

CHAPTER 21

LEGAL NEEDS AND SERVICES

Children are relatively powerless in the legal system. They have little knowledge of the system and ability to use it themselves. If they do have advocates, they are often not trained on how to listen and communicate with young people.'

INTRODUCTION

21.1 Homeless children have particularly urgent legal needs. They frequently come into contact with the criminal justice system and the child welfare system. They are highly vulnerable in dealing with the legal system because they lack the support and protection of the family. Legal assistance and advice is also needed to help homeless children protect their rights in matters such as access to housing and income support. In this chapter we consider the range of 'areas in which homeless children and young people — often in common with other young people — require, or could benefit from legal advice and assistance, and the extent to which those needs are met.

ACCESS TO ENTITLEMENTS AND SERVICES

21.2 For homeless young people, our legal system is generally experienced as something that gives others — police and welfare agencies — power over them, rather than used as a means of protecting themselves and their rights. They tend to seek legal assistance, if at all, only when action is initiated against them, rather than initiating action themselves.' Evidence presented to the Inquiry clearly indicated that many homeless young people are either unaware that legal assistance may be relevant to their problems or lack access to legal remedies. Evidence received concerning the exploitation of homeless youth makes more effective access to such legal protections as are available imperative.

Access to Housing

21.3 As indicated in Chapter 17, Private Sector Accommodation, and Chapter 16, Commonwealth-State Housing Agreement, many witnesses gave evidence that many young people experience legal problems in relation to both public and private tenancies.' The common but incorrect belief that people under 18 are legally unable to enter leases' clearly indicates a need for, legal information and advocacy services with relation to tenancy issues. Moreover, a number of witnesses gave evidence that young people are vulnerable to exploitation in the private rental market, partly as a result of their lack of legal advice and assistance. They are subject to unreasonable refusals to return bond money, unreasonable raising of rent and failure to remedy sub-standard conditions.' There is a role for non-lawyers as advocates for young people with respect to tenancy issues, provided proper training is given,' particularly given the inability — due to lack of resources — of community legal centres to offer intensive advocacy.'

Access to Income Support

21.4 Several witnesses stressed the importance of advocacy services for young people to ensure effective access to social security benefits and allowances.' Many homeless young people are not aware, for example, of the existence of the Youth Homeless Allowance.' As a result, legal and information services spend a considerable proportion of their time informing young people about income support provisions.'

YOUTH WORKERS AND LEGAL RESOURCES

21.5 Non-lawyer intermediaries, therefore, play a crucial role in informing young homeless people about available services and assisting them to obtain them."

21.6 Many young people would be unlikely to approach a lawyer directly. They often lack knowledge of their legal rights and of the relevance of legal solutions:

Many young people, especially from country areas, did not even know what a lawyer was. I think if they do not even know what a lawyer was they have very little concept of their own rights.²

21.7 All Legal Aid Commissions and Legal Services Commissions conduct Community Legal Education programs for youth. Because of limited resources, however, these are mainly confined to talks and lectures, which have been seen as having limited effect.' These programs are not particularly designed to be accessible to, or relevant to the needs of, homeless children. In Western Australia the Legal Aid Commission developed a more extensive program, 'Law for Youth 85'. This involved seminars and workshops for youth workers, secondary school and TAFE students, disadvantaged youth and youth groups, and the preparation and distribution of a text on youth-related legal issues, and other resource materials. This program was seen as highly successful," but has been discontinued, due to financial constraints."

21.8 An imaginative though more expensive form of legal education is provided by Streetwise ' practical legal comics. These are produced by Redfern Legal Centre together with Marrickville Children's Legal Centre and the Legal Services Commission of New South Wales. Some editions have also appeared in other States. They aim to provide relevant legal information in an accessible format, are produced after extensive consultation with the target groups, and are regarded as highly effective.'

21.9 Most Community Legal Centres are involved in legal education for youth." Youth information and advocacy services such as the Shortcuts Youth Information and Referral Service in Canberra also produce printed information and conduct workshops for youth workers and young people." However, Community Legal Centres see themselves as unable to meet the legal information needs of youth adequately, due to limited resources."

21.10 Young people may perceive lawyers and even community legal centres as excessively formal and threatening." In some areas, particularly country areas, limited availability of legal services is another barrier.²¹ Youth workers are best placed to identify the legal needs of homeless children and young people. However, evidence received by the Inquiry indicated that youth workers often fail to recognise legal problems or to refer these problems for legal assistance." Youth workers themselves generally lack training in legal issues, obligations and rights." Many Community Legal Centres are involved in legal education for youth workers. However, resources are limited and education is mostly confined to giving lectures" or conducting workshops."

CRIMINAL JUSTICE AND CHILD WELFARE

21.11 A more prominent aspect of legal need for very many homeless children and young people is their need for assistance in dealing with the criminal justice and child welfare systems. As indicated in Chapter 2, Government Responses to Youth Homelessness, involvement with these systems is, for many children, an integral part of their experience of homelessness. In his survey conducted for the Inquiry, O'Connor found that about half the children interviewed had appeared in court charged with criminal offences and 29 of the 100 had been the subject of a child welfare application." Slightly over half the sample had lived in a child welfare home or a detention centre or both.' The response of each of these systems to both the fact of homelessness and the situations of homeless children and young people can be substantially improved if the associated legal needs of the children and young people concerned are adequately met.

21.12 Homeless children are particularly vulnerable in dealing with the criminal justice system when they do come into contact with it. They are unlikely to have a parent or other adult who can be called on to be present during questioning by police. Their lack of a stable address or family support means they are likely to be refused bail and remanded in custody before and during trial, even for the relatively minor offences typically committed by children."

21.13 Police Questioning: Homeless children, like other children, are particularly vulnerable when subject to police questioning." This vulnerability has been recognised in most Australian jurisdictions," but imperfectly addressed.³¹ The result is that children can be interviewed by police without the presence and assistance of a supportive adult -- much less an advocate. Homeless children are particularly unlikely

to be supported by an independent adult." One result may be that their statements and admissions are used against them at trial although they were interviewed alone." The Brisbane Youth Advocacy Centre attempts to meet this need with a roster of Justices of the Peace who can be called upon to attend a police interrogation on behalf of a young person."

21.14 After-hours advocacy services are needed if the legal advice and support needs, particularly of homeless children, are to be met adequately. It is common for arrests to occur on weekends, late at night and in the early hours of the morning." The Brisbane Youth Advocacy Centre has also established a roster of volunteer lawyers who give after-hours advice in police interviews, which 'has resulted in children being able to make informed choices early in the police investigation process'.³⁶

21.15 Guilty Pleas: A related area of concern is the very high proportion of children charged with offences who plead guilty." Evidence presented to the Inquiry indicated that, in a number of cases, a homeless child, who has had no adequate legal advice, has seen this as the quickest way to 'get it over with'." However, for homeless children and young people, an undeserved criminal record is an additional stigma which may be difficult if not impossible to overcome in later life. It creates additional barriers to obtaining employment and accommodation, and may well damage educational prospects and family relations. One refuge worker described this process to the Inquiry:

No matter what they do — and I have seen some really remarkable efforts by children to go back to school, to get into a foster home, to really give it a go — the inevitable crunch comes on the employment form where it says, 'Name, address, do you have a criminal record, answer yes or no' ... and there is another brick wall waiting."

21.16 Bail: A desire to 'get it over with' by pleading guilty is not as irrational a response as may first appear. The disturbing fact is that a child who pleads not guilty to a minor charge risks being remanded in custody (to await trial) for a period longer than the probable sentence following a guilty plea.^o Many of the offences committed by children are relatively minor, and imprisonment may not even be an available penalty. In such cases remand in custody is a major disincentive to a plea of not guilty. Moreover, it is arguably an unjustified deprivation of liberty.⁴¹ Again homeless children may be particularly disadvantaged by virtue of having no fixed address and a seeming instability of lifestyle, making it apparently less likely that they will appear for trial. Some witnesses adverted to the fact that homeless children are less likely to obtain bail and are remanded in custody, even where the court considers it inappropriate, because of the lack of short to medium-term accommodation as an alternative.^o

21.17 In Victoria, the recently proposed Children and Young Persons Bill attempts to address these problems. If passed it will provide that bail is not to be refused to a child 'on the sole ground that the child does not have any, or any adequate, accommodation'.^o In practice, however, children with no fixed address may continue to be remanded in custody because of perceptions that they are more likely to fail to appear.

21.18 Given the present apparent unwillingness of courts to release homeless children pending trial, there is clearly a need for the provision of suitable accommodation of a non-custodial type to which these children can be referred. There is a chronic lack of such alternatives. Others who could benefit from such community alternatives are country children brought to regional centres and cities to face trial.'

21.19 Representation: The International Covenant on Civil and Political Rights provides that 'everyone' has the right to legal assistance in criminal cases, and to have legal assistance allocated where the interests of justice so require.^o This right applies to children and is reinforced by the right of children to the special measures of protection required by their status. ^o Numerous official reports in Australia in recent years have called for increased legal representation in court for children!' At times lawyers have been thought to be unnecessary in dealing with children, since courts are required to act in the 'best interests of the child'. However, as one witness stated in evidence to the Inquiry, 'to act in the interests of a child or young person without listening to them is to treat the young person as a non-citizen and a non-person'. ^o Children have a right to participate as far as possible in decisions affecting their future (a right which is clearly recognised in the new International Convention on the Rights of the Child, Article 12). If those decisions are really to be in the best interests of the child, the right of children to participate and

have their views considered must be respected. Legislation in most jurisdictions in Australia recognises this in principle.^o For children even more than for adults, effective participation in court proceedings in practice requires legal representation." The effectiveness of a theoretical right to representation, however, depends on the actual availability, accessibility and quality of legal services.

21.20 Legal services for children and young people are generally poor. There are duty lawyer schemes in all States except Tasmania. Except in New South Wales and the Australian Capital Territory, however, these are limited to the provision of advice and representation at the first court appearance." Duty solicitors do not generally appear for children who plead not guilty. Where the duty solicitor is the only legal service effectively available, this obviously increases the pressure to plead guilty. Understandably, legal aid guidelines give priority to young people who are likely to be incarcerated. However, many young people commit minor offences and are likely to receive other outcomes and may not qualify for legal aid.'

21.21 Rates of representation vary widely throughout Australia." The Inquiry was informed that 'probably every child in New South Wales is represented before the Children's Come.'" Studies have also shown increasing rates of representation in Victoria, Queensland, and South Australia." However, in Western Australia, the Inquiry was told that most children go unrepresented." These variations appear partly due to lack of awareness of services in some areas."

21.22 Legal services in country areas are particularly inadequate." The lack of access to legal advice or representation in many outlying areas increases the pressure to centralise court cases." This is not simply an inconvenience for country children. Removing them from their communities and bringing them to urban centres may well contribute to homelessness." Where, as in Victoria, South Australia and Western Australia, Legal Aid Commissions have salaried lawyers with specialised training in children's law, they are generally available only in metropolitan areas.'

21.23 Aboriginal children have particular needs in dealing with the legal system. These needs are particularly pressing given the inordinately high rate at which the criminal justice and child welfare systems have contact with Aboriginal children.⁶² In Western Australia in September 1987, for example, there were 2,360 children in the care of the State, of whom 1,067 (45%) were Aboriginal.^o It was pointed out in a 1986 report for the Federal Attorney-General's Department that:

There appear to be inadequate resources for the proper servicing of the needs of Aboriginal people...hearing in mind the extraordinarily high number of Aboriginal children in foster care, secure institutions, and prison.'

Most Aboriginal children have access to representation by an Aboriginal Legal Service.^o However, a representative of the Northern Australian Aboriginal Legal Aid Service informed the Inquiry that, due to lack of resources, 'we offer very limited and very poor service'.^o

21.24 Legal representation of itself does not necessarily ensure children the right to participate in legal processes affecting them. In fact it may have the opposite effect. One experienced magistrate told the Inquiry that too often what happens in court passes over the child's head." A representative of the Victorian Legal Aid Commission thought it was possible that the introduction of the duty lawyer system 'mainly led to an increased efficiency in courts' processing [of] persons' rather than to improved participation.^o

The processes and mechanisms of the court systematically strip young people of their ability to participate in the court process. Ironically many of these processes, such as legal representation, were developed to prevent injustice.. In many cases in the children's court legal representation simply reinforces the child's disadvantaged and dependent position and allows the court to proceed under the fiction that the child's wishes and

262

interests are represented. Without the development of specialised advocacy services for young people this will remain the case."

21.25 Numerous criticisms have been made of the quality of service provided by duty lawyer schemes. Often a lawyer does not see a child until immediately before the hearing, perhaps for ten minutes or less, which does not give adequate time to take instructions:⁶ In many cases children are getting only

perfunctory advice, as indicated by the evidence of the Children's Court Magistrate at Worimi in Newcastle:

The quality of representation varies enormously ... at my court there may be 50 or 60 kids a day that will come before the court, faced with a total of 160, 180 offences. There will be three duty lawyers there at the most, to represent them. Those duty lawyers are asked to arrive at at least 9.15 before the court starts at 10.00. The opportunity of those lawyers to get instructions in such a limited period of time from such a large number of kids is very limited; in particular to do more than just look at what the offence is."

As the Chairman of the Inquiry observed at the time:

...on my arithmetic that works out on average to each duty solicitor having about two and a half minutes per child...I wonder what we would be saying about our legal system if we were rostering that kind of legal advice to adults?...What we are giving these kids is really third rate justice. How can any lawyer possibly give consideration to what should be pleaded on a child's behalf after a consultation lasting anywhere from 10 seconds to two and a half or three or maybe even five minutes?"

21.26 Lack of continuity is also a very real problem: a child making several appearances on the same matter will often have several different lawyers rostered."

21.27 Although duty lawyer schemes do lead to development of some expertise," lack of experience and training in children's law is a common criticism." Legal Aid Commissions have training programs for their own staff, but these do not generally cover the private lawyers who provide much of the services." Many lawyers lack expertise in the Children's Court jurisdiction, appropriate communication skills for dealing with young people, or knowledge of the life conditions of young people and the services available."

21.28 Specialist experience and training is particularly necessary for lawyers in Children's Courts because of the tension between the usual adversarial approach and the focus of Children's Court proceedings on the 'best interests of the child'. Lawyers' roles are largely left as a matter of personal interpretation." The Inquiry was informed of some services which recognise and address this need. In metropolitan Melbourne all Children's Courts are serviced by specialist salaried lawyers employed by the Legal Aid Commission." By contrast, a witness from the Youth Advocacy Centre in Brisbane informed the Inquiry that hers was the only specialist position in children's law funded in all of Queensland."

APPROACH TO THE PROVISION OF LEGAL SERVICES

21.29 Evidence to the Inquiry identified a need for the expansion and improvement of legal services for children appearing in court. Court-based services suffer some obvious limitations however. The additional need for advocacy before court, in particular during police questioning, has been identified above. Moreover, court-based services continue the pattern of particularly vulnerable young people having access to legal services only to react to actions by others, rather than being able to use the legal system to protect their rights in areas such as income support and tenancy. Evidence presented to the Inquiry also identified a need for advocacy in forums not traditionally familiar to lawyers. For example, there is a need for improved advocacy mechanisms and services within institutions — to improve the protection of children's rights and the ability of institutions to provide for their needs.'

21.30 Most services provided directly by Legal Aid Commissions are restricted to court-based services. However, the Children's Court Section of the Victorian Legal Aid Commission also has wider functions. It undertakes advocacy in institutions and provides representation at case planning conferences, assists in applications for benefits and undertakes other casework." Salaried staff have the advantage of specialised training and expertise. The need for expansion of such services has been recognised in Victoria, and elsewhere, but sufficient funding has not been made available."

21.31 The Inquiry was informed of several services which provide models for legal information and advocacy services specifically targeted at the needs of young people. The Youth Advocacy Centre in Brisbane provides a comprehensive range of services:

- legal information and advice;

- social work services;
- after hours service in police interrogation;
- assistance in accommodation and alternatives to institutional care; and
- legal education.

The Youth Legal Service in Western Australia provides a similar range of services.

21.32 Availability of such an advocacy service means that children do not need to have perceived their problem as a specifically legal one in order to gain access to legal services. It provides for close co-ordination between legal and other responses to the various aspects of a particular child's problem. This model appears conducive to legal workers becoming more aware of other social aspects of children's problems, and youth workers being more aware of legal solutions and perspectives based on quite basic rights.

21.33 However, the Inquiry heard evidence that these services are unable to meet the demands placed on them, primarily due to a lack of funding." Specifically, there is a need for funding of positions for specialist lawyers, whether full or part-time, to provide continuity, training and expertise." The provision of these lawyers, possibly through Legal Aid Commissions, could also serve to meet — at least in part -- the need identified in evidence for more co-ordination between legal services, government and non-government agencies."

21.34 Several Community Legal Centres, such as the Marrickville Legal Centre in Sydney, have developed specialised services for children, which provide a similar range of services and expertise to centres such as the Youth Advocacy Centre, and should be considered in the same category. The Welfare Rights and Legal Centre in Canberra provides a model of a specialised poverty law centre which deals with many legal issues relevant to homeless children, such as tenancy, social security, education allowances and consumer credit." Workers in community legal centres do not necessarily have expertise in the law relating specifically to children, or in communicating with children. Nonetheless the Inquiry heard evidence from a magistrate that Community Legal Centres, such as the Fitzroy Legal Service in Victoria, provide the most effective representation for children." Most witnesses identified the major needs of such services as being for increased training and funding, specifically funding of specialist positions, and improved co-ordination with youth services."

FINDINGS AND RECOMMENDATIONS

21.35 The Inquiry found that homeless children have important and pressing legal needs in dealing with the criminal justice and child welfare systems, and in gaining access to accommodation and income support. Homeless children often lack knowledge of their legal rights.

RECOMMENDATION 21.1

- **The Inquiry recommends that Federal, State and Territory governments develop and implement strategies to improve access to legal advice, information, advocacy and representation for children, with particular reference to the needs of those who are homeless.**

The specific recommendations which follow flow from this general recommendation.

21.36 Many homeless children come into contact with the criminal justice system. They are particularly vulnerable in dealing with this system because of their lack of adult support and protection.

RECOMMENDATION 21.2

- **The Inquiry recommends that existing requirements for an independent person to be present and legal advice to be available to children and young people during police questioning be strengthened, and that funding and support be provided for the expansion of advocacy services for children taken into police custody.**

21.37 Homeless children charged with criminal offences are likely to be denied bail because of their lack of fixed address and instability of lifestyle, and a lack of alternatives to remand in custody available to the courts.

RECOMMENDATION 21.3

- **The Inquiry recommends that legislation establish a presumption in favour of bail for children where this is not already the case. Legislation relating to bail should specifically state that lack of accommodation is not a sufficient reason to refuse bail.**

RECOMMENDATION 21.4

- **The Inquiry further recommends that Federal, State and Territory governments undertake the provision, co-ordination and funding of alternatives to custody pending trial, and ensure that information on these alternatives is readily available to police, magistrates, court officers, young people and workers with youth. Alternatives to custody should include bail hostels and other suitable non-custodial community placements.**

21.38 Legislation in most jurisdictions does not sufficiently guarantee and define the right of children to legal representation.

RECOMMENDATION 21.5

- **The Inquiry recommends that legislation in all jurisdictions be amended where necessary to give express recognition to the right of children to be represented, in their own right, in both criminal and child welfare proceedings.**

21.39 The effectiveness of a *theoretical* right to representation depends on the availability, accessibility and quality of legal services. The Inquiry found that, *in practice*, legal services for children and young people in court are generally poor.

RECOMMENDATION 21.6

- **The Inquiry recommends that effective legal representation be ensured for all children appearing before the courts. Particular emphasis should be give to improving the availability and quality of representation for Aboriginal children, and for children in country and remote areas.**

21.40 Dealing with children and young people in court, particularly those who are homeless, requires special sensitivity, skills and training.

RECOMMENDATION 21.7

- **The Inquiry recommends that additional positions for specialist children's legal representatives and specialist training in children's law be funded in all States and Territories.**

RECOMMENDATION 21.8

- **The Inquiry further recommends that specialist training be instituted for all magistrates and other judicial officers dealing with children.**

21.41 The Inquiry considers that integrated advocacy and information services offer the best model for effective and accessible services for children and young people with the most acute legal needs, including homeless children and young people. (Our recommendations in Chapter 24 are relevant in this context.)

RECOMMENDATION 21.9

- **The Inquiry therefore recommends that funding for comprehensive youth advocacy services (such as those described in this chapter) be substantially increased. Where an integrated advocacy service is not possible or appropriate, any service established should have an extensive and well-developed referral network.**

21.42 Youth_ workers are well placed to identify the legal needs of homeless children. However, evidence to the Inquiry indicates that youth workers often fail to recognise legal problems or refer them for assistance.

RECOMMENDATION 21.10

- **The Inquiry recommends that a strategy for improved legal training and resources for youth workers be developed and implemented as part of the Youth Accommodation and Support Services Program (proposed in Chapter 24).**

Notes

- I. S. Boyle, Youth Legal Service (WA), *Transcript at 710*.
2. I. O'Connor and C. Tilbury, *Legal Aid Needs of Youth* (AGPS, 1986) at 47.
 3. As long ago as 1975 the Australian Government Commission of Inquiry into Poverty found that while young people had a higher than average incidence of tenancy problems, their utilisation of legal services was low: B. Cass and R. Sackville, *Legal Aid in Australia* (AGPS, 1975).
 4. I. O'Connor, *Most of us have got a lot to say and we know what we are talking about*. *Children's and Young People's Experiences of Homelessness* (1988) at 102-104. See also, Chapter 17, Private Sector Accommodation.
 5. G. King, Gold Coast Youth Service (Qld), *Transcript at 369*; S. Mir, Welfare Rights and Legal Centre Canberra, *Transcript at 590*; G. Kempin, Fremantle Youth Accommodation Service (WA), *Transcript at 693*.
 6. S.94, H. Carmichael, Vic Legal Aid Commission, at 31.
 7. S. Mir, Welfare Rights and Legal Centre Canberra, *Transcript at 590*.
 8. H. Carmichael, Vic Legal Aid Commission, *Transcript at 1052*; M. Westthorp, ACT Workers with Youth Network, *Transcript at 541*; B. Jowle, Karratha Drop-In Centre (WA), *Transcript at 789*. See Chapter 14, Income Support for Homeless Young People.
 9. S. Boyle, Youth Legal Service (WA), *Transcript at 709*.
 10. S. Mil, Welfare Rights and Legal Centre Canberra, *Transcript at 593*.
 11. M. Westthorp, ACT Workers with Youth Network, *Transcript at 541*. Most youth workers surveyed by O'Connor and Tilbury in 1986 identified themselves as the major source of legal knowledge for young people: O'Connor and Tilbury, *op cit*, at 61.
 12. S. Boyle, Youth Legal Service (WA), *Transcript at 710*.
 13. O'Connor and Tilbury, *op cit*, at 68
 14. *Id.*, generally.
 15. S. Boyle, Youth Legal Service (WA), *Transcript at 708*.
 16. O'Connor and Tilbury, *op cit*, at 71.
 17. *Id.*, at 70.
 18. A. Williamson, Shortcuts Youth Information and Referral Service Canberra, *Transcript at 545*.
 19. S. Boyle, Youth Legal Service (WA), *Transcript at 708*.
 20. O'Connor and Tilbury, *op cit*, at 59.
 21. B. Jowle, Karratha Drop-In Centre (WA), *Transcript at 789*: 'Legal advice in this area is only available fortnightly and, again, is not well advertised.'
 22. S.10, I. O'Connor, at 7. A survey of youth workers for the Legal Aid branch of the Commonwealth Attorney General's Department in 1986 indicated that the low rate of referral of problems for legal assistance was partly due to a lack of knowledge of legal remedies: O'Connor and Tilbury, *op cit*, at 51-52. Other reasons were that legal solutions were not seen as appropriate or effective; but this in turn was partly explained by a failure to perceive problems in terms of rights. The survey also indicated a lack of knowledge of the availability of legal aid: O'Connor and Tilbury, *op cit*, at 54.
 23. See Chapter 24, A Youth Accommodation and Support Services Program, on opportunities for training of youth workers.
 24. S.10, I. O'Connor, at 71.
 25. A. Williamson, Shortcuts Youth Information and Referral Service Canberra, *Transcript at 545*. Youth workers surveyed in 1986 regarded written material as more effective. The *Legal Resources Book* provides a useful resource, but a place was seen for more specialised services, such as the *Legal Manual for Youth Workers* which exists in New South Wales: O'Connor and Tilbury, *op cit*, at 62. Witnesses also indicated to the Inquiry, however, that other forms of training are necessary, in addition to the provision of information: M. Westthorp, ACT Workers with Youth Network, *Transcript at 541*.
 26. O'Connor, *op cit*, at 27. Very similar figures emerged from a study by the Australian Institute of Criminology: R. Lincoln, Australian Institute of Criminology, *Transcript at 561*.
 27. O'Connor, *op cit.* at 28. See also, Chapter 10, Children in the Care of the State.
 28. G. Berm, WA Legal Aid Commission, *Transcript at 819*.
 29. T. Smith, Youth Shelter Innisfail (Qld), *Transcript at 474, 475*; S. Mir, Welfare Rights and Legal Centre Canberra, *Transcript at 595*.
 30. 'Positive and practical steps must be taken by somebody, if necessary by the police, to see that an accused child knows his rights and that if he proposes to say anything he is saying it freely and in the exercise of a choice which is really a free choice. This will require more than the observance of formalities:: Wickham I, Frijhaf v R (1982) *Western*

Australian Reports 128. For this reason, all jurisdictions have rules which provide for the presence of an independent person during questioning of children. In NSW, the ACT and the Northern Territory these have statutory force: Children (Criminal Proceedings) Act 1987 (NSW), s.13; Children's Services Ordinance 1986 (ACT), ss.30, 40; Juvenile Justice Act 1983 (NT), ss.25, 34. Elsewhere similar rules are found in internal police regulations: see J. Seymour, *Dealing with Young Offenders* (Law Book Co., 1988) at 194 n.21. The WA Police Manual, for example, states: 'Where the accused is a child, or someone under a disability, more persuasive evidence is needed than ordinarily to prove that a confession is voluntary. It is advisable always in such cases to conduct the interview or obtain subsequent verification of the confession or other statement of admission in the presence of an independent person.': cited in M. Rayner, *Fending for Yourself* (1988) at 38.

31. The 'independent person' required to be present under these rules may well be another police officer. The WA rule quoted expressly recognises senior police officers not involved in the investigation as 'independent persons'. The ACT and NT legislation specifies that the person must be a parent or guardian, another adult who is not a police officer, or a lawyer, but if a person within these categories cannot be obtained by 'reasonable steps' within two hours, a police officer may serve the purpose. The NSW legislation is an exception in that it appears to impose an absolute requirement for an independent adult to be present who is not a police officer. However, it also provides that the courts have a discretion to admit evidence obtained in the absence of such a person if there was a 'proper and sufficient reason' for none of the specified persons being present. It is unlikely that many children would regard the presence of an additional police officer as supportive. This is particularly the case given the prevalence of complaints of intimidation by police during interrogation: Rayner, *op cit*, at 40. The rules do not require that the independent person be a lawyer or a person chosen by the child. The presence of parents, welfare officers or teachers may prevent use of threats or force in interrogation. However they may not be well placed to give advice concerning, for example, the right to silence, and indeed such persons may see it as their duty to encourage the child to assist the police. It has been said that it is probable that 'the presence of an independent adult is regularly more benefit to the police than to the child': Seymour, *op cit*, at 211. The legislation and rules fail to specify the role which the independent person is to play, or to provide that the child has a right to choose a supportive person, or to provide that the child has a right to legal advice and to be told of that right. There has been an instance in NSW where a child's confession was excluded from evidence after police had required the child's lawyer to leave when he attempted to give advice: *R v Graves* (unreported) Supreme Court of NSW (Roden J.) 1980; discussed in Seymour, *op cit*, at 203-204. Roden J. thought that it would defeat the purpose of the legislation to prevent the independent person from giving advice. The evidence was excluded even though the mother had been allowed to remain. It appears, however, from evidence to the Inquiry that this case may have been unusual in a lawyer being present at all. One study at Perth Children's Court showed that 86% of children had not asked for a lawyer, and there was no evidence that police had informed them of a right to legal advice: Rayner, *op cit*, at 55.
32. Evidence was given to the Inquiry that the consequence is that rules requiring an independent adult to be present are honoured more in the breach than the observance: M. Rayner, *Transcript* at 646. Evidence from studies in Queensland and the ACT indicates that a large majority of children are interviewed without any adult other than police being present: Seymour, *op cit*, at 210. However there are indications that in Victoria most interviews are in the presence of a parent or other person: *ibid.* Legal Aid Commissions and Aboriginal Legal Services receive frequent complaints from children interviewed without the presence of a supportive adult, but have had little success in challenging confessions obtained in these circumstances, or else lack the resources to do so: Rayner, *op cit*, at 39-40.
33. Confessions obtained in the absence of a supportive adult, even where this is contrary to law, are not automatically inadmissible. A confession will be excluded if the court considers it was not voluntary: *R v Lee* (1950) 82 *Commonwealth Law Reports* 133. However, the absence of a supportive adult will not necessarily establish this in itself. The courts also have a discretion to exclude unfairly prejudicial evidence even if it is obtained voluntarily: 'Convictions obtained by aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.': *R v Ireland* (1970) 126 *Commonwealth Law Reports* 321, at 335, per Barwick CJ. This discretion, however, is exercised sparingly.
34. G. Murray, Youth Advocacy Centre Brisbane, *Transcript* at 211.
35. M. Rayner, *Transcript* at 646; S.71, Perth Inner City Youth Service.
36. A. McMillan, Youth Advocacy Centre Brisbane, *Transcript* at 221. Since the Inquiry commenced, the WA Department of Community Services' Juvenile Justice Review has recommended a Youth Advisor scheme, though only for the Perth metropolitan area. The Youth Advisor would inform children of their rights, services available, and the likely outcomes of questioning: Rayner, *op cit*, at 40. However, negotiations for the establishment of such a service have not been successful as at the time of writing.
37. S. Boyle, Youth Legal Service (WA), *Transcript* at 707; P. Molan, NSW Magistrate, *Transcript* at 1907; S.33, Youth Legal Service (WA). A very high proportion of children accused of criminal offences plead guilty. Research for the Australian Law Reform Commission's reference on Sentencing indicated that 95% of accused children plead guilty: Frieberg, Fox and Hogan, *Sentencing Young Offenders* (ALRC Sentencing Research Paper No. 11, 1988) at 92.
38. S.33, Youth Legal Service (WA).
39. D. Hatfield, *Transcript* at 605.
40. Rayner, *op cit*. at 45.
41. In NSW there is a right to bail in the case of offences not carrying imprisonment as a penalty: Bail Act 1978 (NSW), s.8. The International Covenant on Civil and Political Rights, ratified by Australia in 1980, provides that persons awaiting trial are not

to be detained in custody as a general rule: Art.9.3. This follows from the right to liberty of the person: Art.9.1. Several jurisdictions in Australia attempt to give effect to these principles through statutory presumptions in favour of release on bail: Bail Act 1978 (NSW), s.9; Children's Protection and Young Offenders Act 1979 (SA), s.44; Children's Services Ordinance 1986 (ACT), s.37(2). However, even where there is a presumption in favour of liberty, the factors to be considered by the court in deciding whether to remand the child in custody operate against homeless children being released.

42. S.94, H. Carmichael, Vic Legal Aid Commission, at 14.
 43. Children and Young Persons Bill 1987 (Vic), c1.129(7).
 44. Children brought from remote areas for Children's Court proceedings are at risk of homelessness if they are released on bail, due to a lack of services and facilities in cities: B. Ivanson, Northern Australian Aboriginal Legal Aid Service Darwin, *Transcript* at 1641. Several witnesses identified a need for bail hostels which could provide accommodation and necessary supervision without inappropriate detention in secure facilities: *id.* at 1641; S.41, G. Benn, WA Legal Aid Commission, S.94, H. Carmichael, Vic Legal Aid Commission, at 15.
 45. Art.14(3)(d).
 46. Art. 24.
 47. Commission of Inquiry into Poverty, *Legal Aid in Australia* (1975); Mohr Royal Commission (SA), *Report of the Royal Commission into the Administration of the Juvenile Courts Act and Other Associated Matters*, Part II (1977); ACT Legislative Assembly Standing Committee on Housing and Welfare, *Report* (1978); Australian Law Reform Commission, *Child Welfare* (Report No. 18, 1981); NSW Anti-Discrimination Board, *Discrimination and Age* (1980); NSW Legal Services Commission, *Report of the Legal Services for Children Sub-Committee* (1980); Victoria Child Welfare Practice and Legislation Review Committee, *Equity and Social Justice for Children, Families and Communities* (1984). See also Frieberg, Fox and Hogan, *op cit.* at 117-118.
 48. M. Rayner, *Transcript* at 640.
 49. Children (Care and Protection) Act 1987 (NSW), ss.69, 72; Children (Criminal Proceedings) Act 1987 (NSW), s.12; Children's Court Act 1973 (Vic), ss.4B, 4C; Children's Protection and Young Offenders Act 1979 (SA), s.17; Children's Services Ordinance 1986 (ACT), ss.6, 84; Community Welfare Act 1983 (NT), s.43.
 50. The legislation also generally recognises this: Children (Care and Protection) Act 1987 (NSW) ss.65, 66; Children's Court Act 1973 (Vic), s.23 - though this only recognises a right for the parents to be represented on the child's behalf: compare the Children and Young Persons Bill 1987 (Vic) which would provide for the child to have a right to be represented in his or her own right; Children and Young Offenders Act 1979 (SA), s.17; Children's Services Ordinance 1986 (ACT) ss.93, 167. In NSW, SA, and in Victoria if the Children and Young Persons Bill is passed, proceedings are not to go on without a reasonable opportunity to arrange representation. The ACT gives power to the court to order that a child be represented and to give the child advice and assistance to obtain representation. In Tasmania the Child Welfare Act 1960 (Tas), s.16, gives parents and guardians a right to be represented in child welfare proceedings but omits to provide expressly for such a right for the child. There is no express provision for representation in Queensland, WA or the Northern Territory, although it is probable that such a right should now be recognised as existing at common law: *J v Leischke* (1987) 69 *Australian Law Reports* 647.
 51. O'Connor and Tilbury, *op cit.* at 22.
 52. S. Boyle, Youth Legal Service (WA), *Transcript* at 707.
 53. See Frieberg, Fox and Hogan, *op cit.* at 118-19 and the studies there cited.
 54. P. Molan, NSW Magistrate, *Transcript* at 1906.
 55. O'Connor and Tilbury, *op cit.* at 23.
 56. Rayner, *op cit.* at 11.
 57. O'Connor and Tilbury, *op cit.* at 24.
 58. S. Boyle, Youth Legal Service (WA), *Transcript* at 708; G. Benn, WA Legal Aid Commission, *Transcript* at 824; B. Jowle, Karatha Drop-In Centre (WA), *Transcript* at 789.
 59. G. Benn, WA Legal Aid Commission, *Transcript* at 824.
 60. D.G. de Busch, Yuddika Child Care Agency Cairns (Qld), *Transcript* at 485; I. Horrocks, Aboriginal Legal Service (WA), *Transcript* at 669; D. Brown, Port Augusta Ranges Youth Shelter (SA), *Transcript* at 1397; B. White, Aboriginal Child Care Agency Alice Springs (NT), *Transcript* at 1746.
 61. H. Carmichael, Vic Legal Aid Commission, *Transcript* at 1060; M. Rayner, *Transcript* at 943.
 62. See Chapter 12, The Situation of Aboriginal Children and Young People.
- 268
63. M. Rayner, *Transcript* at 639.
 64. O'Connor and Tilbury, *op cit.* at 61.
 65. See the research cited in Frieberg, Fox and Hogan, *op cit.* at 119.

66. B. Ivinson, Northern Australian Aboriginal Legal Aid Service Darwin, *Transcript* at 1642.
67. P. Molan, NSW Magistrate, *Transcript* at 1910. See also the research discussed in Frieberg, Fox and Hogan, *op cit.* at 120.
68. S.94, H.Carinichael, Victorian Legal Aid Commission, at 24.
69. S.10, I. O'Connor, at 6.
70. S.10, I. O'Connor, at 5; S. Mir, Welfare Rights and Legal Centre Canberra, *Transcript* at 594; O'Connor and Tilbury, *op cit.* at 23.
71. P. Molan, NSW Magistrate, *Transcript* at 1906.
72. *Transcript* at 1908-09, 1911.
73. P. Molan, NSW Magistrate, *Transcript* at 1907; O'Connor and Tilbury, *op cit.* at 24.
74. A. McMillan, Youth Advocacy Centre Brisbane, *Transcript* at 221.
75. M. Rayner, *Transcript* at 644; P. Molan, NSW Magistrate, *Transcript* at 1908; O'Connor and Tilbury, *op cit.* at 24, 60.
76. M. Rayner, *Transcript* at 645.
77. S.10, I. O'Connor, at 5.
78. Frieberg, Fox and Hogan, *op cit.* at 122-23. Some lawyers rely on instructions from parents rather than the child; some form their own view of the child's best interest rather than acting on instructions: Rayner, *op cit.* at 64. There is a lack of statutory definition of the role of a child's legal representative. In Victoria the Children and Young Persons Bill, if passed, will introduce a provision that counsel representing a child must act in accordance with the child's wishes and instructions as far as practicable in view of the maturity of the child. No such provision is expressly made in any existing legislation.
79. H. Carmichael, Victorian Legal Aid Commission, *Transcript* at 1060.
80. A. McMillan, Youth Advocacy Centre Brisbane, *Transcript* at 221.
81. S. Boyle, Youth Legal Service (WA), *Transcript* at 710; S.10, I. O'Connor, at 8; S.33, Youth Legal Service (WA); O'Connor and Tilbury, *op cit.* at 26,70,91; and Rayner, *op cit.*
82. S.94, H.Carmichael, at 29-30.
83. A. McMillan, Youth Advocacy Centre Brisbane, *Transcript* at 221.
84. S. Boyle, Youth Legal Service (WA), *Transcript* at 707.
85. A. McMillan, Youth Advocacy Centre Brisbane, *Transcript* at 221.
86. S. Boyle, Youth Legal Service (WA), *Transcript* at 708.
87. S. Mir, Welfare Rights and Legal Centre Canberra, *Transcript* at 590.
88. P. Molan, NSW Magistrate, *Transcript* at 1908.
89. S. Mir, Welfare Rights and Legal Centre Canberra, *Transcript* at 595.

