

# A Matter of Priority: Children and the Legal Process

*By Sally Moyle\**

**C**hildren and young people increasingly are caught up in legal processes - whether in school discipline or exclusion processes, accessing government services and benefits, obtaining credit from stores and financial institutions or as parties, witnesses or the subjects of formal legal proceedings.

For the past two years, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (the Commissions) have been investigating children's dealings with legal processes. The Commissions' report has been submitted to federal Attorney-General Daryl Williams, but, at the time of writing, remains under embargo, pending its tabling in parliament.

Traditionally, the law has not noticed children. Their evidence was assumed to be unreliable and they had limited roles in court proceedings. Legal processes were run by adults for adults; children were not seen and rarely heard.

But, in fact, children are becoming significant participants in Australia's legal system and there are numbers of children who are parties to - or associated with - litigation, who give evidence in trial or tribunal proceedings, apply for government benefits or challenge administrative decisions by government.

Along with this increasing visibility of children in legal processes, there has been a re-evaluation of children's standing and status in legal proceedings. Reforms in evidence law and procedure make belated recognition that children generally give accurate evidence and ought to be permitted to participate as appropriate in legal processes.

On August 28, 1995, the Commissions - both independent federal statutory bodies - were jointly charged with the responsibility of conducting an inquiry into children and the legal process by the then federal Attorney-General, Michael Lavarch.



The decision to set up the inquiry was, itself, a significant one. It was the first time that any country had initiated a national inquiry to canvass children's dealings with the legal process.

The terms of reference required the Commissions to consider legislative and non-legislative measures that should be taken to address a number of different issues, including legal representation and advocacy for children and their access to legal processes, the appropriateness of procedures by which children give evidence, the effectiveness of the legal process in protecting child consumers, and issues relating to Indigenous children, as well as those living in rural and remote areas.

In March 1996, the Commissions released two issues papers entitled *Speaking for ourselves: Children and the legal process*. The first of these was a brief document aimed specifically at young people; the second, a more comprehensive overview of the issues. Both documents called for comment.

Two hundred and twenty five written submissions were received from individuals, organisations and government departments - material that has been invaluable in assessing community concerns and priorities.

From April to August 1996, the Commissions held public meetings in each capital city as well as Wagga Wagga, Newcastle, Kalgoorlie, Alice Springs, Rockhampton and Parramatta.

The Commissions met with groups of young people in each of the places visited; approximately 100 young people in all, who provided the inquiry with extremely useful information about their impressions and experiences of legal processes.

Children were also surveyed for their views on the legal process. The surveys were distributed in schools and detention centres throughout Australia, with 843 young people responding.

A draft recommendations paper entitled *A Matter of Priority: Children and the Legal Process* was released on May 20, 1997, outlining the key issues, arguments and suggested recommendations for improving the position and participation of children in the legal process.

In conducting this inquiry, the Commissions were concerned with issues surrounding children's participation within the legal process. The inquiry was not concerned with the substance of the laws, rights or entitlements of children within these processes, except in so far as these relate to the processes themselves. Therefore, although many submissions to the inquiry suggested that we should address issues such as the levels of income support provided to young people, the law with respect to joint custody of children, immigration arrangements or the problems of drug abuse among young people, such issues were beyond the terms of the reference.

The focus of the inquiry into a broad range of legal processes did, however, enable the Commissions to consider children's involvement in these processes on a national stage. This focus permitted a wide, detailed examination of legal processes in different jurisdictions, the relationships between these processes and across portfolios and the ramifications for children's involvement in one or more of the processes. In some areas, the legal processes examined were within State and Territory jurisdictions. Such examinations were undertaken on the basis that they were necessary and relevant to the terms of reference.

## Barriers and stereotypes

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Although children are significantly involved with legal matters, they do not always participate in legal processes. Some children are too young. Others, although old enough to understand and take part in the process, may not want to be involved.

Legal processes themselves may discourage or inhibit participation by children, as the legal system is designed for and by adults. Many children are unaware of legal services and processes or may not have the skills and confidence necessary to fill out forms, provide information, give evidence and otherwise participate in the formal legal system. One illustration of the difficulty children have in participating in legal processes was related to the Commissions by a young person, who said when he appeared in court on a criminal charge, he didn't know about duty lawyers:

*"... [T]hen some guy in a suit came into the court and sat next to me and the Magistrate read the charge and asked for a plea. I was about to stand up and say 'not guilty' when this guy in the suit stood up and said 'guilty your Worship', and then he turned to me and said: 'Oh, you are pleading guilty aren't you?'"<sup>1</sup>*

Appropriate participation by children in legal processes requires that children understand and have the intellectual and emotional skills necessary to navigate through the process and to persist in their pursuit of a particular outcome. Many adults do not have all of these abilities and have considerable difficulties; difficulties that are significantly magnified for children.

Traditionally, the law has viewed children as incompetent to give evidence. The assumption has been that children are untruthful, suggestible, prone to fantasy and unable to make accurate and reliable observations about events.

These assumptions meant that children under certain ages were ineligible to participate in trials. Laws regarding ages of consent for sexual activity and marriage demonstrate other instances where the law assumes that children do not have the maturity or judgment to accurately decide their own interests.

Psychological studies have allowed a fuller, more sophisticated understanding of children's capacities to give evidence and make reasoned decisions. Such studies have prompted a re-evaluation of legal rules regarding children's capacity and focused attention on the demonstrated capacities of the individual child, rather than generic rules regarding all children's skills or maturity.

The Commissions also heard evidence that children often face outright discrimination based on stereotypes that young people are prone to unlawful behaviour. Incidents recorded by the Commissions concerned harassment by police, shopkeepers and security guards.

## **Slipping through the cracks**

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Some of the difficulty children experience in dealing with legal processes is a result of structural divisions of responsibility between federal and State or Territory governments and agencies.

The division of responsibilities between different levels of government and departments means that children often have to negotiate a complex web of agencies when they come into contact with legal processes.

The Commonwealth has documented more than 230 pieces of federal, State and Territory legislation which deal with issues relevant to children.<sup>2</sup> The bureaucratic arrangements administering these laws are beset by anomalies and inconsistencies in policy, duplication and gaps in government services, and the shifting of responsibility between different agencies and different levels of government. This fracturing of responsibility often leads to inadequate, incomplete and inappropriate results for the children involved.

The report *The Commonwealth's Role in Preventing Child Abuse* commented on this problem, concluding that there was little communication across departments with respect to similar programs, such as family counselling, unless the programs were explicitly linked and the mechanisms relating to the programs were 'owned' by both or all cooperating departments. The report noted that there was little 'overview' of any aspect of child protection matters. In such a system, children can and do slip through the cracks.<sup>3</sup> The Commissions have been repeatedly told during the course of the inquiry that many agencies dealing with children pursue a type of waiting game, 'standing off' until another

agency assumes responsibility for dealing with particular children.

This problem highlights the importance of developing coherent and consistent policies and practices within departments, between departments and between levels of government.

There is work being done towards this end. However, the clear consensus in submissions to the Commissions is that the welfare of children is a national issue that requires Commonwealth oversight and assistance in developing best practice models for dealing with children, and the Commonwealth's active coordination to ensure better delivery of services to children by the Commonwealth, States and Territories.

\* *Sally Moyle is a Team Leader, with management responsibility for the children's inquiry.*

## **End-notes**

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1. *Youth Advocacy Centre*  
IP submission 120.
  2. *Attorney-General's Department, Australia's Report Under the Convention on the Rights of the Child, 1996.*
  3. *Rayner, M, The Commonwealth's Role in Preventing Child Abuse, Australian Institute of Family Studies, 1994. (released but unpublished)*
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