 10 to 14 year old males: Malmsbury Training Centre Minutes of Meeting Bendigo 31 May 1996; L Atkinson 'Juvenile
corrective institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 408–9.

3358 L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice & Corrections* Longman
Melbourne 1997, 408–9.

3359 eg *Young Offenders Act* 1993 (SA) s 36.

3360 *Juvenile Justice Amendment Act (No 2) 1996* (NT) s 53AG. For other young offenders, the *Juvenile Justice Act* 1992 (NT) s 53 provides that
they can continue to be in a detention centre after age 17, but not past the age of 18.

3361 *Juvenile Justice Act* 1992 (Qld) s 211: a juvenile aged 17 or more can be transferred to an adult prison if they have previously been held in
custody in prison on sentence, remand or 'otherwise' or have been sentenced to serve a term of imprisonment.

3362 *Children (Detention Centres) Act* 1987 (NSW) s 28B; *Children and Young Persons Act* 1989 (Vic) s 240; *Young Offenders Act* 1994(WA) s
7. The WA legislation qualifies this by stating that those 16 years and over are not to share living quarters with an adult prisoner: *Young
Offenders Act* (WA) s 7.

3363 *Children (Detention Centres) Act* 1987 (NSW) ss 28B–E; *Children and Young Persons Act* 1989 (Vic) s 240; *Young Offenders Act* 1993
(SA) s 63.

3364 *Young Offenders Act* 1993 (SA) s 63.

3365 In some jurisdictions this is legislatively based eg *Children and Young Persons Act* 1989 (Vic) s 241.

3366 In 1995 there were 58 children serving sentences in adult prisons in Australia: *Prisoners in Australia 1995: Results of the 1995 National
Prison Census* AIC Canberra 1997 table 1.

3367 *Corrective Services Act* 1980 (Qld) s 38; *Young Offenders Act* (WA) s 7.

3368 *Prisons Act* 1952 (NSW) s 15.

3369 Newcastle Practitioners' Forum 13 May 1996.

3370 Bendigo Practitioners' Forum 31 May 1996. Several residents of Malmsbury Youth Training Centre stated that they had been detained in
police cells for up to two weeks, often side by side with adult offenders: Malmsbury Youth Training Centre Minutes of Meeting Bendigo 31
May 1996.

3371 Newcastle Practitioners' Forum 13 May 1996. The legal practitioners at this forum noted that young people with a mental illness are placed
alongside adults at the James Fletcher Institute.

3372 Church Network for Youth Justice *IP Submission* 212.

3373 Dept of Correctional Services Minutes of Meeting Alice Springs 18 July 1996. This decision is left to the discretion of the magistrate.

3374 Confidential *Public Hearing Submission* Sydney 26 April 1996.

3375 Alice Springs Youth Accommodation and Support Services *DRP Submission* 92. Although children are only supposed to be held in the
prison for seven days, the submission notes that children have been known to be held longer than this.

3376 See para 20.103.

3377 *Children (Detention Centres) Act* 1987 (NSW) s 28D.

3378 *Children and Young Persons Act* 1989 (Vic) s 240; *Young Offenders Act* (SA) s 63.

3379 Confidential *Public Hearing Submission* Sydney 26 April 1996.

3380 The only jurisdiction to explicitly oblige the decision maker to take this into account is NSW: *Children (Detention Centres) Act* 1987(NSW)
s 28E.

3381 Previous reports have made similar recommendations to provide natural justice processes in relation to transfers to adult prisons eg NSW
Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s* Youth Justice Coalition Sydney 1990 rec 232; NSW Ombudsman *Inquiry
into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996 recs 16.4–16.11.

3382 The needs of particular groups of children in general are discussed at paras 4.52–65.

3383 eg Draft QOC Standards 1.3.1; 2.2.1–2.2.4; 4.1.8; 4.5.1–4.5.4. See also paras 20.47, 20.58, 20.66–67.

3384 See para 20.36. See also paras 4.52–53.

3385 See paras 2.16, 4.58.

3386 B White *Public Hearing Submission* Kalgoorlie 4 July 1996; Aboriginal Legal Service of WA *IP Submission* 75; Aboriginal Justice Council
of WA *IP Submission* 79; Oz Child Legal Service *IP Submission* 195; Church Network for Youth Justice *IP Submission* 212.

3387 Northern Australia Aboriginal Legal Service Minutes of Meeting Darwin 16 July 1996; B White *Public Hearing Submission* Kalgoorlie 4
July 1996.

3388 Northern Australia Aboriginal Legal Service Minutes of Meeting Darwin 16 July 1996.

3389 *ibid.*

3390 NSW Ombudsman *Inquiry into Juvenile Detention Centres* vol 1 NSW Ombudsman Sydney 1996, 71.

3391 *Bringing Them Home* HREOC Sydney 1997, 535–6.

3392 Townsville Community Legal Service *Submission* 181.

3393 Don Dale Youth Detention Centre Minutes of Meeting Darwin 16 July 1996.

3394 *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 15.

3395 *ibid* 19.

3396 *New Directions for Juvenile Justice* Vic Dept of Health and Community Services Melbourne June 1995 Pub No 92/0154.

3397 A Wells 'New directions in juvenile justice in WA' *Paper* Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond Conference AIC
Adelaide 26 - 27 June 1997. This program has been piloted in two metropolitan and one country location. It targets young offenders between
16 and 21. Co-ordinators in each area work with young offenders and their families to identify and support suitable family mentors.

3398 D Jopson 'Black mentor program chopped' *The Sydney Morning Herald* 26 July 1997, 13.

3399 Aboriginal Legal Service WA *IP Submission* 75; Law Society of NSW *IP Submission* 209; Church Network for Youth Justice *IP Submission*
212.

3400 Church Network for Youth Justice *IP Submission* 212. See also Northern Australia Aboriginal Legal Service Minutes of Meeting Darwin 16
July 1996.

3401 Law Society of NSW *IP Submission* 209.

3402 Child, aged 15 years, comments made to Aboriginal Legal Service of WA *IP Submission* 75.

3403 Child, aged 14 years, comments made to Aboriginal Legal Service of WA *IP Submission* 75.

3404 NSW Youth Justice Coalition *Kids in Justice: A Blueprint for the 90s*: Youth Justice Coalition Sydney 1990 rec 197.

Church Network for Youth Justice *IP Submission 212*. See also L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 412.

See L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 413. This paper notes that problems faced in finding Indigenous people willing to work as custodial staff is not surprising given their collective experience of the punitive and extensive use of the criminal justice system.

Law Society of NSW *IP Submission 209*.

Central Australian Aboriginal Legal Service Minutes of Meeting Alice Springs 19 July 1996.

Church Network for Youth Justice *IP Submission 212*.

S Scarlett *IP Submission 27*.

Aboriginal Legal Service of WA *IP Submission 75*.

See paras 2.119–120. See also P Reberger *Public Hearing Submission* Sydney 26 April 1996; L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 407; M Cain *Juveniles in Detention: Special Needs Groups* NSW Dept of Juvenile Justice Sydney 1994.

SA Multicultural & Ethnic Affairs Commission *IP Submission 86*; SA Dept of Family and Community Services *IP Submission 110*. See also paras 4.54–57.

S Scarlett *IP Submission 27*.

eg Juvenile Justice Regulation 1993 (Qld) reg 11 provides that if a child has difficulty understanding English, the chief executive must take reasonable steps to ensure that the child understands his or her rights and responsibilities which may entail providing an interpreter to explain or supplying an explanatory note in English or another language. See also *Secure Care Standard Procedures* SA Dept of Family and Community Services Adelaide procedures 13, 26; *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 20; M Cain *Juveniles in Detention: Special Needs Groups* NSW Dept of Juvenile Justice Sydney 1994, 52.

eg Draft QOC Standard 1.3.1 provides, in relation to complaints procedures, that young people from non-English speaking backgrounds should have access to interpreters or have the procedures available in their native language.

eg S Scarlett *IP Submission 27*; Office of Status of Women *IP Submission 82*; Townsville Community Legal Service *IP Submission 181*; Church Network for Youth Justice *IP Submission 212*; Confidential *IP Submission 215*.

Confidential *IP Submission 215*. The submission emphasised that separate detention of young women enables their needs to be catered for more effectively and pointed to the Young Women in Custody Program at the Yasmir Juvenile Justice Centre in NSW as a model. However, it also noted that bringing all girls under one facility may mean some girls are further away from their family and friends. The submission noted that this is why detention, particularly for women, should be a last resort and why preference should be given to diversionary programs for them.

The Integrated Approach: The Philosophy and Directions of Juvenile Detention Qld Corrective Services Commission Brisbane 1997, 20; *Ashley Youth Detention Centre Manual* (draft) Tas Dept Community and Health Services Hobart 1997 Pt 2.18.

Confidential *IP Submission 215*.

E Moore 'Alternatives to secure detention for girls' in L Atkinson & S Gerrull (eds) *National Conference on Juvenile Detention* AIC Canberra 1993, 140.

L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997.

r 26.4. This rule states that 'Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.'

Oz Child Legal Service *IP Submission 195*.

eg Federation of Community Legal Centres (Vic) *IP Submission 129*; Oz Child Legal Service *IP Submission 195*; Alice Springs Youth Accommodation and Support Services *DRP Submission 92*.

Federation of Community Legal Centres (Vic) *IP Submission 129*.

Survey Response 191.

Survey Response 335.

eg Vic Government *IP Submission 213*; Australian Association of Social Workers *IP Submission 207*; R Funston *Public Hearing Submission* Sydney 26 April 1996.

Australian Association of Social Workers *IP Submission 207*.

K Buttrum 'Juvenile justice: What works and what doesn't' *Paper* Juvenile Crime and Juvenile Justice Towards 2000 and Beyond Conference AIC Adelaide 26–27 June 1997, 7.

SA Dept of Family and Community Services *IP Submission 110*; Oz Child Legal Service *IP Submission 195*. See also E Moore 'Custodial programs and transition to the community: A review of policy and program reforms in Australia and New Zealand' (1991) 3 *Current Issues in Criminal Justice* 193.

eg *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 30; *Juvenile Justice Centres Operations Manual* Vic Dept of Health and Community Services Melbourne 1994 Pt 3.13.

Oz Child Legal Service *IP Submission 195*; Australian Association of Social Workers *IP Submission 207*; Law Society of NSW *IP Submission 209*.

SA Dept of Family and Community Services *IP Submission 110*.

WA Ministry of Justice *IP Submission 184*.

Dept of Families, Youth and Community Care Minutes of Meeting Brisbane 31 July 1996.

Keys Young *Juvenile Justice Services and Transition Arrangements: A Report to the National Youth Affairs Research Scheme* National Clearinghouse for Youth Studies Hobart 1997.

id vi–vii.

QOC Standards 2.14–2.15, 5.19–5.21; Draft QOC Standards 2.12–2.14. The endorsed standards include provisions for referrals to community based agencies in relation to alcohol and drug and general health services. The draft standards provide that young people should be informed at the outset when and under what conditions the juvenile justice authority will cease intervention, that case management should continue up to the point of release or transfer, that links to community services should be maintained and developed and that post-release supervision, where possible be maintained in the community.

Keys Young *Juvenile Justice Services and Transition Arrangements: A Report to the National Youth Affairs Research Scheme* National Clearinghouse for Youth Studies Hobart 1997, vii.

See Townsville Community Legal Service *IP Submission 181*; WA Ministry of Justice *IP Submission 184*.

eg in SA conditional release is permitted after a young person has completed at least two-thirds of the period of detention, where the young person's behaviour has been satisfactory and where there is no undue risk of the young person re-offending: *Young Offenders Act 1993* (SA) s 41. In Qld a child sentenced to a detention order must be released from detention after serving 70% of the detention period: *Juvenile Justice*

Act 1992 (Qld) s 188. Other jurisdictions also provide that the Director of the relevant Dept can grant leave to young persons in detention for activities such as education, training, or employment: eg *Children's Service's Act 1986* (ACT) s 68; *Young Offenders Act 1993* (SA) s 40.

Vic Government *IP Submission 218* found that re-offending rates were much lower for young people released from detention who were able to find and retain employment.

DEETYA *DRP Submission 60*. For a more detailed discussion of JPET see para 9.51.

L Atkinson 'Juvenile correctional institutions' in A Borowski & I O'Connor *Juvenile Crime, Justice and Corrections* Longman Melbourne 1997, 403.

ibid 403.

NSW Government *DRP Submission 86*.

See paras 4.42–50.

r 22.1.

See para 18.193.

DRP Submission 86.

National Report AGPS Canberra 1991.

Inquiry into Juvenile Detention Centres vols 1-2 NSW Ombudsman Sydney 1996.

Bringing Them Home HREOC Sydney 1997.

Royal Commission into Aboriginal Deaths in Custody *National Report* vol 4 AGPS Canberra 1991 recs 62, 168, 169, 173, 235, 237, 242.

A number of submissions from government agencies stated that they had made progress in implementing the recommendations: WA Ministry of Justice *IP Submission 184*; NSW Government *DRP Submission 86*. See also paras 20.121–124.

Aboriginal Youth Support Service *IP Submission 57*; Aboriginal Justice Council *IP Submission 79*. See also Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner *Indigenous Deaths in Custody 1989–1996* ATSIC Canberra 1996, 199–217; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 539–40.

NSW Ombudsman *DRP Submission 80*.

eg P Reberger *Public Hearing Submission* Sydney 26 April 1996; Aboriginal Legal Service of WA *IP Submission 75*; Aboriginal Justice Council of WA *IP Submission 79*; Church Network for Youth Justice *IP Submission 212*.

See para 2.118.

Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner *Indigenous Deaths in Custody 1989 to 1996* ATSIC Canberra 1996, 204.

ibid 200. These matters were also noted by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families *Bringing Them Home* HREOC Sydney 1997, 538.

Royal Commission into Aboriginal Deaths in Custody *National Report* vol 3 AGPS Canberra 1981 rec 176.

Secure Care Standard Procedures SA Dept of Family and Community Services Adelaide procedure 26.

HREOC Sydney 1997 recs 44, 660. See also para 19.111.

Design Guidelines, Guiding Principle 1.34. This is similar to a provision in *Standard Guidelines for Corrections in Australia* Corrective Services Ministers' Conference 1994 Guiding Principle 1.8a.

Design Guidelines, Guideline 5.403. See also Draft QOC Standard 5.3.10.

eg *New Directions for Juvenile Justice : Melbourne Juvenile Justice Centre* Information Sheet Vic Dept of Health and Community Services Melbourne June 1995 Pub No 92/1021.

Draft QOC Standard 5.3.9.

Design Guidelines 5.405–407.

J Gaynor 'The home detention program for young offenders' *Paper Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond* Conference AIC Adelaide 26 - 27 June 1997, 2–12. Home detention for juvenile offenders is currently only provided in SA. It involves use of supervision, curfews and electronic surveillance. Gaynor notes that home detention for Indigenous young offenders is consistent with the recommendations of the report of the Royal Commission into Aboriginal Deaths in Custody. However, consideration must be given to the concerns in para 18.159.

NSW Government *DRP Submission 86*.

NSW Ombudsman's Office 1(1) 1997 *Ombudsman's Update* 3.

ibid.

id 2.

id 4.

These items are additional because PM&C has office and computer equipment and a general policy library which OFC could utilise. Additional library costs include establishing journal subscriptions, purchasing extra relevant legislation and purchasing limited relevant texts. Legal research could be conducted through the library at the Attorney-General's Dept.

Salaries based on APS salary rates @ 17.10.96. All salary rates based at top of range.

This mainly covers the costs of discussion papers, newsletters and the Taskforce's report.

includes recruitment advertising, IT maintenance, consumables, stationery, FBT, Comcare, training, maintenance, postage, phones and couriers.

These cover sitting fees for the chairperson and eligible members of the Taskforce. Sitting fees are not payable to members who are judges, magistrates or employees of Commonwealth departments or authorities. The applicable rates (current from 15 July 1995) are \$516 (chairperson) and \$438 (member). Given that approximately half of the Taskforce members will be government employees, the estimate is based on an assumption that 5 members will be entitled to sitting fees. It is expected that there will be approximately 16 meetings, each of 3 days duration, over the 18 month period of the operation of the Taskforce, giving a total of 48 sitting days. To fit in with the recurrent funding structure, the figure given here is based on 24 sitting days a year.

This covers the cost of fares, cabcharge and travelling allowances for the chairperson and eligible Taskforce members other than government employees. The estimate was calculated using the 1995/96 costs of the Family Law Council (FLC). That Council only meets quarterly while the Taskforce will be meeting approximately once every 4–6 weeks. The FLC costs were therefore multiplied by 3.

This mainly covers items such as photocopying, training, attendance at other relevant conferences etc.

Salaries based on APS salary rates @ 17.10.96. All salary rates based at top of range.

Includes recruitment advertising, IT maintenance, consumables, stationery, FBT, Comcare, training, maintenance, postage, phones and couriers.

See ch 6.