REVIEW ARTICLE*

Children's Welfare and the Law: The Limits of Legal Intervention by M KING and J TROWELL (Sage, London, 1994) pp 1-192. Softcover recommended retail price $ 29.95 (ISBN 0-8039-8731-5).

Paediatricians, psychologists, welfare workers and others in the caring professions often express the greatest frustration with the legal system. Experienced child protection professionals, used to dealing with the courts, can readily cite case after case in which they consider the adversarial system has failed the children, the judge has not understood the significance of the evidence, or the children have been abused by a system which purports to protect them.

Frequently, the response to this frustration with the legal system is to call for more education - training for judges in gender sensitivity or child psychology, compulsory "Children and the Law" courses in law schools or specially trained lawyers to represent children in all cases in which their welfare is in issue. All these responses and more are the standard answers to the problem of the law's seeming inability to act consistently in ways which promote the welfare of children- while taking account of the complexity of the issues which are involved in making decisions concerning their welfare.

In a thought-provoking book, Michael King, an academic lawyer, and Judith Trowell a consultant with the Tavistock Clinic in London, take us deeper into these issues. The authors demonstrate how the problems that the law faces in promoting children's welfare arise from the fact that lawyers and welfare professionals approach the issues in entirely different ways. When the outcome of a court case is not beneficial to children's welfare this is often not because the legal system has failed, but because the legal system has operated in accordance with its normal conventions and reached legal decisions according to legal processes. The problem lies in the way that the law perceives the issues, the way it

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frames the questions to be asked, and in its methods for reaching answers. The problem also lies in the law's need to come to definitive findings of fact, sweeping aside the uncertainties which are endemic to the "soft sciences" such as psychiatry.

At the heart of the author's argument is the contention that "the only way the courts can decide complex issues is by reducing them to simple ones and, in doing so, much that concerns the child's future welfare disappears from view".[1]

This happens in many ways. One aspect which is common both to lawyers and psychiatrists is an individualising tendency which focuses attention on psychological explanations for human behaviour, obscuring from view the social and environmental factors which may affect how people respond in certain situations. Thus where a child has been neglected or abused, the focus of both the clinic and the court, in deciding whether the children should be removed from the home, tends to be upon the blameworthiness of the parents and, conversely, their individual potential to become more responsible and capable parents. This largely ignores the various social and environmental factors which might impact upon the family's circumstances. Even where the professionals involved are aware of these factors (as they often are), King and Trowell point out that "the professional framework in which they work tends to exclude them considering [these factors] as appropriate explanations for parents' or children's behaviour". Furthermore, because the legal and mental health professionals have very little influence over these factors, they tend to become peripheral to the main thrust of clinical or courtroom discussions.[2]

Thus the professional framework within which we discuss issues, and the *purpose* for which we discuss an issue, has a marked influence upon the way in which we perceive things. Through numerous case examples drawn from the work of the Tavistock Clinic, the authors show how the professional framework of the law is often quite unsuitable for determining complex issues about the best interests of children. The tendency of the courts is to frame "yes-no" questions to which they endeavour to find answers. Is this woman a fit mother? Is this parent capable of caring for the children? Was this child sexually abused, and if so, how often and by whom? Is it in the best interests of this child to live with her mother or her father? The story of a case, as told by the courts, can be as difficult from the reality as perceived by mental health professionals as a simple children's song is from a Stravinsky symphony. The complexity of interpersonal relationships, the necessary uncertainty of professional evaluations of what is best for an individual child or a family and the unpredictability of human behaviour is all simplified by the courts into yes or no answers to these "yes-no" questions which are framed by lawyers, for lawyers, to resolve particular disputes. Mental health professionals will frequently frame the questions differently, and so it is not surprising that they should come up with different answers - complex responses which cannot be reduced to the law's logical binary code.

King and Trowell demonstrate how the need to reach definitive conclusions about things one way or the other is one distorting factor in the law's approach to

1 M King, J Trowell, *Children's Welfare and the Law: The Limits of Legal Intervention*, Sage (1994) p106.
2 *Ibid*, pp 20-1.

child welfare. Another is the need to make decisions based upon a snapshot of real life. Courts are rarely able to monitor from a distance a fluid, changing situation which depends upon a range of circumstances. The Court's role in conflict resolution requires it to make decisions upon the available evidence (as filtered by the forensic process) at a given moment in time.

Many examples in the book concern allegations of sexual abuse. The authors note the dangers involved in turning the issue of sexual abuse into the sole issue on which a court case depends, obscuring all the other issues relevant to future decision-making about the child. In Chapter Five of the book, they helpfully illustrate how difficult it can be to make an unequivocal determination that a young child has been sexually abused, and how often the clinicians are asked by the courts to offer a definitive resolution of that issue when so much can depend on interpreting equivocal signs of distress in the absence of a clear disclosure.

In the light of King and Trowell's observations about English law, there is wisdom, perhaps, in the High Court's approach to the issue in the case of *M v M* [3] The Court said in that case:

> [T]he resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child. The Family Court's consideration of the paramount issue cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse.[4]

It is not clear, however, that the potential of this approach for decision-making by the Family Court has been fully explored. Instead of the binary code of "guilty of sexual abuse" and "not guilty of sexual abuse" we have in Australia a new binary code: there is an "unacceptable risk" of sexual abuse or there is not. There is definitely some smoke, or alternatively, we can be certain that an over-anxious mother has mistaken a heavy fog for the signs of fire. Thus far, the courts have not had the courage to offer a frank "don't know" answer to their own questions. A question once framed, must have an answer. There is an unacceptable risk or there is not. The law does not seem to countenance the possibility that the water might be too murky to see what is hidden at the bottom, that further time may need to pass before the picture becomes clearer, and that the only way of allowing the picture to become clearer is by preserving the child's relationship with parents.

Among the other important issues raised by the authors is the extent to which the therapeutic role of clinicians is distorted by the obligations placed upon them to play a role in the investigative process. They show how a failure to respect the confidentiality of the clinician's files, and a failure to understand the purposes for which those notes and observations might have been made, has led to changes in the manner in which records are kept and notes taken in order to conform clinical practice to the potential demands of the courts. The authors also show how damaging it can be to the therapeutic function for clinicians, who are trying to work constructively with families, to be caught up in providing answers to the law's questions and responding to its needs.

And now for the solution...

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3 (1988) 66 CLR 69.

4 *Ibid* at 76.

Well, not quite. Readers who are hoping for the magic wand to be produced in the final chapter will be disappointed. The authors have no magic answers, though in the penultimate chapter they do show how cases which were given as examples earlier in the book could have been handled differently by finding creative solutions which did not involve recourse to the courts. It is not the purpose of the book to wave magic wands. Indeed, it is the authors' conviction that for as long as courts apply legal processes to make legal decisions, these problems will continue because they are intrinsic to the nature of decision-making according to law.

However, in the final chapter, the authors do briefly offer alternatives. We are told that in France, the children's courts do not operate like courts. In Scotland, the courts do operate like courts but have a limited fact-finding role, leaving the decisions about the future of the children to "children's panels" which do not operate like courts. The descriptions of alternative systems are tantalisingly brief, and tend to gloss over some obvious problems with those systems. The Family Group Conference structure, pioneered in New Zealand, offers some advantages in dealing with problems the authors raise, but this system is mentioned only in passing.

If it had been the purpose of the book to offer ready-made solutions, the authors would be open to criticism for the brevity of this final chapter. This however, was not their aim. Rather, they have sought to illuminate the differences in the roles of clinic and court. It is in understanding these different roles, and above all, in appreciating the limits of law in promoting children's welfare, that we are best able to make sensible use of the courts and to know also when we must make every effort to divert the matter away from the courts. Through an understanding of the issues raised in this fine book, we may also come to know what we don't know about how best to promote children's welfare in a given situation, and to make decisions accordingly.