

**HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION / AUSTRALIAN
LAW REFORM COMMISSION
ISSUES PAPER 18. "SPEAKING FOR OURSELVES; CHILDREN AND THE
LEGAL PROCESS:"**

Criminal Law.

Question 8.1. What issues effect the interaction of indigenous and NESB children with the juvenile justice system?

Recent statistics would suggest and our experience confirms that the NESB group of children who have most come into contact with the juvenile justice system of late are of Vietnamese, South-East Asian or occasionally Chinese origin.

This part of the Federation's submission has been prepared by staff at the Fitzroy Legal Service. Our experience concerning NESB children is presently dominated by young Vietnamese.

For the most part, these young people have experienced a turbulent life in their home country and probably more significantly have experienced the very unsettling experience of making their way to Australia via refugee camps. In many, many cases this process of refugee immigration has caused their separation from siblings and parents for significant periods during the life of the child.

This means that on arriving in Australia many young Vietnamese reside initially with aunts, uncles and grandparents or in the best situations with the mother or father but rarely with both of their parents.

It is very often the case that when young Vietnamese arrive in Australia their education has already been disrupted and most have very little knowledge of English. Many are barely literate in their first language. From the outset then, they are confronted with the difficulties associated with a disrupted family life and the need to begin to learn a new language, in circumstances where their education is already behind that of their contemporaries including knowledge of their own language.

It is our experience that it is a particular problem for young Vietnamese males that very often the father is either not in Australia or not associated with the family. This leaves the disciplining role for these young men to their mothers, sisters or grandparents. It may be that in their home countries, in a different cultural setting, family stability could be maintained despite the absence of the father. It would appear however that the challenge made to Vietnamese culture by the dominant Australian culture encourages young Vietnamese males to reject the discipline set by their families and to lead independent lives.

Our focus on young Vietnamese males is dictated by the fact that it is our experience that comparatively few Vietnamese females find themselves involved with the criminal justice system. When they are, it would appear that it is usually because they are acting in the company of male friends who are the instigators of the offending.

Given the problems which we have already outlined concerning family break-up, language and educational difficulties, it is hardly surprising that for the same group there are limited employment opportunities. What employment there is, is often to be found in the garment industry and it would appear that the wages and conditions offered to these young people are often below what they are legally entitled to. The poor pay and poor conditions ensure that many young Vietnamese do not stay in these occupations for long.

Given all of these circumstances, it is hardly surprising that many Vietnamese youth have been drawn into a street drug culture which has boomed in recent years because of the easy supply of heroin. We hardly need to point out that young people who feel marginalised because of their inability to compete with other students in the education system, without sufficient family support and unable to find satisfying employment are more likely to be attracted to experimenting with illicit drugs. The decision to use heroin is made easier by virtue of the fact that the price of heroin is now often so low that it is quite common for young people to smoke the drug initially rather than inject it. Obviously with further use and the development of addiction, some of these young people are drawn more deeply into the drug culture and become regular intravenous users of the drug.

It should also be pointed out that given the low wages available to young Vietnamese youth in unsatisfactory conditions, the amounts of money able to be made through minor street dealing make it difficult for many alienated Vietnamese youth to resist joining the drug culture at that level.

Many of the factors outlined above apply to other children of non-English speaking background however, we notice its effect far more in relation to Vietnamese young people than to other groups. We have received some reports that children from Lebanese, Bosnian-Serb and to a far lesser degree Pacific Islander cultures are facing similar difficulties. There is some anecdotal evidence to suggest that young people from Pacific Islander cultures are brought up in environments which are far more tolerant of physical discipline by parents and by older siblings of younger siblings and that at certain points in their teenage years young males are attracted to fighting as a means of demonstrating their growing manhood. It is our experience however that the family situations of these young people are far more stable and that the strong discipline which tends to be applied within the families is probably more effective in rehabilitating these young people than anything done by the juvenile justice system.

It is our view that the key issue concerning the interaction of children of NESB background with the juvenile justice system is their alienation from the dominant culture generally and their lack of trust and understanding of the roles of those in positions of authority who are almost invariably of white European background. This applies to almost every aspect of the juvenile justice system. The exclusion of any significant numbers of people from the NESB groups referred to in Issues Paper 18 amongst social workers, police, lawyers, magistrates and even court registry staff tends to reinforce the view amongst these young people that the juvenile justice system represents a system of which they are not and are not likely to ever be a part of.

Question 8.2. What role if any can the Commonwealth play in addressing these issues?

In our view the Commonwealth has a significant role to play in ensuring that programs and the necessary funding are available to ensure that ethnic specific workers, whether they be court staff, social workers, youth workers, police, lawyers, and even magistrates, should reflect a broader cross section of the community. While practically speaking, we acknowledge the fact that there are few lawyers from backgrounds which represent recently arrived immigrant groups, we are sure that if a serious effort was made to provide appropriate training, that far more people of appropriate background could fairly quickly be found and employed in at least some of these occupations.

We note for example that there are presently no youth workers at all whose job it is to focus specifically on the Fitzroy area. We presume that Fitzroy is not alone.

In addition, the Commonwealth must take responsibility in providing necessary supports to families from refugee backgrounds to minimise the effects of alienation. It is clear that unless it is intended that we should have U.S. style ethnically exclusive ghetto areas in our cities, that the Commonwealth must take a pro-active role in providing the appropriate educational supports and social worker supports for families which have been structurally weakened by the processes of emigrating as refugees.

Question 8.3. The Commissions are interested in receiving information relating to the representation and treatment of boys and girls in the juvenile justice systems in Australia.

It is correct to say that boys are significantly over-represented in the juvenile justice system compared to girls. It is the common wisdom that the significant reason for this is that rights of passage for young males are significantly different to those for young females.

It is apparent that within male culture exhibiting toughness and rebelliousness in one form or other, is important in establishing identity. The need to do so in this way is far more significant for young males who are failing to establish an identity in other ways. It is not surprising then that those who feature in the juvenile justice system are usually boys who are struggling at school, who have few family supports and whose occupational prospects are grim. The tightening of the labour market, particularly for those with out skills over the last decade has impacted significantly on young males.

For young males, particularly those whose alienation is exacerbated by family problems, the lack of meaningful employment opportunities often leads to the adopting of an attitude of not caring about the ramifications of criminal behaviour. This applies not only to the victims of their offending, but more particularly to themselves and therefore to the capacity of the juvenile justice system to implement sentencing procedures which have a deterrent effect. It is not unusual for young males to see incarceration in youth training centers or even in adult prisons as preferable to life on the outside. The view is sometimes taken that at least while in custody meals will be guaranteed, the opportunity will exist to take a break from substance abuse and indeed some facilities such as gymnasium equipment and educational opportunities exist in prison for them whereas they do not appear to exist for them in the broader community.

The far lower number of young females who are brought before the juvenile justice system creates difficulty in making meaningful statements of a general nature. It is apparent however that those girls who come into contact with the juvenile justice system on more than a fleeting basis, almost always do so because of backgrounds of abuse which ultimately have left many of them more open to risk taking behaviour. The low self esteem which often follows sexual and physical abuse in the home causes many young girls to seek solace in poly-drug use and often to support that use by involvement in prostitution.

A growing number of young females then become involved in other offending behaviour, usually with male accomplices, to obtain funds for basic necessities as well as for funding of their drug habits. It would appear that a preparedness to become involved in violent offences is more common amongst young females than in the past. We do not believe that sufficient research has been done at this stage for us to offer any explanation as to why this is so.

The experience for both young males and young females in dealing with police is often intimidating and degrading. It is our experience that young males are far more likely to be subjected to assaults by police, however girls are far more likely to be subjected to the making of degrading remarks often of a sexual nature by both male and female police officers.

We do not believe that we are in a position to demonstrate any difference in the treatment afforded young males and females by magistrates when passing sentence. Young females however appear to experience the extra difficulty associated with being in a very small numerical group. We believe that sentencing statistics will demonstrate that at any one time there are unlikely to be more than ten young females in custody in juvenile detention centers in the state of Victoria.

We believe that the duty lawyer system which has been provided by the Legal Aid Commission of Victoria, now known as Victoria Legal Aid provides adequate representation to both young males and young females. We are particularly concerned that any reduction in funding to Legal Aid may result in less assistance being made available to young people at court. As a group, young people, whether they be male or female often lack the awareness of how the judicial system works to approach lawyers prior to their attendance at court. The provision of lawyers well trained and available at the court on an ongoing basis is vital in ensuring that their views are properly put. There are weaknesses in the current system because often the duty lawyers are so overworked that they do not have the time to properly explain to young people the processes of the court and the ramifications of the decisions being made.

Question 8.4. The Commissions are interested in receiving information about whether children with psychiatric, language or learning difficulties come to the notice of police more often than other children.

In our view there is no doubt that children with these difficulties come to the notice of police more often than others.

We have already referred earlier in this section to the problems faced by children with language and learning difficulties. It is also apparent to us that many young people with psychiatric difficulties also find themselves in trouble with police.

It would be fair to say that young people with psychiatric difficulties are amongst the most marginalised in our society. Clearly if children with psychiatric difficulties are provided with significant supports, the chances of their coming to the notice of police are less. Our experience is that the police frequently intercept young people in public places, and on public transport systems for no particular reason. Young people who are homeless are more likely than any others to come to the notice of police. Anecdotally, we can say that there is often a link between the young person having psychiatric or psychological problems and to their being made homeless. Young people with these problems will often be difficult to manage and may become homeless because of the unwillingness of their families and those who are responsible for alternate accommodation to tolerate their difficult behaviour. In our view, homelessness virtually forces young people to commit offences to survive. The offending is most usually related to theft from motor vehicles, homes and shops. This occurs in addition to the need to obtain funds for basic necessities because of the boredom associated with being unemployed, outside the education system and without a home.

As we indicated earlier some young people with psychiatric or psychological problems can be difficult to manage. In some instances they resort to violent behaviour which is associated with their disordered mental states. It is of course usual for those who are subjected to such violence to ensure that these matters are brought to the attention of the police.

Question 8.23. What further limits if any should be put on the time police are given to question children?
How should any limits be defined?

We believe that the limit of two hours on the holding of people under the ages of 18 year as per the Crimes Act 1914 (Commonwealth) is sensible legislation. We would propose that such legislation be introduced Australia wide given that there is very little accountability in relation to police behaviour. We believe that it is entirely appropriate that the police should not be permitted to hold a person under the age of 18 years for more than two hours without being prepared to go before a magistrate to indicate why they believe it is necessary to do so. The Commonwealth should urge the States to adopt consistent legislation.

A significant difficulty in terms of the time limits to be placed on police questioning is the fact that the availability of magistrates and lawyers outside of normal working hours is severely limited. There should be funding provided to ensure that both magistrates and lawyers are available should police wish to hold young people for beyond two hours. Where there are problems with significant travel time being involved in investigations, there is no reason why police cannot contact magistrates and defence lawyers by telephone. The Commonwealth should make the necessary funding available to ensure that there is easy access to these people at all times.

Question 8.24 Are there proper reasons for different provisions in different jurisdictions?

We do not believe that there are any proper reasons for different provisions in different jurisdictions.

Question 8.25 Do additional steps need to be taken in order to overcome the particular vulnerability of children in dealing with police? If so what further steps can and should be taken?

We believe that significant work needs to be done to increase the accountability of police, not only in their dealings with children, but in their dealings with the public at large. To this end we believe that there needs to be a strong independent body established for the investigation of police complaints. There should be community visitors at police stations with unlimited access who can make surprise visits. There should also be unannounced monitoring by video of police stations and police vehicles.

In Victoria young people cannot be questioned by police in the absence of a parent guardian or independent person. Young people are also entitled to contact a lawyer for legal advice and a friend or relative to advise them that they are in police custody.

Although these rights exist, it is usually the case that young people are not able to contact lawyers either because the police indicate to them that it is not necessary or not welcome or because a lawyer is simply not available at the time of the arrest. It is our view that using the Victorian legislation as a model amendments should be made which require police to ensure that young people are given a real opportunity to contact a lawyer.

This could be made possible by the establishment of state or nationwide emergency telephone legal advice services. If a young person does not have a lawyer of their own choice to contact, then police should be required by legislation to contact the emergency legal advice number and allow the young person to speak to the lawyer. Should the young person in fact not wish to receive legal advice, they need only advise the lawyer of that and a record could be kept of what the young person said. To further ensure that when a young person expresses such a wish, that they are not doing so because of earlier intimidation by police, the lawyer could confirm that this is the situation by speaking to the parents, guardians or independent person.

It is also our view that an independent person register should be set up to ensure that those who act as independent persons are not people chosen by police because they have influenced young people to act in a way which suits the police. We are aware of examples in this state where independent persons have taken a role which ensures that young people are highly unlikely to exercise their right to silence. There is a need for training programs to be established to ensure that independent persons fully understand this role. There is a need also for the choice of who the independent person will be to be made by a person independent of the police. We would recommend that the Commission consider the Independent Person's Programme being established in Melbourne's northern suburbs with the assistance of the Victorian Council of Churches. Jacinta Nancarrow is co-ordinating its development and can be contacted on 9650 4511.

Question 8.28. Are the limits on police discretion investigating offences against children appropriate? If not, what limits should there be?

It is our view that there should be quite strict limits placed on police investigating offences against children because of the potential of using certain investigative matters or methods to intimidate the child.

The Commission is already aware of the Victorian legislative provisions concerning fingerprinting. It is our view that there should be no right to fingerprint persons under the age of 17 years without a court order. Further it is absolutely imperative that children and their legal representatives have the right to cross examine police or other witnesses so that courts can be placed in a proper position for establishing whether the request by police has merit.

It is our view that there should also be severe limits on police conducting strip searches on young people. The common law already provides restrictions on the exercise of the power to strip search by police. However, it is apparent that strip searches often occur inappropriately and little or nothing can be done about it. It is our view that to protect children from inappropriate strip searching there must be a requirement that police obtain a court order to enable them to conduct strip searches. There will obviously be many cases where police would argue that it is necessary to urgently conduct a strip search. In those cases the police should be required to conduct the strip search and then present to a court the basis upon which they did so. This would in effect place the Children's Court magistrates in a position where they could require some accountability from police in respect of how they conduct their investigations.

In order to ensure that police strictly follow legislative requirements concerning investigations, there should also be strong legislation which prevents use by the police of any evidence obtained illegally.

8.29 Are present arrangements for legal representation of children in police custody adequate?
8.30 If not, what can and should be done to improve the situation?

We referred earlier in this paper to the need for the establishment of state wide or nationwide emergency telephone access to lawyers. We believe that telephone access is the minimum requirement which should be met by government to ensure that young people properly understand their rights and feel free to exercise them should they wish.

A far better scenario would be to have 24 hour duty solicitors available to attend at police stations to advise young people of their rights and to fully advise them as to the benefit or otherwise for them should they chose to exercise those rights. It is our experience that young people who have been intimidated by police without a lawyer feel far safer when a lawyer is present and are in that way empowered to exercise their rights. This clearly applies most significantly to the exercise of the right to silence.

We have also already mentioned the independent person program being established with the assistance of the Victorian Council of Churches. We do not believe in any way that this a replacement to legal representation at a police station, however it would improve upon the current situation. A further problem faced by young people is that often parents and or guardians will take a role which is in fact against the interests of the young person. It is not uncommon for parents or guardians to be very angry if their children have gotten into trouble with police and to order their children to cooperate with the police by making admissions. In these circumstances it is absolutely imperative that children have access to legal advice if the right to silence is to have any meaning for them at all.

Question 8.34 Should there be a specialised Children's Magistracy ?
Question 8.35 If so, how could that best be achieved, particularly in rural and remote areas?

We unequivocally believe that there should be a specialised Children's Magistracy. This would require appropriate training of magistrates before being appointed to a Children's Court.

Rural Magistrates should also receive specialist training in dealing with children's matters however, a preferable option would be to establish circuit sittings by specialist Children's Court magistrates.

Question 8.36 Should Magistrates dealing with children's matters receive training in children's issues?
Question 8.37 If so what should that training entail?
Question 8.38 Should experience or qualifications in children's issues be a requirement for magistrates hearing criminal matters against children?

We have already indicated that we believe that magistrates should receive specialist training before being appointed to a Children's Court. We believe that that training should include topics such as child psychology, ethnic and indigenous children's issues, gender issues as they relate to children and social context issues. By social context issues we mean that magistrates should have a very clear understanding of how education systems currently operate and of changes occurring in youth subcultures. It would be helpful if magistrates were aware of, for instance, the sorts of drugs that young people are commonly using, why those drugs are being used, what their effects are and whether the particular drugs are being used simply for reasons of 'coolness' or whether there may be deeper issues involved. Magistrates should also be aware of socio-economic issues as they impact on children. Often the magistrates and indeed defence lawyers and others, judge young people by the values which were current when they were children. Very often those values are meaningless to young people. By way of example we dare to suggest that magistrates who may have passed through their teenage years in the Aquarius age will have

By way of example we dare to suggest that magistrates who may have passed through their teenage years in the Aquarius age will have difficulty understanding the behavioural patterns of young people whose subculture may be dominated by the values expressed in black American rap music. Magistrates should be fully aware of services available for rehabilitation.

We also believe that it is necessary to have special experience or qualifications in children's issues as a requirement for hearing criminal matters because overwhelmingly our experience is that children who commit offences also have problems not dissimilar to those children who appear in the family division of the children's court. Often the nature of those problems and the reaction of the young person to their problems are such that child welfare workers make the decision not to make applications for protection orders. Nevertheless in deciding on the appropriate disposition for a young person in a criminal matter, a magistrate needs to fully understand the social context in which young people act.

We have not specifically answered all questions asked by the Committee in the section on Criminal Law however, we believe that we have addressed those matters of greatest importance and those matters in which our practice gives us the most expertise.