



Inquiry into Children's Advocacy

**NSW Legislative Council Standing Committee
on Social Issues**

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1. INTRODUCTION

UnitingCare Burnside (Burnside) is pleased to present this submission to the NSW Legislative Council Standing Committee on Social Issues Inquiry into Children's Advocacy and would welcome the opportunity to give evidence to the Committee.

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 inspired by the United Nations Convention on the Rights of the Child and considers how those rights are (not) addressed by present provisions for children's advocacy in NSW.

2. ADVOCACY & ISSUES

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations (UN) Convention on the Rights of the Child ("the Convention") was adopted by the UN General Assembly in 1989 and ratified by Australia in December 1990. The Convention 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* (Commonwealth Dept. of Human Services and Health, 1994) which identifies ten challenges for Australia. The first challenge is to "implement and monitor the Convention on the Rights of the Child".

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

The obligation of the NSW Government to comply with the Convention is beyond doubt. Any possibility of dispute was settled in 1994, with the decision by the UN Human Rights Committee that the sections of Tasmania's criminal code purporting to make homosexual activity between consenting adults unlawful were contrary to the UN Convention on Civil and Political Rights and thereby placed Australia in breach of its international obligations.

2.1 Health

Under Article 24 of the Convention, the child has a right to the highest standard of health and medical care attainable.

Indigenous Children

The first issue immediately raised by this is the plight of Indigenous children in NSW. The standard of health care available to many of them is well-known and disgraceful. Australia cannot comply with the Convention until this woeful situation is rectified.

Advocacy & Complaints

More generally, there is a need for more effective mechanisms for children's views as to their own health care to be heard. 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.¹ The Act does not address the situation where the parent/guardian consents and the child refuses or vice-versa.

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

¹*Minors (Property and Contracts) Act 1970* (NSW), s.49;

understand what is proposed.² 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.³ In an even 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.⁴

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 16⁵, 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.⁶

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, there is no effective means for children and young people to complain when standards of health care fall below the "highest standard". While the Health Care Complaints Commission (HCCC) exists, the procedures for complaining and in particular the resulting investigation/ conciliation processes are often difficult and intimidating for even adults to use, let alone children. Often, remedies are entirely inappropriate or inadequate. (See section 3). Even more crucially, the level of resources available to the HCCC means that matters are often inadequately dealt with or are subject to long delays.

There is a need in this area, as in so many others, for the voice of children and young people to be heard. There are a number of possible strategies to achieve this. One would be to have specialist staff within the HCCC to deal with complaints involving children. Burnside would welcome such an initiative, along with the adequate provision of resources to the HCCC so that it can more successfully carry out its functions. (See Section 4).

Burnside also endorses the model of advocacy formulated by the National Children's and Youth Law Centre as part of the draft *Australian Children's Charter*⁷, with the establishment of a Children's Commissioner within the Human Rights and Equal Opportunity Commission, to administer a Commonwealth Children's Rights Act.

²Gillick v. West Norfolk & Wisbech Area Health Authority [1986] AC 112 ;

³Re. R (A Minor)(Wardship: Medical Treatment) [1991] 4 All ER 177;

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

⁵K v. Minister for Youth & Community Services [1982] 1 NSWLR 311 ;

⁶Secretary, Department of Health and Community Services (NT) v. JWB & SMB (1992) 175 CLR 218; (1992) 66 ALJR 300 ;

⁷ 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, pp.55 -56;

However, Burnside would recommend that a similar model should also be adopted by the NSW Government, by establishing an Advocate for Children and Young People. The office of the Advocate should do all that is advocated in the Draft Charter⁸. This would obviously require fairly substantial resources, were it to be anything other than a token effort.

2.2 Education

Under Article 28 of the Convention, the child has a right to education. School discipline shall be consistent with the child's rights and dignity.

Suspension, Exclusion and Expulsion

At present, the procedures in New South Wales surrounding suspension, exclusion and expulsion from school do not comply with this Article.⁹

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, the Convention 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.¹⁰

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".

⁸ *ibid.*;

⁹ 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;

¹⁰ NSW Dept. of School Education, Memo 94/011, 2 February 1994;

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.

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.

2.3 Law & Justice

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.¹¹ 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 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.

¹¹ 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;

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.

Family Law Proceedings

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.

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 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)*.¹²

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.

¹² cf. Tracy Goulding, (ed.), *The Law Handbook*, 5th edition, Redfern Legal Centre Publishing, Redfern, 1995, pp.480-481;

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 9.30am and are not dealt with until late afternoon, sometimes well after 4pm.

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.

2.4 Care & Protection

Under Article 19 of the Convention, Australia is obliged to protect the child from all forms of maltreatment by parents or others responsible for the care of the child and to establish appropriate programs for the prevention of abuse and the treatment of victims.

It may appear that Australia substantially complies with this Article, through the operation of the mechanisms in each State and Territory for care and protection proceedings to be held. However (leaving aside the woeful state of prevention services in all jurisdictions), the way these proceedings are conducted means that Australia's "compliance" is in name only.

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,¹³ 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). (see Section 4).

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 (see 2.3). 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.

¹³ Brandy v. Human Rights and Equal Opportunity Commission, *ALJR*, April 19 1995, p.191;

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.

2.5 Other issues

2.5.1 "Best Interests of the Child"

Article 3 of the Convention 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 wider community as well: there is only one drug and alcohol counsellor in the entire area of Cabramatta.

3. EXISTING AGENCIES

While many of the following existing agencies endeavour to advocate for the rights of children and young people, none of them is entirely successful. This is largely due to the paucity of resources devoted to them and to children and young people in general.

3.1 NSW Ombudsman

The Office of the Ombudsman can and does investigate complaints relating to children. This is an important agency, particularly with regard to complaints involving schools and police. However, as always, the effectiveness of such investigations is hampered by lack of resources. This leads to delays and to a lack of awareness amongst the populace that the Office can in fact carry out such investigations, since there are no resources for community education. Lack of adequate resources can also affect the quality of investigations.

Another problem faced by the Office of the Ombudsman is the inadequate powers given it under legislation, which hampers its ability to investigate complaints properly, and most importantly, the lack of adequate and appropriate remedies for complainants.

3.2 NSW Child Protection Council

At present, the Child Protection Council serves a very limited advisory role. It provides no real, effective advocacy for the rights of children and families.

Burnside recommends that, as part of the Review of Community Welfare Legislation currently underway, the *Children (Care & Protection) Act 1987* be amended to give the Council a legislative mandate and real independence. Members of the Council should be appointed by Parliament and the Council should have the powers and resources to oversee the policies and activities of the Department of Community Services and other agencies to ensure an effective system of child protection.

This role should complement that of the Community Services Commission.

3.3 Official Visitors Program

The Community Services Commission have recruited and trained official visitors. At the moment, they will be limited to residential care programs for children & young people and people with disabilities. Burnside supports and welcomes this program as another avenue for vulnerable children to voice their concerns.

3.4 Community Services Commission (CSC)

The Community Services Commission was established to promote the rights and welfare of citizens who are subject to community welfare legislation. Within the Commission, a Children's Advocate has been appointed to report to the Minister for Community Services.

Once again, however, neither the CSC in toto nor the Children's Advocate has sufficient resources to comprehensively investigate and resolve complaints.

3.5 Health Care Complaints Commission (HCCC)

The HCCC, like all of the agencies discussed, is chronically short of resources to investigate the volume of complaints it receives, which are now at record levels. In particular, there is a lack of staff experienced in dealing with children and young people among the HCCC's investigators. This means that almost all complaints are not only made but pursued by parents or guardians, with the child playing a peripheral role at best.

Another problem is the limited range of remedies available to complainants, should their complaint be substantiated. While health professionals will at times be disciplined or even struck off, complainants seeking compensation have to pursue separate costly and lengthy private lawsuits.

3.6 National Children's and Youth Law Centre (NCYLC)

The NCYLC is in many ways an outstanding agency. Its work in the area of community education, publications, policy and law reform is extremely admirable. However, given its resources (which have just been significantly diminished) and its national role, any expectation that it can be in any way an effective advocate for individual children and young people is misplaced. Several centres of its type, at least one in each State and Territory, would be necessary before anything like effective advocacy could occur.

4. CONCLUSION & RECOMMENDATIONS

As can be seen by the scope of this submission, the problems caused by the lack of effective advocacy mechanisms for children and young people in NSW are many and varied.

If we are serious about fulfilling our international obligations under the UN Convention on the Rights of the Child, these problems must be tackled.

Hopefully, this Inquiry will play a significant part in this process.

As a first step, Burnside makes the following recommendations:

1. That a NSW Minister for Young People be appointed, to deal with specific youth issues and to advocate on behalf of youth in Cabinet.
2. That the Federal Government enact a Children's Rights Act, incorporating into domestic Australian law the UN Convention on the Rights of the Child.
 - I. That a Federal Children's Commissioner be appointed to the Human Rights and Equal Opportunity Commission, to administer the Children's Rights Act.
 - II. That the NSW Government adopt the model outlined in the Draft *Australian Children's Charter*¹⁴, by legislating for and appointing an Advocate for Children and Young People, who 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.¹⁵

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

- III. That a Parliamentary Standing Committee be established to monitor children's rights and advocate on their behalf until such time as a Minister and Advocate are appointed.
3. That all persons working with very young children, in whatever context, receive mandatory training in communicating with young children and in the way young children process information, grow and learn.

¹⁴ op.cit., p.55;

¹⁵ ibid.;

- IV. That the *Children (Care & Protection) Act 1987* be amended to give the NSW Child Protection Council a legislative mandate and independence. The Council should have a real role in monitoring the policies and activities of the Department of Community Services and other agencies, in consultation with the Community Services Commission.
- V. That identified Police positions (eg. General Duties Youth Liaison Officers) 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.

- VI. That specific support and advocacy services be developed, introduced and maintained for Indigenous young people and young people of Non English Speaking Background.
4. That more attention and resources be devoted to literacy and numeracy programs, perhaps by the introduction of study centres across the State.
 5. That an integrated, properly funded approach be adopted to school attendance, truancy, suspension, exclusion and expulsion from school. This should involve the development and adoption of national, mandatory policies and procedures which conform to the UN Convention on the Rights of the Child.
 6. That school Principals be **required** to notify 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 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.
 - VII. That an independent Education complaints mechanism be established to investigate and resolve disputes within schools, preferably both government and non-government schools.
 - VIII. That legislation, Federal and/or State be enacted to outlaw corporal punishment in all schools.
7. That the role of youth workers and support services for young people, especially out of school hours, be strengthened and properly funded. In addition, alternative, safe meeting places for young people should be developed, in consultation with young people themselves, (eg. "The Drum" Information Cafe operated by Burnside at Campbelltown). This would then enable harm reduction programs, living skills training, counselling, mediation, advocacy and legal services for young people to be further developed. Outreach, referral and information services should also be incorporated.

8. That young people be given an increased voice in the formation of policy concerning their rights and welfare, through increased consultation, either with existing advocacy groups or preferably with new, representative bodies.
9. That the Legal Aid Commission (LAC) 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.
10. That the Duty Solicitor Scheme be restructured to enable young people to obtain legal advice about their matter prior to the first court date.
 - IX. That the LAC review its funding of children's' matters to take into account the extra time required to take instructions from children especially NESB children.
11. That the LAC monitor the Duty Solicitor Scheme in the Children's Courts.
12. That the LAC provide mandatory training for solicitors in the Duty Solicitor Scheme and other solicitors acting in the Children's Court.
 - X. That the LAC 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.
 - XI. That there 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.
13. That Aboriginal support personnel 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.
14. That the Children's Court 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.
15. That members of the working party (see XVII) be permitted to attend Children's Courts in metropolitan and regional areas to observe proceedings without the necessity of prior notice being given to the Children's Court Magistrate or the solicitors.
16. That an independent mechanism be established to investigate and resolve complaints about Duty Solicitors.

17. That Magistrates 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), where a specially designated Children's Court is unavailable.
18. That a mechanism be established for the judicial review of decisions made by Community Youth Conferences (CYCs).
 - XII. That an external evaluation of CYC trials be established. The evaluation should also examine the effect of formal and informal cautioning.
19. That there be a mechanism for children to have decisions of their parents about custody and access reviewed judicially and/or through a mediation process.
20. That a 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 be established.
21. That a separate, specialist Children's Court be established in the Campbelltown/ Camden area to deal with the problems at Campbelltown and Camden Courts.
 - XIII. That the Lidcombe Children's Court be remodelled to provide a comfortable and safe environment for young people and their families.
 - XIV. That a Youth Health Assessment Centre be established, 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. Any young person with severe emotional problems, violent or suicidal tendencies should also be assessed, even if there are no criminal charges involved.
22. That specialist child protection tribunals be established by the Federal Government in each State and Territory. This would be possible under the External Affairs power of the Constitution. 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,¹⁶ 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.

¹⁶ Brandy v. Human Rights and Equal Opportunity Commission, *ALJR*, April 19 1995, p.191;

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).

23. That children and young people be guaranteed adequate, separate representation in all care and protection proceedings.
 - XV. That the *Minors (Property and Contracts) Act 1970* (NSW) 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.
 - XVI. That sufficient resources be allocated to allow specialist staff to be appointed to the Health Care Complaints Commission and the Office of the Ombudsman to deal with complaints involving children. This should be part of the adequate provision of resources to such agencies so that they can more successfully carry out their functions.
 - XVII. That a number of legal and policy centres for children and young people be established and adequately funded around New South Wales to monitor and advocate for children's rights.

Burnside would welcome the opportunity to give evidence to the Committee.

Burnside looks forward to the Inquiry's Report and to further cooperation with the Standing Committee on Social Issues.