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FAMILY LAW

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"THE CHILDREN'S COURT"

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THE CHILDREN'S COURT

This paper will examine the New Zealand Court in the exercise of its criminal jurisdiction. It is believed that an analysis of the historical development of the Children's Court and its procedure and present jurisdiction will indicate the need for urgent reform in the field of juvenile justice. Analysis of overseas methods in relation to young offenders will be a guide to possible legislation designed to replace the existing Child Welfare Act.

1. HISTORICAL DEVELOPMENT

The English Common Law, operating under the insignia of the blindfolded figure of justice was, until the twentieth century, without special provisions for dealing with the young offender. However, there had always been limited recognition that the very young should not be held accountable for a breach of the criminal law. The earliest recorded approach was to pardon infants as a matter of course, although there was no direct admission of infancy as a defence. The exact age at which the law recognized that a child should not be held liable was a matter of some doubt. It was decided in 1302[1] that a child under the age of seven

1. Y.B. 30-31 Edward I, 511-3 per Spigurnel J.

could not suffer judgment in a case of homicide. However, the jurists of the time were divided as to when a child should assume full responsibility for his actions. Coke, for one, was of the opinion that the dividing line should be drawn at fourteen, whereas, other judicial commentators regarded twelve as being an appropriate age. By the seventeenth century it was settled that a child over the age of fourteen could be held responsible for his actions and that those under seven should be immune from the process of the law.[2]

Despite the limited protection that these arbitrary age limits conferred, within the area of qualified discretion (between seven and fourteen), there could still be a conviction if the child could be shown to understand the nature of his offence, i.e., that it was wrong and contrary to the laws of the land. At this formative stage of the legal process relating to the young, the qualified discretion of the child did not always serve to protect him from the rigours of the criminal law. For example, as late as 1833, a nine year old boy was sentenced to death for pushing a stick through a cracked window and withdrawing some colouring materials valued at two pence. Although in practice few young offenders actually suffered the death penalty, this was due more to the sympathy of juries, rather than a strict interpretation of the law.

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2. A.W.G. Kean, "The Criminal Liability of Children" 53 L.Q.R. 367.

There were few efforts made to protect children or to ensure that their interests before the law would be safeguarded. A limited exception was the interest of the King in his wards. This interest arose through the incidents of feudal land law. When a tenant-in-chief died, leaving an infant heir, the King became guardian of the child. In this capacity the Crown had a right to receive profits from the land coupled with a duty to maintain and educate the infant. In time the powers exercised by the King were passed to a special tribunal known as the Court of Wards. When the right to receive such profits was abolished in 1660, the Crown asserted, as its prerogative, a wider right of supervision over all children who owed it allegiance.[3] Thus, the Crown, as parens patriae moved away from the exercise of a narrow jurisdiction over children with interests in land towards a wider protective philosophy directed at all children. The exercise of this jurisdiction was delegated first to the Lord Chancellor and later, in 1875, to the Court of Chancery. Historically, therefore, there has always been a strong judicial element in the exercise of powers over wards of courts. Today, although wardship proceedings are heard separately from the Children's Court, this assumption of judicial authority in the case of children in need of care

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3. Cross "Wards of Court" 83 L.Q.R. 201.

or protection (either from themselves or others) forms one of the foundations for the modern jurisdiction of the Children's Court over delinquent and non-delinquent children. A jurisdiction which will be criticized elsewhere in this paper.

The age of reform heralded by the nineteenth century began to improve the general quality of life of the newly industrialized England. Little, however, was done to improve the lot of the child unfortunate enough to suffer the process of the law. At a time when public executions and the exhibition of notorious criminals attracted vast crowds, drawn from all sections of society, there was no great interest in the penal policy of the land whether in respect of Adult or Child. Starvation and death in the streets or in the prisons were a source of indifference. In this atmosphere small groups did exist who united in an attempt to ameliorate the conditions under which young offenders were kept on being apprehended and after trial, but little was done to ensure a diminution in the harsh penalties applied to young and old alike. As mentioned above, juveniles usually escaped capital punishment, only to receive "lesser" penalties, including flogging and transportation.

Indeed, despite leniency to the very young, it was recorded that in 1785 eighteen out of every twenty offenders

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executed in London were under the age of twenty one.[4] In 1806 the Philanthropic Society set up a series of homes as a refuge for young people who had been released from prison and made efforts to find them suitable employment. This could be regarded as the forerunner of the modern pre-release hostel. It was the beginning of gradual reform in penal techniques directed at the young. A realization, that the young person in prison, indiscriminately housed with adult offenders of all types, suffered an indelible harm, led to a movement towards classification. The child who might have been convicted of the most trivial offence would be hardened and reinforced in the pattern of his behaviour by contact with the prison society. The Second Report of the House of Commons Committee on the State of the Police in the Metropolis (1817) noted that a new prison had received 399 felons aged nine to nineteen in company with adult offenders and stated that many of those who had suffered their penalty "were turned loose on the world more hardened in character than ever".

It was not until 1839 that a major departure from previous penal policy was apparent. Under the Parkhurst Act of that year a prison was set up on the Isle of Wight

4. Parl. History (1785-86) vol. 25 col. 889.

to receive boys between 10 and 18 years of age. The discipline within this institution and the conditions under which the inmates existed would be unthinkable today but at the time represented a significant advance. The process of reform continued in 1847 when an Act was passed which made it possible for justices to deal summarily with those, under the age of fourteen, who had been convicted of theft, rather than send them before a judge and jury. A whipping was the usual punishment. In 1854 the Youthful Offender's Act had come into force. Under this act the young offender who had been sentenced to prison, could upon release from the Adult institution, be sentenced to a maximum of five years in a reformatory school. Whether this was a desirable evolution may be doubted, as the damage had usually been done by the prison sentence, and the reformatory schools were, in reality, juvenile prisons. It was evidence, however, of a desire not only to punish but to rehabilitate the young offender.

New Zealand, with its inheritance of English laws and attitudes, made little, if any, provision for the child who had committed an offence. In many instances, owing to the makeshift nature of the prisons and subsequent overcrowding, the situation of the youthful offender in New Zealand was worse than that of his English counterpart. In Auckland a

notorious institution known as the Stockade attracted the following criticism from the Chief Justice in 1861. He stated[5]

"all ideas of reformation, of moral or religious improvement, of social development, or of industrial training will be dispelled from the mind of the visitor upon entering the Stockade"

he continued;

"An ingenious system has been contrived by which the cells are simultaneously volatilized, while the heat and stench of one cell may be circulated among those around and above it, and the same cell may be reciprocally compensated through the return of the accumulated heat and stenches of the whole twenty four."

Under these conditions the young, the old and the insane were detained together with no provision for classification or segregation.

It was not until 1867 that an Act was passed which provided for "neglected and criminal" children. This Act was based on the English experience with reformatory and industrial schools, set up in 1854, 1867, which had ensured the release of juveniles from Adult institutions (Du Cane[6] records that by 1866 there were no children in any British penal institution for adults).

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5. Robson (ed) The British Commonwealth - The Development of its Laws and Constitutions quoting Appendices to the Journal of The House of Representatives 1861 D2A No. 6)

6. Du Cane (1885) "The Punishment and Prevention of Crime" p.203

The fact, that both industrial and reformatory schools were established in New Zealand in 1867, provides another link with the dual jurisdiction of the present court over deliquent and non-deliquent children. Under the act, neglected children were to be sent to special industrial schools, whilst their "criminal" contemporaries went to the reformatory. In practice, however, the distinction became blurred and both deliquents and non-deliquents were mixed within the institutions. One of the present anomalies of the Children's Court is that it should decide the disposal of non-criminally charged children. The judicial process is totally unsuited to making this type of semi-sentencing decision. Other agencies with a non-judicial function, (for example the Child Welfare Division of the Department of Social Welfare) should more appropriately deal with children in need of care and protection. The jurisdiction of the court stems, in part, from the nineteenth century reasoning that the neglected child is a potential criminal. While in many cases neglect and delinquency are counterparts, it is not considered that a judicial agency should adjudicate in "care and protection", cases especially where there is no element of criminal behaviour present or any dispute by the parents. It was clear that despite the ameliorating aspects of the Industrial and Reformatory School Acts a proportion of very young offenders still found their way into prisons.

Captain Arthur Hume, Inspector General of Prisons in the later part of the nineteenth century was amongst those who felt concerned enough to protest. He observed:[7]

"What can these 20 infants under the age of 10 years - a tender era, when these unfortunates should be inmates of some home or school - develop into but criminals, no matter how they may be kept isolated when in goals? The fear of the police cells, the dread of prison walls, are all blunted in their child minds; and so they commence their downward career, and are successfully made into hardened criminals before they reach man - or woman-hood. I must again reiterate my annual protest that prisons are altogether unsuitable places for the detention of children of tender years, and the commitment to or detention in goals of children under 10 years of age is nothing short of a public scandal."

The reformatory and industrial school concept was widened by the Industrial Schools Act of 1882 (N.Z.). Emphasis was placed on boarding children out of the institutions in private homes to avoid the destructive influence of the prison environment. In 1900 the age limit of those who could be treated in this way was raised to sixteen. Unfortunately, the laudable aim of removing the child

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7. Mayhew, P.K. "The Penal System of New Zealand 1840-1924" p.76

from the adult prison was not always successful in practice. There is evidence that in some cases the regime of the Reformatory schools was considerably harsher than that of the normal prison, with excessive use of physical punishments. Even those children who were boarded out in private homes were not entirely free from unwarranted ill treatment (see, for example the description by John A. Lee of industrial schools coupled with a system of private boarding in his novel "The Hunted " (1936). The stigmatization of the young offender could not be avoided by merely providing for release from the institution. An entirely new non-institutional approach was required.

In 1886 New Zealand instituted a probation scheme designed to avoid prison sentences for the young and for the first offender. The administrators of Justice had finally come to a recognition that the sentence could prove more damaging than rehabilitative and that alternatives were desirable. The benefit derived by juveniles under this scheme may be doubted as there were no trained probation officers (most being police officers) and also because there were severe restrictions on the categories of offenders who would be accepted for probation (e.g. only first offenders).

During the first World War the objectives of probation treatment for the young were redirected. Special probation treatment by trained officers was seen to be a beneficial factor in the rehabilitation of the child in conflict with

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the law. Accordingly, experimental observations were made which left young offenders in the community under the supervision of special juvenile probation officers. These tests were successful and in 1917 juvenile probation officers were appointed throughout the country.

Whilst in New Zealand the Actual treatment of the young had progressed steadily, the procedure by which the young offender was dealt with by the courts was sadly deficient by overseas standards. In Suffolk County, Massachussetts, in the United States there was a requirement in existence by 1870, that separate hearings be given to childrens' cases. By 1877, New York State had followed suit in prohibiting the association of young and adult offenders in courts or institutions. In 1889 South Australia set up the World's first Children's Court. (This court received legislative approval in 1895) followed by Illinois in 1899. Thus, attempts to reform the treatment and conditions of the young offender had been taken to a logical conclusion. The philosophy of care and protection of the chancery court was to extend to all judicial proceedings involving children. New Zealand, usually well to the fore in social legislation, was curiously hesitant in adopting similar measures. It was not until 1925, with the passing of the Child Welfare Act, that legislative approval was given to the formation of the

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juvenile court system in New Zealand. By that time courts had commenced operation in Britain (1908) France, Austria, Belgian (1912), Hungary (1913) Spain (1918) and Germany in 1923.[8]

It appears that an unofficial children's court was operating in Wellington for some time before the passing of the 1925 legislation[9]. This court had special hearings in a private room, with the magistrate being advised by a female "referee". The public were excluded. It may be stated that when the Act of 1925 commenced operation the official Children's Court never attained fully, the role that this pioneer tribunal had created for itself. The example of the Wellington court,of today reveals the erosion that has taken place since the 1925 Act was passed, not only in Wellington, but throughout New Zealand.

In proposing the Child Welfare Bill the then Minister of Justice - the Hon. Sir C.J. Parr said:

"We propose in this bill that there shall be a Children's Court. If possible the Court will be held in some room of the Probation Home or in some place apart from

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8. See the description of the evolution of American Juvenile Courts in Tappan "Crime, Justice and Correction" 1960 pp. 390-395

9. N.Z. Parl. Debates 1925 vol. 206 p.678

the magistrates' Court Building altogether. We hope to select, if this bill is carried, suitable magistrates for the work. I am glad to acknowledge that there are in New Zealand, Magistrates who show an extraordinary sympathy for children and who are eminently suited for the work."

He then continued - "In the Bill there is provision by which persons of either sex will be appointed to confer with the magistrate and assist him in dealing with these cases. The object of that clause is to enable the Minister to appoint suitable women referees. We hope to get experienced women with a deep sympathy for children, and that knowledge of children which only a woman, a mother, can have, to sit in judgment upon these little ones."[10]

One can imagine the tears, which at this point, must have furrowed the cheeks of the parliamentarians of the time but with the cold reality of most legislation the promise made fell far short of the expectations created. The Minister had elucidated three basic concepts that would guide the new court in its welfare role.

a) The complete separation of process from the Adult Courts.
b) Specially selected Magistrates (it would have been too much to expect Specially trained ones).
c) Women to be appointed as advisers to the court.

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10. N.Z. Parl. Debates 1925 vol. 206 p. 585

These became law when the Child Welfare Act was passed (see sections 29(2) and section 18(1) of the Amendment Act 1927 and section 27(1) and (2) of the 1925 Act).

Praiseworthy as these measures may have been they were quickly brushed aside. Every magistrate in New Zealand is now "specially selected" for service in the Court and there are no women to be found acting either as magistrates or referees. Indeed some measure of the rapidity with which the intent and spirit of the Act was breached can be seen in the long list of magistrates, "specially selected", by the Governor General, which was published in the New Zealand Gazette of 1925.

In the present Court at Wellington the myth of separation of process is upheld by hearing children's cases in the court library - a room which is also used for the hearing of criminal cases brought against adults when the main courts are overloaded. On days when the Children's Court is in session a long queue of juvenile defendants stretches down the stairs and into the concourse of the building. There is no provision for a waiting room for children or parents. In the light of the modern situation of the court it is interesting to note, however, that a woman actually assisted the magistrate in the unofficial court prior to the passing of the 1925 Act. When this was pointed out in Parliament,

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when the Child Welfare Bill was moving through the house, the Minister said that far from merely recognising the status quo the new provisions would ensure that any court adviser would have "a definite legal status" as the existing adviser had none.[11]

It is ironical to record that, although for some years after the passing of the Child Welfare Act a woman did sit on the bench, the practice had been abandoned by the end of the second world war. It would seem that statutory recognition had provided no great incentive to continue the earlier and it is believed valuable practice of having special advisers. This provision, in company with the requirement of special magistrates now seems to be completely defunct. In England, since 1966, special training is mandatory for all juvenile Court Magistrates and it is anomalous that New Zealand made similar provision almost half a century ago but allowed the statutory intent to gradually erode.

Recently there has been much criticism of the role played by judicial authorities in the sentencing of convicted persons, both juvenile and adult. It is argued that a magistrate possesses only legal qualifications and is quite unsuited to reaching decisions involving the disposal of sentenced

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11. N.Z. Parl. Debates 1925 vol. 206 p. 585

persons . Indeed, some magistrates interviewed by the writer admitted that in the exercise of their powers as a magistrate of the Children's Court, they felt disadvantaged by their lack of special training. Instruction of magistrates in sociology, psychology, and related sciences with the provision of advisers qualified in these areas would remove such objections and enable the court to deal more realistically with the problem of treating children who appear before it. The present Act requires special appointments but there is no enforcement of its provisions. Thus, the original ideals behind the creation of a separate children's Court have disappeared in practice. A later section of this paper will show that what remains of the Child Welfare Act works in many cases to prejudice the interests of the child appearing before the Court.

The original concept of the Children's Court was a valuable departure from the traditional legal treatment of children. The Welfare of the child was to be the predominant concern. Protection, rather than punishment was to be the philosophy. The rituals of the law were to be modified. No child was to take oath and the public were to be excluded to avoid stigmatizing the child with the brand of a criminal trial. There was to be an effort to make the child aware that he or she was an integral part of the proceedings

rather than the inanimate chief exhibit. Informality was to prevail so that there would be no barrier between the accused and the representatives of the law who surrounded him. The court was to assist the child rather than to exact retribution in the name of the state.

In practice, however, these aims are not readily apparent. The writer has attended sittings of the Wellington court in the library (in which both adult proceedings and children's cases are heard). There is no effort to achieve informality and the atmosphere is similar to an ordinary session of the court. The accused children seem absolutely stricken by the occasion and are unable to say more than a few words. Both magistrate and court clerk adopt an inquisitorial attitude - "Men of uncommon sympathy" seem to be sadly lacking".

To conclude, historical analysis of the position of the child before the criminal courts reveals a movement from indifference towards a philosophy of care and protection as embodied by the Child Welfare Act of 1925. The value to the young defendant of such a movement has been mixed, as the welfare concept of a Children's Court conflicts with normally accepted Adult Criminal Procedure. In practice the chief elements of the 1925 Child Welfare Act are often disregarded in the Courts and indeed, in Wellington, it could be argued that the child appearing before the unofficial Children's Court

prior to 1925 was in a more advantageous position than his counterpart of the nineteen seventies.

2. THE JURISDICTION OF THE CHILDREN'S COURT

Section 29(1) of the Child Welfare Act 1925 states:

"Save as hereinafter in this section provided, all judicial proceedings within the jurisdiction of a Stipendiary Magistrate or of Justices and relating to the committal of children to the care of the Superintendent under this Act, or to offences committed by children, or otherwise relating primarily to any child or children, whether such proceedings have arisen under this Act or not, shall so far as they may involve the attendance of children at any Court be heard and determined in a Children's Court established under this Act by a Stipendiary Magistrate or by a Justice or Justices appointed to exercise jurisdiction in that court".

This provision apparently gives jurisdiction over all proceedings involving children, but in fact, matters of custody, guardianship and maintenance are excluded because the attendance of the child at court is not required. However, there is power to make an order committing the child to the care of the Superintendant of Child Welfare, who then becomes Guardian of the Child to the exclusion of all others (compare this with the

powers of a Court under the Guardianship Act 1968).

The Court may, apart from committal, dispose of children before it by the following methods:

a) probation (usually for the older offender).

b) Supervision Orders (child remains in the home but is subject to the supervision of a Child Welfare Officer for a stated period - supervision orders may be followed by probation when the child turns 17).

c) Dismiss the case if the matter is trivial or discharge the information.

d) Fine and order restitution.

e) Admonish and discharge.

f) Order Borstal training for those 15 years and over.

g) Order Detention centre training for those 16 years and over.

h) Impose a prison sentence.

The hearing of charges of murder and manslaughter in the court is expressly excluded by the Child Welfare Act[12] as is the hearing of traffic offences which are not punishable by imprisonment.[13] Where there is an indictable offence which is not triable summarily, the court may deal with the matter by making a committal or supervision order under section 31, but has no jurisdiction apart from this.[14]

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12. Child Welfare Amendment Act 1927 section 22
13. Child Welfare Amendment Act 1961 section 11
14. Child Welfare Amendment Act 1927 section 19(1)6.

If this procedure is followed, the child then loses the right he would otherwise have had of electing trial by jury (-R v C (1965) NZLR 825). In all other cases the court must decide whether the child shall be committed for trial in the Supreme Court or whether to dismiss the case.

Before proceeding further in an examination of the court's jurisdiction, it is instructive to analyse the justification for the age limits imposed on the court's jurisdiction. Primarily all children under the age of seventeen are within the court's jurisdiction, subject to the above mentioned exceptions, but in certain circumstances children of not more than eighteen years may be sent by the ordinary courts to the Children's court for trial.[15] The Crimes Act 1961 imposes further restrictions on the disposal of children by the Court. No person under the age of ten may be convicted of an offence, and for children between ten and fourteen the onus is on the prosecution to prove that the child was aware that his offence was wrong.[16] Therefore it will be appreciated that the court has unqualified jurisdiction over a two year age range only. Namely those over fourteen and under seventeen. In practice, however, the distinction between the over ten year olds and the over fourteen

15. Child Welfare Act 1925 section 32

16. Crimes Act 1961 sections 21 and 22

year olds drawn by the Crimes Act is rarely argued before the Children's Court. It is exceedingly difficult, when dealing with a child, to discover the actual state of mind he or she has in relation to the "wrongness" of an action. Cavenagh[17] states the matter in the following terms:

"....... it is possible and even probable that a proportion of the children coming before the court did not know that what they were doing was wrong in the same sense that an adult would have known this. It did not appear wrong to the child to do it, and he did not have the appropriate feelings about doing it, though at the same time he would have known, if he had thought about it, that an adult would think it wrong. At a later stage he does have appropriate feelings against doing things that adults think are wrong, and this gradually changes into a feeling that the things themselves are wrong things to do......."

At exactly what stage the child learns that his action, was in terms of section 22(1), "wrong or contrary to law" is a moot point, but its determination (apart from the Crimes Act) is a moral necessity for any court which seeks to hear a charge against a child.

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17. Cavenagh "Juvenile Courts, the Child and the Law" 1967 p.150

One of the few cases in New Zealand which dealt with this point was R v ADAMS[18] in which a seven year old child gave evidence which convicted a person of rape. She was then, in company with her father, indicted for conspiring to accuse the convicted man of this crime. Her age and the evidence of another child who said that she had admitted the innocence of the man who had supposedly raped her, coupled with the notes of her evidence at the trial were relied on as providing proof of capacity to conspire. The question was put to the jury and a verdict of guilty was returned. The Court of Appeal quashed the conviction in the following terms: (per Williams J.)

"The commission of these acts (i.e. a series of lies) is really no evidence at all of the capacity of the child to enter into an agreement with her father and the learned Judge who tried the case states there was no other evidence of capacity. No inference, therefore, could be drawn from the overt acts that proved such an agreement existed. In my opinion, the learned Judge should have directed the jury that from the evidence before the Court the child was incapable of conspiracy, and should have directed an acquittal".

The distinction between the defence of insanity and infancy was discussed in R v Brooks.[19] In this case medical evidence,

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18. (1882) 1N.Z.L.R. 311 (C.A.)

19. (1945) N.Z.L.R. 584

for the purpose of proving knowledge on the part of the accused as to the wrongness of his act, was held to be admissable. The burden, even if the child appeared to be mentally disturbed, of proving full knowledge rests with the crown and the defence of insanity can only be raised in the case of a child over fourteen. Medical evidence to prove insanity alone will not be admissable, since the sole requirement is proof of knowledge.

In England there has been some judicial confusion as to the exact nature of the knowledge required as, for example, in the case of R v Gorrie[20] where it was stated that a jury must be satisfied:

"That when the (boy) did this he knew he was doing what was wrong - not merely what was wrong, but what was gravely wrong, seriously wrong".

To avoid conflicting standards created by difficulties in applying the presumption of doli incapax to children between ten and fourteen, the Ingleby Committee[21] recommended that the presumption be abolished. This recommendation did not pass into law but has some merit. The overall concern of the Court is for the welfare of the child, therefore whatever the decision of the

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20. (1919) 83 J.P. 136

21. Report of the (Ingleby) Committee on Children and Young Persons, Cmnd 1191 H.M.S.O. 1960 page 30 and following.

Court may be the interests of the child should not have to be protected by such presumptions and rules of law. The aim will not be to inflict purely retributive punishment.[22]

The opinion of this writer is that a better solution would be to raise the age of criminal responsibility to fifteen years. Indeed, it will be suggested in this paper that the present Children's Court is an unsuitable agency for dealing with children under this age. In Western Germany an irrebuttable presumption of absence of criminal responsibility is raised in the case of offences committed by those under fifteen. So also in Norway and Denmark the age of criminal responsibility is fifteen (whereas it might be pointed out that in some of the federal jurisdictions of Australia the age at which criminal responsibility may arise is as low as seven years). Another factor which might well influence criminal responsibility being fixed on those above fourteen only, is that the present range of custodial sanctions (apart from committal to Child Welfare) are available exclusively for offenders above this age. At present there is very rarely a proper investigation into the understanding of the child before the Court, making section 22(1) of the Crimes Act redundant. Once again the case could be argued for the specially trained magistrate and associate who would be qualified to conduct an investigation into these matters.

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22. See discussion on this point in Smith and Hogan "Criminal Law" 1965 at pp.98-99.

The approach taken in Scandanavian countries of completely excluding those under fifteen from the Courts is recommended. The English White Paper "Children in Trouble"[23] proposed:

"The prosecution of children under this age (14) will cease, and action to deal with offenders and to help their parents will be taken, where possible, on a voluntary basis. If a child commits an offence and his parents are not providing adequate care, protection and guidance, or the offence indicates that he is beyond parental control, it will be possible to take him before a juvenile Court as in need of care, protection and control".

All children under the age of fifteen should be excluded from the jurisdiction of the court. As mentioned above, the court is unable to impose any penal sentence on those under fifteen and its chief powers in this area lie in committal or supervision orders. Why should a judicial tribunal have jurisdiction in this area? A large number of cases are effectively dealt with before reaching the court by the Police Youth Aid scheme under which the child may be given a formal caution, referred to The Department of Social Welfare, for supervision, or released. If this scheme were extended to handle all those under fifteen, the prosecution of this group could be eliminated by either cautioning or referral to the

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23. Cmnd 3601 para. 51 (a)

Department of Social Welfare (which is in effect, all the court can do after determining the case). Since the court has a negative function when dealing with those under fifteen it would, be beneficial to completely abandon having any sort of criminal procedure in cases involving this group, apart from those who wish to dispute the offence they are suspected of committing. In this situation the court, if still constituted in its present form, would be limited to a determination of guilt or innocence. Those found guilty would be dealt with in the normal way by the Police Youth Aid Scheme (which of course would have to widen its scope considerably and work in conjunction with the Department of Social Welfare). The anomaly of having the court deal with non-criminal children, could also be elminated by referring such cases to the Department of Social Welfare. Thus both criminal and non-criminal cases would be dealt with in the complete absence of judicial procedure apart from a guilt determination (if desired) in the case of those criminally charged.

The Police Youth Aid Branch would be responsible for an initial classification of the accused child and a substantial number of these could appropriately be released with a caution. The Youth Aid Branch in conjunction with the Social Welfare Department could then determine whether supervision of the

child or committ al would be appropriate and act accordingly. In reaching this determination they would, without judicial procedure, be exercising the powers of the present court in relation to those under fifteen, apart from guilt determination. There is evidence to show that disputed cases would be rare in any event. The writer estimates that in the present Children's Court only 8% of all cases involve a dispute as to the facts charged. (The English Kilbrandon Report[25] calculated that the figure was as low as 5%). Thus a court exercising a guilt determination function would have a very limited role.

As regards those over fifteen, it is also doubtful whether any benefit is derived from conducting hearings in the Children's Court. It is anomalous that the seventeen year old may be tried by the Adult courts whilst the fifteen and sixteen year olds, who were his partners in an offence, are dealt with by the Children's Court. The harm likely to attend those over fifteen in normal court hearings would be minimal. In any case those accused of ordinary motoring offences are expected to attend normal adult court sessions without evidence of detriment. Furthermore, all the more serious charges against children are heard by the Adult Courts, (murder and manslaughter are always excluded) and the Children's Court has in these cases, only a power of committal under section 31. It is submitted that the absence of the Children's Court from the judicial process on the terms suggested

25. Kilbrandon Committee on Children and Young Persons Scotland 1964 Cmnd. 2306 H.M.S.O.

would result in a more logical and efficient procedure. As a determiner of guilt or innocence it would still have a part to play but there would be no sentencing function vested in the Court.

Further anomalies exist which enable the courts to hear charges against adults who have committed offences against children, unless the magistrate is of the opinion that the case should more properly be heard elsewhere, in which case the charge may be heard and determined as if the Children's Court had not been established.[26] Adults may be tried by the court (with more justification) where a child has been a joint perpetrator of a crime with the accused. In this situation the magistrate or Justices may, on considering the information, direct that the charges be heard elsewhere.

It should be noted that the court has no jurisdiction to hear charges relating to offences committed by a person when he was under seventeen, if at the time of the hearing, he is outside the jurisdictional age limits of the court. This follows from section 29(1) which states that a child becomes liable to attend the court when the information is laid. (See also Police v.W.[27]) However, should the information be laid when the person is still a "child", within the definition of section 2 of the Act,

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26. Child Welfare Amendment Act 1927 sec. 21
27. (1941) 2 M.C.D. 85

would result in a more logical and efficient procedure. As a determiner of guilt or innocence it would still have a part to play but there would be no sentencing function vested in the Court.

Further anomalies exist which enable the courts to hear charges against adults who have committed offences against children, unless the magistrate is of the opinion that the case should more properly be heard elsewhere, in which case the charge may be heard and determined as if the Children's Court had not been established.[26] Adults may be tried by the court (with more justification) where a child has been a joint perpetrator of a crime with the accused. In this situation the magistrate or Justices may, on considering the information, direct that the charges be heard elsewhere.

It should be noted that the court has no jurisdiction to hear charges relating to offences committed by a person when he was under seventeen, if at the time of the hearing, he is outside the jurisdictional age limits of the court. This follows from section 29(1) which states that a child becomes liable to attend the court when the information is laid. (See also Police v.W.[27]) However, should the information be laid when the person is still a "child", within the definition of section 2 of the Act,

26. Child Welfare Amendment Act 1927 sec. 21
27. (1941) 2 M.C.D. 85

and the resulting hearing takes place when the child is over seventeen the Court must still hear the offence - Elvey v. Police.[28] This may have important consequences in that if the offence involved is tried in an Adult Court the proceedings and possible conviction or sentence, although apparently directed at an adult will be void. R. v Rix[29] held that the Children's Court has exclusive jurisdiction over any child and that proceedings in respect of a child taken outside the Court, would be void even in circumstances where the child has misrepresented his age. This decision was followed in R. v Swinton[30] when the accused was believed to be seventeen years of age but in fact turned out to be sixteen years and eleven months.

Finally consideration should be given to the power of the Children's Court to impose prison sentences in normal adult penal institutions. The Criminal Justice Act 1954 section 14 (1) states:

"Where any person appears to any court to be under the age of twenty one years the Court shall not sentence him to imprisonment; or impose on him a term of imprisonment in default of payment of any sum adjudged or ordered to be paid - unless the Court, having regard to his character and personal history and to all the circumstances of the case, has formed the opinion

28. (1969) N.Z.L.R. 21

29. (1931) N.Z.L.R. 984

30. (1946) N.Z.L.R. 43

that he should be imprisoned notwithstanding his age".

What are the factors the Court will take into account when applying this discretion? The best discussion may be found in the decision of the Court of Appeal in R. v Halliday[31] It was stated:

"In the case of youthful offenders, however, the public interest, which is served by making punishment deterrent, is to be balanced against and may have to yield to that other public interest to which the section is plainly directed - namely, that taking a long view, that interest may be better served by not imprisoning youthful offenders".

This attitude, which is consistent with the aims of the Children's Court, is, however, not always apparent in the sentencing decisions of magistrates. For example, in the recent incident involving a protest fire bombing of the U.T.A. building in Auckland the magistrate was reported[32] to have said, when sentencing a 16 year old to three years imprisonment, that although the youth had never been before the courts previously and showed deep remorse, the duty he (the magistrate) owed to the public in view of the increasing number of fire-bombings made a sentence of probation, periodic detention or borstal inappropriate. Obviously in certain cases an element

31. (1958) N.Z.L.R. 1040 at p.1044

32. Evening Post, July 12, 1972

of public interest must be considered, but the imposition of the maximum prison term which a magistrate can impose, was here only justified by its deterrent aspect. This would appear to be a case in which the magistrate formed the opinion that of "all the circumstances" of the case, the public interest was so dominant that the three year term should be imposed. The other factors all indicated the suitability of a non-custodial sentence. Whether the public interest should play such a prominent role in Children's Court sentencing decisions, is debatable.

3. PROCEDURE IN THE CHILDREN'S COURT

To be consistent in the aim of having the Children's Court removed as far as possible from the normal sphere of the criminal process it is necessary also to have a different procedure. The technicalities of adult court procedure can play little part in the Children's Court. The child when brought before the court will be confused merely by being the focus of attention of the adults who hear the case. Cavenagh[33] gives an admirable description of the basic lack of comprehension of young defendants when faced with normal legal terminology. Words like charge, guilt, probation and evidence may either be misinterpreted or completely misunderstood. In these circumstances the full legal ritual of asking for a plea and reading complex lists of charges

33. op cit. p.161

becomes meaningless. Magistrates who have sat in criminal courts for four days of the week cannot be expected to adjust to the level of explaining the procedure, to a child before the court, in simple and comprehensible terms. This further highlights the unfortunate abandonment of the "special magistrate" concept. Cavenagh points out that young offenders have been shown to remember very little of their trial in several follow up studies subsequent to sentencing. These studies indicate that the dominant impression is made by the attitude of the magistrate, rather than what he says. It would be desirable if magistrates could explain the principles involved in the hearing so that the child gains some realization of the purpose of the proceedings. A connection between the crime committed and the punishment of the court can be the only way the sentence will have a deterrent effect. If the meaning of probation or committal were to be explained the young offender could understand what the court is seeking to achieve.

One of the most valuable distinctions between the procedure of the juvenile court and that of the Adult Court is the exclusion of the public and the power to limit press reports. The stigma of the court appearance is avoided and the child does not become an outcast in his neighbourhood and at school, thus being type-cast and reinforced in anti-social tendencies. The press may, in certain situations, report the proceedings

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at the discretion of the magistrate provided that there are no means of identifying the child or his parents. It has been suggested that the publication of offenders names is one of the chief criminal sanctions feared by the offender more than actual imprisonment. However, in the case of the young offender, any salutary effect is outweighed by the possible harm done. If salvage of the child is hoped for all obstacles to this aim should be removed.

The Court also has jurisdiction to dismiss informations which disclose a minor offence, if, after consideration of the Child Welfare Report, the Magistrate is of the opinion that the matter is trivial. This power has lost some of its importance as a result of the Police Youth Aid scheme "filtering" off the majority of trivial offences before they reach the courts. Since the inception of this scheme in 1958 approximately 65,000 children have escaped prosecution through the use of Polise Youth Aid. In 1970 the figure was 8,707 with a twenty six percent increase in 1971 to 10,978 (although these figures represent the actual number of offences which were not heard by the court, the individual number of children in 1971 was 10,306, some offenders having been involved in more than one offence). Furthermore, the court may impose a penalty without conviction and avoid imposing a conviction, even though the charge is found to be proved.[34] The Court also has a substantial discretion

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34. Child Welfare Amendment Act 1927 section 24.

to determine rules which the magistrate thinks applicable to the particular situation in the absence of statutory rules. In the formulation of these rules there is no requirement that normal rules of Adult Courts be followed.

Commendable although movements away from normal criminal procedure may appear to be, difficulties become apparent when there is an abandonment of those rules which provide the defendant with substantial safeguards. For example the procedure in normal adult proceedings, is to consider reports on the defendant only after a determination of guilt has been made. However this procedure has been abrogated by section 31(1) of the 1927 Amendment Act -

"No judicial proceedings shall be heard or determined in any Children's Court unless and until a Child Welfare Officer has had an opportunity to investigate the circumstances of the case and to report thereon to the Court".

There is no necessity to disclose the report to the defendant or his counsel in this situation, although practice varies between individual magistrates. In an adult court any prejudicial report must be made available to the affected party - R. v Bodmin J.J. ex parte McEwen.[35] According to the ordinary rules of natural justice, the Children's Court procedure is defective in two distinct ways, regarding the receipt of reports, in that (a) the report is available to the courts before the question of

35. (1947) IKB 321

guilt is determined and (b) there is no requirement to disclose the report. Often the reports could be considered highly prejudicial because recommendations as to possible sentence are made, however magistrates interviewed by the writer regarded this practice as involving little liklihood, of bias. One went so far as to claim that he read all the reports together the night before hearings and that by the time the case was heard he had forgotten the contents of the reports! There is however a recognition in the courts, that in circumstances involving the possibility of harm to the defendant or to others from the production of a report, the court need not disclose its contents. This factor is often important in cases involving children. For example in Re K.[36] it was decided that in a custody hearing the courts are justified in withholding matter which would be harmful to the child. In Children's Court proceedings distressing family details which may have been previously unknown to the child are revealed. Questions of I.Q. or the insecurity of the young offende may be examined in minute psychological detail. The jurisdiction of the Court is in many ways analogous to that of a court determining custody proceedings or exercising power over its wards. In Re K.[37] Lord Evershed said -

"The jurisdiction is not only ancient but is surely also very special, and being very special the extent and application of the rules of natural justice must be applied and qualified

36. (1965) A.C. 201

37. supra at pages 218 and 219

accordingly. The judge must in exercising this jurisdiction act judicially, but the means whereby he reaches his conclusion must not be more important than the end. The procedure and rules should serve and not thwart the purpose".

It should also be remembered that the report of the child Welfare Officer or Probation Officer is the most valuable form of assistance the court can have when determing the appropriate sentence to be imposed on a young offender. It will discuss background and other details and is reported by an unbiased party to the proceedings. Any recommendation as to sentence will be made on a thorough and skilled appreciation of the needs of the individual child. It is, to some extent, an answer to criticism made elsewhere in this paper concerning the unsuitability of having a single magistrate with no qualification (other than legal) sitting in judgment upon the child. In a large number of cases the magistrate will follow the recommendation which is made[38] and to restrict production of these valuable documents would be unwarranted.

If the Children's Court is to maintain its present role as a judicial body exercising a welfare orientated jurisdiction strict legal procedure must be modified. It is difficult to suggest areas of procedure where this can be attempted without

38. Cripps "Pre-Sentence Reports 1972 6.U.U.W.L.R. p.322.

discarding valuable safeguards. The question of the Child Welfare or Probation Officer's Report discussed above, illustrates some of the difficulties and considerations which must be examined when analyzing the justification for retention of a procedure.

That there are dangers in abandoning Adult procedural rights must also be obvious. A striking example of this may be seen in R. v C.[39] In this case a boy aged thirteen was charged with indecent assault of a nineteen year old woman. The offences were, under the Crimes Act 1961, indictable offences which could be triable summarily.[40] It was held both in the Supreme Court and the Court of Appeal that where a child is charged with an indictable offence triable summarily, and section 31 of the Child Welfare Act is invoked by the Court (so that the child is committed to the care of the Superintendent of Child Welfare) the child loses the right to elect trial by jury. It is apparent that the adult offender would at this stage of a normal trial be in a substantially better position. The Children's Court Magistrate, before he invokes section 31, will have had the advantage of examining the Child Welfare report which may have recommended the following of the procedure laid down in section 31 which states:

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39. R. v C. (1965) N.Z.L.R. 825

40. Summary Proceedings Act 1957 sec. 40

"When a child is brought before a Children's Court charged with any offence, the Court shall hear and determine the charge and, if the charge is proved may and after taking into consideration the parentage of the child, its environment, history, education, mentality, disposition and any other relevant matters, make an order committing the child to the care of the Superintendent, or make any other order in relation to the child that the Court would have power to make if a complaint in respect of the child had been made under section "thirteen hereof".

Thus, it could be claimed that the young defendant has been robbed of his chance to obtain a jury trial, partly through the unjustified use of a prejudicial report. For the reasons given above it is not believed that this use of a report is injurious on every occasion, but where the possible use of section 31 is involved, the young offender, far from being protected by procedure is placed at a disadvantage.

Hardie Boys J. in the Supreme Court in R. v C.[41] stated:

"The scheme of the Child Welfare legislation has, I believe been properly described as involving not the punishment of child offenders but parental care or supervision to ensure their reformation and future welfare. Adult processes of examination and cross examination of witnesses and addresses to the jury, which are all part of a highly cherished right of trial by jury could well be positively inimical to the interests of a boy of 13 as is here the case"........

41. (1965) N.Z.L.R. 366 at p.369.

Whilst it is not the purpose of this paper to enter into discussion on the relative merits of trial by jury in criminal cases, there are certain disturbing aspects of the exercise of a magistrate's power under section 31. It was pointed out by the Court of Appeal in R. v C.[42] that section 31, as it now stands, involves a hearing and a determination of the charge before the Court may use its powers under section 31. There is no requirement that the magistrate should hear and determine the case before acting in the ordinary way and not under section 31. It may be reasonable, on the grounds expressed by Hardie-Boys J, to deny the child an election for a jury trial in an indictable offence triable summarily if section 31 is invoked. If, however, the magistrate does not give notice of his intention to proceed under section 31 (which he should be able to do at an early stage in the trial, having read the Child Welfare Report, which in terms of section 31 would give details of "the parentage of the child, its environment, history, education, mentality, disposition, and any other relevant matters") then the child is unaware of the proper method of proceeding. The Court of Appeal (per North J.) in R. v C. stated:[43]

"If, however, this does not happen (i.e. notice is given) then the child is placed in a dilemma. If he does not give evidence in his defence and call his witnesses he may be

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42. (1965) N.Z.L.R. 825

43. (Supra) at p.831

in danger that the Magistrate will hold that the charge has been proved on the case for the prosecution and invoke section 31. Therefore, to protect himself against that risk he or his counsel is required to determine whether evidence for the defence should be called. The Solicitor-General suggested the only way out of this difficulty, if it should arise was that there should be in effect two hearings; that on the first occasion the child would be entitled to give and call evidence in aid of his plea that he was not guilty of the offence with which he was charged; if thereafter the Magistrate decided not to exercise the powers conferred on him by section 31, the Magistrate would begin again and, upon the child electing trial by jury, have the depositions taken in the usual way, that in such event, the evidence given by the child or his witnesses should not form part of the depositions and should not be made use of in the subsequent proceedings in the Supreme Court. There are obviously inconveniences in this proposed procedure, but on reflection we can see no wholly satisfactory alternative".

It is submitted, with respect, that the confusion that is inherent in the above quotation stems from the conflicting role that the Court in New Zealand is called on to play. The concept of a treatment clinic or paternal protector is forced to lie in uncomfortable union with the cold realities of legal procedure. If the early ideal of a Court which was distinct and quite

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apart from the normal Courts of the land had been carried through into practice, the present confusion could never have arisen. When, however, there is a Court which is only nominally distinct, but which still makes weak concessions to the status of childhood, there is a real danger that substantial detriment to the child will ensue. In what way would the complicated procedure suggested in R. v C. aid the child defendant? He is actually in a far weaker position than the adult defendant who makes his election before the charge is gone into and reserves his case for the jury. Whilst it might be argued that the Courts are bound to act within the general framework of the Child Welfare Act, the difficulties raised by the decision in R. v C. serve to highlight the need for complete reform in that area of legislation which covers the Children's Court.

It is also noteworthy that part of the decision in R. v C. involved an analysis by both the Supreme Court and the Court of Appeal of section 19 of the Child Welfare Amendment Act 1927. Part of section 19 reads as follows:

"And whereas doubts have been expressed as to the true intent and purpose of this provision and it is desired to remove the same"

The Act then proceeds to attempt to remove those same doubts with such clarity of expression that in the Court of Appeal it was stated:[44]

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44. (Supra)at p.829.

"It may be a little more doubtful whether summary offences punishable by imprisonment for a term exceeding three months are caught by para.(b) (of section 19(2)), but the Solicitor-General submitted they were, and that is a possible construction, but we prefer the view that they were already covered by the provisions of section 29..."

To find this sort of comment made about a section which purportedly is a declaratory provision as to the extent of jurisdiction of Children's Courts is a further indictment of the Child Welfare Act. The previous comments, made by this writer, as to the indesirability of having a Court at all for those under fifteen and having those over fifteen dealt with by the ordinary criminal process, would negate the existing uncertainty which arises from the dual role of the Children's Court. There is little, if any, room for an intrusion by part of Adult criminal procedure to the exclusion of the rest. The safeguards surrounding criminal trials, have evolved over the centuries to become a cohesive procedure in the modern Courts, ensuring that the defendant is placed in a position of equality before the law. The dangers of amending substantial parts of this procedure, even under the guise of protection, reformation or welfare can only lead to injustice to those the legal system would apparently wish to protect. Fitzgerald[45] puts the problem concisely:

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45. 1966 Crim. L.R. 607.

"Equality before the law was abandoned when juvenile Courts were set up. The simple choice between acquittal and conviction gave way with the introduction of 'care and protection' procedure".

In America doubts about the beneficial aspects of Children's Court Procedure have led the Courts into a remarkable series of "about-faces" in the determination of what procedure should be applied. In general, it could be said that there has been a withdrawal from a liberal philosophy of "welfare" Courts and a reversion to the strict rules of criminal procedure.

The question of the jury trial for juveniles, as deliberated upon in New Zealand in R. v C. has vexed the American Courts in particular.

The emotional linkage of a constitutionally guaranteed jury trial[46] to the fair hearing of criminal cases has proved an obstacle that the American Courts could not shatter in as cavalier a manner as the New Zealand Court of Appeal in R. v C. American jurists were concerned, that although the child before the Court could suffer penalties that were equal (and in some cases harsher) than those given to adults, they lacked the protection afforded to adults. The procedure was criticized in

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46. For example Duncan v Lousiana 391 U.S. 145 (1968) held that the sixth amendment jury trial guarantee was incorporated into the fourteenth amendment due process guarantees.

the following terms.

"there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded adults nor the solicitous care and regenerative treatment postulated for children"[47].

A balance should be drawn between the protection of the child and the over-simplification and abandonment of procedure. The child is hardly being helped by being placed in a worse position merely because of age. Despite this it would be undesirable for the Courts to return to the full rigour of adult procedure. The United States seemed likely to be in the process of doing this after the decision in Re Gault[48]. In this case, the Supreme Court destroyed the commonly held idea that Children's Courts proceedings were really "civil" in nature and not criminal. If liberty could be lost as a result of the proceedings, the case involved the same serious determination as an adult prosecution. The Court in Gault restated the rights of a juvenile defendant to confront and cross examine witnesses, to notice of the charges laid against him, to notice of the right to be represented by counsel and the right to avoid self incrimination. However the court did recognize that certain aspects of the juvenile Court procedure had to remain unique but it considered that observation of certain fundamental rights

47. Kent v United States 383 U.S. 541 at 556.

48. In Re Gault 387 U.S. 1(1967).

of a defendant would not impaire the unique functioning of the Court. Whilst the Gault decision seemed to herald a return to strict legal procedure, an analysis of later cases shows that there may be a trend back towards a liberal approach in Juvenile Courts. In Re Fucini[49] it was decided that Gaults' case did not completely equate the rights of a child before the Court with those of an adult, and went on to state that a jury trial was not a constitutional requirement in juvenile deliquency proceedings. Gaults case had restrained the loose application of welfare proceedings which involved loss of constitutional safeguards, but had, at the same time, caused a greater recognition within the Courts that latitude in procedure could be partnered with an attempt to preserve the special status of the child. McKeiver v Pennsylvania[50] exemplifies this new current of opinion. It was held in this case that juries were not essential for accurate fact finding and that their presence in the juvenile Court might constitute a hindrance to the effective operation of the Court (note the similarity to the reasoning in R. v C.) Unfortunately, the Court in McKeiver failed to examine adequately, the conflict that could result when the child facing a harsh sentence was denied normal criminal procedural rights. Whether there will be another return in the United States to an equation of

49. In Re Fucini 44 I11 2d 305; 255 N.E. 2d 380 1970
50. 403 U.S. 528 (1971).

juvenile Court proceedings with Adult trials may be doubted. The warning notes raised by these decisions should however receive greater attention in New Zealand. The fact that they do not is due, in part, to a lack of concern about the legal position of the child before the Court. As pointed out above; the majority of young defendants do not bother to exercise those rights that they do have. Few plead not guilty and even fewer put forward the argument that they were not aware of the wrongness of their action. In this atmosphere reform of procedural inadequacies seems unlikely in the near future.

4. THE SUCCESS OR FAILURE OF THE COURT IN NEW ZEALAND?

A commonly shared viewpoint of magistrates interviewed by the writer was, that the Children's Court, as it exists in New Zealand, is an ineffective tribunal for dealing with young offenders. Whether this is due to lack of deterrent or rehabilitative sentences, the procedure of the Court, or simply the nature of the offenders being dealt with, statistics relating to reapperances by offenders who have previously been dealt with by the Court, appear to testify to the accuracy of these sentiments. It must be borne in mind that many potential candidates for the Court are removed by the Police Youth Aid Scheme. However in 1971 the Report of the Child Welfare[51]

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51. Report on the Work of the Child Welfare Division For the Year Ended 31 March 1972.

Department revealed that of 10,750 appearances before the Court involving a criminal charge 5,260 or approximately 49 percent had appeared before the Court previously. This is a staggeringly high return rate and indicates that the Court is becoming increasingly ineffective in the modern judicial system. (In 1966 only 37 percent of those who appeared before the Court were making a second apperance). Part of the reason for apparently increased reappearances before the Court, is the generally higher level of juvenile offending. In 1937 the ratio of juvenile Court apperances per ten thousand of population was 42, by 1950 the number had reduced to 33 per ten thousand from which time it has climbed to 80 in 1969 and 114 in 1971 - and this despite increased use of techniques designed to remove children from the judicial process who might otherwise have appeared before the Courts. Although 10,750 appearances before the Court were recorded in 1971, 10,978 cases were dealt with by the Police Youth Aid Branch so that prosecution did not result. Of Course it may be argued that statistics never reveal the total situation when analysing suitable treatments and methods of disposal of young offenders. The savings to society and to the individual offender from a treatment which will ensure the most efficient rehabilitative process may justify a system that <u>apparently</u> produces little result. In the case of the Children's Court the magnitude of the reoffending rates points out such a failure in judicial treatment that it is difficult to find adequate justification for its continued operation.

There is, however, an inherent danger in the criticism of a judicial procedure, when the real cause of criticism may be found in the methods of treatment after the child has been dealt with by the Court. In New Zealand a combination of Court and after-care failures indicates a need for general reform in the whole approach to treating young offenders. West[52] sums up the problem:

"Nobody expects anyone explanation or treatment method to solve all health problems. Advocates of a single cure-all for delinquency, whether it be harsher punishment or more child guidance are equally unrealistic. An unremitting attack on a wide front, using different methods for different problems, holds the best hope for progress. Above all, social and penal measures, which seek to change behaviour, should be securely based upon rational inquiry into the causal factors involved, and should include objective assessment of the results of different courses of action".

The present measures by which we deal with children appear inadequate. Disregarding possible methods of treatment after the Court hearing, can overseas experience with juvenile Courts provide an alternative in the New Zealand context?

5. OVERSEAS METHODS OF DEALING WITH THE CHILD BEFORE THE COURT

The Scandanavian procedures for dealing with delinquent

52. "The Young Offender" 1967 p.298.

children provide a useful basepoint from which to discuss the operation of the Court in relation to overseas measures. In these countries judicial methods are avoided to ensure that the Welfare concept of a child treatment programme will not clash with established judicial procedure, as is the case in New Zealand. Denmark is especially relevant in the context of juvenile offending studies. With a similar general standard of living to New Zealand this country has, since the end of world war two, seen a gradual decline in overall offending rates. Perhaps the answer is the attitude taken when youthful offending is encountered. As Clunies-Ross[53] states:

"In Denmark there are no juvenile Courts: The Danes never think of the child offender as a criminal, and no one under 15 can be brought before a criminal Court. Even charges against juveniles betwenn 15 and 18 are generally withdrawn by the Public Prosecutor and referred to those admirable voluntary bodies - the Children's Protection Committees".

To the New Zealand observer these committees are surprising. Comprised of laymen, they are part of the local Governmental System and as such are elected. It is only in the larger centres that expert advice is available to the boards. As is the case with the New Zealand Court, the Committees handle both delinquent and non-deliquent children and measures of punishment, including

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53. J. Clunies-Ross (quoting Frampton(1964)) 1A and N.Z. Journal of Criminology (1968) 1,4. at p.219.

institutional training, may be imposed. The System in Norway and Sweden is similar. For the older offenders (under 18) there is an inference of criminal responsibility but the Welfare Committee may deal with the case if it is felt by the authorities that a hearing in a normal Court is undesirable.

It has been said[54] that this system produces conflict, in that in certain situations, neither the Welfare Committees nor the normal prosecuting authorities are willing to take action leaving the case suspended in a state of limbo. Further criticism is that the non-legal nature of the committees and their untrained personnel produce a result which is both unfair and injurious to the defendant. However, bearing in mind the remarks made above about the procedure of the New Zealand Court this comment seems to have application even where the administration of the Court is on a legal basis.

The Swedish Child Welfare Act[55] states that the Child Welfare Committees must aim to develop young people in a suitable way and provide generally good conditions for their upbringing. Under the Act there is no instruction as to how this aim may be achieved but it is evidence of the wider approach taken b y the Swedish legislature to the problem. Unfortunately, in practice, different Welfare Boards have tended to interpret this provision

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54. "Scandanavian Studies in Criminology"(1968)p.16
55. section 1.

in different ways, producing a marked lack of uniformity throughout the country. It should be mentioned that the Child Welfare Board has the power to recommend that the Public Prosecutor take no action in the case of juveniles over fifteen but under eighteen. The child who is dealt with by the prosecutor undergoes a vastly different process from the child handled by the Welfare Boards. Britt-Mari Persson Blegvad sums up the difference by contrasting the office of the Public Prosecutor and the Child Welfare Board:[55(a)]

"The Public Prosecutor's Office	The Child Welfare Board
1) A distinct goal	1) A rather vague goal
2) A state Agency	2) A board elected by the legislative assembly of the municipality
3) Only state officials	3) Elected Laymen - sometimes supplemented by a paid staff
4) Officials placed in an hierachical system make the decisions	4) A collegiate board makes all important decisions
5) The office is situated at a middle level of the organisation	5) The board is both part of a local self-government and controlled by state authority
6) The office is under strict control	6) The board is only controlled in principle - not in detail
7) The procedure is rather formalized	7) The procedure is rather informal

It could be said that the disposal of young offenders under this system is comparable to the Youth Aid - Social Welfare -

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55(a). "Scandanavian Studies in Criminology" (1968)p.28.

Children's Court combination which operates in New Zealand. It can be seen that when the jurisdiction of the non-legally orientated body comes into conflict with the legal, the system becomes an unsatisfactory method of ensuring efficient disposal of cases (note the Act states that it is desirable but not mandatory that the boards contain at least one lawyer). To have two dissimilar organizations operating in the field of child care can be expected to produce the same uncertainty as one body with conflicting orientations (i.e. the New Zealand Children's Court).

Can the Scandanavian illustration offer a useful alternative to the New Zealand Court? It is submitted that the concept of the Welfare Board with sole jurisdiction (subject to the right of appeal) is worthy of consideration.

Concessions would have to be made to the traditional Common Law distrust of elected bodies being responsible for judicial or semi-judicial proceedings. Therefore a solution in the New Zealand context would be a tribunal appointed by the executive in the same manner as existing judicial and administrative tribunals. Some form of legal training would also be desirable, so that the chairman, at least, of the tribunal would be able to appreciate any legal matters arising in the course of the case (for example the requirements of natural justice, so far as

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applicable). The other members of the tribunal rather than being laymen in the Scandanavian sense should represent those professions which could be of greatest assistance in analysing and treating the offender (e.g. psychologists, psychiatrists, sociologists etc.) working in conjunction with representatives of the Department of Social Welfare, the Probation Service and the Police Youth Aid Scheme. It is doubtful whether a layman without a particular professional skill would have a valuable contribution to make to the board. Like the Swedish Child Welfare Committee such a board could be given a broadly based area of jurisdiction without having to work within a rigid framework. This would be a viable alternative to the suggestions made earlier in this paper that the existing pre-hearing agencies (Youth Aid and Social Welfare) assume complete control, and would ensure that there was less suspicion of arbitrary justice. The above suggestion is really a restatement of the "treatment tribunal" in operation in some parts of the United States (see discussion later in this paper). Under such a system a philosophy of care and protection (nominally practiced by the New Zealand Courts) could be predominant, without the superimposed strain of adjustment to legal procedure. The best interests of the child could be considered in an atmosphere which would be free from the overriding judicial concern, displayed at present, for the public interest.

THE ENGLISH CHILDREN'S COURT

The English disposal of juveniles is very similar to that existing in New Zealand's Children's Courts. The emphasis here, is again on the judicial approach and attempts to move towards Welfare Orientated bodies have been strongly resisted.

In 1965 a radical revision of the English Children's Court structure was proposed in the Government paper "The Child, The Family and the Young Offender"[56]. This paper recommended replacing the existing Courts with an English version of the Scandanavian Welfare Board to be known as a Family Council. More importantly, the range of penal sanctions presently available to the Courts would be extensively modified. There was emphasis placed on control of institutions (for example, the approved schools) being handed over to local Government, where possible. Following Sweden, Norway and Denmark the Family Council was to deal with the whole range of juveniles in need of the protection of the law - the criminal and non-criminal. Interestingly, in view of proposals made in this paper, the Family Councils were to handle all children up to the age of sixteen with those above this age and under twenty one being dealt with by normal juvenile Courts (albeit with a redirected concern for welfare).

There was to be provision for disputed cases to be referred

56. Cmnd. 2742 H.M.S.O.

from the Family Council to a Family Court which would determine (inter alia) the disputed facts in the case. Child Welfare Officers would oversee those young offenders who were dealt with by the councils and deemed to be in need of supervision, eliminating the previous practice of putting such offenders under the supervision of probation officers attached to the juvenile Court. In line with the aim of decentralizing the administration of the juvenile Court process, the Child Welfare officers were to be under local Government direction.

Watson described the fate of the paper[57].

"That White Paper had a short and troubled life. Magistrates, lawyers, social workers and men and women of all political persuasions united to oppose it. Their main ground for doing so was that the proposals, if adopted, would abrogate the ancient principle that no subject of the Crown, however young or undistinguished, may be deprived of his liberty except by order of a properly constituted Court of law. In the face of those criticisms the 1965 White Paper made a dignified retirement and there was an interval of nearly three years while its sponsors, the Labour Government, thought again".

Once more a basic failure to comprehend the necessary distinction that must be made between the Child and the Adult

57. Watson "The Juvenile Court 1970 Onward" London 1970 p.ix

before the Court had brought about the failure of an admirable proposal for reform. Critics still saw the judicial function of the Court taking precedence over its role as a welfare agency.

The basic procedure which was proposed in the White Paper would have stressed prevention as much as cure and this was part of the reason for allotting administrative responsibility to local Governmental agencies.

There was to be an effort to abolish the need for children to be dealt with at all by directing that preventive work be done at a local level.

When the basic proposals of the 1965 White Paper were abandoned, a new set of proposals appeared three years later in a "second White Paper, "Children in Trouble".[58]

This paper had adopted a modified approach to the problem and failed to arouse the controversy of the original paper. Briefly, the paper recommended that all children between 10 and 14 be dealt with as in need of care, protection and control, whether in respect of criminal or non-criminal proceedings. No offence was to be excluded from such proceedings, including murder. For older children between 14 and 17 the same procedure would be followed, except in "special cases" including murder which would require hearing in the normal Courts.

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58. Cmnd 3601, 1968 H.M.S.O. London.

No charge could be brought against a child unless the welfare branches of local authorities had been contacted and given a right to challenge the laying of the charge. A magistrate would determine whether leave to lay the charge be granted. There was also to be provision for the existing juvenile Court to exercise jurisdiction in specified circumstances and also to act, as one commentator has expressed it," as the core of any official action against children, to safeguard them against infringement of individual rights under the guise of increased State Paternalism". In addition, there were moves made to decentralize the control of institutions, placing greater responsibility on local authorities. The proposals finally adopted were merely a watered down version of the 1965 White Paper and fell between the traditional approach to the juvenile Court and the more radical American non-judicial tribunal.

Despite the reception the English White Paper of 1965 encountered, Scotland in 1968 took measures which corresponded with the English proposals. These measures were embodied in the Social Work (Scotland) Act of 1968 which also appeared to be closely related to the Scandanavian experience in this area. Special Children's Panels were to be set up and staffed by suitably experienced laymen (i.e. non-lawyers). The panels would deal with children under the age of 16, with the proviso that the existing juvenile process would still be available in cases where the Crown wished to prosecute.

Following the English recommendations, the child would have the right if a dispute arose, as to the facts alleged to have taken place, or the sentence finally passed, to have the right to have the case referred to the normal Court. The Local Government would assume responsibility for administration and provide social workers to advise the panel and to supervise after-care. While children under sixteen could be dealt with in this way (subject to an exceptional right of the Crown to intervene) all those over sixteen could only be dealt with by Adult Courts. This is basically the approach recommended by the writer of this paper, although fifteen is suggested as a more suitable age division. The provision that the Crown may intervene in certain circumstances may be criticized. Such intervention implicitly acknowledges that the public interest will demand a hearing in the adult Courts (as exemplified by the provision in the New Zealand Child Welfare Act that cases of murder and manslaughter be removed from the Children's Court into the Adult Courts). A single procedure for dealing with all cases would be more desirable. Indeed, if it is accepted that even the present Juvenile Court proceedings are too formal the provision of tribunals, panels, committees or boards may be seen as further attempts to add formality to

a process that would often benefit from being informal. It is submitted that if the protection of optional hearings before a normal Court (specially constituted, however, to be able to deal with juvenile cases) and a right of appeal were to be made available to young offenders, the whole ritual of hearings before a tribunal, would not be required.

However such a body is described or entitled, it carries the image of a judicial tribunal. Disposal of cases by interdepartmental consultation between welfare orientated agencies acting on the fullest information available about the child, would be more desirable than conducting any sort of hearing which the child will usually neither understand nor benefit from.

JUVENILE COURTS IN THE UNITED STATES

As practice varies from state to state it is proposed to examine only those jurisdictions which depart significantly from the traditional process of the Criminal Law. The discussion above, in relation to Court procedure illustrates the concern in America for the safeguarding of defendants' rights when appearing before a juvenile Court. The procedure within American juvenile Courts makes them particularly vulnerable to criticism of this nature. Few American states give exclusive jurisdiction, in respect of young offenders to juvenile Courts, and as a

result, the child can be exposed to two fundamentally different systems of procedure. A basic confusion as to whether the Courts are judicial bodies or administrative tribunals has led to increased concern that the child will, far from being protected, suffer increased detriment at the hands of the law. The liberal philosophy apparent in the United States can be gauged from the following extract from Commanwealth v Fisher[59].

"To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the Courts of the state without any process at all for the purpose of subjecting it to the states guardianship and protection."

The individual methods of treating juveniles before the Courts are both varied and interesting. For example, in some states provision is made for family Courts in the strict sense of the word. These tribunals handle all matters relating to the family including adoption, custody, domestic relations, consent to marriage of minors etc. The officers attached to the Courts handle the full spectrum of domestic relations matters as well as juvenile delinquents. Such Courts exist in Cincinnati

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59. Commonwealth v Fisher 213 Pa 48 (1905)

and Philadelphia.[60] This approach also recognizes that juvenile offending may be the product not of the delinquent child but of the delinquent parent. In fact in some states the practice has been to imprison the parent of the delinquent child rather than the child itself when the parent is clearly at fault.

In New York state special provision is made for the adolescent before the Court. A special Court commission handles all first offenders between 16 and 18 and there is provision for substantial reductions of the maximum terms, prescribed by statute for certain offences. These Court hearings are regarded as being "criminal" in nature whereas the procedure for those under 16 is "civil".

Killan[61] saw four distinct classes of Children's Court structures in existence in the United States:

"a) The Independent Court with jurisdiction over children: with city, county or state wide jurisdiction and with probation services supplied by the Court or by city, county or state agencies; mostly in large urban centres (or state-wide Courts, as in Utah, Connecticut and Rhode Island.

b) Family Courts with jurisdiction over specified offences and relations and over specified types of family conflict, including jurisdiction over children; services attached or separate and largely in urban centres. Of thirty-three family and domestic relations Courts listed in the book of States, only nineteen possess divorce jurisdiction.

60. For a detailed description of family Courts see Vedder "The Juvenile Offender" (1954) (also Tappan (op.cit)1960).

61. Killan, "The Juvenile Court as an Institution" (1949).

c) Juvenile and domestic relations Courts: independent Courts or part of Courts with more general jurisdiction; rarely having jurisdiction over divorce and separation with services attached or independent and again largely in urban centres.

d) Juvenile Courts as sections or parts of Courts with more general jurisdiction: judges of the Court holding juvenile parts or divisions by designation sometimes in rotation (usually probate, county, circuit or common pleas) with services attached or separate and being more common in non urban areas and in many urban centres as well."

The concept of the "treatment tribunal" discussed above is best illustrated by the Californian example. In this state since 1961 adjudication and disposal have been divided. Primarily the child is brought before the Court to determine factual matters and to admit the jurisdiction of the Court. After this procedure an analysis is made by a separate tribunal of the most suitable method of dealing with the particular child. It was in relation to similar procedures, that controversy has arisen over possible breaches of the defendants rights, in that the original intention was to admit only legally permissable evidence at the first hearing leaving sociological and welfare data until the later hearing. However, the practice arose of judges reading these reports before the primary hearing

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and thus (supposedly) prejudicing the chances of the defendant for a fair trial. In New Zealand, this is the rule rather than an error when the magistrate is a treatment tribunal and a judicial authority in the same proceedings. It is interesting to note that in England, juvenile Court judges do not hear such evidence until the conclusion of the guilt determination process. A modified form of the split hearing is also practised in New York state, although in this state there is judicial authority in existence which clearly rules against the admissability at the primary hearing of reports not directly concerned with fact determination. As in New Zealand, Police and Welfare agencies play a significant role in removing certain offenders from the judicial arena before proceedings are commenced. Of those cases which are finally referred to the Courts 52% are disposed of other than by judicial methods. In some States special "intake" officers perform the screening process at present carried out in New Zealand by the Police Youth Aid Scheme. The intake officer, if he deems that the case is not one which should be referred to the Courts, may bring in other welfare agencies to assist.

Special probation treatments and community service projects without the necessity of Court proceedings may be applied to the offender dealt with in this way. Tappan however, reveals that in different judicial districts the practice varies

considerably - for example in Washington one Court disposed of 9 percent of its cases officially while another disposed of 83 percent by official methods.

When faced with the diversity of proceedings possible in United States juvenile Courts it is unwise to generalize when suggesting possible applications of the American procedures within New Zealand. The main feature of the legislation which sets up United States juvenile Courts is its lack of rigid structure. In New Zealand, the Child Welfare Act is specific in its procedural application to the Couts, whereas much of the procedure laid down in comparable American statutes is simply stated and informality is the keynote. Whilst a loosely defined structure is valuable within a Children's Court, it is the variation between different jurisdictions that has led to the series of cases cited earlier in this paper, which laid down minimum procedural safeguards. It is evident that at some point, the desire for informality must give way to the necessity to avoid prejudicing the rights of the child. As far as possible application within New Zealand goes, the interest of the researcher must be focused on the Family Courts with wide jurisdiction to determine all matters relative to the family including delinquency.

Such a Court would accumulate a fund of specialized

knowledge and experience enabling the particular judges to deal in a sympathetic and enlightened manner with the problems peculiar to family disputes. Delinquency proceedings and proceedings where the child is in need of care and protection are often the sum of an unstable family relationship. Matrimonial disputes usually leave the greatest mark on the children of the marriage. A Court with a unified jurisdiction over all matters relating to the family including divorce, custody and guardianship, care and protection proceedings, marital separations and delinquency proceedings and staffed only by those members of the judiciary with special training and aptitude for determining such matters would be a valuable innovation in New Zealand. Equally, the concept of the separate treatment tribunal with power to determine sentence is worthy of consideration.

The present judicial authorities are untrained, and in many cases unsuited to making disposals of sentenced juveniles. A few of the more enlightened magistrates, freely admit that their purely legal qualifications leave them sadly deficient in the knowledge and understanding required to ensure that a child receives the best possible sentence which will ensure rehabilitation.

The examples of judicial sentencing quoted in this paper are some evidence of the undesirability of having a magistrate

who has sat in normal Court proceedings four days of the week, being expected to adjust to the Children's Court on the fifth. Different considerations must be applied. A treatment tribunal made up of psychiatrists, sociologists, psychologists, and Child Welfare Agencies operating at a post-guilt determination state would answer the charge that a magistrate is insufficiently trained to deal with the sentencing of juveniles. Of course, criticism can be made against the concept of the sentencing tribunal. Is there any evidence that a panel of scientifically trained laymen would reach a decision that is any less arbitrary than that of a magistrate? It could be expected that considerations of public policy would be less to the forefront when a sentencing panel was in operation, and the fullest information about the offender would be available. If one accepts that individualized treatment of young offenders is a valuable advance on the "mass production" type sentencing so much in evidence in the modern Court room, then undoubtedly the separate tribunal has a role to play. Provided a balance can be drawn between safeguarding the defendant from unfair judicial process and the necessity to ensure the most beneficial sentence, separation of juvenile Court functions would be a justified step in rationalizing Court procedures.

CONCLUSION

If the spirit and intent of the Child Welfare Act 1925 had been observed in practice, the deficiencies of a judicial

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approach would not have been so apparent. The foreign jurisdictions discussed in this paper are moving or have moved from formal judicial proceedings in respect of children. New Zealand, Australia and to a lesser extent Britain retain a rigid procedure.

There is considerable variation in international attitudes displayed to children before the Court ranging from the Danish viewpoint that the child should never be considered a criminal to the New Zealand procedure which, in practice, if not in theory, makes little effort to differentiate the child from his adult counterpart. The age at which criminal responsibility can arise is equally diverse, fluctuating between 15 years in the Scandanavian countries and 7 years in some Australian States. The tribunals may decide criminal charges only, in some jurisdictions, whereas others have a wider jurisdiction over both delinquent and non-delinquent children. In America, the family Courts decide the full range of proceedings relating to family problems.

What approach should be taken in New Zealand? It will be appreciated that this paper advocates complete abandonment of judicial proceedings in any form for those children under fifteen, with normal adult proceedings being available for those over this age.

The possibility of having special Court hearings for those under twenty one but over fifteen without attempting to set up

a different procedure, would, in these circumstances, be desirable. Furthermore, although no attempt has been made to discuss the role of the Courts in the case of the non-criminal child, it will be seen that it is anomalous that a Court should have jurisdiction over these children in "need of care and protection" for whom the use of judicial procedure is completely unjustified. The powers to sentence and dispose of children, at present held by the Court, should be delegated to welfare agencies whichwould be able to determine the needs of the child in a manner detached from judicial considerations.

The present activities of the Police Youth Aid Scheme and the Child Welfare Division of the Department of Social Welfare point out that the transition from judicial tribunal to welfare agency would not involve any radical change from the present system. The Children's Court relies heavily on the services of these bodies both before and after the Court hearing. The intermediate role of the Court serves no useful purpose other than to adjudicate questions of guilt or innocence. The small number of "not guilty" pleas heard by the Court, (approx. 8%) reveal that even this function is only exercised to a limited extent. It is submitted, however, that the right of any member of society to dispute charges brought against him is a fundamental part of our legal system and should not be abandoned even in the case of juvenile proceedings. Thus, a

Children's Court as a judicial tribunal would only have a role to play in the determination of disputed charges. In exercising this function, the procedure of the normal criminal Courts should be amended only to the extent that the amendment safeguards the child and does not prejudice it. The example of the present Court illustrates the importance of selective amendment of procedural rights.

A return to welfare orientated proceedings within the area of juvenile offending will ensure that the possibility of adult recidivism will be diminished at the earliest possible stage, by the provision of the most suitable treatment techniques. Only then, will the community, as well as the child, receive some measure of protection before the law, through reformation and rehabilitation, rather than blind punishment.

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