LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON COMMUNITY SERVICES AND SOCIAL EQUITY

(Reference: inquiry into the rights, interests and wellbeing of children and young people)

Members:

MR J HARGREAVES (The Chair)
MS R DUNDAS (The Deputy Chair)
MR G CORNWELL
MRS H CROSS

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 15 MAY 2003

Secretary to the committee:
Ms J Carmody (Ph: 6205 0129)

By authority of the Legislative Assembly for the Australian Capital Territory

The committee met at 2.04 pm.

JOHN BURNS was called.

THE CHAIR: First, Mr Burns, thank you very much for coming and speaking to us. As discussed with you, we have a set of three issues, which Jane Carmody has kindly done up for us and which, with your permission, we will stick to. For the record, we are particularly sensitive to the separation of powers issue, as I mentioned to you when we spoke, so I'm going to be tough on members if that gets close to the line.

Mr Burns: I have prepared a statement dealing with the three issues that Ms Carmody indicated you wanted me to focus on. With the committee's permission, I will read the statement and at the conclusion of that I will be available for questions.

THE CHAIR: Sure. We're obliged to read out a card that says that if you tell us porkies it's really serious. But we're not going to insist on that, recognising your position. But for the sake of Hansard, would you say your name and your position into the microphone so that the guys up in the booth can record it.

Mr Burns: My full name is John Dominic Burns, and I'm a magistrate in the Australian Capital Territory. I currently hold the designation of Children's Court Magistrate.

THE CHAIR: I invite you to make that statement, and then we'll see where it takes us.

Mr Burns: I've been advised by the secretary to the committee, Ms Carmody, that the committee wishes me to focus on three issues, the first being the typical progress of both care and criminal matters through the Children's Court, the second being an outline of the role of the Children's Court and the third being consideration of diversionary approaches. If it is convenient for the committee, I will briefly address each of these areas before receiving questions.

Criminal matters in the Children's Court will typically be commenced by the young person being charged with an offence, receiving a summons to attend court or entering into a voluntary agreement to attend court. If the young person is charged by police, he or she will either be released on bail to appear before the court on a future date or, if bail is refused by the authorised police officer, they will be held in custody to appear at the earliest opportunity before the court.

Typically, many young people attend court on their first appearance with respect to criminal proceedings in the company of one or more of their parents but without legal representation. Some of these young persons request an adjournment of the proceedings to attend or to obtain legal advice and representation. However, even those young persons who are represented on their first appearance may require an adjournment to, for example, interview witnesses or obtain material relevant either to the nature of the plea to be entered or mitigation of penalty if the plea is to be one of guilty.

Once the young person has had an opportunity to obtain legal advice or representation, the young person is required to enter a plea of either guilty or not guilty to the charges

before the court. If the young person pleads guilty, the court will consider the submissions made by the Director of Public Prosecutions and the child, or counsel for the child where the child is represented.

The court also considers any previous criminal history of the young person. Typically, the parents of the young person will be asked whether they have any concerns relating to the young person that they want to bring to the attention of the court. The court may adjourn sentencing proceedings to obtain further information such as a pre-sentence report or a psychological assessment, where the facts of the matter—the nature of the charges, the prior record of the young person or other information before the court—suggest an underlying problem that requires investigation or active attention.

One of the purposes of obtaining such information is to identify appropriate sentencing options. When all of the appropriate information is before the court, the court passes sentence. Where the young person enters a plea of not guilty, the young person is entitled to the presumption of innocence—the same presumption that adults enjoy.

The charges are adjourned to a case management hearing date approximately six weeks from the date of the adjournment. The six-week delay is dictated by the inability of the Director of Public Prosecutions and the Australian Federal Police to prepare a brief of evidence in any lesser period. During the six-week adjournment leading up to the case management hearing, the prosecution prepares and serves upon the young person or their legal representatives a brief of evidence containing the statements of witnesses the prosecution intends to call to prove the charges.

At the case management hearing a frank discussion of the strengths and weaknesses of the prosecution and defence cases is encouraged. For this reason the magistrate who conducts the case management hearing cannot usually be the magistrate who conducts the trial if the matter remains defended. Presently, Magistrate Michael Somes conducts the case management hearings, which means that, for practical reasons, he sits in the Children's Court every Monday.

If the charges remain defended after the case management hearing, a hearing date is allocated. At the hearing the court determines whether the charges are proved and, if so, the court embarks upon the same sentencing process I earlier referred to.

In care matters, proceedings are typically commenced by the chief executive of Family Services lodging an application with the court seeking orders under the Children and Young People Act. Copies of the application are served upon interested parties, such as the parents of the child. In many cases, the chief executive will apply for interim orders with respect to the child on the first date that the application is before the court.

On this first return date of the application a conference is usually convened between the chief executive, any representative of the child and any other interested parties, such as the parents or their legal representatives. This conference is facilitated by a senior deputy registrar of the court. Agreement on interim orders is often reached at such a conference, but it is unlikely that sufficient information will be available at that time to allow agreement to be reached on the question of final orders. Therefore, the proceedings are usually adjourned for a further conference, to allow assessments to be undertaken and reports prepared.

This is probably the most important phase of the proceedings, as the assessments define the nature of any concerns for the welfare of the child and point the way ahead. It may be necessary for a number of conferences to be held as areas of concern are raised or refined and attempted interventions are assessed.

If consensus cannot be achieved at conference, a date for hearing of the application is allocated. At the hearing the chief executive presents to the court such evidence as he or she possesses relevant to the application, and the other parties also have the opportunity to place evidence before the court. The court then adjudicates upon the application. I must stress that in my experience very few applications actually progress to a full-blown contested hearing. Most are resolved to the satisfaction of the parties at conference.

I will now address the question of the role of the court. Understanding the role of the court is a matter of such fundamental importance that I cannot overemphasise it. From time to time, one hears assertions or comments that the courts and adherence to the legal process constitute an inconvenient impediment to dealing with the real issues of abuse and neglect. Such comments are dangerous and unhelpful. Sadly, they sometimes emanate from people who should know better.

These sentiments are dangerous because they ignore the rights of the child and of others, such as parents. Such sentiments are based upon assumptions that those employed by the executive government to investigate and act upon allegations of child abuse or neglect are always completely competent, utterly scrupulous and without bias and will in their judgments reflect contemporary community attitudes.

Doubtless, similar concerns may be said to attend the judicial process from time to time. But there are these differences: the judicial process occurs in open court, or at least as open as the legislature allows; the judicial officer is required to give reasons for her or his decisions, and those reasons are open to public scrutiny and independent review; and the judicial officer has taken no part in the investigation of the alleged abuse or neglect and so scrutinises the evidence called by the parties with an open mind.

To attempt to displace the role of the court in favour of giving greater powers to public servants is the equivalent of giving police the power to determine guilt or innocence as well as the duty to investigate alleged offences. I believe as a society we would find such a suggestion abhorrent. Why would it be any less abhorrent if the police uniform were replaced by the public servant's suit?

It must always be remembered that applications for care orders affect the rights of the child. As in common with adults, children have many rights, not all of which are always compatible. Sometimes there is a tension between those rights. Doubtless, a child has the right not to be neglected or abused. However, a child also has a right to be with and be cared for by parents and other family members. Such rights are recognised by the Children and Young People Act.

Where it is alleged that a parent has abused or neglected a child, there is an obvious tension between those rights. The court's role in care matters is to determine, consistent

with the will of the legislature as expressed in the Children and Young People Act, whether the child is in need of care and protection, which for practical purposes means determining as a question of fact that the child has been the subject of abuse or neglect.

Not infrequently, the facts alleged by the chief executive will be disputed by other interested parties, or the assessment of the chief executive that a certain factual situation warrants a particular level of intervention may be disputed. It is the duty of the court to determine these issues. Even where it is established that a child is in need of care and protection, real issues arise about what orders are appropriate.

In determining the orders to be made, the court is required to take as its paramount consideration the best interest of the child, and there are two points I want to make about the best interest principle. First, to say the paramount consideration is the best interest of the child is not to say that it is the only consideration. Section 12 of the Children and Young People Act makes it clear that other considerations must be taken into account.

The second point I wish to make about the best interest principle is that the principle is not satisfied by simply asking whether a better outcome is available in a particular case. Thus, if the chief executive is seeking orders that the chief executive be given parental responsibility for a child, the application of the best interest principle is not the same as asking: can someone parent the child better than his or her own parents? If the test was whether someone could do it better, there would be very few of us left with children.

The application of the best interest principle requires a balancing of competing rights and interests. In my view, a child should not lightly be denied his or her right to be with the parents. The application of the best interest principle in any other way is fraught with danger. Are we, for example, to remove children from poor families because they will be materially better off if placed with wealthy families?

Of course, the most significant circumstance to bear in mind is that the legislature has provided that the court has no role to play unless or until the court has satisfied itself that the child has been abused or neglected or that it is likely that the child will be abused or neglected. The court does not have an all-embracing supervisory jurisdiction over children and young people. The court cannot simply apply the best interest principle to the circumstances of any young person or child as it sees fit.

The court's ability to make orders applying the best interest principle is firmly predicated upon a factual finding of abuse or neglect. In that regard, the court's role is to be contrasted with the role of executive government, in particular the chief executive of Family Services. If the community has entrusted the role of general oversight of the welfare of children and young people to anyone, it is to the responsible minister and the chief executive. To put the matter simply, the role of the court is to adjudicate.

Similarly, the commencement of criminal proceedings against a young person does not vest the Children's Court with a general supervisory jurisdiction to inquire into and make orders pertaining to the welfare of a child or young person. The processes of the criminal law should not be used as parenting tools.

The primary role of the court in criminal matters is to adjudicate upon the charges laid against the young person and to determine guilt or innocence. That is not to say that the court has no role to play in identifying and dealing with care issues when they arise within the context of criminal proceedings, but that part of the court's role must be limited.

There must be some demonstrable connection between, for example, bail conditions and the nature of the proceedings. Thus, it may be appropriate to direct an assessment of drug abuse issues as a condition of bail where the young person consents to such a course or whether there are admitted drug abuse issues. But care must be taken not to allow bail conditions to become a tool for the gathering of evidence against a young person where the charges are disputed or not admitted. Care must also be taken to ensure that bail conditions are not used to unduly restrict the ordinary rights of a young person where the charges remain mere allegations.

Different considerations will, of course, apply where the young person has admitted guilt or the offence has been proven. The fact of proof of a breach of the criminal law allows the court legitimately to intrude upon what would otherwise be the right of the individual to live without interference from the state. It allows the court legitimately to order assessments and to impose obligations with a view to addressing underlying criminogenic factors.

Finally, I will address the issue of diversionary approaches in criminal proceedings. Supplementing my written submissions, I would like to make the following points. First, any diversionary scheme must have the characteristics of transparency and accountability. If the process of determining which young people or which charges are to be diverted from the current criminal justice system is not transparent, potential exists for corruption or at least concerns about corruption. Similarly, if there is a lack of accountability by means of independent oversight of the processes and results, we risk losing public confidence.

Second, if transparency and accountability are essential features of such schemes, consideration must be given to the method of ensuring them. For example, shall all offences be dealt with by such a scheme or only certain nominated offences? Should a discretion exist to deal with offences under the usual processes of the criminal law and, if so, what factors should affect the exercise of that discretion?

For myself, I would propose that the Children's Court be vested with the discretion to order that charges be dealt with by way of any diversionary scheme that is set in place and that the exercise of that discretion should be subject to legislative guidelines, including consideration of the seriousness of the offence and the antecedents of the young person.

Finally, the structure of any diversionary scheme will need to be carefully considered. If the scheme is to involve a form of extra-curial conferencing, who will conduct the conference and what resources will such a scheme require? Valuable guidance in the answering of these questions may be available by examining the experience in other jurisdictions, in particular the New Zealand model, which I am told has been operating successfully for some years.

THE CHAIR: Thank you very much. You've covered a great deal of ground, and we appreciate it very much. At the end of the day, we share the commitment to try to do things in the best interests of the child. That is something with which the committee has struggled in the course of its inquiry. It has had difficulty with the notion that you touched on about the best interests of the child and weighing up the difference between a contention that the child is unsafe versus the issue of the child staying with the parents.

We've heard various people say that it's a judgment issue. Whether the child will be less safe out of the home than in it is indeed a fine judgment to make. Do you want to expand on that?

Mr Burns: I have often said that it is one of the things that cannot be scientifically measured. As is often the case in judicial duties, you are asked to make judgment calls. The question of whether the best interest principle requires the child to be removed from the home setting or not is, as you say, one of those judgment calls.

The best one can do in those circumstances is recognise that the decision-making process is subject to checks and balances. If one of the parties disagrees about the order that the court ultimately decides to make, that will be subject to review in the Supreme Court. The prospect of error resulting in unacceptable danger or risk to a child is somewhat ameliorated by the fact that the process and the decisions are subject to review.

THE CHAIR: A point you raised that I'd like to expand on, which has never actually been raised among the issues brought to the committee—certainly not on the official record—is the possibility, almost probability, that the contention which is brought before the court is based on the fact that one party believes they are going to be better parents. You've explained that.

Indeed, the example you give about people who are fairly well off saying that they can provide a better life opportunity for kids who are less well off financially is quite clear. But we don't take kids off their family just because they're poor. Can you expand a bit on that sort of thing from your experience? It is almost seminal to our discussions here about the care and protection of young people.

The evidence that's been given to us has been quite critical of Family Services. It hasn't been so critical of the courts per se. If anything, it's just that the court system is too expensive for the people enduring battle in it anyway—particularly if they wish to contest a ruling from the Children's Court. A greater statement is required from the committee to the community that we need to be concerned that the actions of people are in fact about the best interests of the child and not the contention that they would be better parents.

An example is that we might have two grandparents contesting before the court that they're better parents to their grandchildren than are their children.

Mr Burns: From time to time I get the impression that there are unrealistic expectations of what the court process can achieve. The court process is well suited to determining disputes about issues of fact. It is also reasonably well suited to forming judgments about

the best alternatives that are available from those that are before the court. But it is almost inevitable that one or more of the parties to the proceedings by definition will go away from the proceedings dissatisfied because their expectations have not been met. We do from time to time see circumstances where that problem with expectation not only relates to parents or grandparents; the expectations of those who are employed by Family Services are also sometimes not particularly realistic.

The court has to operate within a framework, and that framework is made up of the laws of the territory and such laws of the Commonwealth as apply in the territory—in particular, the Evidence Act. This is not something that the court makes up or chooses to comply with or not; it is imposed upon the court. For example, the Evidence Act, being an act of the Commonwealth, is an expression of the will of the people of Australia, such that the court has to abide by the provisions of the Evidence Act in determining what evidence is admissible.

As I say, from time to time there are unrealistic expectations on the part of the chief executive, or those who are employed by the chief executive, about what matters the court can legitimately take into account or what weight the court can legitimately give to information that is put before it.

MRS CROSS: Magistrate Burns, I have two questions. One is on the reference you made during your presentation to the competing interests of the child. I'd like you to elaborate on what those competing interests are. The second question is about the quality of the representation that the children have when they come before you. I assume—correct me if I'm wrong—that it would put some pressure on you if a child, because of inadequate counsel or counsel that is not well versed in dealing with children or understanding the complexity of a children's issue, is not represented as well as possible.

A number of examples of this have been brought before us in our inquiry, going back some months. Could you elaborate on that and how you handle it?

Mr Burns: I'll deal with the first matter you raise, which is the question of competing interests. The example I gave is a fairly stark one.

MRS CROSS: The rich and poor?

Mr Burns: Well, no. The child has an interest or right not to be abused. At the same time, the child has a legitimate interest or a right to be with their parents. Those two interests may never conflict if the child is appropriately cared for by the parent. But where there is an allegation that the parents are abusing or neglecting the child, clearly there is a conflict between those interests that the child has. Resolving that conflict involves a judgment call as to what level of intervention is required in order to deal appropriately with the level of risk to the child.

One can start from the proposition that there are two extremes: doing virtually nothing or taking the child away from the family with no access to the family for the child. Between those two extremes there are any number of graduations, and that is where the judgment call is made in terms of the competing interests. At what point do you determine that this case requires you to set the bar?

I hope that answers the question you've put to me. There are many different types of competing interests, and I cannot purport to outline to you what all of the interests of a particular child may be and how they may be competing with others.

MRS CROSS: Would I be correct in assuming—and I don't say this to be arrogant; this is where your expertise comes into it—that you can make a judgment on the evidence before you and assess the child that comes before you, only if the child is there or is represented? A number of constituents have come to me, very young people, who have felt that, because of the poor service of Family Services, they were returned to the family despite the fact that there had been ongoing abuse. The follow-up of Family Services had been irregular and intermittent—a case of out of sight, out of mind—and the child was returned to an abusive environment.

Can you intervene in a situation like that? If you can, how do you do it? Are you afraid of putting people's noses out of joint because it's a government department and you don't want to rub the hierarchy up the wrong way?

Mr Burns: If I can deal with that last issue first, it doesn't concern me in the slightest to annoy either the government departments or the ministers. Moving on to the broader issue you have raised, it is not easy for the court to maintain any supervisory role of Family Services. The court is dependent upon Family Services or some other party bringing an application before the court for the court to adjudicate upon.

If the children's representative, or the child—him or herself—or some other party to the proceedings raises in the proceedings before me some alleged deficiency in the way Family Services has gone about conducting its responsibilities, I have no difficulty investigating that and calling upon Family Services to explain what they have done. As I have said, I am dependent upon somebody bringing the issue to my attention.

MRS CROSS: The quality of representation was my second question.

Mr Burns: That is a very difficult issue because the quality of representation varies enormously. As I said in the written paper that I forwarded to the committee, lawyers, in common with everybody else, are only human beings who have different levels of competence and different capabilities. Some of them are better at their job than others. There are very few occasions when I would suggest that the representation is such that you could determine it to be incompetent.

However, it is a fair statement to make that the Children's Court does not attract the best advocates. One of the reasons is that the work of the Children's Court is not likely to be highly remunerated. Much of the work is subject to a grant of Legal Aid. Accordingly, very often it is the younger and less experienced practitioners who are given the duty of representing people in the Children's Court.

MRS CROSS: So the children are representing the children.

Mr Burns: Not quite children.

MRS CROSS: Well, rookies.

Mr Burns: Yes. There is a perception that the Children's Court is where you go when you're not quite ready to appear in the Magistrates Court and the Magistrates Court is where you go when you serve your apprenticeship to appear in the Supreme Court. Lawyers love hierarchies like that and are very status conscious in that area.

MRS CROSS: So are some politicians.

Mr Burns: It would be unfair to say that the standard of representation in the Children's Court is unacceptable. There are some very good advocates, including good young advocates, who appear regularly in the Children's Court. That's not to say that things couldn't be improved.

MR CORNWELL: I have two questions. Is the six-week delay that you mentioned in your address a normal delay? Does it apply in the Magistrates Court as well as the Children's Court, or is there some special problem?

Mr Burns: No, it is a common problem, and the same problem exists in the Magistrates Court. The case management system that is currently being implemented in the Magistrates Court also requires a six-week adjournment from the date of entry of the plea of not guilty until the case management hearing. That is subject, as I understand it, to a protocol between the court and the Director of Public Prosecutions because the Australian Federal Police, as I understand it, have indicated that they do not have the resources to prepare a brief of evidence in any less time.

MRS CROSS: I see. So the AFP is the problem.

Mr Burns: As I understand it.

MR CORNWELL: I'd also like the magistrate's view on criminal matters. I would like your view on whether a 15-year-old who commits an adult crime should be named and whether a 22-year-old who has the mental capacity of a 12-year-old should not be. Do you think discretion should be given to the court on these matters, or do you see that a particular age should be set where nothing below it will be given out and nothing above it will be suppressed?

Mr Burns: The setting of a particular age is usually a fairly arbitrary purpose because some 17-year-olds are more mature than some 19 or 20-year-olds. A discretion already exists in the ACT Evidence Act for the court to order non-publication of details of proceedings, which would include the name of one of the parties to the proceedings. But that is circumscribed by the requirement that the court is satisfied that it is in the interests of justice to make such an order. It is not always easy to see why it is in the interests of justice to make an order with respect to one person and not everybody else.

Whether the court should have the discretion to allow the publication of the name of somebody under the age of 18 I find a difficult question. I cannot easily see any circumstances in which the public will benefit from such an approach. That's not to say that, upon more mature thought, somebody won't be able to come up with circumstances where it would be appropriate. In any event, it really is a policy issue for the legislature as opposed to the judiciary.

THE CHAIR: I am conscious of the time and our call on Mr Burns's time. I invite one more question and suggest that, if we have further questions, we convey those to the magistrate via Jane Carmody for him to respond to or not.

MRS CROSS: I'd like to go on from Mr Cornwell's question to you, Magistrate Burns. It is a policy question, but you view a greater quantity of diverse youth than we do. Our experience is intermittent, and it's usually schools that come through here. You view the actual problem cases before you, which means you would have an opinion on a 15-year-old who's committed a more serious crime than a 20-year-old. If you had a wish list and someone said, "You can do whatever you like," what would you do?

Mr Burns: In the context of the publication of names, publishing the names of young people who have been either charged with an offence or convicted of an offence would not be on that wish list. The thrust of the court's role in juvenile matters is to encourage the rehabilitation of the young person. The community has no greater interest than to encourage a young person to adopt a law-abiding way of life. I do not see that as being compatible with the publication of the name of the young person with consequent possible vilification of the child.

An example of that occurred in the last six months in respect of a young man who was charged with what was termed a "looting offence" following the fires. As I recollect, a photo was taken of people leaving the court on that date and, by means of the publication of that photograph, the parents of the young person were identified and that identified the young person to people who knew the parents. A considerable amount of community anger and vilification was directed at the parents of this young person. Inevitably, that is also visited upon the young person if and when they are released into the community. I don't believe that it is compatible with either the child's interests or the community's interests to have children being reported as criminals.

THE CHAIR: I have a final question, Mr Burns. I wanted your view on the point that was made to us by Mr Justice Crispin, in his Law Reform Commission role. He was advocating a greater degree of discretion for the courts as opposed to overprescription in legislation. One of the issues to consider when we talk about whether to have a children and young person's commissioner for the ACT is the degree to which we legislate what can and cannot happen in respect of that job—because of our experience of meeting other commissioners around the traps.

First, how do you feel about Mr Crispin's view of allowing the magistrates more discretion, and how do you feel about the current level? Second, you mentioned diversionary conferencing—the New Zealand model. In your opinion, would the committee be well served by investigating quite deeply the New Zealand model versus models available here in Australia?

Mr Burns: My view is that discretion is at the heart of justice. Justice in order to be justice must be individual and, in order to be able to deliver individual justice, you must have a broad discretion in what orders the court can make. Having said that, I do not consider that the present legislation significantly hampers the ability of the court to deal with the types of cases that come before it. I have been critical of the complexity of the legislation from time to time, but that is a different issue.

In terms of the powers that the court has and the way in which those powers are to be exercised, there is no significant impediment that I can readily identify that I would say needs to be dealt with.

Turning to the diversionary scheme question, I don't purport to be an expert in the New Zealand scheme. I have had some discussions with the chief judge of the New Zealand Children's Court. The heads of the Australian and New Zealand children's courts meet annually to discuss developments and look at the different ways each of the jurisdictions goes about dealing with the common problems that we have. Within the context of those meetings we discuss the various diversionary schemes that each of the jurisdictions may have in force. Again, I don't purport to be an expert on any of those schemes.

If the ACT is looking to go down the road of having some form of diversionary scheme, it is inevitable that we examine—and in some depth—the schemes that have been implemented in other places in order to see how they have succeeded, or otherwise, so that we don't, as we so often do in this jurisdiction, reinvent the wheel. That's all I can say in relation to that.

THE CHAIR: I understand from that that people who are going to be talking about the framework of any such scheme, or even contemplating it, would be well advised to consider such schemes as exist in places like New Zealand. I'm aware that other jurisdictions around the world are doing it, and we in Australia, particularly in New South Wales, have been doing some rather good work in that area. I couldn't agree more with you that the last thing we want to do is reinvent the wheel. But the committee may well consider recommending that the government investigate its relevance to the ACT.

Thank you for sparing us the time; we do appreciate it. You've elaborated on your submission to us, and you've raised a couple of points that had not hitherto been in our minds at all. I adjourn this public hearing.

The committee adjourned at 2.51 pm.