History of Children's Legislation in New South Wales – the Children's Court

[Extracted from: The Children's Court & Community Welfare in NSW by Rod Blackmore, with the kind permission of Publishers Longman Cheshire Pty Ltd and the author and former Senior Children's Magistrate of NSW Rod Blackmore] Please note that any reference to legislation is for historical purposes only and should not be relied upon as being currently in force]

1.1 Legislation leading up to 1905

Early in the nineteenth century in New South Wales there was no legislation specifically for young offenders; they were subject to the same laws as adults, and liable to be dealt with in the adult courts. The first special provision of any kind was the *Juvenile Offenders Act* (14 Vic No II) of 1850, the purpose of which was 'to ensure more speedy trial and avoid the evils of their long imprisonment'. The Act provided for summary conviction by justices of persons under fourteen charged with simple larceny; with penalties of imprisonment not exceeding three months in a common gaol or house of correction, or a maximum fine of three pounds, or dismissal on finding sureties for good behaviour.

In 1866 the *Reformatory Schools Act* (30 Vic No IV) provided for the establishment of reformatory schools. For offences punishable by more than fourteen days' imprisonment, juvenile offenders (defined as under under sixteen) could be directed to be sent to a reformatory school for not less than one year and not more than five years, in addition to, or instead of, a sentence of imprisonment.

Public and private 'industrial schools' were provided for in the same year in the *Destitute Children Act* (30 Vic No 11) - also referred to as the Industrial Schools Act - to which vagrant and destitute children could be sent by justices until eighteen, or until their earlier discharge or apprenticeship - the first 'caring' legislation for children in New South Wales. In an amending Act (34 Vic No IV) of 1870 it was provided that boys under six committed to an industrial school might be detained in a female industrial school until seven years of age, then removed to a male industrial school.

In 1880, the *Public Instruction Act* (43 Vic No 23) provided for penalties on parents for neglecting to send their children to school.

The *State Children Relief Act* (44 Vic No 24) of 1881 established a system of 'boarding out' children otherwise held in asylums or reformatory schools, and established the State Children's Relief Board. The first extensive review of criminal

law in New South Wales was the *Criminal Law Amendment Act* (46 Vic No 17) of 1883. Section 382 of that Act provided that where a person under sixteen was convicted on indictment, the court might abstain from sentence on that person entering a recognisance to appear to receive sentence within three years; or instead of, or in addition to, sentence the court could direct that an offender be sent to a reformatory school.

The *Criminal Law and Evidence Amendment Act* (55 Vic No 5) of 1891 rendered unsworn but corroborated evidence of children of tender years admissible, a provision which had been enacted in the *Imperial Act* (Vic 48 and 49, ch 69). By the *Children's Protection Act* (55 Vic No 30) of 1892, a stipendiary or police magistrate in lieu of committing to prison any child under fourteen convicted of an offence could 'hand over' such child to a home for destitute and neglected children or an industrial institution, from where the child might be adopted out or apprenticed.

The *Crimes Act* 1900 included a number of provisions for 'juvenile offenders'. Section 429 re-enacted section 382 of the repealed *Criminal Law Amendment Act* 1883, and remained in the statute until repealed in 1951 (although rendered ineffective for most of those years by other specific legislation for young offenders). Section 434 provided for whipping of male offenders under sixteen convicted of indictable offences. This section was not attracted by reviewing legislation in 1951 and remained in the Act until repealed in 1974. First-offender juveniles for offences of assault, indecency, throwing missiles, wanton destruction, desecration or cruelty to animals, could be fined 40 shillings, or detained for six to ninety-six hours, or discharged after six hours upon some person entering a recognisance for the offender's good behaviour for six months. An additional alternative for offences of indecency, desecration, or cruelty to animals, was 'one private whipping'. Juveniles with previous convictions might be whipped for any of those offences (section 482-485). These provisions were finally repealed in 1974.

The *Reformatory and Industrial Schools Act* 1901 re-enacted the 1866 provisions for offenders under sixteen, and for vagrant and destitute children. Under section 30 of the *Children's Protection Act* 1902, where a child was before a court of petty sessions under circumstances authorising the court to deal with the child under the 1901provisions, the court might in lieu make an order of committal of the child to the care of a relation or a named person. Section 31 re-enacted the 1892 provision (supra). Under section 32, where a court had power to commit to care under section 30, it might commit to the care of the State Children Relief Board (the precursor of State wardship) or to a public industrial school.

The *Deserted Wives and Children Act* 1901 gave magistrates power to make maintenance orders for wives, and children of the marriage – and orders for legal custody of those children. It can be seen that at the turn of the century, although there had emerged some alternative sentencing provisions for young offenders and some alternatives for placing children in alternate care, those cases still came before the appropriate adult courts, and (in the case of an offender) adult sanctions were still available to those courts. By 1902 more advanced legislation was already in operation in other colonies and certain American States (particularly with regard to special courts for juveniles). There is some debate as to whether the (then) colony of South Australia, or the city of Chicago in the United States was the world leader in having commenced operations of separate courts for children.

In 1902 a State Children Bill was introduced in New South Wales which was to provide for a children's court to deal with all children's cases, including criminal offences, paternity cases, assault and neglect, destitution, and the power to commit to the State Children's Relief Board. The long and complex Bill was worked over carefully in the Legislative Council (where it originated) but progressed no further than a first reading the Legislative Assembly before the parliamentary session ended. A further series of Bills in the following parliament culminated in the passing of the *Infant Protection Act* 1904, which, for the first time in New South Wales legislation, mentioned 'Children's Courts'. The Act, however, related only to affiliation proceedings, and the term 'Children's Courts' appears only as the heading to Part IV of the Act. Beyond noting (in section 31) that the court would be constituted by a magistrate, the Act made no other provision for the structure of a children's court.

Finally, under a new government, the *Neglected Children and Juvenile Offenders Act* 1905 was passed, defining the powers of the Children's Court and providing that children who were neglected and uncontrollable, and juvenile offenders charged with summary and indictable offences, could all be dealt with by it. A child was defined as a boy of girl under sixteen and over five years of age. The Children's Courts were also able to employ honorary probation officers to supervise children, and had a general discretion as to the institutions to which children might be sent. The courts were to consist of 'special magistrates'. Courts of petty sessions were deprived of jurisdiction over children, but the Act explicitly preserved the powers magistrates had under the general law (section 10).

1.2 1905 to 1923

Under section 71 of the *Crimes Act* 1900, the so-called 'age of consent' was established as fourteen. This was increased to sixteen by the *Crimes (Girl's Protection) Act* 1910, and has survived unchanged despite occasional suggestions that it should again be lowered. (It has been suggested in recent times that the

raising of the age to sixteen was a response in ‘Victorian’ times to protect maidservants from their employers; this can be seen to be chronologically incorrect). The same Act provided that youths aged sixteen or seventeen found guilty of offences against girls over fourteen under sections 71, 72 or 77 of the Crimes Act might be dealt with under section 429 of the Act (supra) or by committal to an institution or reformatory school. (Those youths were at that time outside the ambit of Children’s Courts).

The *Child Welfare Act* 1923 repealed the *State Children Relief Act* 1901, the *Children’s Protection Act* 1902, the *Infant Protection Act* 1904, and the *Neglected Children and Juvenile Offenders Act* 1905. Jurisdiction over young offenders, neglected and uncontrollable children, by Children’s Court was extended to boys and girls under eighteen years of age. Some substantial amendments were made in respect of affiliation proceedings, and Part XIV of the Act dealing with adoption of children was new legislation. Section 97 again preserved the general powers of magistrates.

1.3 The Child Welfare Act 1939

The 1939 Act substantially re-enacted the *Child Welfare Act* 1923, but contained new provisions relating to establishments, mentally defective children, maintenance of children by their relatives, discipline in institutions and transfer of persons from prison to an institution. The Act continued to deal with both affiliation and adoption proceedings. The definition of ‘neglected child’ was expanded and included not attending school regularly (without lawful excuse). The age of criminal responsibility was raised to eight years (following the English example of 1933); it had previously been unnecessary to legislatively state the common law rule that no child under the age of seven years can be guilty of an offence. Section 12(1)(a) again preserved in explicit terms the general powers of magistrates.

The 1939 Act amended

Amending legislation was passed on some twenty-five occasions during the forty-eight years’ history of the Child Welfare Act. Many amendments were simply consequential upon other legislation, but principal amendments removed both affiliation and adoption from the Act and replaced provisions for ‘mentally defective’ children with those for ‘intellectually handicapped persons’. Amendments in 1969 made clear that neglected and uncontrollable children were not ‘charged’ before a court, but the purpose and publicity of those amendments were overshadowed by debate and publicity concerning children having tattoos without written parental consent. Amendments in 1977 came from review of the legislation that had been proceeding since 1974, and from recognition of the problems of child abuse. The age

of criminal responsibility was raised from eight to ten years. Provision was made for evidence of statements made by juveniles in police stations to be inadmissible unless in the presence of a parent, guardian, solicitor or other nominated independent person (subject to judicial discretion to admit the evidence where the absence of those persons was properly explained). Mandatory reporting by doctors, and voluntary reporting by any citizen, of cases of child abuse, with associated provisions for investigation of those cases was introduced. Another provision permitted the Children's Court to act on evidence which otherwise would not have been admissible in child abuse cases. The court was also empowered to order the release of a neglected child upon terms and conditions willingly undertaken by parents or another person.

An amendment in 1981 permitted any juvenile to elect committal for trial or sentence for an indictable offence, a discretion which previously lay only with the court. The provision was intended to permit juveniles to have the same procedural rights as adults, and is now re-enacted in the Children (Criminal Proceedings) Act. It is hard to understand the haste with which the measure was introduced when there were more urgent measures awaiting introduction, such as proper security arrangements for juveniles on remand. Even the Community Welfare legislation has not extended the same concept of procedural rights by permitting a juvenile to consent to Crimes Act sanctions under section 476 of that Act in appropriate cases in the Children's Court.

1.4 Crimes Act, amendments 1974

The new provisions of section 476 of the Crimes Act in 1974 gave to magistrates a greatly increased jurisdiction in less serious indictable offences, exercisable only with the consent of the accused. The purpose of the amendments was to relieve the District Court of large numbers of matters committed for trial or sentence. It was argued in some quarters that there was no power of the Children's Court to utilise those provisions, although there would have been much irony in the spectacle of a District Court having dispossessed itself of great numbers of adults still retaining the need to try and sentence numbers of juveniles committed to it for those offences. With reliance upon section 12(1)(a) of the Child Welfare Act, the opportunity for juveniles to elect to be dealt with by the Children's Court with realistic sanctions was frequently given; in fact it is recorded that limited similar use had been made for many years prior to 1974 of the previous Crimes Act provisions. That power was ultimately confirmed by the Supreme Court in the case of *Ceissman v Donovan & Ors* (1983) 2 NSWLR 491. It will be seen, however, that the Community Welfare legislation specifically negates the power of a Children's Court to utilise certain provisions of the Crimes Act. The likely outcome is an increased number of cases committed for trial or sentence at the District Court when sanctions provided for in the Children (Criminal Proceedings) Act are inadequate; for example, in the cases of serious indictable offences committed by older juveniles, or older juveniles with a

long history of offences and methods of treatment, or where compensation requested is outside the powers of the Children's Court.

1.5 Other legislation affecting children

Deserted Wives and Children Act 1901

Deserting a wife or child was a criminal offence (vide section 45 of the *Crimes Act* 1900, which was finally repealed in 1974). Initially the Deserted Wives and Children Act permitted orders to be made for the support of wives and/or children; an amendment in 1913 permitted the granting of legal custody of children to a wife when an order for support was being made. Proceedings under the Act were heard in 'Children's Courts' (achieving the non-publicity arising from closed courts.) The Act was repealed by the *Maintenance Act* 1964.

Infant Convicts Adoption Act 1901

This little-heard-of and possibly little-used Act repealed but substantially re-enacted the *Infant Convicts Act* (13 Vic No 21) of 1849, the preamble of which commenced "Whereas it is expedient that every facility should be offered for the improvement and better education of infants under nineteen who have been or may be convicted of felony or misdemeanour……'. The Acts permitted the Supreme Court to assign the care or custody of an infant (under nineteen) convicted of a felony or misdemeanour to any applicant willing to provide care, maintenance and education. While the stated sentiments expressed a concern for children who had been offenders, the legislation also reflected the prevailing view of the loss of personal rights arising from conviction; a view which the Children (Criminal Proceedings) Act attempts to finally correct by taking the emphasis away from 'convictions' as a prerequisite to the court exercising its powers in respect of offenders. The *Infant Convicts Adoption Act* 1901 was repealed by the *Child Welfare Act* 1939.

Infants' Custody and Settlements Act 1899

Earlier legislation (*Infants Custody Act* (18 Vic No 1) of 1854 and *Custody of Infants Act* (39 Vic No XVI) of 1875) concerned itself with the fact that the custody of a child reposed with the child's father, but moved to give a mother rights as to access to the child. Under the *Custody of Children and Children's Settlements Act* (57 Vic No 10) of 1894 it was provided that the Supreme Court, whenever satisfied that a parent or person having custody of a child was unfit to continue to have custody by reason of cruelty or neglect to the child, could order that the child be given up to the custody of some near relative or other person willing to accept such custody (and order maintenance chargeable upon the parent). The 1899 Act repealed the earlier legislation but re-enacted that provision. Primary jurisdiction in the Act resides in the Supreme Court. Magistrates had had no power to make orders for custody of a child

until 1913 (under the Deserted Wives and Children Act). Where the question of custody lay outside the ambit of those provisions, magistrates had no power to grant custody until section 10A was inserted in the Infants' Custody and Settlements Act by the *Guardianship of Infants Act* 1934. The section extended the Supreme Court's jurisdiction to District Courts and Courts of Petty Sessions – magistrates' jurisdiction being limited to infants under sixteen years of age and to a small amount by way of award for maintenance. Section 17 of the Act was also inserted in 1934, providing for the first time the statement of principle that in any proceedings in any court where the custody or upbringing of an infant is in question, the court, in deciding that question shall regard the welfare of the infant as the first and paramount consideration.

Aborigines Protection Acts

A series of Acts commencing in 1909 and spanning the next sixty years purported to 'protect' Aborigines in New South Wales. In pursuing a policy of assimilation, the legislation (in retrospect) can be seen to have been repressive and in negation of human rights. This was particularly so in regard to Aboriginal children. Under the 1909 Act the Aborigines Protection Board could cause any Aboriginal child, or a neglected child of any person with an 'admixture of Aboriginal blood' to be apprenticed. Under the 1915 amendment it was provided that a child who refused to go to an apprenticeship might be removed to a home or institution arranged by the board. It was also provided that 'The Board may assume full control and custody of the child of any aborigine, if after due inquiry, it is satisfied that such a course is in the interest of the moral or physical welfare of such child'. (Stated reasons in the board's records include 'because the child is an aborigine'). The board could thereupon remove such a child to such control and care as it thought best. This latter provision was repealed in 1940, and replaced by 'neglect or uncontrollable' provisions similar to those in the *Child Welfare Act* 1939; it was then possible for a Children's Court to commit an Aboriginal child (found to be neglected or uncontrollable) to the care of the Aboriginal Welfare Board.

The Aborigines Protection Acts were finally replaced by the *Aborigines Act* 1969, and all children under the care of the Aboriginal Welfare Board at that time became wards of the State.

While some will suggest that the Community Welfare legislation does not make sufficient special provision for Aboriginal children, it does purport to require equal consideration for all children in its stated principles, particularly those that 'children should, wherever possible, grow up in the care and under the responsibility of their parents'. In care proceedings the court is required to obtain and take into account reports from competent advisors if an application involves any conflict of cultural

factors; and where a child has been brought up substantially within any cultural or ethnic group, the court, before making an order of custody or wardship, take into account the desirability and feasibility of making an order placing the child in the custody of a person belonging to that group. Section 87 of the Children (Care and Protection) Act makes detailed provisions for the circumstances in which an Aboriginal child may be placed in the custody or care of some other person which give priority to placement in the child's extended family recognised by the Aboriginal community to which the child belongs, or with another member of that community or other Aboriginal Family residing in the vicinity. If those options (in order) fail, the Director-General of Family and Community Services (The Directors General) is bound to consult with members of the child's recognised extended family and appropriate Aboriginal welfare organisations in relation to the placement. It follows that the Children's Court cannot make an order conflicting with these requirements the court must be informed by way of assessment that these priorities have been given effect. 'Aboriginal' in the Act has the same meaning as it has in the *Aboriginal Lands Rights Act* 1983.

Juvenile Smoking Suppression Act 1903

This extremely short Act provided that it was an offence for a dealer or tobacconist to supply tobacco in any form to a person under sixteen years of age. Since incorporated into the Public Health Act (s. 751) the provision does not create an offence on the part of the child.

Juvenile Migrant Acts

1921 and 1926 introduced legislation for the 'care and well-being' of juvenile assisted migrants (aged between fourteen and eighteen years). A juvenile migrant coming to New South Wales under an assisted scheme signed a statement placing himself or herself under the care and control of the Minister for Labour and Industry, and could be placed on a government training farm or in other suitable employment. The Act gave the juvenile migrant a right to sue for wages.