NESB YOUTH

Kids, ethnicity and law

A federal inquiry into children and the legal process is underway. SALLY MOYLE reports with regard to NESB kids

In August 1995 the then Attorney-General, Michael Lavarch, MP, asked the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (the Commissions) to inquire into and report on matters relating to children and federal legal processes. The Commissions released an Issues Paper in March 1996.

The reference is very broad, requiring the Commissions to inquire into and report on children's interaction with the legal process in all federal courts and tribunals. The Commissions are obliged to give particular consideration to access to courts, legal advice, advocacy and trial outcomes for children and the appropriateness of trial and pre-trial procedures including:

> the desirability of children giving evidence in family and associated proceedings; and
>
> legal processes designed to protect children as consumers.

The Commissions are also required to consider the needs of children for whom the Commonwealth has a special responsibility arising under the Constitution, and international obligations.

NESB children

In 1990 Australia ratified the United Nations Convention on the Rights of the Child. Article 2 of that Convention requires parties to ensure that all children are accorded the rights set out in the Convention without discrimination of any kind:

> irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The Convention also requires parties to take appropriate measures to protect children against discrimination on the basis of that status.

The inquiry into children and the legal process will attempt to ascertain how, if at all, particular groups of children are disadvantaged in contact with federal legal processes and what can be done to overcome that disadvantage. One such group is children of non-English speaking backgrounds (NESB) and other first and second generation immigrant children.

Australia's population is made up of close to 200 different ethnic groups. The Commissions recognise that language, cultural, religious and historical differences make the experiences of each group and each child unique. However, NESB children share many common experiences.

There is criticism of the use of the term 'NESB' as an indicator of social disadvantage.[1] One argument is that it is not ethnicity in itself that determines the life chances for children in Australia, but rather the interaction of ethnicity with other factors such as gender and social class.[2]

Many immigrant children may not be disadvantaged at all relative to children whose parents were born in Australia. Immigrant children and children of immigrant parents from English speaking backgrounds are in some cases even better off than children who were born, and whose parents were born, in Australia.[3]

Similarly, many NESB children may not suffer social or economic disadvantage in Australia. 'Many people of NESB are, in fact, high achievers, educationally, socially and economically.'[4] However, some NESB children are particularly disadvantaged and the fact remains that there are many indicators that give cause for concern such as poverty and poor English language skills.[5] These areas of disadvantage can create impediments for NESB children trying to access courts and other legal services. The Commissions' inquiry is still in its early stages and no conclusions have yet been drawn. However, it is possible to discuss some factors affecting the access of NESB children to the law.

Poverty

A study in 1992 addressed the following three questions.

- To what extent are children of immigrants living in poverty?
- Which children of immigrants are living in poverty?
- What is the relationship between poverty and other forms of disadvantage?[6]

Three common features were identified among those immigrants with the highest poverty rates. Generally, they had been resident in Australia for less than six years, were from a non-English speaking background and only had secondary schooling. Overall, NESB families had less informal support than the other families in the study. Only 29.2% of the NESB mothers had their own mother living in Melbourne, compared with over 60% for both Australian mothers and those from other backgrounds. Similarly, only 75% of the NESB women had friends to turn to for advice, while around 90% of the other mothers had this support.[7]

A 1985-86 study found that the level of poverty among immigrants was significantly higher than for the Australian-born population. While poverty among the Australian-born population rose 16% between 1981-82 and 1985-86, it rose 48% for immigrants.[8]

Language, support and access to services

The acquisition of English is extremely important in enabling NESB children to participate equitably in Australian life.[9] Conversational English does not necessarily equip children to cope with advanced education. Nor does it equip them to deal with the legal system. The language barrier has been proposed as '. . . the single most important reason for the inaccessibility of services'.[10] A House of Representatives Standing Committee on Community Affairs report concluded that the provision of interpreting and translating services to NESB people '. . . is essential to ensuring an equal share of resources and opportunities'.[11] However:

> [a]ll too often the provision of translated information is used as the easy way to discharge what ought to be more onerous obligations to ensure that NESB people are advised about legal rights and obligations.[12]

The simple translation of documents into a variety of languages can be of limited value.[13] It requires that the person be literate in their own language, and much legal language (including plain English) is difficult to understand — even for those for whom English is a first language. A related point is that translated information often will not make sense unless the reader is familiar with Anglo-Australian culture and institutions.[14]

Many more newly arrived NESB communities have an average age lower than that of the more established immigrant communities. Between 1981 and 1991 in NSW, the number of people speaking Chinese languages at home grew by 90.3%. This was followed by Vietnamese (70.6%) and Arabic or Lebanese (35.6%). In comparison, the number of people speaking Italian grew by just 0.8%.[15] It can be assumed that there will be a number of children from an Asian or Arabic background who will require training in English as a second language as part of their education.

Education

One area of particular concern is education. High school retention rates among females are noticeably lower for the newer migrant group arrivals.[16] Turkish girls, for example, are frequently withdrawn from school at an early age to remain under parental supervision until married.[17]

The isolation of some girls has an important effect on their English language skills, which in turn affects their opportunities in Australia. In 1980, interviews were carried out with 96 Turkish girls aged between 15 and 20 in Melbourne as part of a project on the education and employment of migrant youth.[18] Only 5% of these girls spoke English very well, while 30% had a basic understanding but no conversational skills, and 14% spoke virtually no English.[19]

Schooling played an important part in the development of English skills. Of those Turkish-born girls who had attended school in Australia for five or more years, 80% spoke English well. However, the study found that the girls received little education in comparison with the general population. While the majority had four to nine years of education, 20% had only one to three years, and one quarter had no schooling at all.[20]

For groups of NESB children such as this, whose education and English language skills are limited, lack of awareness of the services available can be the chief obstacle to gaining appropriate access to legal processes.

Juvenile justice

One problem in considering contact of NESB youth with the juvenile justice system is that few comprehensive statistics are kept at either a State or national level.[21] Courts generally do not record the ethnic background of their 'clients'.[22] One reason put forward for the non-collection of such data is that it would be racist. This lack of statistics, however, may mask any conscious, unconscious or systemic discrimination within this system against NESB children.

As noted, NESB children, especially those from the more recently arrived ethnic groups, are more likely than other children to be disadvantaged socially, educationally and economically. It has been suggested that they may thus be more likely to come to the attention of the police and then to be drawn into the juvenile justice system.[23] Young people who have emigrated from oppressive regimes may associate police with totalitarian state violence or corruption, rather than seeing them as a source of help or protection.[24] This may exacerbate problems between these children and police.

Despite these difficulties, the overall crime rate for immigrant youths appears to be relatively low. In 1989, in response to sensational media reports concerning the alleged extent of Vietnamese gangs, Easteal conducted a study of Vietnamese youth crime, which illustrated the significant differences between the perceptions of youth crime, and actual crime rates.[25] The crime rate of children of Vietnamese background was found to be lower than that of the general youth population.

However, early indications are that, at least in NSW, some groups of NESB children are becoming over-represented in the juvenile detention centres.[26] This over-representation may begin with initial contact with police and extend throughout the juvenile justice system.

Indo-Chinese youths are particularly over-represented in NSW juvenile detention centres.[27] Their numbers in custody have increased dramatically over recent years. Many Indo-Chinese young people are convicted of more serious offences, which means that the sentences given to these young people are on average much longer than those of other young people.[28] Children of Lebanese and Pacific-Islander backgrounds are also becoming over-represented, in comparison with their numbers in the community, in NSW detention centres.[29]

Legal processes which fail to take account of language difficulties, cultural differences and disadvantage may play a part in the over-representation of some groups of NESB children within the criminal legal system.

Conclusion

Legal processes can determine access to the law and its remedies. Legal processes also form part of government decision making in a wide range of matters such as employment, education and welfare. The disadvantage suffered by some NESB children may affect their ability to understand, access or achieve fair outcomes from the legal system and obtain equitable treatment by legal and administrative processes. Disadvantages that NESB and immigrant children experience within society are then exacerbated by contact with the legal system. If language disadvantage and cultural unfamiliarity are ignored in the design of legal processes, those processes can become discriminatory.

The Commissions are interested in hearing how, if at all, children from immigrant backgrounds are disadvantaged by present legal and administrative processes. The Commissions welcome any suggestions about how these processes can be amended to provide access and equity to these children.

Copies of the Issues Paper, *Speaking for Ourselves: Children and the Legal Process*, can be obtained free of charge by contacting the Australian Law Reform Commission (tel 02 284 6333) or the Human Rights and Equal Opportunity Commission (tel 02 284 9600). Submissions on the questions raised in the paper are invited by 31 July 1996.

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With thanks to Kristin Sykes.

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Letter

Dear Editor

Re: Whistleblowing

I read with interest Mr De Maria's article about whistleblowing legislation in Australia [(1995) 20(6) *Alt.LJ* 270]. I do not comment on what he has to say about other legislative efforts, but I find it necessary to correct his account of the South Australian legislation for the benefit of your readers.

1. In Table 1, Mr De Maria says that the qualifications for protection are 'Good faith disclosure to relevant authority'. Wrong. What is required is:
   (a) a belief on reasonable grounds that the information is true, or belief on reasonable grounds that there is warrant for further investigation;
   (b) disclosure to an appropriate authority; and
   (c) that the information is 'public interest information' as defined.
2. In Table 2, Mr De Maria says that a person is not protected if they disclose to the media. Wrong. A disclosure to the media will be protected if it is 'in the circumstances of the case, reasonable and appropriate' to disclose to the media.
3. In Table 2, Mr De Maria says that a person is not protected if they disclose 'involuntarily'. Wrong. The legislation makes no statement about this matter but applies to all disclosures which meet the tests set out above.
4. In Table 2, Mr De Maria says that a person is not protected if they disclose previous wrongdoing. Wrong. The Act specifically applies to disclosures made after it came into operation about events which took place at any time before it came into operation.
5. In Table 3, Mr De Maria says that a person is not protected from contravening secrecy enactments. Wrong. The Act says that a protected person incurs 'no civil or criminal liability by doing so'. Period.
6. In Table 3, Mr De Maria says that a victimised person has no access to an injunctive remedy. Wrong. The Act provides access for the victimised to a civil court or the Equal Opportunity system and both have injunctive powers.
7. In Table 3, Mr De Maria says that a person has no absolute privilege in a defamation action. Since the Act clearly says that a protected person incurs no civil liability in relation to the disclosure, the conferral of absolute privilege would seem superfluous.
8. In Table 4, Mr De Maria says that a victimised person has no access to damages. Wrong. The Act provides access for the victimised to a civil court or the Equal Opportunity system and both have powers to award damages.

Mr De Maria is, I suppose, entitled to publish the unsubstantiated assertion that the South Australian legislation is 'miserably conceived'. He would be much better placed to do so if he could perform the elementary task of reading an Act of Parliament. As it stands, he might be better advised to arrange for the printing of an apologetic series of corrections.

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Reply from Dr Bill de Maria

Like fridges that don't freeze and planes that don't fly, South Australia has a whistleblower protection law that doesn't work. Rather than face that fact Mr Goode faces me with technical pedantry.

The information in my tables was abbreviated. I can, however, assure the reader that the core material is there for all who would see.

1. Mr Goode contradicts my view of what is required in the South Australian Act (the Act) to warrant protection. Section 2(a) of the Act offers protection when three criteria are met:
   (i) belief on reasonable grounds that information is true, or
   (ii) information may be true, and