



Speaking for ourselves Children and the Legal Process

Human Rights and Equal Opportunity
Commission
Australian Law Reform Commission

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Introduction

UnitingCare Burnside (Burnside) is pleased to present this submission to the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission for the Inquiry into Children and the Legal Process.

Burnside's mission is to participate in the caring ministry of the Uniting Church by making a positive difference in the lives of socially disadvantaged children, young people and families in NSW and the ACT by providing a range of services on the basis of need and without discrimination.

Burnside's goals are:

- to protect and nurture children and young people who are unable to live with their families by providing quality care;
- to develop preventative services aimed at children and young people at risk of abuse and/or admission to care;
- to strengthen the capacity of vulnerable young people and families within the community;
- to assist in the development of networks and self-help initiatives which support families and strengthen communities; and
- to promote just and equitable social structures aimed at reducing the causes of social disadvantage.

The submission is in response to the issues paper *Speaking for Ourselves*, released by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) in March 1996. The submission takes as its matrix the United Nations Convention on the Rights of the Child (CROC).

CROC was adopted by the UN General Assembly in 1989 and ratified by Australia in December 1990. CROC is now the most widely supported of any UN Convention with 172 nations having ratified it as at April 1995.

Australia has developed a National Program of Action, *Our Children: Our Future* (in response to the World Declaration on the Survival, Protection and Development of Children and its Plan of Action agreed by the World Summit for Children in 1990) which identifies ten challenges for Australia. The first challenge is to "implement and monitor the Convention on the Rights of the Child"¹.

Despite Australia's stated commitment to the Convention and the World Declaration, no action has been taken to incorporate the Convention into Australian law.

Commonwealth Department of Human Services and Health, *Our Children, Our Future - Australia's National Program of Action*, AGPS, Canberra, 1994, p. x;

The best way for Australia to do so would be for domestic legislation to be enacted to implement the Convention. Burnside believes that this should take the form of a Children's Rights Act (as proposed by the ALRC in its report *Child Care for Kids*) and the establishment of a Children's Commissioner within HREOC.²

Burnside supports the model outlined in the Draft *Australian Children's Charter*³, whereby the Commissioner would:

- review legislation, policies and practices affecting children;
- report to the Government any areas of doubtful or non-compliance with acceptable standards of fair treatment of children by government authorities and non-government agencies;
- report to Parliament on any children's issues;
- be responsible for developing mechanisms to consult with children;
- be a voice for children to government and non-government agencies;
- initiate proceedings on behalf of children; and
- intervene in proceedings which involve children.⁴

The Commissioner would, of course, require substantial resources in order to fulfil any of these roles.

see Australian Youth Foundation Inc. & National Children's and Youth Law Centre, *Australian Children's Charter: A Charter of Rights for Children and Young People in Australia - Draft for Consultation*, June 1995, p.55;

op.cit., p.55;
ibid.;

Children, rights and childhood - a broader view of children and the law

Children with particular needs

Q2.1 How should the legal process adapt to accommodate the needs of children for whom the Commonwealth has a special responsibility?

Indigenous children

The problems confronting indigenous children and young people in their interaction with the legal process are multitudinous and varied. Burnside believes that any process to address these problems should be consistent not only with CROC, but with the principle of self-determination of indigenous peoples. While this issue involves all of society and thus the entire legal system, two sectors are particularly significant: juvenile justice and the care and protection system.

Juvenile Justice

Burnside supports the calls of Elizabeth Evatt⁵, Chris Sidoti⁶ and others for a national approach to juvenile justice. Such an approach should have four objectives:

- promoting crime prevention;
- focussing on the rehabilitation of young offenders;
- addressing the over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice system; and
- setting national standards, including human rights standards, for the treatment of young people who have been accused or convicted of crime.

Burnside also supports the following recommendations made by the Royal Commission into Aboriginal Deaths in Custody in its Final Report, published in May 1991:

62. That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.⁷

Elizabeth Evatt, *The Treatment of Juveniles in the Justice System*, Address to the Forum on Children in Watch-house Detention, 26 May, 1992, unpublished;

Chris Sidoti, "The Commonwealth's Responsibility for Aboriginal Young Offenders", in Sandra McKillop (ed.), *Aboriginal Justice Issues*, Australian Institute of Criminology Conference Proceedings No. 21, AIC, Canberra, 1993, pp. 79-93;

Royal Commission into Aboriginal Deaths in Custody, National Report, May 1991, AGPS, Canberra; Vol.2, p.252;

215. That Police Services introduce procedures, in consultation with appropriate Aboriginal organisations, whereby negotiation will take place at the local level between Aboriginal communities and police concerning police activities affecting such communities...⁸
235. That policies of government and the practices of agencies which have involvement with Aboriginal juveniles in the welfare and criminal justice systems should recognise and be committed to ensuring, through legislative enactment, that the primary sources of advice about the interests and welfare of Aboriginal juveniles should be the families and community groups of the juveniles and specialist Aboriginal organisations, including Aboriginal Child Care Agencies.⁹
236. That in the process of negotiating with Aboriginal communities and organisations in the devising of Aboriginal youth programs governments should recognise that local community based and devised strategies have the greatest prospect of success and this recognition should be reflected in funding.¹⁰
239. That governments should review relevant legislation and police standing orders so as to ensure that police officers do not exercise their powers of arrest in relation to Aboriginal juveniles rather than proceed by way of formal or informal caution or service of an attendance notice or summons unless there are reasonable grounds for believing that such action is necessary. The test whether arrest is necessary should, in general, be more stringent than that imposed in relation to adults.

The general rule should be that if the offence alleged to have been committed is not grave and if the indications are that the juvenile is unlikely to repeat the offence or commit other offences at that time then arrest should not be effected.¹¹

242. That, except in exceptional circumstances, juveniles should not be detained in police lockups. In order to avoid such an outcome in places where alternative juvenile detention facilities do not exist, the following administrative and, where necessary, legislative steps should be taken:
- a. Police officers in charge of lockups should be instructed that consideration of bail in such cases be expedited as a matter of urgency.
 - b. If the juvenile is not released as a result of a grant of bail by a police officer or Justice of the Peace then the question of bail should be immediately referred (telephone referral being permitted) to a magistrate, clerk of Court or such other person as shall be given appropriate jurisdiction so that bail can be reconsidered;
 - c. Government should approve informal juvenile holding homes, particularly the homes of Aboriginal people, in which juveniles can lawfully be placed by police officers if bail is in fact not allowed; and

ibid., Vol.4, p. 85;
ibid., Vol. 4, p.177;
ibid., Vol. 4, p.177;
ibid., Vol. 4, p.183;

- d. If in the event a juvenile is detained overnight in a police lockup every effort should be made to arrange for a parent or visitor to attend and remain with the juvenile whether pursuant to the terms of a formal cell visitor scheme or otherwise.

Such steps should be in addition to notice that the officer in charge of the station should give to parents, the Aboriginal Legal Service or its representative.¹²

243. That where an Aboriginal juvenile is taken to a police station..., the officer in charge of the police station where the juvenile is detained should be required to immediately advise the relevant Aboriginal Legal Service and the parent or person responsible for the care and supervision of the juvenile of the fact of the child being detained at the police station (without prejudice to any obligation to advise any other person).¹³
245. That legislation, regulations and/or police standing orders, as may be appropriate, be amended so as to require compliance with the above recommendations.¹⁴

Care & Protection

The assimilation policy adopted by governments for so many years in Australia was specifically aimed at forcing Aboriginal people to be absorbed into Anglo-Australian culture and to relinquish their own. As such, it breached principles which underpin Article 29 (c) of CROC, respect for cultural identity.

Even today, many indigenous people view with deep suspicion the policies of welfare agencies, particularly with regard to adoption, fostering and substitute care. In an attempt to redress this, most states have adopted the "placement principle": that indigenous children should be placed with members of their own community. Burnside supports the recommendation of the Royal Commission into Aboriginal Deaths in Custody, that: in States or Territories which have not already so provided there should be legislative recognition of:

- the Aboriginal Child Placement Principle; and
- the essential role of Aboriginal Child Care Agencies.¹⁵

NESB and refugee children

CROC states that the detention of asylum seeking children should be a last resort and for the shortest period of time [Articles 22 and 37(b)] and yet Australia keeps many children in detention for up to 5 years. Children have been born in detention and remained in detention for up to 5 years. The length of detention is clearly in breach of Australia's obligations under CROC and concern and criticism has repeatedly been expressed to the government.

ibid., Vol. 4, p.202;

ibid., Vol. 4, p.203;

ibid., Vol.4, p.205;

ibid., Vol.2, Recommendation No. 54, p. 83;

The vast majority of asylum seekers are held in Port Hedland, Western Australia. This is geographically very remote, leading to problems in visitation for relatives of extended families. The geographical isolation of this and other centres also makes visits from concerned human rights bodies and the provision of counselling, legal and other services very difficult. Children are also prevented from attending cultural and religious events which impedes their cultural education and isolates them from their peers if they are returned to their country of origin.

The Department of Immigration and Ethnic Affairs which runs the centres refused in May 1996 to deliver letters from the Human Rights Commissioner informing children and their parents of their rights to legal representation as asylum seekers. The Department argued that they are not entitled to receive information unless they have specifically asked for it. The Human Rights Commissioner's appeal against this decision was upheld by the Federal Court, but the Government has prepared legislation which will deny asylum seekers who are being held in detention the right to receive information about their rights. This is a breach of CROC [Articles 12 and 22] and other international instruments, including the International Covenant on Civil and Political Rights.

In 1995, the then Minister for Immigration introduced bridging visas to release children into community care. While this was a laudable move, the visas are still difficult to obtain. In any case, this is not a solution for very young children who should not be separated from their parents who remain in detention.

Many children seeking asylum have witnessed or experienced torture and other traumatic events. The provision of trauma counselling services is manifestly inadequate. Failure to assist the children can lead to them experiencing serious mental health problems. Children should be assessed on the basis of their psychological needs soon after arrival and be provided with specialist treatment.

Up until 1986, all children born in Australia were automatically Australian citizens. The rights of such children to live with their families in Australia became a factor in appeals against deportation orders made in respect of their parents. In 1986, the Federal Government removed the automatic right to citizenship. Now, children born in Australia only acquire citizenship if one of their parents has citizen or permanent resident status. This means that there is now no consideration given to the child's best interests in the decision making process.¹⁶ This is a clear breach of CROC [Article 3].

Children from rural and remote areas

Children in rural and remote areas do not have adequate access to government services. This is one reason that Burnside instituted its *New Ventures* program, which provides limited funding for services in rural and remote NSW.

These inequities are particularly highlighted when rural and remote young people come into contact with the legal system, in the guise of juvenile justice or care and protection.

Kathryn Cronin, "A primary consideration - Children's Rights in Australian Immigration Law", *Australian Journal of Human Rights*, vol.2, no.2, Autumn 1996;

Gender

The problems of inequities and inflexibility involving gender in the various parts of the legal process will be discussed.

Children with disabilities

The problems of children and young people with disabilities in respect of care and protection and juvenile justice will be dealt with.

One of the reasons for these problems, however, is the fact that many children with disabilities do not receive the necessary "early intervention" which would minimise later problems, including those leading to interaction with the legal process. "Early intervention" by experts (in fields such as therapy and education) facilitates children's development and thus maximises their functioning and minimises the impact of their disability. Without such early intervention the eventual level of disability would be far greater. There should be comprehensive processes to identify children who would benefit from "early intervention" and to provide individually tailored services both as soon as practicable and in an ongoing fashion. At present, such comprehensive arrangements do not exist.

Gay and lesbian children

Gay and lesbian children and young people and the children of gay and lesbian adults face particular problems. These largely stem from the discrimination and ostracism levelled at gays and lesbians. This leads, at times, to vilification and violence. It also leads to severe emotional and personality difficulties for young gays and lesbians. This often manifests in low self esteem, difficulties at school, drug and alcohol abuse, homelessness¹⁷ and suicide¹⁸.

These problems are at times exacerbated by the legal process. While anti-discrimination statutes in some State jurisdictions¹⁹ offer some protection to gays and lesbians, the fairly wide and varying exceptions mean that this protection is patchy at best. In Tasmania and Western Australia there is no protection at all.

Moreover, Tasmania retains legislation which penalises male homosexual acts²⁰ and other jurisdictions (NSW, WA, and Qld) discriminate with regard to the age of consent.

In order to remove these discriminatory anomalies, a Federal anti-discrimination statute should be enacted, providing that discrimination against gays and lesbians of any age is unlawful. Such a statute should also provide that vilification of gays and lesbians and that discrimination on the basis of association with gays and lesbians are unlawful (thus protecting the children of gay and lesbian parents).

Anti-Discrimination Act 1977 (NSW), s.49ZF; Anti-Discrimination Act 1991 (Qld.), s.7(1); Equal Opportunity Act 1984 (SA), s. 29(1)-(3); Discrimination Act 1991 (ACT), ss. 7(1), 4(1); Anti-Discrimination Act 1992 (NT), s.19(1); Equal Opportunity Act 1995 (Vic.), s. ??; In NSW, homosexual vilification is also unlawful: Anti-Discrimination Act 1977 (NSW), s.

Criminal Code (Tas.), ss. 122, 123;

Discrimination against children

Q. In what legal contexts, if any, are the different methods of dealing with children, compared to adults, a reflection of inappropriate attitudes towards children, their capacities and their responsibilities?

The legal system deals inappropriately with children in two connected but different ways. In some contexts, children are treated as though they are merely "small adults", while conversely, in others, children are treated as incapable of making decisions and as unreliable witnesses, merely on the grounds of their age.

Thus, in the area of criminal law, juvenile offenders are increasingly treated as having similar responsibilities as adult perpetrators, yet at the same time, child witnesses and complainants are treated as especially unreliable and incapable of giving credible evidence. The court system is both bewildering and alienating for children and it serves their interests very poorly.

Q. The Commissions wish to document laws and practices that limit children's access to services or employment on the ground of age and any unjust discrimination that may have occurred as a result of these practices.

Burnside is concerned over recent developments with regard to wage discrimination against some young people working under Federal awards.

We join with the Youth Action and Policy Association (YAPA) in arguing that this is just as offensive and unjust as wage discrimination against women or Aboriginal people, both of which are unlawful and have been for some time.

Under a decision in June 1996 by the Australian Industrial Relations Commission, "career aspirants" in formal training arrangements will be brought into line with Australian Traineeship System (AVTS) guidelines as soon as possible.

These guidelines include a competency-based framework for the payment of wages; that is, wage levels will be determined by the competency of trainees at different stages of the traineeship. For young workers not in training, wage levels will be based on a formula related to their years of schooling.

This, coupled with the provisions contained within the Industrial Relations Bill 1996 (Cth), whereby young people will not be paid for time spent away from the workplace while training, will result in significantly lower wages for many young people.

Lower wages for young people has not prevented unemployment. On the contrary, a study completed in 1992 by the ACTU showed that young people's wages had decreased in relation to adult wages, whilst youth unemployment had risen during the period of study.

If wage discrimination was removed and full time traineeships became more attractive to employers than casual employment, there could be a structural change in the youth labour market. Casual jobs could then be replaced by traineeships.

At present, approximately 219 000 15-19 year olds in Australia are in school or full time education and have a casual job. Approximately 131 000 15-19 year olds in Australia are neither in full time education or employment.²¹

Burnside believes that job creation policies are needed, not continued wage discrimination against young people. The situation described above could become even more discriminatory towards young people, if provisions for youth and training wages, contained in the *Workplace Relations Bill 1996* (Cth) are implemented.

Age Limits

Q. Should children be taken to have or given full adult capacity at different ages and in different contexts?

Litigation

While the adult legal system is theoretically open to children, despite the age limit of 18 years, it is certainly under-utilised. O'Connor and Tilbury²² suggest, however, that rather than age limits, the reasons are:

- the failure of the legal profession to recognise the distinct pattern of children's legal needs;
- the failure of substantive law to provide adequate protection in areas such as the administrative discretion of child welfare authorities;
- the failure of legal aid to systematically distribute information about its availability and to deliver targeted services;
- the narrow range of problems that have been dealt with and the narrow framework in which they are delivered;
- children's subjective perceptions of the law and legal services in particular that:
 - they are regulated by, but do not have access to, law;
 - legal services and lawyers are threatening;
 - the cost of legal services is seen as prohibitive;
- children's ignorance of their legal rights and access to legal aid;
- the overly narrow definition of legal problems by youth workers; and
- youth workers acknowledgment of their own ignorance of the law and legal services.

These factors are at least as significant as the age limit to civil litigation.

source: YAPA;

I. O'Connor & C. Tilbury, *Legal Needs of Youth*, Commonwealth Legal Aid Council, Canberra, 1986;

Marriage

Burnside believes that the present age limit of 18 years, with provision for court approved exceptions, is appropriate.

Sex

For reasons of equity, clarity and uniformity, Burnside believes that there should be a national age of consent of 16 years for both males and females participating in consensual heterosexual or homosexual activities.

Voting

Burnside supports the view that the voting age should be lowered from 18 to 16. This would involve voluntary registration to vote from the age of 16 (retaining compulsory registration from 18 up). Once registered, voting would be compulsory.²³ If accompanied by voter education to encourage greater political involvement, it would lead to an increase in the citizenship status of young people and children.

Education

Burnside supports the retention of the requirement for children between the ages of 6 and 15 years to receive full time education. THE requirement for education to continue until the age of 16 years in Tasmania does not substantially interfere with national uniformity.

Employment²⁴

Children need to be protected to ensure that their development, their education and their time for leisure are not adversely affected by working. One way to do this is to set a minimum age for employment. At present, there is no agreed national minimum age for the employment of children.

The International Labour Organisation (ILO) Convention 138 sets 15 as the minimum age. ILO Convention 138 allows for exceptions for 13-15 year olds doing light work and individual exceptions for participation in artistic performances. The age of 15 is linked with the minimum school leaving age in almost all Australian jurisdictions.

Burnside supports the ratification and enactment into domestic law of this Convention.

Medical treatment

At present, all children under the age of 14, have little if any say in the type or form of testing or treatment they will receive. The situation for children aged between 14 and 16 is also unclear.

The *Minors (Property and Contracts) Act 1970* (NSW) authorises the parent/guardian of a child under the age of sixteen to consent to medical treatment and a child over the age of fourteen to consent to his/her own medical treatment.²⁵ The Act does not address the situation where the parent/guardian consents and the child refuses or vice-versa.

This was the model called for by the national non-government youth peak body, the Australian Youth Policy and Action Coalition (AYPAC), at its conference in July 1994.

Much of this section is based on material in: Australian Youth Foundation Inc. & National Children's and Youth Law Centre, *op. cit.*, p.49;

Minors (Property and Contracts) Act 1970 (NSW), s.49;

Several courts have, however considered this issue, in both the United Kingdom and Australia. In the UK, the House of Lords has held that the parental right to determine whether or not a child under sixteen will have medical treatment terminates if and when the child has sufficient understanding and intelligence to enable him/her to fully understand what is proposed.²⁶ Despite this, Lord Donaldson found in a later case (1991) that both a court in the exercise of its inherent jurisdiction and a parent may give consent, even in the case of a competent child and even in the face of the child's refusal. In a more recent case, the English Court of Appeal held that a child's refusal of treatment (for anorexia nervosa) may be overridden by his/her parents or the court.²⁷

The case law in Australia seems to favour the approach taken in *Gillick*. While the NSW Court of Appeal found in 1982 that s. 49 of the *Minors (Property and Contracts) Act 1970* (NSW) does not have the effect of taking away the parental right to consent to or refuse treatment for children aged between 14 and 16²⁸, the High Court of Australia, in deciding that the parents of an intellectually disabled child must obtain the court's permission to have her sterilised, made the following observation:

A minor is, according to this principle, capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. This approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology.

It should be followed in this country as part of the common law.²⁹

The *Minors (Property and Contracts) Act 1970* (NSW) should be amended to clearly give children aged between 14 and 16 years the right to consent to or refuse treatment in all but the most exceptional circumstances.

Moreover, Federal legislation should be enacted to give all Australian children this right.

Alcohol and cigarettes

While Burnside recognises the abject and manifest failure of the age limits on the consumption of alcohol and the sale of tobacco to prevent their use by young people, it does not recommend that these age limits be removed or lowered.

Q. Does the law in Australia adequately reflect the evolving capacities of children?

In a number of areas, the law is lacking in its recognition of children's capacities. That is why Burnside recommends the changes outlined in the answer to Q2.4, above. Given the complexity of contemporary life, it will never be possible to determine an age prior to which a person is "child" in every respect and beyond which the person is "adult" in every respect. This will depend on the nature of the activity or decision, the particular individual involved and the circumstances.

Gillick v. West Norfolk & Wisbech Area Health Authority [1986] AC 112 ;

Re. W (A Minor) (Medical Treatment) [1992] 4 All ER 627 ;

K v. Minister for Youth & Community Services [1982] 1 NSWLR 311 ;

Secretary, Department of Health and Community Services (NT) v. JWB & SMB (1992) 175 CLR 218; (1992) 66 ALJR 300 ;

Q. Can the notion that maturity is a developing capacity and that children become increasingly competent to make decisions as they get older be expressed clearly in legislation?

For the reasons stated above, there needs to be a degree of flexibility in provisions which regulate the age at which certain decisions can be made. While this may lead to a degree of uncertainty, if sufficiently clear criteria are provided as to capacity, it is possible to draft legislation that expresses such a notion.

Children's rights

Q. In the workings of the Australian legal process is the proper balance struck between the responsibilities of government and parents for children?

The entire structure of Australian society, not just the legal process, is built upon the assumption of parents' responsibilities to support their children, even (at times) when those children reach adulthood.

A number of studies³⁰ have shown that children have moved from being an economic asset, as in Adam Smith's time, to that of an economic liability to their parents, while still remaining an economic asset to the community as a whole. As Margaret Coady puts it, "It would be an economic and social disaster if everyone made the 'economically rational' decision to remain childless"³¹.

Despite this, there is an increasing trend to place even greater responsibility on the shoulders of parents, in effect blaming them for the wrongdoing of their children. This is evident in such developments as the *Children (Parental Responsibility) Act 1994* (NSW)³² and recent proposals in Queensland.

These kinds of provisions seek to punish parents if their children commit offences or breach court orders. They scapegoat parents and young people who may be experiencing difficulty in their relationships. They assume that the parents, and only the parents are responsible for any problems they face. The operation of such laws Act can only further demoralise families under pressure. They focus on the responsibility of parents for their own children but largely ignore the whole community's responsibility to create conditions that encourage effective parenting. In other words, parents are set up to fail and then punished when they do.

Burnside steadfastly opposes any move to further shift the balance of responsibility within the legal process onto parents.

Nancy Folbre, "Children as public goods", *American Economic Review*, May 1994;
Rolf George, "On the external benefits of children", in Diana Tietjens Meyers, Kenneth Kipnis & Cornelius F. Murphy Jr., (eds.), *Kindred Matters: Rethinking the Philosophy of the Family*, Cornell University Press, Ithaca, 1993;

Margaret. M. Coady, "Reflections on Children's Rights", in Kathleen Funder (ed.), *Citizen Child: Australian Law and Children's Rights*, Australian Institute of Family Studies, Melbourne, 1996;

see A. Bendall and J. O'Brien, *Can anybody find me ... somebody to blame? The Children (Parental Responsibility) Act 1994 (NSW) : a discussion paper*, Burnside and Youth Action and Policy Association, 1995;

Children Making Decisions

Q. Are the rights accorded to children in CROC to have a voice in proceedings affecting them and to have their best interests considered adequately reflected in Australian legal processes?

Q. What more or what else, can and should be done within the Australian legal process to give effect to those provisions of CROC?

Under Article 12 of CROC, the child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or proceeding affecting the child. Accordingly, provision should be made, in all matters affecting the rights or interests of a child, that child's views are able to be heard by the decision maker to the greatest extent possible.

In Family Law proceedings, a child's right to be separately represented is usually only created once a matter is listed for hearing before a judge. The vast majority of Family Law matters in relation to custody, access and property are settled. There is no mechanism for the child's opinion to be heard during the negotiation process. The child is not separately represented during that process.

Indeed, there is no automatic separate representation for every case that goes to court. The decision in *Re K* broadened the types of cases where a separate representative will be appointed. However, the courts have tried to restrict the interpretation of *Re K*, partly because of the expense incurred. All separate representatives are funded through the Legal Aid Commission.

There should be a mechanism for children to have decisions of their parents about custody and access reviewed judicially and/or through a mediation process.

Lawyers are not necessarily the best people to represent the interests of children. There should be specially approved people with proven skills in communicating with children and advocacy, knowledge of family dynamics and social welfare programs. Article 3 of CROC requires that all actions concerning the child shall take full account of his/her best interests.

The term "best interests of the child" raises issues as to the role of the advocate in courts and tribunals. Quite often it is the advocate deciding on behalf of the child what is in his or her best interests. In some circumstances this is appropriate, but in others it means that the child's views are not heard by the court/ tribunal determining the matter. Some instances involve children's rights at home and within the health care and education systems.

For example, a child under the age of 14 may or may not be consulted in a hospital as to the form of treatment available to him or her. In the education system, often decisions are made according to what is in the best interests of the school or the teacher, rather than the child.

Issues are also raised here as to institutional standards of juvenile detention centres and children's courts. There is insufficient assistance and facilities for young people with a range of problems, including drugs and alcohol. For example, there is only one drug and alcohol counsellor at Cobham Juvenile Justice Centre. Indeed, these problems exist in the general community as well: there is only one drug and alcohol counsellor in the entire area of Cabramatta, in South Western Sydney.

Advocacy for children

The legal process and advocacy for children

Q. In what additional areas of the legal process could the best interest principle usefully apply?

Burnside would support the application of the best interests principle in **all** areas of the legal process dealing with children. Even in areas such as criminal law and sentencing, a primary consideration in decision making should be the best interests of the child, balanced against the interests of the victim (if there is one) and the community.

Q. Is there an age below which a child's wishes should not be considered in making a decision that affects him or her?

Burnside does not support the setting of age limits for the consideration of a child's wishes. Rather, the formulation laid down in *Gillick*³³ and affirmed by the High Court in *H v W*³⁴ should be followed. The weight given to the child's wishes will of course depend on the child's age and capacity.

Options for advocacy in litigation

Next Friend

Q. Is the next friend model a useful one for children, particularly younger children, allowing them to have a voice in proceedings that affect them?

Q. How, if at all, should this model be amended to assist the participation of children in the legal process?

The next friend model as it currently operates is inadequate, in that it does not address the conflict between the principles of the "best interests" of the child and the child's right to express his or her opinion freely and to have that opinion taken into account in any matter or proceeding affecting the child.

In 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.

Gillick v. West Norfolk & Wisbech Area Health Authority [1986] AC 112 ;

(1995) FLC 92-598

The separate representative

Q. Is the separate representative model a useful one for children, particularly younger children, allowing them to have a voice in proceedings that affect them?

Q. How, if at all, should this model be amended to assist the participation of children in the legal process?

In Family Law proceedings, a child's right to be separately represented is usually only created once a matter is listed for hearing before a judge. The vast majority of family law matters in relation to custody and access are settled. There is no mechanism for the child's opinion to be heard during the negotiation process. The child is not separately represented during that process.

Indeed, there is no automatic separate representation for every case that goes to court. The decision in *Re K* broadened the types of cases where a separate representative will be appointed. However, the courts have tried to restrict the interpretation of *Re K*, partly because of the expense incurred. All separate representatives are funded through the Legal Aid Commission.

There should be a mechanism for children to have decisions of their parents about custody and access reviewed judicially and/or through a mediation process.

In addition, Burnside supports the adoption of the guardian *ad litem* model, whereby the child effectively has two representatives: an independent social worker and a legal representative. This would at least partially address the dichotomy between the right of the child to have his/her opinion heard and the paramountcy of the child's best interests. This model should operate not just in the care and protection jurisdiction (as in Britain), but in all legal forums making decisions as to a child's welfare and interests.

The standard representational role

Q. Is the standard representational model a useful one for children, particularly younger children, allowing them to have a voice in proceedings that affect them?

Q. How, if at all, should this model be amended to assist the participation of children in the legal process?

The standard representational is perhaps the least useful of all models for children. This is so in all areas of law and justice, but is particularly acute in the area of juvenile justice.

In New South Wales, legal assistance is usually provided under the Duty Solicitor Scheme. Such assistance is hopelessly inadequate. Often, there is no requirement that solicitors participating in the scheme receive training or have experience in Juvenile Justice. Some geographical areas, such as Gosford, require solicitors to have continuing legal education in Juvenile Justice/ Children's Law if they are to join the scheme. This should be the case universally.

In some areas, the youngest, most inexperienced solicitor in a firm is sent to do the Duty List and the Children's Court is treated as a "learning patch".

Even if practitioners are both skilled and motivated, it is difficult for them to provide assistance to their clients. They often see them only on the day of the hearing, when the child or young person is nervous and upset. There is no time for a proper conference or to seek proper instructions. Often, there is no provision for interpreters, even for clients with virtually no English. There is no time to properly examine the facts and analyse the elements of the alleged offence or to consider possible defences.

Often neither the charges nor, after 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.

Under the Duty Solicitor Scheme, there is no proper supervision or quality control, even for the most junior of practitioners. Nor is there any continuity. Children may be represented by a different solicitor at each appearance in court, all of whom they meet only once. This can lead to pressure for them to plead guilty, as no real knowledge of or interest in the case is developed.

Often young people are told to plead guilty (notwithstanding the fact that they may have a defence at law) on the basis that it is faster to plead guilty and "get the matter out of the way" or that s/he will only receive a "slap on the wrist" and is better off pleading guilty than defending the matter.

Even if the duty solicitor is extremely skilful, motivated and experienced, as many are, if (s)he is handling 20 or 30 clients in one morning, there is no chance for adequate representation. Duty Solicitors are required to deal with defended matters on the day having been served that morning with the Police Brief which does not allow them sufficient time to properly obtain instructions or to adequately research the law. Often, children are persuaded to plead guilty after the Police Brief is served on the Duty Solicitor.

Often, factors such as mental illness or intellectual disability will not be picked up, even where there is clear evidence that the child is unfit to plead.

If a young person forgets to bring their Charge Sheet or Statement of Police Facts, often the only information available to the Duty Solicitor is the list of Court matters indicating the offence.

Often references and other material which would be of use to the court (particularly information on the child's rehabilitation) is not utilised because the guilty plea is taken on the first occasion and the child does not know it is in his/her interest to bring along character references or references from counsellors or other welfare workers who are assisting him/her to rehabilitate him/herself in the community.

There are also serious problems in relation to representation in care and protection proceedings.

A broader model of advocacy for children

Q. Do children need formal advocates to champion their interests in a broader range of legal and administrative processes?

Q. If so, what functions should this advocate have?

Q. Should the advocate deal with problems of individual children as well as promote the general interests of children? Why or why not?

As indicated in the Introduction above, Burnside believes that the lack of formal advocates for children and young people is one of the central issues confronting their participation in society, including the legal process.

The best way to remedy this would be for domestic legislation to be enacted to implement the Convention. Burnside believes that this should take the form of a Children's Rights Act (as proposed by the ALRC in its report *Child Care for Kids*³⁵) and the establishment of a Children's Commissioner within HREOC.³⁶

Burnside supports the model outlined in the Draft *Australian Children's Charter*³⁷, whereby the Commissioner would:

- review legislation, policies and practices affecting children;
- report to the Government any areas of doubtful or non-compliance with acceptable standards of fair treatment of children by government authorities and non-government agencies;
- report to Parliament on any children's issues;
- be responsible for developing mechanisms to consult with children;
- be a voice for children to government and non-government agencies;
- initiate proceedings on behalf of children; and
- intervene in proceedings which involve children.³⁸

The Commissioner would, of course, require substantial resources in order to fulfil any of these roles.

ALRC, *Child Care for Kids*, Interim Report no. 70, Review of Legislation administered by Dept. of Human Services and Health, 1994, p. 11;

see Australian Youth Foundation Inc. & National Children's and Youth Law Centre, *Australian Children's Charter: A Charter of Rights for Children and Young People in Australia - Draft for Consultation*, June 1995, p.55

op.cit., p.55;

ibid.;

The issue of whether or not the Commissioner should deal with the problems of individual children as well as promoting the general interests of children is a vexed one. On one hand, handling individual complaints ensures that an agency stays in touch with the real issues "on the ground", rather than indulging in theoretical "flights of fancy". However, given that the resources available to the Commissioner's office are likely to be extremely limited, it would be very easy for individual complaints to completely overwhelm the more general, policy work of the Commissioner.

Burnside would support the Commissioner having the power to investigate individual complaints with perhaps the discretion to proceed only with those involving an issue (or issues) of general public interest.

Optimally, the Federal Commissioner would be complemented by the establishment by State and Territory Governments of similar positions with statutory powers to monitor the impact of State legislation, policies and budgets and to investigate complaints and issues.

Children as consumers - the legal process

This is outside Burnside's core activities and, as such, Burnside offers no comment.

Children - immigration, studies, work and welfare

Immigration

This is outside Burnside's core activities and, as such, Burnside offers no comment.

Children and the education process

Rights education in schools

Q. Do current school curricula adequately inform children about their rights?

In Burnside's view, education of children as to their rights is not in any way adequate. There have been no resources allocated to date to give publicity or information about CROC to adults, let alone amongst children. This amounts to an abdication of responsibility. There has been only one initial national information campaign on CROC and UNICEF material was used for that.

There is no coherent strategy within school curricula to educate children about CROC or about their rights more generally.

Q. What is the most effective way to ensure that children are aware of their rights within the education system?

A comprehensive campaign is needed. This should involve an integrated curriculum for all schools, both State and private, including teaching materials, kits and a complementary media campaign, perhaps in the form of information for journalists and some form of incentive schemes (eg. awards) for journalism in the area of children's rights. This campaign should be funded by the Federal Government and co-ordinated by a central agency, perhaps the Human Rights Commission (which has already asked for funding to do so) and be developed in consultation with children and young people.

Children's participation in curriculum development and other school decision making

Q. The Commissions would like to hear about experiences with children's participation in schooling and education decision making processes

Burnside has had a number of experiences involving children in care who have been experiencing difficulties at school or have been refusing to attend school or truanting, who have benefited from processes involving them in decision making. This process has involved Burnside's Education program co-ordinating meetings between school officials, the child, a worker from the NSW Department of School Education Substitute Care Program and Burnside staff, to develop a case plan relevant to the individual child. Importantly, this has occurred prior to the child being placed in the school. In this way, the child's anxiety over attendance at school, particular subjects, participation in sport or other activities can be addressed and to a large extent, accommodated.

Burnside has found that a number of schools are extremely co-operative and, in consultation with Burnside and the child, will agree to special provisions, such as partial attendance for a period, in order to maximise the child's attendance and opportunities.

Q. Should children's participation in school governance be encouraged? If so, how?

As noted above, Burnside believes that, in accordance with Article 12 of CROC, children should, to the greatest extent possible, participate in decisions affecting their rights or interests. Thus, such measures as student representative councils are to be encouraged.

Punishment and disciplinary measures

Q. Are current laws and legal processes regarding punishment and discipline in schools satisfactory?

At present, the procedures in New South Wales surrounding suspension, exclusion and expulsion from school do not comply with this Article.³⁹

see NSW Dept. of School Education, *Suspension, Exclusion and Expulsion of Students from School and Procedures for the Declaration of Place Vacant*, 94/011, Feb. 1994;

The procedures set out by the NSW Department of School Education relating to long suspensions or exclusions from school do not adequately protect the interests of the child and in particular the child who comes from a disadvantaged background where literacy and communication skills are a difficulty for his/her parent(s).

The Department's guidelines state that a Principal must write to the parent(s) to inform them of the child's suspension and the length of the suspension. Often, if a child is to have a long suspension or where the school does not really want the child to return, the Principal will write to the parent(s) explaining that the child has been suspended but not describing or explaining to the parent the procedure for conciliation with the school or for transfer to another school.

Where there is difficulty in the child transferring to another school or returning to the original school the child may be completely ignored for longer than the maximum 20 day period for suspension set out in the guidelines. Often, no steps towards conciliation with the school or transfer to a new school are taken, as required.

Further, CROC arguably requires that during the period of suspension, the school provide the young person or child with homework so that her/his education does not suffer unduly. Often, this does not occur. Departmental policy is that only in cases of long suspensions is the school required to provide homework.⁴⁰

Schools often avoid expelling or excluding a student by placing the student on a short suspension, then advising the student/ parent that the student is no longer welcome at the school. This keeps expulsion/ exclusion statistics low and deprives the student of the procedural steps available when being formally expelled/ excluded.

This policy of indefinite exclusion is not only contrary to the Convention, it breaches NSW law. Sections 4(1)A and 4(1)D of the *Education Reform Act 1990* (NSW) state that every child has the right to receive an education "and the principal responsibility of the State in the education of children is the provision of public education".

In order to fulfil the requirements of the Convention, Burnside recommends that the Principal be **required** to notify the parent(s) in writing and verbally of the fact that the child has been suspended and the reasons for the suspension. The Principal should also be required to notify the parent(s) both verbally and in writing of the procedural steps set out by the Department of School Education to address the problem of the child's suspension and to address the issue of reconciliation with the school or transfer to a new school.

NSW Dept. of School Education, Memo 94/011, 2 February 1994;

Complaints

The NSW Department of School Education's Complaints Procedure, (as expressed in a Memo to Principals, dated 27 May 1994) states that "each party shall have the right to have an **observer** present...". Such an observer does not have the right to speak. This effectively denies the child an advocate and as such is both a breach of this Article and of Article 12, which guarantees the right of the child to express her/his opinion freely and to have that opinion taken into account in any matter or proceeding affecting the child.

Burnside recommends the establishment of an independent advocate/complaints body to investigate and resolve disputes within schools.

Another difficulty is, that in the private school sector, there is **no** uniform, enforceable, independent complaints mechanism at all. Given that private schools are also exempted from the *Anti-Discrimination Act 1977* (NSW), this effectively denies all rights of redress for students at these schools.

Corporal Punishment

The requirement under Article 28 that discipline be consistent with the child's rights and dignity also raises the issue of corporal punishment. Burnside believes that caning and other physical assaults are barbaric and a clear infringement of the rights guaranteed under the Convention. We note that the NSW Government has taken steps to end the practice in NSW.

Q. Should principles of natural justice apply to children facing school discipline?

Yes. The principles of procedural fairness should apply. A child's views should be heard before a decision is made to inflict a particular form of discipline. Student involvement in the development of policy and practices relating to behaviour management and exclusion is also crucial. Reasoned decisions as to discipline are just as important and appropriate as reasoned and well thought out decisions as to curriculum.

Q. Should there be a right of appeal against decisions to exclude children from school or inflict corporal punishment?

Yes. As noted above, Burnside advocates the establishment of an independent advocate/ complaints body to investigate and resolve disputes within schools.

Violence in schools

Q. Are processes used to prevent or deal with violence in schools adequate?

Not in a general sense. The level of and response to violence in schools varies greatly. Burnside endorses the findings of the House of Representatives Standing Committee on Employment, Education and Training⁴¹ and the recommendations contained in its report.

Further, Burnside endorses the findings and recommendations of the New South Wales Legislative Council Standing Committee on Social Issues Inquiry into Youth Violence⁴².

Children and work

Training and employment services

Q. Do the current training and employment services offered by the Commonwealth adequately promote children's right to work and protect children from economic exploitation?

Employment and training assistance for unemployed people - including young people - have been cut substantially in the 1996-7 Federal Budget. \$575 million has been cut this financial year, with a cut of \$956 million to be cut in 1997-98, a cut of \$1 531 million over two years.

In this context, it is difficult to see how it could be said that there was adequate promotion of children's right to work. Coupled with the *Workplace Relations Bill 1996* (Cth), promotion of children's rights and protection of them from exploitation does not seem to be informing Commonwealth law and policy.

Children and the welfare process

Income support⁴³

Q. What should be the aim of income support for children?

The aim of income support for all people, including children, should be to protect and preserve the right to a decent standard of living. Where the standard of living of the child falls below a certain level, the Commonwealth and /or States should step in to provide income support. That support should be in the form of welfare payments, where necessary, but also in the form of health, education and other services.

Sticks and Stones: Report on violence in Australian schools, House of Representatives Standing Committee on Employment, Education and Training, AGPS, Canberra, March 1994;
see Standing Committee on Social Issues, Legislative Council, Parliament of New South Wales, *A Report into Youth Violence in New South Wales*, September 1995, esp. pp. 65-100;

see Anthony King, "Income Support for Children and Young People", in Kathleen Funder, op. cit., pp. 216-257;

Q. Do current legal processes reflect and support that aim?

Current legal processes seem to support this aim. Most elements of the Australian income support system for children and young people are based on the concept of conditional rights, with the conditions reflecting the categorical and targeted nature of the system.

If someone can demonstrate their eligibility for a payment and also, in most cases, that their private income and assets do not disqualify them from receiving assistance, then they have a right to receive their entitlement. It is a right, not a privilege. Such an interpretation of the rights in the income support system is illustrated in the approach to social security payments taken by the Welfare Rights Centre in its handbook.

A basic philosophy underpinning the Handbook is that the social security system is based on rights, entitlements, responsibilities and obligations which should be clearly stated and legally enforceable. Social security payments are not made as an act of charity to individuals whom the bureaucracy considers to be worthy of assistance.⁴⁴

A conditional right to an income support entitlement says nothing about the level of that entitlement in terms of some standard of adequacy. Instead, the income support system largely relies on relativities in the setting of rates. One of the difficulties in addressing questions of adequacy in the income support system is that there is no single standard for an adequate income.

This problem can be at least partially avoided by focusing on the relativities in the system rather than the absolute amounts. For example, if we assume that it is right that a 21-year old unemployed person receives a given amount, is it right that a 20-year-old should receive a certain amount less? Following this logic, we can conclude unambiguously that many payments for children and young people in the income support system provide less than adequate assistance according to the standards of the income support system itself.

Why are the Independent and Homeless rates of payment less than the adult rates, given that financial independence is presumed? The reason that the rates are depressed is concerns about the effects on work incentives and on incentives to leave home. Adequacy and the right to a guaranteed minimum standard of living has been explicitly compromised. Another basis for concern with the adequacy of payments for children and young people arises where a low level of payment presumes financial support from parents. Where parents are either unwilling or unable to provide such support, the level of assistance will be inadequate.

Burnside also has concerns over the treatment of people who do not comply with the responsibilities or obligations imposed under the income support system (eg. the new "dole diary"). Where a person fails to comply, there are penalties involving suspension of benefits. Where the person has children, those children's standard of living is thereby compromised for no just or logical reason. Expressions such as "rots" and "middle-class welfare" does not lessen the impact of poverty on a child.

Welfare Rights Centre, *The Independent Social Security Handbook*, 2nd edn., Pluto Press, Sydney, 1994; quoted in A. King, *ibid.*, p.246;

Department of Social Security (DSS) Benefits

Department of Education, Employment Training and Youth Affairs (DEETYA)

Q. Are the administrative processes for dealing with applications for income support by children appropriate?

Q. How has the Commonwealth/State Youth Protocol affected the procedure for children obtaining assistance and income support?

In 1994, the Commonwealth and States and Territories introduced Protocols in an attempt to deal with the problem of youth homelessness and income security for homeless youth. The Protocols require DSS staff to refer any young people under 15, 15 to 17 year olds who are considered "at risk" and all those under 18 who are state wards to the responsible State/Territory welfare authorities for an assessment of their need for protective services and support.

Whilst the Protocols assume that State and Territories are responsible for young people in need of care, in practice it fails in many areas. It is current DSS practice to deny income support to young people in the age categories covered by the protocols regardless of whether the State welfare department has taken responsibility for the young person or not. Many homeless young people complain that they have been denied a Special Benefit by DSS and have experienced delays or no action by the State department.

This practice may well be in breach of Articles 26 & 27 which specifically state that States will recognise the right of every child to benefit from social security.

Appealing a decision to refuse income support to a child

Q. Are children aware of their rights of appeal against a decision to refuse income support and if so, how often do they exercise their rights?

While young people who have the support of advocacy services or who have the initiative and persistence may seek review, many young people who are turned away by DSS simply give up.

Q. Do the departmental appeal sections, the SSAT and the AAT accommodate the special needs of child appellants appropriately? If not, what alternative processes should be put in place?

Like most aspects of the legal system, the special needs of child appellants are at best partially met by the SSAT and the AAT. Most procedures are still designed for adult, literate appellants. Few of the Tribunals' personnel have specific training in dealing and communicating with children nor in the needs of children in terms of income support.

Other issues

Q. Would general guidelines for dealing with child litigants and witnesses be useful in certain areas of federal responsibility?

Q. If so, how should these guidelines operate and what force should they have?

Yes. It is imperative that Federal administrative and review processes operate under general guidelines, which coupled with specific training, would help agencies and offices better deal with the special needs of children.

Q. Would a single merits review tribunal, as recommended by the Administrative Review Council, assist in addressing the needs of children? If so, how?

Yes. A single merits review would allow all support issues concerning Federal income support and other Federal services to be heard in the one forum and be dealt with together.

Children and the Family Court

Family Law Jurisdiction

The Family Court of Australia

Q. Have the referral of powers, the cross-vesting legislation and the conferral of the welfare jurisdiction given the Family Court sufficient power to deal with the range of matters facing families with children?

There are still some serious doubts⁴⁵ as to the extent of the Family Court's jurisdiction over ex-nuptial children. It should be noted that the references of power from the Australian States have expressly excluded the word "welfare". There is also no doubt that they have jealously guarded their own child welfare legislation procedures. This protection is best illustrated by the provisions of section 60H of the *Family Law Act 1975* (Cth), which states that "... a court having jurisdiction under this Act ... in relation to a child who is under the guardianship, or in the custody or care and control of a person under child welfare law..."

Despite the fact that the States and Territories patently do not want the Family Court to exercise the usual child welfare provisions (such as care applications) in place of the State and Territory Magistrate's Courts and Children's Courts which presently deal with these matters, Burnside believes that 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.⁴⁶

see John Seymour, "The role of the Family Court of Australia in child welfare matters", *Federal Law Review* vol.21, Part 1, pp.1 ff.;

see John Dewar, "The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) compared - twins or distant cousins?", *Australian Journal of Family Law*, vol.10, no.1, March 1996, pp.18-34;

Courts of summary jurisdiction and family law

Q. What role should the magistrates' courts have in family law disputes relating to children?

While magistrates' courts allow greater accessibility and lower costs, they should only have a role in family law disputes relating to children if the magistracy and practitioners in such matters receive specialised training, not just in family law but in the way children communicate, acquire and process information and develop.

Q. Do magistrates' courts adequately deal with the needs, interests and participation of children in family law disputes?

At present, no. Magistrates' courts are generalist courts, with no specific expertise or skills in the area of family law or children's matters. While it is recognised that a specialised tribunal could not hear every single matter concerning children, magistrates' courts which deal with such matters should be staffed by personnel who have received some training in family law and procedure and in child development.

Q. Do magistrates' courts provide children in rural and remote communities with sufficient access to the family law jurisdiction?

No. While magistrates' courts at least provide rural and remote communities with some access to justice, it is often a very "poor cousin" indeed to that offered by specialist Family Courts. Specific procedures and training should apply to those magistrates' courts exercising jurisdiction over family law.

Q. Do counselling services in magistrates' courts meet the needs of children, particularly those in rural and remote communities?

Counselling services in magistrates' courts rarely meet the needs of adults, let alone children. This is so across geographic areas, but is particularly acute in rural and remote areas. Counselling services, whether attached to courts or not, are few and far between in rural and remote areas.

Q. How can magistrates' courts family procedures and practices be improved?

Part of the answer is an increase in resources, so that facilities such as interpreters, counselling and the like are more accessible. As well as that, all practitioners and magistrates practising in the jurisdiction should receive specialised training of the type outlined above.

Children's access to the Court

Q. What type and standard of training in relation to children's issues should be offered to family law practitioners and judges?

Burnside believes that all persons working with very young children, in whatever context, should receive mandatory training in communicating with young children and in the way young children process information, grow and learn.

Burnside believes that the training of professionals involved in the process is critical. At present, legal training contains minimal if any training in social welfare. This is despite the fact that a large body of knowledge has been amassed by the social welfare professions. Every professional practising in this area, be they legal practitioners, Magistrates or members of the judiciary should receive specialised and ongoing training in child behaviour, development and psychology.

Vulnerable groups and the family court

Indigenous children

Q. Is the Family Court relevant and accessible to indigenous children?

All indigenous Australians, including children, have difficulty feeling confident about using the services offered by a court which deals with arrangements concerning children. This is not surprising, given the historical practice of removing indigenous children from their parents.

However, steps are being taken to remedy this, largely at the instigation of Chief Justice Alastair Nicholson.⁴⁷ These measures will, of course, require substantial resources at a time when the Family Court is already stretched almost beyond its capacity.

Q. Does the Family Court take sufficient account of indigenous cultural practices, particularly practices in relation to the residence of children within extended families? If not, what should be done to ensure that the Court takes account of indigenous cultural issues in proceedings?

In 1994, Chief Justice Alastair Nicholson of the Family Court recommended to the Federal Government that the *Family Law Act 1975* be amended to require the Court to take into account traditional law and culture when making custody and similar decisions involving children of ATSI descent. The then Attorney-General accepted this and an amendment was introduced to the first *Family Law Reform Act 1995* (Cth) to achieve this objective. Burnside commends this initiative.

The Chief Justice has also recommended a number of provisions to better recognise customary Indigenous laws with regard to marriage, child care, adoption and the like. Burnside strongly supports the examination of such proposals, in consultation with the Aboriginal and Torres Strait Islander communities.⁴⁸

see Alastair Nicholson, "Indigenous Customary Law and Australian Family Law", *Family Matters*, No.42, Spring/Summer 1995, pp.24-29;

ibid.;

NESB children

Q. Is the Family Court accessible to NESB children and families?

For many NESB people, the Family Court, like all other courts, is not accessible. There are some fairly obvious linguistic difficulties. These can be at least partially overcome by the use of interpreters. Problems remain, however, particularly in the areas of mediation and counselling. For other families, there are strong cultural reasons which make attendance difficult. In some countries, courts are instruments of oppression and attending court may simply be too traumatic for former residents of these countries. This is often exacerbated by the intimate, personal nature of the matters which come before the Family Court.

Q. If not, what more should be done?

There needs to be effective community education programs to inform NESB people of their right to access the Court and the nature of Court proceedings. An effective court support scheme, staffed by members of the families' own community, could also increase access. Increased access to interpreter services would also be of assistance.

Children in remote communities

Q. What should be done to improve access to court in family law matters for children from rural and remote areas?

The model posited by Chief Justice Nicholson to improve access to the court in remote North Queensland and the Torres Strait⁴⁹ should be examined for application in other remote areas. Following the Chief Justice's visit to the Islands of the Torres Strait in 1994, a visiting counselling service was set up and funded under the previous Government's Access to Justice Program. In addition, the previous Government's Justice Statement included provision for four ATSI Family Consultants in North Queensland and the Torres Strait. There is also provision for judges to travel, if required to remote communities in the Torres Strait, North Queensland and the Northern Territory.

The Court is to be applauded for such schemes. However, they require substantial resources. Burnside believes that such investment is warranted. Access to justice is a basic human right and all reasonable steps should be taken to ensure it.

The family adjudication model

Q. Is the present modified adversarial system the most appropriate system for the Family Court in relation to children? Why or why not?

The changes made by the *Family Law Reform Act 1995* (Cth) are certainly welcome. However, the adversarial system does not serve the interests of children in any area, be it criminal justice, care & protection or family law. Burnside would favour a modified inquisitorial or investigatory system, whereby the tribunal investigated the best outcome for the child and family, rather than a contest between the parties.

ibid.,p.29;

For that reason, Burnside prefers a tribunal model, where a team of professionals, including but not limited to lawyers, could jointly assess what arrangement best serves the interests of the child.

While Burnside recognises the difficulties presented by the provisions of the Constitution concerning the judicial power of the Commonwealth and the decision in Brandy,⁵⁰ we would argue that it is essential that measures be taken to better serve the interests of the child in family law matters.

The welfare and the best interests principles and the wishes of the child

Q. Are the factors listed by the Family Law Reform Act sufficient to clarify the meaning of the “best interest” principle?

Given the provision in s. 68F(2) that "any other fact or circumstance that the Court thinks is relevant" as one of the listed factors, as well as the other, mandatory factors, it seems that the present list is about as comprehensive as it is possible to be without being excessively proscriptive.

Q. Are the procedures for ascertaining a child’s wishes appropriate for all children? In practice, what weight is given to the child’s wishes?

This largely depends on the skill of the separate representative in the particular case. Interviewing skills plus knowledge and experience of the way that children communicate and develop are crucial for the child's wishes to be properly ascertained, let alone communicated to the court. Likewise, the weight given to a child's wishes largely depends on the way those wishes are ascertained, communicated to the court and the knowledge and experience of the presiding judge. It is for this reason that the training and background of all personnel involved is crucial.

The right of the child to be heard in family law proceedings

Q. Should children be encouraged to participate in family law proceedings as parties? If so, what should be done to assist children?

Burnside is strongly in favour of children having the maximum opportunity to express their views freely in all matters affecting them, in accordance with Article 12 of CROC.

Therefore, where the views of the child will not otherwise be heard, children should be encouraged to participate in proceedings as parties. This should be facilitated by a better, more streamlined process of ascertaining the child's wishes and the appointment of separate representatives at the earliest stage practicable. This is important, not just to implement CROC, but in order to maximise children's participation in family decision making and thus in the family itself. Family is something the child should be part of, not something that happens to him/her.

Brandy v. Human Rights and Equal Opportunity Commission, *ALJR*, April 19 1995, p.191;

Family reports

- Q. What should be the role of the family report and when should a family report be prepared?**
- Q. Who should be responsible for preparing the report and what skills and qualifications should such individuals possess?**
- Q. Do family reports adequately assist in the discharge of CROC requirements that children should be able to express their views in matters that affect them?**

Burnside believes that family reports should only be prepared where there is a clear need for further information to place before the court as to the family situation. When one is prepared, this should be done by a court-appointed specialist, with extensive qualifications and experience in dealing with families in difficult or crisis situations.

Burnside does not believe that the preparation of a family report discharges CROC requirements. A range of mechanisms is necessary to provide the child with an opportunity to voice her views.

Counselling

- Q. Is it appropriate for all children in separated families to be involved in a counselling program? If so, how would the Family Court manage and resource such an initiative?**

It would be optimal for all children in separated families to be involved in a counselling program. This would maximise the information available to the Court as to whether a particular agreement was in the child's best interests. It would also maximise participation of the child in proceedings.

However, given the clear evidence that the counselling resources of the Court are already stretched, management and resourcing of this would be most difficult. It is difficult to see how such an initiative could operate without some additional resources. One way it could be managed, however, is for external agencies to be contracted to provide counselling services to the Court. This would still require substantial resources and probably fewer than extra Court resources, given that overheads (recruitment, superannuation, etc.) would be lower.

- Q. Does the involvement of children in counselling sessions give them sufficient involvement in the family decision making process? If not, what more or what else should be done to involve children in this process?**

Involvement of children in counselling sessions at least gives them **some** involvement in the family decision making process. Other measures which would increase their involvement would be the encouragement of child parties, the appointment of separate representatives prior to hearing (or even where the matter does not come to hearing), and an amendment to the adversarial system to a system of family conferencing or group decision making.

Unfortunately, all of these measures would require substantial extra resources.

Parenting plans

- Q. Do the provisions in the Family Law Reform Act allow children to be appropriately involved in the process of drawing and registering parenting plans? If not, what more or what else can and should be done to assure children appropriate participation in the preparation of parenting plans?**
- Q. Do the provisions of the Family Law Reform Act allow the Court to adequately scrutinise parenting plans to ensure that the child's best interests are protected?**

There should be a requirement that the child at least be consulted as to her wishes with regard to the parenting plan. When plans are registered in the Family Court, the Court should be required to examine how well the plan serves the best interests of the child. This should not be dependent on an application from one of the parties, but should follow as a consequence of an application for registration.

Children as Witnesses

- Q. When, if ever should a child be permitted to give evidence in family law matters?**

This should only occur where the court considers it both desirable and necessary. Moreover, procedural changes should be made so that the child could give evidence in a comfortable, non-threatening environment. The use of video-taped evidence should also be considered.

- Q. Who should be responsible for deciding whether a child should be permitted to give evidence as witnesses?**

It should be a matter for the Court, with the overriding principle of the best interests of the child and the secondary principle of the child's rights to have her views heard as guidance.

- Q. Is the provision that allows the admission of hearsay evidence of statements made by children an appropriate mechanism for hearing children's evidence concerning family matters? What problems, if any, are associated with children's evidence elicited in this form? What weight should be given to such evidence?**

The problem with this mechanism for hearing children's evidence is that what the court is hearing is not the child's view directly, but a report of that evidence, which can easily become a re-interpretation of the evidence or a finessing of it. This is particularly so when the person relaying the evidence has some vested (even if indirect) interest matter. The weight of such evidence should therefore be closely examined by the court, particularly where it is the only evidence presented of the child's views. However, if judiciary and practitioners are skilful enough to properly test the evidence presented, it is at least some indication of the child's views.

Q. Is affidavit evidence an appropriate means of obtaining evidence from children?

Burnside believes that other, less formal mechanisms for eliciting evidence would be less traumatic for the child. Evidence, either in the form of testimony or affidavit, should be elicited sensitively, in a comfortable, non-threatening environment. As in all areas concerning children in the legal process, practitioners should receive specialised training in the way children react to trauma, communicate, process information and develop.

Children interviewed by a judge

Q. Is the interview of a child by a judicial officer in chambers a useful tool involving children in proceedings that affect them? Why or why not?

This could be an effective way to elicit the child's views, as it is likely to be less traumatic and threatening for the child. This is entirely dependent, however, on the skills and expertise of the judge. It once again supports Burnside's case for special training for those dealing with children.

Q. If it is useful, should greater use of such interviews be encouraged?

Given the above proviso, Burnside would welcome the greater use of such interviews.

Children's evidence in cases of child abuse

Q. Does the Family Court have appropriate arrangements for receiving the evidence of children in cases of alleged child abuse?

Q. What are the relative merits of the different arrangements for taking child evidence in such cases?

Q. What weight should the Court place on children's evidence in such cases?

The comments in regard to the criminal courts also apply to the Family Court.

Separate representation of children

Appointment of separate representatives

Q. What particular skills and qualifications should a separate representative have?

Burnside supports the view of the Family Law Council that the "representative" should not necessarily be an individual, but rather a small team of people from different disciplines, for instance a lawyer plus a counsellor or psychologist. At the very least, it would be desirable to have an individual possessing both social welfare qualifications and (perhaps) some legal training.

Q. What issues should be addressed in training for separate representatives?

As stated repeatedly throughout this submission, Burnside is firmly of the view that only those receiving some form of specialised training in child psychology, communication and development should practise in this area.

Q. How comprehensive and appropriate are the guidelines for separate representatives set out by the Family Court in *Re K*?

Burnside sees the guidelines set out in *Re K* as both appropriate and comprehensive. We welcome this initiative of the Court. However, we would see it as desirable that there be a presumption that a representative should be appointed, unless there is some evidence that this would not be helpful. We recognise that this would have significant resource implications for the Legal Aid Commission, at a time when it is facing a funding crisis. That, however, does not lessen the urgency of a child's need for advocacy and representation.

Q. At what stage of the proceedings should separate representatives be appointed?

Burnside would consider it optimal for a representative to be appointed when proceedings commence in the court, prior to a hearing being set down. The vast majority of family law matters in relation to custody and access are settled. There is no mechanism for the child's opinion to be heard during the negotiation process. The child is not presently separately represented during that process. One answer to this may be to give children the right to have decisions of their parents about custody and access reviewed judicially and/or through a mediation process.

The separate representative and other professionals in the Family Court

Q. Are lawyers best qualified to act as separate representatives? Why or why not?

Q. Would a co-ordinator assist in the management of cases involving children? If so, what should his or her role be and what skills and qualifications would such a person require? How should such a position be funded?

A co-ordinator may be a useful player in cases involving children. (S)he could in effect act as "chair" of the separate representative "team". Specialised skills, in both social welfare and law, would be desirable. The question of funding is vexed, as is the question of funding of any kind of representation for children in family law matters.

The role and functions of the separate representative

Q. Is the role and function of the separate representative sufficiently well done?

The view that the separate representative is in some sense an "amicus curiae", rather than a representative of the child, still persists at times. This can result in the representative's view of the child's best interests, rather than the child's "voice" being heard in the proceedings.

Q. How, if at all, should the guidelines for separate representatives be amended?

There should be some emphasis placed on the role of **representing** the views and interests of the child inserted into the guidelines. It is after all the interests of the child which are being discussed in the court.

Q. Should children of a certain maturity have the power to dismiss a separate representative?

Yes. If there is to be any real sense of representation, then older children must be able to reject the representation offered. Otherwise, they are being forcibly “represented”, against their will. This would be as anomalous as not allowing adults to dismiss their legal counsel.

Some problems with the separate representative model

Q. Does the current model of the separate representative meet the requirements of CROC in giving children a voice in proceedings that affect them? Why or why not? If not, can the model of the separate representative be developed to give children a real voice in proceedings that affect them?

Burnside believes that, while the advent of the separate representative goes some way towards satisfying Article 12 of CROC, there is still a need for the Court to examine other ways to further involve children in proceedings which concern their interests so intimately and profoundly. As discussed above, this should be done in a way which is neither unduly traumatic nor threatening.

Q. What funding, resource and training problems have separate representative arrangements raised? What can be done to address them in practice?

These issues are considerable. The separate representative arrangements have compounded these issues, but the whole area of funding, resources and training in the Family Court needs to be addressed as a matter of urgency. Increased resources are needed, just at a time when cuts are being made.

Q. Are there other models for involving children in family law proceedings that may be more appropriate than the separate representative model?

The methods and models discussed above should be given serious consideration, including giving children the right to have decisions of their parents about custody and access reviewed judicially and/or through a mediation process. Burnside has developed a 'Family Decision Making' model, a brochure of which is attached, for children 'at risk'. This model should be explored in many aspects of family law proceedings and decision making for a child.

Child support and maintenance

This is outside Burnside's core activities and, as such, Burnside offers no comment.

Children in the care and protection system

Abuse and neglect

Q. Should there be a nationally agreed definition of child abuse and neglect? If so, what should that definition be?

There should be a nationally agreed definition of child abuse which encompasses physical abuse, sexual and indecent assault, emotional abuse and neglect. This would reflect Article 19 of CROC.

Burnside endorses the definition proposed by Oz Child: Children Australia, as follows: Child abuse, in its widest sense, means the curtailment of normal development of a child occasioned by deliberate or neglectful action by an individual, a group of people or even a whole society. In its narrower sense, abuse occurs when a child experiences some physical, emotional or psychological damage occasioned by other than accident, through the actions [or neglect] of one or more individuals.⁵¹

Reporting child abuse

Q. How do the various child abuse reporting regimes in the Australian jurisdictions operate in practice?

Q. Is mandatory reporting working successfully? Why or why not?

The main problem with the mandatory reporting regime in NSW is not so much a result of the regime *per se*, but a combination of the introduction of mandatory and significant restructuring and de-resourcing of the Department of Community Services during the same period. This has resulted in a large increase in the number of notifications⁵². Departmental staff are unable to properly investigate and/or monitor these cases. It has also further skewed the allocation of resources towards crisis intervention and away from services which assist and support the family and the child. There is often a greater interest in investigation rather than supportive services. This is largely associated with the level of resources allocated to the Department, rather than any inherent qualities of compulsory reporting regimes.

⁵¹Peter Boss, Sue Edwards, Susan Pitman, *Profile of Young Australians: Facts, Figures and Issues*,

Australian Youth Foundation and Oz Child: Children Australia, Churchill Livingstone, 1995, p.134; material in brackets added;

⁵²Between 1990/91 and 1993/94 child protection investigations increased by 56%. Over the 1993/94 financial year, the increase was 21%. In 1993/94, there were approximately 32 000 notifications. [source: DOCS];

Q. Do mandatory reporting regimes take sufficient account of the wishes of children in relation to disclosure and the action to be taken in relation to allegations of child abuse?

While it can be argued that compulsory notification may not always accord with the stated wishes a child in relation to disclosure and the action to be taken, Burnside believes that this is an area where the best interests of the child should be the paramount consideration, even where this does not accord with the child's wishes. A desire for secrecy and ambivalence towards alleged perpetrators (who are most often relatives and loved ones of the child) is understandable on the part of the child. This does not, however, vitiate the child's right to be safe nor the community's responsibility to offer protection.

Investigations of child abuse and neglect

Q. Are investigations into allegations of child abuse sufficiently sensitive to the needs of children in the different jurisdictions?

There are major problems where the investigation of care and protection issues by DOCS (or its equivalent) is occurring in parallel with a criminal prosecution of the alleged perpetrator for sexual assault.

In these circumstances, the protective and prosecutorial imperatives are in conflict. There should be an explicit recognition, both in training and investigative policy and procedures that the best interests of the child are to be the paramount consideration. While Burnside realises that the principles of procedural fairness need to be observed, it is possible to do so and to protect the interests of the child complainant.

Burnside believes that all persons working with very young children, in whatever context, should receive mandatory training in communicating with young children and in the way young children process information, grow and learn.

Court Proceedings

In Court

Q. How effectively do the procedures of the Children's Courts operate in practice in the various jurisdictions? Of particular interest to the Commissions are the manner of taking evidence from children and the practical role of the child's legal representative.

Care and Protection proceedings

At present in NSW, the conduct of care and protection matters is woefully inadequate. Delays are endemic, the procedure is not child-focused and the combination of these factors often leads to entirely inappropriate orders. In particular, the lack of permanency planning in care orders creates confusion and heartache.

There should be specialist child protection tribunals established by the Federal Government in each State and Territory. This would be possible under the External Affairs power of the Constitution, given this Article of the Convention. The tribunal should contain members with broad based expertise in child welfare and protection. Orders of the tribunal should be enforceable by the Federal Court.

While Burnside recognises the difficulties presented by the provisions of the Constitution concerning the judicial power of the Commonwealth and the decision in Brandy,⁵³ we would argue that it is essential that a specialised decision making body be constituted to enforce child protection laws. As an absolute minimum, such matters should be heard by a special division of the Federal Court, with the assistance of an official "Reference Group" made up of individuals with wide ranging, cross-disciplinary expertise and experience in child protection.

Failing action by the Federal Government, a similar tribunal should be established by the NSW Government. No problems would exist as to the enforceability of orders in the State arena. Decisions of the Tribunal could be subject to appeal in the Courts, perhaps only on matters of law, as under the *Anti-Discrimination Act 1977* (NSW).

Separate Representation

Children should be guaranteed adequate, separate representation in all care and protection proceedings. At present in New South Wales, such representation is provided under the duty solicitors scheme. Due to the ridiculously overwhelming work-load and to the inadequate experience and/or expertise of participating practitioners, such representation is very rarely satisfactory. Where the child is very young, often instructions will be taken from officers of the Department of Community Services, rather than the child. This calls into question the very notion of "separate" representation.

Care & Protection Matters at Camden

The Camden Courthouse has inadequate facilities for young people, their families and support workers who are waiting for matters to be heard. At present, solicitors, District Officers from the Department of Community Services, children and parents all wait outside the court on the footpath and are subject to all weather conditions.

Interviews with Duty Solicitors take place in the waiting room. Private solicitors usually interview clients on the footpath. There are no separate waiting facilities for young children who are the subject of care proceedings.

Care proceedings are sensitive, emotional and often distressing proceedings. It is inappropriate for members of the public passing the court, as well as those attending court, to see parties to proceedings who are emotionally traumatised and distressed. Parents who have their children taken into care are often visibly distressed. They have no privacy whatsoever.

⁵³ Brandy v. Human Rights and Equal Opportunity Commission, ALJR, April 19 1995, p.191;

Delays and publication of reasons

Q. What delays are experienced in care and protection matters?

Delays in the NSW Care & Protection jurisdiction are endemic. One of the reasons for this is that Children's Courts hear both criminal and care matters and are chronically under resourced. This, coupled with the inadequate resourcing of DOCS and the problems with the level of resources and training for duty solicitors all work to compound the problem.

Q. What can and should be done to address delays?

The establishment of a specialised tribunal/court to hear care matters, proper resourcing of DOCS and the reforms to the Duty Solicitor system suggested in Chapter 8, below would go a considerable way towards addressing the delays.

Q. Should reasons for decisions in care and protection matters be published? Why or why not?

The publication of reasons in care and protection matters, better and different training for practitioners in the area and greater co-operation between lawyers and other professionals in the area would improve the professionalism, expertise and consistency in the jurisdiction.

Appeals from the Children's Court

Q. What is the most suitable appellate structure for care and protection matters?

Burnside would support a move to hear appeals from care and protection matters in the Family Court, due to that Court's superior expertise in the areas of family and children. However, they will need to develop expertise in child protection matters.

As stated above, Burnside believes either a Commonwealth "Care tribunal" or the Family Court should also hear these matters at first instance.

Children under orders

Q. Do the processes for supervision of children living at home under orders adequately protect children?

It appears to Burnside that these processes are not at present working to adequately protect children, but it is difficult to determine if this is related to the process itself, or to the chronic state of under-funding endured by DOCS. Departmental officers are so overloaded with investigating contacts and notifications that any supervisory or support role can be minimal at best. This then leads to situations whereby protection is almost non-existent, as in the cases of deaths in NSW during 1994 and 1995.

Q. Do the processes for providing children in care with contact with their families, including siblings in care, function adequately? How often in practice do children in care remain in contact with their parents?

Legally there is adequate provision for continuing contact between a child and their parents.

In practice the amount of contact a child will have with their parents will be influenced by the views of the child, parents and agency about this issue, and this can change over the life of a placement. In general, the degree of contact depends on the level of commitment to the importance of contact on the part of the carer(s) and the agency. Burnside goes to a lot of trouble to locate family members and to ensure that children in our care remain in contact. This is not the case with all agencies and is particularly problematic for those children in Departmental care.

Q. Are the requirements to become a foster parent in the various jurisdictions adequate? What oversight of foster parents is there in practice? Are children assured sufficient privacy in substitute care?

Provisions for the selection of foster parents vary widely. Most agencies and DOCS have quite stringent training programs and assessment procedures. However, there is no uniform, legal requirement for such assessment, especially for those agencies providing casual or respite care.

Burnside believes that another deficiency in the present system is the lack of a central registry or some other mechanism of checking the history of prospective carers. There should be some way of checking whether or not applicants have previously been rejected for abuse or inappropriate behaviour.

Within most agencies, and certainly within Burnside, supervision of foster parents is also thorough, with regular visits by their worker plus group support and training meetings. Burnside has, however had reports from DOCS foster parents which suggest that the support and supervision they receive is patchy. Some people have very infrequent visits by their DO (1-2 times per year) and who complain of never seeing the same DO more than once or twice. Last month, departmental carers in the Campbelltown region of NSW went on strike over the lack of supervision and support offered to them.

Complaints mechanisms and monitoring

Q. Are the views of children ascertained or given sufficient weight in decisions which affect them in substitute care?

Q. Are complaints handling mechanisms both within and independent of the relevant department accessible to children in care and responsive to their needs?

Until recently, there were few if any mechanisms for children's views to be ascertained or given any weight in decisions regarding substitute care affecting them. The creation of the Australian Association of Young People in Care and the State Network of young People in Care has provided both advocacy and support for young people in care. This now means that the views of young people in care are being voiced. It is less certain that they are being heard.

The existence of the Community Services Commission in NSW gives children some access to make complaints. However, this is dependent on the children's knowledge of their rights to complain and on the temerity and persistence of the child to do so.

The Commission does not have an ongoing, specific role in monitoring agencies, including DOCS, which provide substitute care. Such a body is needed.

Burnside has instituted its own feedback process, Mature Adult Talk (MAT) to facilitate the airing of views as to decision making, conditions for children in care, the situations in residential homes and a range of other issues.

Leaving care

Q. The Commissions are interested in hearing about children's experiences in leaving care including their levels of skills and education.

Burnside would urge the Commissions to examine the findings of Judy Cashmore with regard to the experience of children leaving care.⁵⁴

Burnside places a high priority on looking after our care leavers, through our After Care program and Education program. We still offer tutoring and provide for payment of TAFE fees, etc. until some young people are in their early twenties. However, all young people leaving care do not have access to such support.

Q. How do the State and Territory welfare departments interact with Commonwealth agencies to ensure that children and young people leaving care have access to appropriate services?

In Burnside's experience, there is minimal interaction between Commonwealth and State and Territory authorities to ensure that children and young people have access to appropriate services.

Commonwealth co-ordination of such interaction is desperately needed.

The Commonwealth and care and protection

Co-ordination of the care and protection system

Q. What strategies can the Commonwealth employ to improve co-ordination of State and Territory care and protection processes?

Burnside would support the Federal Government accepting responsibility for care and protection matters, in order to improve the consistency and the general quality of the processes around the country. However, in this era of "devolution", we recognise that this is unlikely to occur. However, the Commonwealth should provide leadership in a process to develop national, uniform care & protection legislation. This could maintain the roles of the States and Territories in running the processes, but would at least achieve some consistency. Without overarching Federal legislation (utilising the External Affairs power of the Constitution), however, which would over-ride State and Territory laws in situations of conflict (through the operation of s.109 of the Constitution), maintenance of consistency could not be ensured.

⁵⁴Judy Cashmore and Marina Paxman, Wards Leaving Care: A Longitudinal Study, Social Policy Research Centre, UNSW, commissioned by DOCS, 1996;

Q. Are the State and Territory agreements and guidelines concerning transfer of care orders and agency co-operation adequate to protect children who are involved with the care and protection systems in more than one state or who are involved with more than one agency?

No. While even these attempts at consistency and uniformity are welcomed, they are not enough. Due to the complexity of the different systems, it is still possible for children to become “lost” in the fissures between jurisdictions.

Q. What level of consistency between State and Territory care and protection arrangements is desirable?

Burnside believes that the highest possible level of consistency is desirable. However, this should not be achieved by adopting a “lowest common denominator” approach, watering down existing State processes so as to achieve unanimity. The Commonwealth should adopt a leadership role, in the same way that it did in the area of gun law reform.

Systems abuse

The comments in regard to the criminal courts are equally applicable to the Children’s Court care & protection jurisdiction.

What can the Commonwealth do?

Q. What support is there for a transfer of jurisdiction over care and protection matters to the Family Court?

Burnside would welcome a transfer of jurisdiction to the Federal Court. This would allow a body of jurisprudence, expertise and skilled, specialised personnel to be built up. It would, however necessitate measures to achieve uniformity in legislation such as those discussed above.

Q. What are the potential problems and advantages of the proposal?

The problems largely lie in the potential drawbacks involved in achieving uniform legislation, discussed above. Another potential problem would be that the substantial extra resources needed would not accompany the transferred jurisdiction. The Commonwealth, would, of course, make substantial savings on transfer payments to the States which are currently made in this area.

Criminal law

Sentencing options for children

Burnside contributes the following general comments in these two areas:

Under Article 40 of the Convention, a child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society. The child is entitled to basic guarantees, including: to be presumed innocent until proven guilty; to be informed promptly and directly of the charges against him or her and to have legal or other appropriate assistance; and to have the free assistance of an interpreter if the child cannot understand or speak the language used.

A whole range of issues are raised by these guarantees under the Convention.

Legal Assistance/ Representation

In New South Wales, legal assistance is usually provided under the Duty Solicitor Scheme. Such assistance is hopelessly inadequate. Often, there is no requirement that solicitors participating in the scheme receive training or have experience in Juvenile Justice. Some geographical areas, such as Gosford, require solicitors to have continuing legal education in Juvenile Justice/Children's Law if they are to join the scheme. This should be the case universally.

In some areas, the youngest, most inexperienced solicitor in a firm is sent to do the Duty List and the Children's Court is treated as a "learning patch".

Even if practitioners are both skilled and motivated, it is difficult for them to provide assistance to their clients. They often see them only on the day of the hearing, when the child or young person is nervous and upset. There is no time for a proper conference or to seek proper instructions. Often, there is no provision for interpreters, even for clients with virtually no English. There is no time to properly examine the facts and analyse the elements of the alleged offence or to consider possible defences.

Often neither the charges nor, after 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.

Under the Duty Solicitor Scheme, there is no proper supervision or quality control, even for the most junior of practitioners. Nor is there any continuity. Children may be represented by a different solicitor at each appearance in court, all of whom they meet only once. This can lead to pressure for them to plead guilty, as no real knowledge of or interest in the case is developed.

Often young people are told to plead guilty (notwithstanding the fact that they may have a defence at law) on the basis that it is faster to plead guilty and "get the matter out of the way" or that s/he will only receive a "slap on the wrist" and is better off pleading guilty than defending the matter.

Even if the duty solicitor is extremely skilful, motivated and experienced, as many are, if (s)he is handling 20 or 30 clients in one morning, there is no chance for adequate representation. Duty Solicitors are required to deal with defended matters on the day having been served that morning with the Police Brief which does not allow them sufficient time to properly obtain instructions or to adequately research the law. Often, children are persuaded to plead guilty after the Police Brief is served on the Duty Solicitor.

Often, factors such as mental illness or intellectual disability will not be picked up, even where there is clear evidence that the child is unfit to plead.

If a young person forgets to bring their Charge Sheet or Statement of Police Facts, often the only information available to the Duty Solicitor is the list of Court matters indicating the offence.

Often references and other material which would be of use to the court (particularly information on the child's rehabilitation) is not utilised because the guilty plea is taken on the first occasion and the child does not know it is in his/her interest to bring along character references or references from counsellors or other welfare workers who are assisting him/her to rehabilitate him/herself in the community.

Police

There are also major issues involving police interaction with young people.⁵⁵ Identified Police positions (eg. General Duties Youth Liaison Officers) should be designated throughout the State. These officers should receive adequate specialised training on juvenile justice and youth policing. These positions should be given status and authority in order to deal in a suitable way with youth and juvenile problems. In addition, all officers should receive increased training on youth issues and in communicating with young people.

Court Procedure

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.

There is a lack of youth workers/ welfare workers and support people for children and young people within the juvenile justice system. There is also a lack of support for young people who are in custody and who come before the court.

The Children's Court system generally is in crisis. In the Sydney Metropolitan area, there are specific Children's Courts (though these are far from adequate). In country areas, the adult magistrate "changes hats" and sits as the children's magistrate. This is even less satisfactory.

There is little if any protection of confidentiality, particularly in country courts. Children are often left to sit in adult cells, children's names are called out over PA systems and children are left to sit with adult offenders in court waiting rooms. Some alternative system should be developed. As an absolute minimum, magistrates

see A. Pisarski, *Nobody Listens: the experience of contact between young people and the police*, Youth Justice Coalition, Western Sydney Juvenile Justice Interest Group and the Youth Action and Policy Association (NSW) (YAPA), 1994; R. White & C. Alder (eds.) *The Police and Young People in Australia*, Cambridge University Press, Melbourne, 1994

who hear children's matters should receive specialised training and there should be special, deliberate and mandatory changes in procedure when children's matters are being heard (eg. hearings in chambers).

Community Youth Conferences (CYCs)

The Convention also guarantees the right of a child to have a decision and/or any penalty reviewed by a higher competent, independent and impartial authority or judicial body. [Art.40 (2 (b)(v)]. As a consequence, a young person should have the right to have decisions made by a CYC reviewed. This is not presently the case.

Burnside also has concerns that, as in the formal Courts, young people with mental illness, poor literacy or developmental disabilities may not understand the Conference process.

The Campbelltown CYC trial reportedly involves the highest number of CYCs in the State. There has been little, if any, assessment or evaluation of the success of this trial. An external evaluation of CYC trials is needed. The evaluation should also examine the effect of formal and informal cautioning.

Health issues

A Youth Health Assessment Centre is needed, where young people suspected of being psychotic or of having a severe developmental disability can be diverted from court for a thorough assessment over a number of days. Many young people are "falling through the gaps", as they can "keep it together" for a few hours for an initial assessment and are thus incorrectly assessed.

Any young person with severe emotional problems, violent or suicidal tendencies should also be assessed, even if there are no criminal charges involved.

Young People in Care

There is no specialist advocacy service for young people who are State Wards or are in the care of the Director-General who have also become part of the Juvenile Justice system. Also, duty solicitors are not encouraged to gain knowledge of the child's background by reading the Department of Community Services file or at least by speaking to the child's District Officer.

Rehabilitation & Support Services

Often, because the child is not seen until the day of the court appearance, referrals cannot be made which would assist the child to rehabilitate themselves rather than become a repeat offender.

The Duty solicitors should be given resources to assist them to at least advise their clients as to programs in their geographic area which could benefit them in rehabilitating themselves. These services could include drug and alcohol programs, general counselling, health services, suicide counselling, family counselling, etc.

Very Young Offenders

Reiby Detention Centre still accommodates a number of 10 year olds in their 10-13 year olds program. In most cases, there are welfare/ care & protection issues involved. These children should not have to be in detention to access the help they need. Such young children should not be held with older offenders, as they very quickly become institutionalised.

Case Studies

SIMON

Simon was charged with "Assault and Rob" and "Assault", with one juvenile co-defendant and two adult co-defendants. His matter had been set down for a committal hearing at Campbelltown Children's Court. Half way through the proceedings, Simon's Duty Solicitor left the court room to attend another court to represent another client. Simon was left to cross-examine a police witness by himself.

PETER

Peter was detained in custody after re-offending. On his court file there were psychiatric reports relating to his capacity to plead. The first Duty Solicitor who saw Peter determined that in his view Peter was unfit to plead and he asked for the matter to be adjourned so that a psychiatric report could be prepared. The matter was adjourned for one week. Peter remained in custody. Nothing was done during that week to facilitate an updated psychiatric assessment. The following week, a different Duty Solicitor appeared for Peter. That Duty Solicitor also determined that Peter was unfit to plead, however he told the Magistrate that he had managed to take some instructions from Peter. The Magistrate invited the Duty Solicitor to either continue a Plea in Mitigation or state specifically whether he felt that Peter was unfit to plead. When the Duty Solicitor finally stated that in his view Peter was unfit to plead, the Magistrate agreed to adjourn Peter's case for a further week and made a specific order to the court that Peter be properly assessed at an appropriate hospital. The Magistrate then ordered that the second Duty Solicitor retain Peter's case so that there would be some continuity. The second Duty Solicitor was not aware of the provisions of the *Mental Health (Criminal Procedure) Act 1990* (NSW).⁵⁶

⁵⁶ cf. Tracy Goulding, (ed.), *The Law Handbook*, 5th edition, Redfern Legal Centre Publishing, Redfern, 1995, pp.480-481

PHUONG

Phuong is a young Vietnamese boy who was charged with Possession of Heroin. When he expressed concern over the length of the sentence handed down following conviction, the Duty Solicitor said to him, "You were lucky. In your old country you would have been shot in the head for such an offence."

TOBY

Toby was represented by a Duty Solicitor and received a Control Order. Toby was clearly emotionally disturbed. He was unable to deal with the fact that he had been incarcerated. He threatened suicide. The Duty Solicitor neglected to go down into the cells and explain the effect of the Control Order to Toby. It was necessary for the staff from the Department of Corrective Services, who were supervising Toby, to call and request that a solicitor from the Burnside Adolescent Legal Service go down to the cells to explain the sentence to Toby, even though that solicitor had not represented him and knew nothing of his case. The solicitor was confronted by a young boy repeatedly threatening suicide because of his custodial sentence, who understood nothing of the reasons for his Control Order.

GEOFFREY

Geoffrey was charged with malicious damage. It was a first offence. He went to see the Duty Solicitor and told him that he wished to plead not guilty. The Duty Solicitor told him to plead guilty because the matter would be dealt with that day and he would receive "a slap on the wrist". Geoffrey pleaded guilty. The Magistrate ordered a background report which indicated that he was considering a community service order or a custodial sentence or supervision by the Department of Juvenile Justice. When Geoffrey spoke to a Juvenile Justice Officer, he explained to the Officer that he was not guilty of the offence and the reasons why. Geoffrey was advised to go back to the Duty Solicitor to request that his guilty plea be withdrawn.

NHUNG

Nhung was in custody. She was charged with offences related to heroin. She was vague and unclear about her charges. She was brought into the court where there was some discussion about whether some outstanding warrants related to her or not. The warrants were in the name of "Nancy". In the court room, her solicitor loudly admonished her for not telling him that she had two names. She appeared to be in a fragile condition before that and looked completely shattered afterwards.

A lot of children have two names, one from their home country and an anglicised version. Some children of refugees come to Australia with the names of other children who have died or have been left behind. A lawyer dealing with immigrant or refugee clients should be trained to ask whether or not the client is known by any other name.

Problems at Campbelltown Children's Court

Juvenile criminal proceedings were transferred to Campbelltown Court in 1991. They are heard in Courtroom Number 5, which is in the middle of four adult courts. On the Children's Court list day there are large numbers of juveniles waiting to attend court who must wait in the same area as adult offenders and complainants seeking Apprehended Violence Orders. The court waiting area is often overcrowded.

The very same concerns were raised, by the Youth Justice Coalition and others, in relation to the Burwood Local Court complex when both juvenile and adult matters were heard at Burwood. Once concerns about juveniles mixing with adult criminals and the lack of confidentiality were raised about the Burwood complex, juvenile matters were removed from Burwood.

Problems at Lidcombe Children's Court

At Lidcombe, there can be 30 or 40 children attending on a list day. It is not unusual for the court to be dealing with more than 100 separate charges. The list is too long for two solicitors and one magistrate. Often, children arrive at 9.30 am and are not dealt with until late afternoon, sometimes well after 4 pm.

The accommodation available for the children is inadequate. Early in the day the waiting room is very crowded as many children wait outside. There is inadequate shelter outside for the numbers of children waiting. Some children are unaccompanied and wait alone. It is likely that some children go without food or drink during the day. Children dealt with late in the day may be tired and cranky and the solicitor and magistrate are likely to be in similar condition. There is no reading material, television, game machine or other recreational facility for children to use while they wait. The crowded conditions do not provide sufficient privacy. It is easy to overhear young people discussing their cases with family/supporters.

Private solicitors have no privacy at all with their clients.

Some parents bring younger children to court. There are no facilities for these children. Interpreters are usually not available for appearances. The magistrate will order interpreters for subsequent appearances if they are aware that they are needed. Court papers should advise children, parents and supporters to contact the court before the first appearance for an interpreter if one is required.

Burnside advocates a number of measures to improve the present situation, as it operates in New South Wales:

- The Legal Aid Commission (LAC) should review the Duty Solicitor Scheme to ensure that all children charged by the Police receive professional and adequate representation in the Children's Courts. This review should be undertaken with the assistance of a working party, made up of experts in the area of children's law/ juvenile justice.
- The Duty Solicitor Scheme should be restructured to enable young people to obtain legal advice about their matter prior to the first court date.

- The LAC should review its funding of childrens' matters to take into account the extra time required to take instructions from children, especially NESB children.
- The LAC should monitor the Duty Solicitor Scheme in the Children's Courts.
- There should be mandatory training for solicitors in the Duty Solicitor Scheme and other solicitors acting in the Children's Court.
- The LAC should provide duty solicitors with up to date resources to assist them to advise their clients about programs and services in their area which could assist in client rehabilitation. These services would include drug and alcohol programs, general counselling, health services, suicide counselling, family counselling, etc.
- There should be a Court Support Scheme involving youth workers who would assist young people at court to liaise with Duty Solicitors in both care and protection proceedings and criminal proceedings.
- Aboriginal support personnel should be appointed to all Children's Courts where Aboriginal juveniles appear, to provide information, advocacy and support for Aboriginal juveniles and their families. The Aboriginal support personnel should be trained in court procedure and juvenile justice, in the same way as court personnel.
- The Children's Court should provide interpreters for young people and their families from the first court appearance. Court notices should provide advice that interpreters will be provided if requested before the first court appearance.
- An independent mechanism should be established to investigate and resolve complaints about Duty Solicitors.

Children as witnesses and victims of crime

Investigations

At present, the therapeutic treatment of the complainant or witness and the investigation of the alleged offence operate to contradictory imperatives. There should be an explicit recognition, both in training and investigative policy and procedures that the best interests of the child are to be the paramount consideration. While Burnside realises that the principles of procedural fairness need to be observed, it is possible to do so and to protect the interests of the child complainant.

Interviewing children

Q. Who should conduct the initial interview with a child witness as victim?

Specific personnel should be employed, within the Child Protection Units of the State Police Services and the State Community Services Departments, to conduct these initial interviews.

Q. What form of training is needed for interviewers of child witnesses?

Burnside believes that all persons working with very young children, in whatever context, should receive mandatory training in communicating with young children and in the way young children process information, grow and learn.

In the area of criminal investigation of offences involving child complainants, especially in the area of child abuse, sexual assault and domestic violence, this is even more crucial. Interviewers of child witnesses should possess qualifications in social welfare, giving them specific knowledge of child psychology, development and welfare.

Q. Should there be limits on how long and how many times a child witness can be interviewed?

Yes. There should be strict limits on the time and number of interviews a child victim is subjected to. In fact, Burnside advocates an approach whereby child witnesses or complainants are only interviewed once and videotaped, to avoid them having to retell their story repeatedly and to allow the therapeutic process to commence as early as possible.

Q. Should child witnesses have the right to have an independent adult present in any interview?

All steps should be taken to minimise the trauma and further abuse of a child witness or complainant. This includes allowing a support person to be with them while they are interviewed. In order to avoid the possibility of contamination of evidence, that person should not actually take part in the interview but they should be present to support the child.

Q. What role should social workers play during criminal investigations involving children?

As indicated above, Burnside believes that the person(s) conducting the initial interview with a child witness should be trained in social welfare or psychology, with specific training as to children. In addition, all steps should be taken to facilitate the therapeutic process following the trauma of witnessing or being subject to an offence. Thus, social workers and other welfare workers play a crucial role in the process.

Q. Is sufficient provision made for interpreters for child witnesses at the investigation stage of proceedings?

Provision for interpreters is a problem at the investigation stage of all proceedings, not just those involving child witnesses. Another significant problem with the use of interpreters is that, by and large, interpreters will not have the kind of training in the way children process information, develop and learn that Burnside advocates all personnel dealing with children, especially very young children, should receive. For this reason, Burnside would advocate that a limited number of interpreters in each major language group should receive such training and be available to assist in the investigation process.

Delays

Q. Should cases involving child witnesses or victims be given priority? Could this endanger the quality of investigation or hearing or result in other injustice?

Steps should be taken to reduce the substantial delay that occurs between the complainant reporting abuse and the decision being made by the Police/ the Director of Public Prosecutions to charge the alleged perpetrator. There are also substantial delays between the time of charging and the time of the trial, where the accused pleads not guilty.

This is a major problem, both for child complainants and for children who are alleged perpetrators. In both cases, it makes the task of providing assistance much more difficult.

This is particularly so in the case of child complainants, as they cannot receive any counselling throughout this entire period, due to the danger of polluting the evidence and the risk of an abortive trial. To reduce the trauma involved in the process, child victims should only be interviewed once and videotaped, to avoid them having to retell their story repeatedly and to allow the therapeutic process to commence as early as possible.

Provided certain guidelines are followed, Burnside believes that it is possible to both preserve the principles of procedural fairness and to reduce delays. However, this would probably involve the provision of increased resources.

Q. Do committals or jury trials inappropriately increase stress on child witnesses or victims?

Committals and jury trials do increase stress on child witnesses and victims. The more procedural steps are involved, such as committal hearings, the more often the child will have to tell his/her story. Jury trials, with their concomitant formality and emphasis on the rules of evidence, also increase the stress on the child. Burnside believes a number of steps could be taken to alleviate this. Firstly, committal hearings should be avoided in cases involving child complainants. If they are held, the videotape of the child's evidence, perhaps accompanied by an interview between the child and the magistrate (provided adequate training for the magistracy), should constitute the major evidence.

In terms of jury trials, Burnside believes that a move to a more inquisitorial, less adversarial format would be advantageous in the area of child sexual assault. These matters should be heard by specially trained members of the judiciary, so as to reduce the tendency of legal argument to become highly aggressive and rhetorical. This would also avoid the alleged tendency of juries to pre-judge the accused where closed circuit television or videotaped evidence is used. This would lessen the reliance on the rules of evidence, cross-examination and rhetorical argument. It would allow the judge to conduct an inquiry into the alleged incident and determine both law and fact. If the present format of jury trials was to continue, certain measures involving CCTV, videotaped evidence and limited cross-examination could be used to lessen the impact on the child.

Other issues in investigations

Counselling before trial

Q. Are the current pre-trial and post-trial counselling services available to child witnesses adequate?

No. As noted above, the reluctance to allow counselling for fear of "caching" or other contamination of evidence works diametrically against the therapeutic interests of the child. This is one of the reasons for Burnside's support of videotaped evidence. The main consideration should be the best interests of the child (as is required under CROC). This is best served by facilitating his/her recovery from the event leading to the proceedings.

Q. Does counselling assist child witnesses and enhance their understanding of and ability to cope with the legal process?

In many instances this can be the case. A child witness who is assisted to make sense of an event, who understands that they are now safe and that the event was not their responsibility is likely to be much calmer, much less nervous and better able to contribute to the legal process.

Q. Should counselling before trial be restricted in any way? If so, how should it be limited?

The use of video taped evidence would allow unlimited counselling. If this is not possible, counselling should still take place, as an essential part of the legal and therapeutic process. It could perhaps be limited, as part of the management of the case, so that only a specific person or specific people were involved. These people, perhaps including the child's family, should receive instruction/counselling themselves as to how best help the child at the same time as avoiding contamination of evidence.

Issues concerning children's evidence

Children and hearsay

Q. How does the rule against hearsay operate in practice with respect to children's evidence?

Q. What changes, if any, should be made to this rule to accommodate the perspectives of children?

The rule against hearsay is often relaxed in cases involving child sexual assault. Burnside approves of and encourages this approach.

In cases involving children, it would be more appropriate for both parties to present all the relevant evidence and then for the trial court to decide its weight. This would be particularly true if trials were to heard by a judge alone.

Children and the rule requiring corroboration

Q. Should the rule requiring corroboration remain in any form in relation to children's evidence?

Q. Is any form of warning to juries about the uncorroborated evidence of children appropriate? If so, in what circumstances?

Q. How do warnings to juries about children's evidence work in practice?

Burnside does not see the necessity to insist upon either a rule against uncorroborated evidence or a requirement to warn the jury. There is no evidence that children are any more devious or unreliable as witnesses than are adults. It is also clear that judges and, where jury trials are held, juries are perfectly capable of assessing the veracity and reliability of evidence given by a witness. This problem is further reduced if judges sit alone in child abuse cases.

Use of expert witnesses

Q. Is appropriate use being made of expert evidence in cases involving children in Australian courts?

No comment.

Use of victim impact statements

Q. Is VIS a useful tool for sentencing where a child is victim?

Q. Does a VIS place further unnecessary stress on the child witness?

Burnside does not believe that VIS is useful in cases involving child victims. If members of the legal profession judiciary are properly trained, the impact that sexual assault, abuse or violence against the child will have will be apparent or can be demonstrated by other evidence, not specific to the child. This would remove the necessity for the child to be subjected to yet another examination or interview, to ascertain how stressful the original incident was. This amounts to systems abuse.

Child witnesses in court

Q. Should CCTV be used for all child witnesses?

CCTV should be an option in all cases involving child witnesses. Burnside supports the recommendation of the ALRC⁵⁷ that there be a presumption in favour of using CCTV for children under eighteen, which is now embodied in the *Evidence (CCTV) Act 1991* (ACT).

ALRC Report No.63, *Children's Evidence : Closed Circuit TV*, ALRC, Sydney, 1992;

Q. Should the child witness have the right to decide whether he or she wants to stay in the courtroom while the accused remains in a separate room?

Yes. In some cases, being in the courtroom may help the child to understand what is happening and to feel part of the process. The child should certainly not have to confront the accused, but there should be an option as to whether that involves appearing in court or elsewhere.

Q. Does the use of CCTV create a risk that the jury may prejudge the accused?

It has been argued that this is the case. This is one reason (though not the main reason) that Burnside advocates that child sexual assault matters not be heard by juries, but by a judge sitting alone.

Q. Does the use of CCTV make it harder for the jury to evaluate the child's evidence?

There are ways in which a child's evidence can be evaluated even with the use of CCTV or videotaped evidence. Admittedly, this is more problematic given the presence of a jury. Again, this supports the hearing of these matters by a judge alone.

Taping children's evidence

Q. Does videotaping interviews or evidence have benefits for child witnesses?

As stated above, the videotaping of evidence has distinct advantages for child witnesses. It allows the therapeutic process to begin much earlier than otherwise. If the evidence is taken in an appropriate way, it may also obviate the necessity for the child to appear in court at the time of trial. This can lead to the child being more confident and relaxed at the time of testifying and thus elicit more candid and reliable evidence. The tendency of juries to pre-judge the accused where special measures such as video or CCTV are used could be obviated by judge-only trials.

Q. How often and in what circumstances should video-taped evidence of child witnesses be used?

The use of video-taped evidence should occur in all child sexual assault cases. In other matters involving children, where there is evidence that giving evidence in any other way, including CCTV, is going to be distressing to the child, video-tape should also be used.

Q. What guidelines should govern the taping and supervision of video interviews and evidence?

The guidelines currently operating in Western Australia seem to be appropriate and effective. There, a pre-trial hearing is held, where the child gives evidence in an informal hearing in the presence of the trial judge, the prosecutor and the defence counsel. During this process, the child is examined and cross-examined. The child does not then appear in the trial.

The only concern Burnside has with this procedure is that there may be a considerable delay between the time of an alleged abusive incident and the pre-trial hearing. This would delay the therapeutic process.

This process would also be dependent on adequate training (or re-training) of the judge, the prosecutor and the defence counsel as to ways to properly examine and cross-examine the child, so as not to traumatise and in effect further abuse the child.

Cross-examination of child witnesses

Q. Should there be particular rules for cross-examining child witnesses or particular protections afforded children subject to cross-examination?

Yes.

Burnside has real concerns over the cross-examination of complainants. If this is to occur, it should be under tighter procedural rules that prevent intimidatory and confusing tactics by legal practitioners. Complainants should give their evidence and be cross-examined in a comfortable setting without the offender present (perhaps during a pre-trial hearing or by CCTV). Legal practitioners should only be allowed to practise in this area if they have received specific training in the cross-examination of child witnesses and in child psychology and development. The same should be true of members of the judiciary.

Q. Are there any alternative methods for obtaining or testing evidence from children which should be preferred over examination and cross-examination?

It is possible for certain interview techniques to be adopted which allow the evidence of a child to be obtained and tested, without using traditional methods of examination and cross-examination. However, in order to be effective, these techniques require specialised training and knowledge. All practitioners and judges in this area should have such training. Traditional techniques in this area amount to nothing less than systems abuse.

Use of communicators and support persons

Q. Do communicators and support persons facilitate a child's understanding of court processes and limit their sense of alienation or anxiety during a trial?

Q. Should the use of communicators or support persons be expanded or made compulsory?

Q. Should child witnesses have access to an adviser or advocate? Should the adviser be a legal adviser? What should the role of the adviser be?

Q. At what stage of the proceedings should a child be entitled to a support person?

Burnside supports the use of support persons, communicators and other measures that facilitates children's participation in legal proceedings and minimises the trauma and stress experienced by child witnesses.

Training legal staff

- Q. Are judges, magistrates and court staff suitably trained and qualified to look after the interests of child witnesses?**
- Q. Should specific training programs be available to judges and court staff who regularly deal with children witnesses?**
- Q. What particular issues should judges and staff be alerted to in relation to child witnesses?**

As has been stated repeatedly throughout this submission, Burnside believes that all people dealing with children, particularly very young children, in the legal process should receive specific training in child psychology, communication and development. All undergraduate law students should be required to study some aspects of social welfare theory and practice.