ADDRESS — "IN WHOSE BEST INTEREST" — JOHN ROBERTSON — B.A., L.L.B. SOLICITOR — BRISBANE — MONDAY, 9TH JULY 1984

ROBERTSON: Thank you Dianne. Just so that it can't be said that I'm here under false pretences I actually graduated in 1971, not 1981.

CLARKE: I thought you looked very young.

ROBERTSON: I'll take that as a compliment. Miss Chairwoman, Mr Hoare, the Honourable Mr Hoare, Mr Justice Vasta, Ladies and Gentlemen. My paper will be attempting to address the issue as to whose best interests if any are best served by the present Criminal Justice System. I presume that I have been asked to deliver this paper on the basis of my professional experience in the area of Child Abuse. Predominantly my experience has been in acting for male offenders charged with sexual offences against children. Predominantly these have been males who have been the natural fathers of the child victim or "inlocoprentice" to these children. My comments and conclusions and recommendations therefore must be considered in the light of this framework of my own experience.

I think it needs to be said at the outset that the Criminal Justice System deals only with a very small number of Child Abuse cases that actually occur in the community. Unitl recent times I think it's well accepted that there has been an appalling lack of recognition in society of this problem. It must also be remembered that the legal system is a responsive system, i.e. it responds to the changes in society, and I daresay that the lack of knowledge and the lack of recognition of this particular problem in society has been reflected in the Criminal Justice System up until recent times. In the course of my paper, I will be offering what I hope will be regarded as constructive criticisms of the Criminal Justice Systems and I think that at all times it must be recognised that it is not the System itself that is at fault but society as a whole. I think this was clearly recognised by the Royal Commission on Human Relationships in its highly controversial Report published in April 1977. Mr Justice Vasta has referred to it in his paper. The Commissioners in their report in **Volume 4 — Page 188** the following, clearly made the point "that society itself and Governments must bear some of the burden of this extremely serious problem because of the lack of parent preparation and education." In considering my topic I don't think anyone would dispute that the same comments and criticisms that are relevant to cases involving sexual abuse of children apply equally to cases involving physical abuse. In my paper I will be dealing with a number of topics.

Firstly I will be considering judicial trends and judicial attitudes in dealing with Child Abuse offenders. In this context I believe it is helpful to trace the development of the case law as evidenced in a number of Judgements of the Court of Criminal Appeal in recent times. The Court of Criminal Appeal represents the highest Court in our State and comprises the pinnacle if you like of our Criminal Justice System. Also in the context of Judicial trends and attitudes I will be dealing with the vexed question of the deterrent element of punishment as applied to offenders convicted of sexual offences relating to children. I will also be making some comments on the various punishment options open to the Court at the present time in dealing with these offenders and finally I will be dealing briefly with the role of the Children's Services Department and the suspected Child Abuse and Neglect Teams in the Criminal Justice System from my own perspective as a practising Lawyer.

In conclusion I will be advancing some proposals for discussion and reform of the present problems in the System as I see them.

If I could deal firstly with Judicial trends and attitudes. I have already made the point that it is only a very small number of actual Child Abuse cases that reach the Courts. The reasons for this are many. Many offences are not reported or complained of to Police or the Children's Services Officers. Many are not prosecuted for a lack of admissible evidence, and Mr Justice Vasta has made what I think are some very relevant comments about this. Some of recent times are not prosecuted as a result of a decision made by a SCAN Team or the Police not to do so in the interests of the family and only a very small number of these prosecutions come under the incisive spotlight of the Court of Criminal Appeal. Although there are relatively few pronouncements on the subject those that are available in my view are quite helpful in assessing present Judicial trends and attitudes in this area.

As far as I am aware the two most recent decisions of the Court of Criminal Appeal involving sexual offences against children, are **The Queen V Michael Adams** reported in the 1982 Criminal Appeal Reports — **Page 207** and **The Queen against Warren** ex-parte of the Attorney-General reported in **1979 Queensland State Report — Page 268.** Interestingly enough Mr Justice Hoare as he then was a member of both of those Courts. Both cases involved appeals by the Attorney-General against Probation Orders made by a District Court Judge in sentencing the particular defendants on charges of indecent dealing. Before examining the comments of the various Judges of the Court in these cases it's necessary to look briefly at the facts.

Warren was a case involving a fifty-four (54) year old offender without any previous convictions. The victim was a female child of eleven (11) years of age. The offences occured in a caravan park at a time when the offender's grand-children who were also of tender years were present. The offender held a position of trust in relation to the child victim. She in fact regarded him as her Grandfather. The factors which were reprehensible in the view of the Court were these:

The extreme discrepancy in age between offender and victim;

The fact that the offender had in that particular case in the view of the Court, pursued a scheme of premeditated perversion, in that he had attempted to corrupt the child's mind over a period of time by showing her lurid photographs and pornographic literature;

and finally the offences were committed in the presence of his Granddaughters.

The factors that were in the offender's favour in the view of the Court were:

His previous good character and record;

Psychiatric evidence which was before the Court which tended to show that it was unlikely that he would reoffend;

and finally the fact that the child was not physically harmed.

The Court in Warren's case by a majority of two to one declined the Appeal and did not interfere with the Probation Order made by the District Court Judge. Sir Charles Wantstall who was then the Chief Justice was the minority Judge. In his judgement he commented that in his view the District Court Judge took no account of the deterrent effect of a term of imprisonment on other persons likely to commit

these offences. He also made the comment that has general application that the Psychiatric Report tendered to the Judge was concerned only with the interests of the offender whereas the Courts must not only consider the rehabilitation of the offender but the much wider interest of the community in ensuring that such offenders are adequately punished. Sir Charles Wantstall in his judgement referred to a case of **R/The Queen V Viviers — 1942 — State Report Queensland — 230** as being the classical pronouncement of the Queensland Supreme Court of the principles to apply in sentencing these offenders. He commented that the comments of Chief Justice Webb in that case are still valid and applicable. The primary theme of the Judgement in Viviers' case as I see it, was that in dealing with the people charged with these offences the Court must take into account primarily the deterrent aspect of the sentence and therefore a custodial sentence was the most likely punishment. Mr Justice Hoare, as he then was, in the case of Warren, gave the majority judgement. his Honour made some very interesting comments on the deterrent aspect of punishment in these type of offences. He in fact reiterated views expressed by him on previous occasions in unreported decisions in the Court of Criminal Appeal and in particular a case of **Burns** which was heard by the Court of Criminal Appeal in December of 1974. At **Page 275** of the report of Warren's case, Mr Justice Hoare said this:

> "Except in the case of premeditated crimes committed for gain, there is now much less assurance by the Judges as to the effectiveness of a substantial prison sentence as a deterrent as was once the case."

His Honour, in his judgement, went on to point out that the facts and circumstances in these types of cases, i.e. sexual offence cases, are so varied as to make it impossible for a Tariff Sentence to be applicable. A Tariff Sentence is one which is the one normally applied in the case of particular offences, e.g. in relation to drink driving offences where one can predict accurately what the licence suspension and the fine will be. At **277** of the report of Warren's case, Mr Justice Hoare I think summed up a lot of the problems that are facing Judges in these types of offences at the present time. He said this:

> "In determining what is an appropriate sentence it is essential that the sentencing Judge bear in mind the interest of the victim, the community and the offender. Usually the interests of the community outweigh the interests of the offender. Frequently the interests of the community require the imposition of a substantial sentence even though this course may be clearly contrary to the future prospects of the individual. Of course the future prospects of the individual bear on the question of the interests of the community. A reformed citizen is likely to be a better member of the community than a person soured and possibly further corrupted by imprisonment."

The other case that I referred to before was **The Queen against Michael Adams** and again the Court was dealing with an Appeal by the Queensland Attorney-General against the inadequacy of a Probation Order imposed on a man convicted on his own admission of two offences of indecent dealing.

In this case the offender was fifty-five (55) years of age and the offences related to two different female children of eleven (11) and twelve (12) years. By unanimous decision the Court of Criminal Appeal comprising Mr Justice Hoare, Mr Justice W.B. Campbell, as he then was, and Mr Justice Andrews, as he then was allowed the Appeal and substituted a sentence of imprisonment for a period fo twelve (12) months. The primary consideration in the Appeal being allowed was the fact that the Respondent that is the Defendant, had previously been convicted in Israel and in Brisbane of related offences. He had also been convicted of two charges of aggravated assaults on females under the age of seventeen (17) years which offences had occured subsequently to him being charged with the offences being considered by the Court. Mr. Justice Hoare in this case distinguished the facts from the case of Warren for a number of reasons including the fact that the Defendant had no previous convictions and he bore an overall good record which was not the case in Adams.

The actions which constituted the offences were not committed as a series of incidents effecting children at large. There was persuasive evidence before the Trial Judge which indicated that the offender was unlikely to commit any similar offence. In the case of Adams there was no Psychiatric Report before the Court which could conclusively say that he wouldn't reoffend and of course the facts of his subsequent conviction on other offences clearly proved that he was a danger.

As part of the exercise in examining Judicial trends and attitudes in these types of cases, I have also accessed the Public Defender's Records which are extensive relating to previous sentences and I have reviewed the facts and circumstances relating to a large number of cases taken to the Court of Criminal Appeal since 1977. The cases of Adams and Warren are of course reported cases and that's why I have concentrated on them. But as a general statement the sentiments and views expressed in the reported cases are reflected in the unreported decisions as well. It is clear because of the great variety of facts and circumstances the sentences imposed by Courts for these types of offences vary greatly. Primarily the sentencing options for a Court in these type of cases appear to be between Probation and Imprisonment. This is one of the problems that I will refer to later in my paper.

From these cases I think a number of factors can be drawn out which at the present time influence Judges in imposing sentences on offenders. These factors are as follows:

> The previous good record or otherwise of the offender;
> Whether the offence was isolated or whether it comprised an act committed in the course of conduct over a lenghty period of time;
> The comparative age difference between the offender and the child victim;
> The likelihood of the offence being recommitted by the particular offender;
> Whether the offender held a position "in loco parentis" to the child victim;
> and in limited cases and I stress that, the effect on the child victim.

In general summary, I think it is fair to say that the majority of Judges in our Courts at the present time, are still swayed by the old principles enunciated in Viviers' case, i.e. that the essential role of punishment for these types of cases is to deter others. I myself prefer to more enlightened and more sensible view in the light of the overall community interest expressed by Mr Justice Hoare in the decision of Warren and in the decision of Burns which I havi referred to before, i.e. in considering the deterrent effect of punishment, one must take into account that class of persons who are likely to be deterred by the punishment. His Honour made the very good point in Warren's case that in considering the class of persons likely to be deterred by a sentence of imprisonment one must assume that these people respond in an approriate and normal way which of course is not the case. Another complicating factor in considering the deterrent effect of Custodial Sentences on persons convicted of sexual offences

relating to children is the effect of **Section 138 of the Children's Services Act. Section 138** gives the Court a discretion to prohibit publication of reports of proceedings involving an indictable offence in which a child is concerned. **Section 273 of the new Family and Community Bill** prohibits the publication of the name of any such child. It seems to take away the power of the Court to prohibit publication of these progeedings. The problem with **Section 138** or like sections in other states, is that if a Judge or a Justice decides to prohibit publication then any deterrent effect of a subsequent jail sentence is lost. Many Judges through the cases have commented on this anomaly. I have also reviewed a large number of unreported decisions of District Court Judges in these types of cases who of course have the primaary responsibility of sentencing people charged with indecent dealing. The same general attitudes reflected in the Court of Appeal are reflected in the Court. Some Judges will almost in all the circumstances impose a sentence of Custody unless the circumstances are extremely special whereas other Judges will rarely impose a Custodial Sentence unless the facts are particularly bad.

As a practising Criminal Lawyer of course and as a representative of society, this leads I think, to an unfortunate situation in that in deciding what course your client is to take one must consider the personal leanings of a particular Judge before whom you are appearing. My examination of the cases and the comments of Judges lead me to an important conclusion about our Criminal Justice System in this area. That is that the Judges are at the present time, to a large extent unaware of the operation of such bodies as the Suspected Child Abuse and Neglect Programme and for this reason I think their sentencing options are much limited. As it presently stands I think it is reasonable that the Judges regard their only options in these cases as being Probation or a sentence of imprisonment. However there is no consistent line of approach from Judges, there often being wildly different outcomes in cases involving similar facts. I think like society itself Judges need to be better informed about the Problem itself and about the methods of dealing with it as people are to have faith in the system. I would like now to make some general comments about the SCAN Programme and about the role of the Children's Services Department in these types of cases, from I stress the perspective of a practising Criminal Lawyer.

My own experience of the work of the SCAN Programme and my study of the research from the United States convinces me beyond any shadow of doubt that it is on the right track. I think the major benefiting factor of the SCAN Programme is that it attempts to deal with a family as a whole and doesn't isolate one particular segment of the problem. The SCAN Programme I think was referred to indrectly in the report of the Royal Commission on Human Relations which I referred to before. That report incidentally at that stage recommended one Child Protection Service at each stage of dealing with the problem of Child Abuse. I would certainly support that. The Report summarised the mechanisms of dealing with Child Abuse as follows:

> "Firstly, the detection of the abuse and that usually is generally through a General Practitioner, through a hospital or in some cases through a Teacher;
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> The second stage is the removal of the child on a temporary basis;
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> The third is an examination and assessment of the child;
>
> The fourth is the decision to prosecute and/or place in care;
>
> and the fifth is counselling for the family

and I point out that the SCAN Programme as one Child Protection Unit addresses each of those problems except of course for the detection aspect although that comes into it. I think one of the major problems with the SCAN Programme at the moment in Queensland is what I would describe as a identity crisis. My observation and experience in dealing with these Teams in individual cases leads me to think that they can't decide on their true role. On a number of occasions in my experience and in the experience of a number of my colleagues, the SCAN Teams have acted in an aribtrary way in the nature of the star chamber. It's always important I think in considering this problem that all times the Body entrusted with the difficult and complex problem of dealing with children, should if at all possible, maintain its credibility in the eyes of all persons involved. I think the problem of credibility in these isolated cases, and I stress isolated cases, has arisen because of a lack of understanding on both sides. When I say both sides, I mean Legal representatives acting for suspected offenders and members of the Children's Services Department and/or members of SCAN Teams.

The main area of conflict arises where on legal advice an offender has refused to co-operate with or at least to answer questions directed to him from the SCAN Team. The Law is quite clear at the present time, i.e. any admissions made to members of SCAN Teams in the context of an investigation by them into an alleged case of Child Abuse are admissible against the person in subsequent Court Proceedings. It seems to me therefore that if the SCAN Programme is to continue which I hope it will, then perhaps consideration should be given to the inclusion of a Lawyer as a member of each Team. Also consideration should be given to the altering of the Rules of Evidence to perhaps render inadmissible statements of a confessional nature made by an offender to members of the SCAN Team in the context of an investigation by them into suspected Child Abuse. My experience leads me to say that I think the same principles I have referred to above apply with the Children's Services Department. Unfortunately there almost seems to be traditionally an air of suspicion between Child Care Officers and Lawyers involved in these cases. I myself have always endeavoured to keep lines of communication open and I have always approached individual Child Care Officers in the spirit of co-operation trying to take into account all the factors. I believe that Conferences such as these with joint Committees involving both groups of professionals are essential to break down the barriers wihc exist at the present time. If this doesn't happen I don't think the SCAN Porgramme will be as effective as it would otherwise be and I think both Lawyers and Social Workers should recognise that there is this barrier. It's often a problem that's often swept under the carpet. In the light of these above general observations I now pose the question — "In Whose Best Interest Is The Criminal Justice System Presently Weighted?". For brevity's sake I will only deal briefly with each aspect.

Firstly, I deal with the community interest. In my view the present system does not benefit the community interest as a whole. It is generally accepted that much Child Abuse remains undetected. There is a fear in families in which Child Abuse is occuring that if for instance the mother comes forward it will lead ultimately to the imprisonment of the breadwinner in the family. Therefore as a direct consequence of the present system. I believe that much Child Abuse remains undetected and untreated and I do not think that this is in any way in the interests of the community as a whole. Further, it is well known that when Child Abuse offenders receive sentences of imprisonment they are almost invariably segrated in Her Majesty's Prison at Annerley. This is because of the peculiar social hierarchy that applies in prisons where offenders against children are regarded as the lowest of the

low. This leads to the consequence that persons who have been imprisoned for these types of offences are segrated in the company of other similar offenders. Any chance of rehabilitation in those circumstances seems to me to be entirely remote. It is more likely that in prison they'll become more corrupted in such circumstances and upon release they will be greater threat to the community. His Honour, Mr Justice Hoare, made reference to that in Warren's case and I have quoted that before. Therefore as I presently see it, the sentence of imprisonment in all but the most serious cases, seems to be an inappropriate to the community interests. In fact the **Report of the Royal Commission on Human Relationships** to which I have referred to on a number of occasions made that point in **Paragraph 253 of Volume 4.** They said "that the majority of cases on their findings, prosecution hindered rehabilitation." I hasten to add that there are cases that are so serious that prison is the only answer, if only to protect the family from further abuse.

Secondly I deal with the interests of the offender. Unfortunately my experience in this area leads me to the conclusion that men who commit these offences often come from families in which they were themselves abused by their own parents or were witness to abuse of a sister or a mother by the father figure. Many of them lack insight into their problem and most are acutely unaware of the awful consequences of their conduct. To send these men to jail into such an environment as I have referred to above seems absolutely pointless, however often Probation is not appropriate either if the particular Probation Officer is not trained or because of the lack of power in the Judge to impose suitable conditions the Probation Officer is very limited in how he can conduct the Probation with the offender. My conclusion is that at present time the Criminal Justice System does not in any way assist the interests of the offender.

"The Child Victim" — in reality I think the child victim in our present Criminal Justice System is ignored. I leave out of those considerations the activities of the SCAN Team which are of course of comparatively recent application. When an offender is prosecuted the child victim becomes a witness. If the offender decides to plead "not guilty" the child may then be put through what can only be described as a traumatic and harrowing experience of having to give evidence and to be cross-examined and to be confronted by the father figure in Court. On the rare occasions that I had been involved in such cases, ny experience leads me to conclude that the Court experience may be more damaging psychologically to the child than the actual physical abuse.

In the granting of Probation Orders the Courts do not directly take into account the interest of the child and I think that it is in this direction that major reforms are necessary. Above all, the System should aim to eliminate the sense of guilt the child complainants have and to integrate them back into a family unit where the conduct complained of is not seen by the child as being normal.

Fourthly, the family of the offender. Similar considerations apply in relation to the family of the offender. The mother who is often the person who reports the sexual abuse is placed in the unenviable position of having to make a decision which could lead to the imprisonment of the breadwinner in the family. This is an awesome responsibility for any woman in such a situation and often these women are socially and emotionally inadequate. Once again when the offender is prosecuted, the wife or the de facto wife, is often a witness. Any chance of reconciliation or rehabilitation for the benefit of the whole family is seriously jeopardised by this factor. The SCAN Programme of course directly addresses this problem in what I think is an enlightened way. It is accepted that many cases where the child complains, the mother takes the side of the father figure against the child for purely economic reasons. The consequences of such a situation to the child and the family are quite horrendous. In conclusion I would like to make some concrete proposals for reform which perhaps can be discussed now.

I believe that as a true reflection of society's reaction to the problem of Child Abuse the Criminal Justice system at present is doing little to alleviate the problem. I do not blame the Courts for this state of affairs because of the limited options open to them and the lack of research and knowledge of the problems up until now. I believe that the SCAN Programme should be widened and in this respect, the Government, as a major economic responsibility. The aims of the SCAN Unit should be clearly defined and I have suggested the inclusion of Lawyers in such Units to add to the present representation of Police, Social Workers, Psychiatrists and Paediatricians. I suggest also that the Rules of Evidence be altered to render inadmissible statements made by offenders to SCAN Units in the course of their investigation. I also susggest amendments to the relative legislation, i.e. the offender's Probation and Parole Act and the Family and Community Bill which is not yet Law, to provide for the compulsory presentation to the sentencing Judge in these cases of Reports of SCAN Teams or Officers of the Children's Services Department assigned to particular cases as well as relevant Psychiatric Reports concerning the offender. I believe Judges should in all cases involving sentencing of persons charged with Child Abuse offences have before them, if possible, evidence of the emotional and/or physical effect upon the child victim. This rarely happens in fact. Such cases would include assults of a sexual nature, indecent dealing, unlawful carnal knowledge, incest and rape. Finally I strongly suggest that the material be prepared including conclusions, particularly of research in the United States setting out the role and function and aspirations of the SCAN Programme and this material should be made available to all the Judges in our States.

Finally I too would like to commend the organisers of this Conference for addressing what is such a serious and frightening problem in our society.