THE USE OF CURFEWS TO CONTROL JUVENILE OFFENDING IN AUSTRALIA: MANAGING CRIME OR WASTING TIME?

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A concern in recent times with a perceived rise in juvenile offending has caused residents of a number of regional towns in Australia to propose or implement curfews on young people. For example, in 1990 Port Augusta in South Australia held a local referendum which recorded a vote in favour of a 10pm curfew on children under 16.[1] During 1991, Cloncurry in North West Queensland introduced a midnight to dawn curfew on teenagers.[2] The South Australian House of Assembly Select Committee on the Juvenile Justice System listed curfews as one option for controlling juvenile crime in its 1991 discussion paper[3] although it has made no recommendation in favour of curfews in its 1992 interim report.[4] The Western Australian coalition government was also recently elected with a law and order policy which included the implementation of juvenile curfews "in a number of country regions where problems of crime and violence exist as a characteristic of the region".[5]

There are a number of problems raised by the use of such curfews which are examined in this article. One major problem is that curfews clearly conflict with the fundamental liberties of young people to move freely about the community and to participate in various activities. These liberties are usually recognised as integral aspects of a free society and are supported by various international human rights instruments to which Australia is a party. The effect of these instruments and the fundamental nature of the freedoms infringed are therefore discussed in the context of the legal validity of curfews. We also discuss the apparent absence in municipal law of any clear authority to impose curfews and raise doubts about their legal basis. Indeed, Federal and State anti-discrimination laws may also prevent their use. But apart from the legal problems associated with the use

1 "Curfew on Children Unlikely to Go Ahead" *The Age* 13 Nov 1990 at 16.

2 "Cloncurry Sets Curfew" *The Courier Mail* 15 Nov 1991 at 1.

3 South Australia House of Assembly Select Committee on the Juvenile Justice System, *Juvenile Justice in South Australia: Options for Reform: A Discussion Paper for Public Comment* (1991) at 6.

4 Parliament of South Australia, House of Assembly, *Interim Report of the Select Committee on the Juvenile Justice System* (1992).

5 *Law and Order: Western Australian Coalition Policies for the Nineties*, Liberal Party of WA, National Party of Australia (WA) at 8.

of curfews there is also a lack of evidence to support their effectiveness as a crime control device. Thus we examine why, in spite of the many questions surrounding the usefulness of curfews, they are periodically suggested as a way to curb juvenile crime. It is suggested that the explanation for this apparent inconsistency can only be understood in the context of a public debate which seeks to blame young people and their families for behaviour which is often caused by factors beyond their control.

THE ATTRACTION OF CURFEWS

There is nothing novel in the use of curfews. The attraction of the curfew as a device to keep people off the streets at certain times of the day or night has been used throughout history as a means of social control.[6] The prerequisite to the imposition of a curfew is usually the declaration of a crisis or state of emergency to justify such action. In recent times some sectors of the community, accepting the common perception that juvenile crime is "out of control", have portrayed young offenders as "bad" and claimed that the crimes they commit are of a more serious nature than those committed by young people in the past. Accordingly, this is said to be evidence of a crisis which justifies the consideration of extreme responses,[7] including curfews.

It is well recognised that restricting the movement of people, or groups of people, will reduce crime rates.[8] But this approach to crime control comes at a price:

> [f]reedom of movement is a sine qua non of crime and it has been frequently observed that crime is one of the costs of freedom. Reduce freedom of movement and crime will decline. But if total immobility would mean crimelessness it would also mean economic and social death for the community. Therefore, the control imposed has to be geared to the amount of economic development and social fulfilment which is required.[9]

Such concerns are no less relevant when considering the imposition of curfews on children and young people. But the perceived benefits of a juvenile curfew — such as a reduction in juvenile crime, the protection of young people themselves from being the victims of crime and the increased opportunity for parental influence on housebound children — are often thought to outweigh such libertarian concerns. This cost-benefit analysis of curfews, however, raises two questions. First, are the costs in terms of restriction of young people's freedoms necessarily outweighed by the benefits? Secondly, are the benefits real or illusory? In attempting to answer these questions we turn in the first instance to the United States where juvenile curfews have been used extensively.

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6 Gruberg dates curfews from medieval times, to the time of Alfred the Great. He notes that the first American curfew law was enacted in Omaha, Nebraska in the late 1800s to regulate the hours of minors: *Encyclopedia Americana* (Grolier, 1981), at 330.

7 While such a view is not universally accepted, it has a high degree of currency and is often found in the popular media. See eg "Jail Terms Likely for Juveniles" *The Advertiser* 6 Jan 1992 at 5; "Battleground of Fear on the Streets" *The Advertiser* 8 Jan 1992 at 1; "Concern over WA Teen Criminals' move on SA" *The News* 14 Jan 1992 at 5; "Youth Crime Uproar" *The Advertiser* 21 May 1992 at 1.

8 Clifford, W and Mukherjee, S, *Crime Trends and Crime Prevention Strategies*, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Australian Discussion Paper, Topic 1 (1979) at 21.

9 Ibid.

THE UNITED STATES EXPERIENCE

The imposition of curfews on juveniles has a long history in the United States.[10] This history has resulted in periodic examinations of the conflict between curfews on juveniles and the democratic freedoms enshrined in the United States Constitution. Such examinations have considered the extent to which curfews undermine the interest of juveniles in being able to "venture away from home" as well as the effect of curfews on the interests of parents to raise their children without state interference.[11]

These considerations were raised in a 1975 challenge to juvenile curfew laws which reached the United States Supreme Court.[12] A young person aged 12 (and his mother) challenged the curfew imposed by Middletown, Pennsylvania. The curfew prohibited children under 12 from being on the streets without adult supervision after 10pm, children between 12 and 13 after 10.30pm and children 14 to 17 after 11pm.[13] It was argued that the curfew was in conflict with young people's freedoms of movement, speech, association, assembly and travel.[14] The mother also argued that the curfew infringed the rights of parents to direct the upbringing of their children and thus violated family autonomy, as well as infringing the equal protection amendment of the United States Constitution.[15]

A District Court had upheld the curfew on the basis that while it restricted the important right of freedom of movement for young people it also protected them from the harm that others might commit on them if they went about at night, even though the curfew was also aimed at preventing harm committed by young people. These considerations, according to the District Court, outweighed the freedom of juveniles to move about the community.[16] A majority of the Supreme Court declined to review the decision of the lower court with no discussion. But one of the minority, Marshall, J, was prepared to review the decision and articulated considerations which continue to leave some doubt over the lawfulness of curfews. He said:

> I have little doubt but that, absent a genuine emergency, ... a curfew aimed at all citizens could not survive constitutional scrutiny. This is true even though such a general curfew,

10 The latter part of the 19th century saw a flurry of activity in the United States around a proposal by Alexander Hogeland (dubbed the 'Father of the curfew law'): Note, "Curfew Ordinances and the Control of Nocturnal Juvenile Crime" (1958) 107 *Univ Penn LR* 66, n5. By the end of the 19th century there were 3,000 municipalities and villages in the United States with curfew ordinances: Ibid, citing Townsend, "Curfew for City Children" (1896) 163 *N Amer R* 725. Apparently, the use of curfews was fuelled by a fear that immigrants would not control their children: Note "Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution" (1984) 97 *Harvard LR* 1163.

11 "Curfew Ordinances and the Control of Nocturnal Juvenile Crime", above n10 at 98. The Fourteenth Amendment to the United States Constitution provides, inter alia, '... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

12 *Bykofsky v Middletown* 429 US 964.

13 Zimring, F E, *The Changing Legal World of Adolescence* (1982) at 11.

14 Id at 12.

15 Ibid.

16 Ibid. See also Cahill, P M, "Nonemergency Municipal Curfew Ordinances and the Liberty Interests of Minors" (1984) *Fordham Urban LJ* 513, 550–551.

> like the instant ordinance, would protect those subject to it from injury and prevent them from causing nocturnal mischief ...
>
> The question squarely presented by this case, then, is whether the due process rights of juveniles are entitled to lesser protection than those of adults. The prior decisions of this Court provide no clear answer. We have recognized that '[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights'. But we also have acknowledged that the State has somewhat broader authority to regulate the activities of children than of adults.[17]

Although the curfew was upheld in *Bykofsky,* the comments of the minority in that case, combined with the effect of later decisions in lower courts, have left the validity of curfews open to debate.[18] In *Johnson v City of Opelousas,*[19] for example, a juvenile curfew was held to be unconstitutional because it infringed the rights of free association guaranteed by the First Amendment to the United States Constitution.[20] In doing so the Court referred in particular to the "overbreadth" of the curfew ordinance which provided very few exceptions to the prohibition on young people's movements during the curfew period.[21] This type of ordinance has been contrasted with the ordinance in *Bykofsky* which had a number of exceptions, including its non-application to minors who had notified the sheriff's office that they were exercising their first amendment rights, minors returning home from a religious activity with prior notice given to the police, and minors with a current employment card signed by the Chief of Police.[22] Other United States decisions have held juvenile curfew ordinances to be "void for vagueness" because the words used to describe the activities prohibited did not clearly suggest activities of a wrongful nature.[23]

Juvenile curfews in the United States have also been analysed in terms of whether they infringe young people's due process rights.[24] Thus

> [i]n *Thistlewood v Trial Magistrate,*[25] the court considered three questions when evaluating the municipal curfew challenged by the arrested minors: (1) whether there is an evil creating a need for the juvenile curfew; (2) whether the means chosen has a 'real and substantial relation' to the end sought; and (3) whether the juvenile curfew 'unduly infringe[s] or oppress[es] fundamental rights'.[26]

17 Above n12, cited in Zimring, above n13.

18 See, eg, Cahill, above n16; "Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution", above n10; Note, "Juvenile Curfew Ordinances and the Constitution (1977) 76 *Michigan LR* 109.

19 658 F2d 1065 (5th Cir 1981) cited in Cahill, id at 536.

20 The First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

21 Cahill, above n16 at 536.

22 Id at 539.

23 Id at 545 citing: *In re Doe* 54 *Hawaii* 647, 651, 513 P2d 1385, 1388 (1973) 'loitering'; *City of Seattle v Pullman* 82 *Wash* 2d 794, 795, 514 P2d 1059, 1060 n1, 1063 (1973) 'loiter, idle, wander or play'.

24 Cahill, above n16 at 547–556.

25 236 *Md* 548, 204 A2d 688 (1964).

26 Id at 556.

While the first two questions posed in *Thistlewood* will cause considerable discussion about the perceived need and effectiveness of curfews in curbing juvenile crime (to which we will return below), it is the third question which deals with the more fundamental question of the role of the law in its dealing with young people.

In assessing the justifications for inhibiting the fundamental right of free movement of young people one commentary in the *Harvard Law Review* concluded that "[j]uvenile curfews protect no significant state interest pertaining only to children".[27] This conclusion relies on the application of the criteria used by the Supreme Court in *Bellotti v Baird*.[28] In that case the court dealt with restrictions on minors' access to abortions. Whether such restrictions were justified depended on a consideration of the vulnerability of children, the ability of children to make their own informed decisions and the central role of parents in the upbringing of their children.[29]

As the authors of the above commentary also observed, to support the special vulnerability of children as a justification for curfews on the basis that by restricting the movement of children they are protected from assault or other harm requires one to also accept the possibility of similar restrictions in relation to other vulnerable people such as the elderly and people with disabilities. The danger of the paternalism implicit in this justification is clear.[30] Nor can possible emotional harm be used as a justification to keep children off the streets:

> [b]anning children from the streets is not an attempt to adjust the legal system in order to shield children from some specific emotional trauma to which they may be especially vulnerable. Rather, it is an attempt to shelter them from some unspecified future harm — an attempt that simultaneously forecloses many beneficial opportunities.[31]

The idea that children cannot make mature decisions and are therefore more likely than adults to get into trouble[32] also provides little justification for the imposition of a curfew on all children. This rationale supports the handing of a broad discretion to law enforcement agencies to deal with children who may have done nothing more than breach the curfew. Once again, the restriction on the liberty of all because of the illegal acts of a few seems unbalanced.[33] Curfews are also seen to reduce the role of parents in determining how their children should be raised. Although forcing children to stay at home for longer periods may provide parents with opportunities to exercise control and influence, curfews operate at a more fundamental level to take away from parents their right to determine when their children are ready to make decisions for themselves.[34]

27 "Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution", above n10.

28 443 US 622 (1979) cited in "Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfevs and the Constitution", above n10 at 1173.

29 Ibid.

30 Id at 1175.

31 Id at 1175–6.

32 Id at 1177.

33 Id at 1177–8.

34 Id at 1178.

Underlying all of these objections to the use of curfews on young people is the problem that curfews send a message that the state holds young people in low esteem.

> If children are to grow up appreciating and cherishing the liberties and privileges enjoyed by citizens of this nation, the government must grant them those liberties to the greatest extent possible.[35] Undue restriction by the state, even in cases in which parental control varies from the ideal, may cause children to perceive a disparity between the liberties they are supposed to enjoy as citizens and those they do in fact enjoy. Minimal restriction of rights by the state is essential if we are to avoid 'teaching youth to discount important principles of our government as mere platitudes'.[36]

THE AUSTRALIAN POSITION

The United States experience of juvenile curfews is of direct relevance for Australia. Although Australia does not have a Bill of Rights entrenched in its Constitution as does the United States the issues which have arisen in that country with respect to juvenile curfews are equally applicable. Both countries have strong democratic traditions with a respect for fundamental freedoms such as freedom of movement and communication. It has now been accepted by the High Court that at least freedom of communication with respect to electoral matters is implicitly recognised by our Constitution,[37] although the full extent of such Constitutional protection is as yet unclear.

In addition to any Constitutional recognition of freedom of movement and communication, a number of intemational human rights documents to which Australia is a party[38] seek to protect people from arbitrary arrest or detention,[39] to prevent arbitrary interference with a person's privacy, family and attacks upon a person's honour and reputation,[40] to ensure the right to freedom of movement,[41] the right to freedom of peaceful assembly and association.[42] A curfew clearly has the potential to deny the exercise of these rights. In addition, there are a number of rights which may be infringed indirectly by the existence of a curfew. If people are denied freedom of movement at

35 Citing Foster and Freed "A Bill of Rights for Children" (1972) 6 *Family LQ* 343, 375 and quoting 'unless children are treated fairly and their rights are respected, it is idle to speak down to them about duty and responsibility' and also citing Rosenberg "The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past" (1980) 27 *UCLA LR* 656, 696 quoting '[i]f one is valued by a system, it is correspondingly easier to value that system'.

36 "Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution", above n10 at 1179–80, quoting *West Virginia State Board of Education v Barnette* 319 *US* 624, 637 (1943).

37 *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 108 ALR 577 per Mason, CJ at 594–595; Brennan, J at 602–603; Deane and Toohey, JJ at 622; Gaudron, J at 654–656.

38 A number of these instruments have been incorporated into domestic law through the *Human Rights and Equal Opportunity Act* 1986 (Cth). It is beyond the scope of this article to discuss the full extent of this incorporation. While this legislation specifically applies only to Commonwealth bodies, it would be wrong to think that the acceptance of the human rights embodied in the various instruments at a national level has no impact on State matters. See eg the discussion in Gaze, B and Jones, M, *Law, Liberty and Australian Democracy* (1990) at 54–56.

39 *Universal Declaration of Human Rights (UDHR)* article 9; *International Covenant on Civil and Political Rights (ICCPR)* article 9.

40 *UHDR* article 12; *ICCPR* article 17.

41 *UHDR* article 13; *ICCPR* article 12.

42 *UHDR* article 20; *ICCPR* article 21, 22.

particular times of the day they may be denied the right to practise a religion,[43] to work,[44] or to participate in the government of the country,[45] education,[46] and the cultural life of the community[47] as many activities associated with the exercise of these rights are held, or may be available, late in the evening when a curfew is likely to be imposed.

There is nothing in any of the human rights documents referred to above which suggests that the human rights they articulate are not applicable to all persons regardless of age. While there is a view that children do not enjoy full "adult" rights (as evidenced by some of the comments in *Bykofsky* above), it is clearly dangerous ground to deny to any powerless group, such as young people, a means of asserting their interests through the claiming of rights.[48] Indeed, while it is arguable that the recent *United Nations Convention on the Rights of the Child* to which Australia is a party has not clarified all of the issues concerning the rights of children,[49] it has at the least confirmed the rights of children to freedom of religion,[50] freedom of association and peaceful assembly,[51] protection from arbitrary or unlawful interference with privacy, family, honour and reputation,[52] education,[53] work,[54] and protection from arbitrary arrest, detention or imprisonment.[55]

It is true that the various international instruments mentioned above do not in themselves form part of Australian municipal law[56] and thus cannot form the basis for impugning curfews on young people. But it has been suggested that the common law of Australia should develop in a manner consistent with Australia's international legal obligations.[57] In *Dietrich v R*[58] Toohey J accepted this approach[59] while Mason CJ and McHugh J referred to it as a "commonsense approach" without explicitly endorsing it.[60] In the same case Brennan J described such obligations as a "legitimate influence on the development of the common law".[61] Dawson J acknowledged that when interpreting ambiguous legislation there is a presumption that Parliament intended to legislate in

43 *UHDR* article 18; *ICCPR* article 18.
44 *UHDR* article 23; *International Covenant on Economic, Social and Cultural Rights (ICESCR)* article 6.
45 *UHDR* article 21; *ICCPR* article 25.
46 *UHDR* article 26; *ICESCR* article 13.
47 *UHDR* article 27; *ICESCR* article 15.
48 See, eg, Donnison, D, "Rethinking Rights Talk" in Orchard, L and Dore, R (eds) *Markets, Morals and Public Policy* (1989).
49 See, eg, Bennett, W H, "A Critique of the Emerging Convention on the Rights of the Child" (1987) 20 *Cornell Intl LJ* 1, 31-34.
50 *United Nations Convention on the Rights of the Child (UNCRC)*, article 14.
51 *UNCRC*, article 15.
52 *UNCRC*, article 16.
53 *UNCRC*, article 28.
54 *UNCRC*, article 32 (by implication).
55 *UNCRC*, article 37.
56 See, eg, *Bradley v Commonwealth* (1973) 128 CLR 557; *Dietrich v R* (1992) 109 ALR 385 at 391 per Mason CJ and McHugh J.
57 *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569 per Kirby, P cited in *Dietrich*, above n56 at 392 per Mason CJ and McHugh J.
58 Above n57.
59 Id at 434.
60 Id at 392.
61 Id at 404 citing *Mabo v Queensland* (1992) 107 ALR at 29.

conformity with its treaty obligations. But he was uncertain as to whether this principle extended to resolving uncertainties in the common law.[62] The law is thus unclear as to the precise status of such international treaty obligations in municipal law. But it is clear that such obligations do shape municipal law as well as providing potent moral arguments in favour of the need to observe the rights contained therein. Thus it is possible that the courts could find a common law right to freedom of movement which would limit the availability of juvenile curfews.

Of course, some international human rights instruments have resulted in the establishment of enforceable rights under municipal law. One such example is in the area of racial discrimination which bears directly on the circumstances in which some attempts to impose curfews have arisen. For example, when Port Augusta discussed the need for a curfew on young people it was reported that "[t]here were claims that the proposal had racial overtones in a town where about 2000 of the 16,300 residents are Aborigines".[63]

The *International Convention on the Elimination of All Forms of Racial Discrimination* guarantees the rights to freedom of movement, freedom of religion, freedom of peaceful assembly and association, the right to work and the right to equal participation in cultural activities without distinction as to race, colour, national or ethnic origin.[64] The *Racial Discrimination Act* 1975 (Cth) seeks to implement that Convention in municipal law.[65] Of course, there are also State antidiscrimination laws which make racial discrimination unlawful.[66]

The problem for those seeking to apply such provisions to a curfew which may have as its real aim the targeting of a particular racial group, is that it is unlikely the curfew would be expressed in racist terms. Such curfews, however, may involve indirect discrimination which is addressed expressly in State legislation,[67] and implicitly in the Commonwealth legislation.[68] As Rowe notes:

> [e]ssentially, the principle is that, where a facially neutral rule, requirement, condition, practice or procedure is capable of being obeyed, satisfied, adhered to, or followed by the members of different groups in different proportions, then the rule (etc) must be justified in order to avoid a finding of unlawful discrimination.[69]

Thus, although it was denied that there was a racist motive behind attempts to impose a curfew in the case of Port Augusta by that city's mayor,[70] if the imposition resulted in an

62 Id at 426.

63 *The Age* 13 Nov 1990 at 16.

64 Article 5.

65 See esp s9(1).

66 See eg *Anti-Discrimination Act* 1977 (NSW) ss 6–22; *Equal Opportunity Act* 1984 (Vic) ss 4, 17; *Anti-Discrimination Act* 1991 (Qld), s7; *Equal Opportunity Act* 1984 (SA) ss 51–65; *Equal Opportunity Act* 1984 (WA) ss 36–52.

67 See Rowe, G C, "*Maynard v Neilson*: Goods and Services Discrimination Against Aboriginal People" (1988) 2/35 *Abor LB* 12, 13 at n15; *Anti-Discrimination Act* 1977 (NSW), ss7(2), 24(3), 39(3), 49A(3), 49P(3), 49ZG(2); *Equal Opportunity Act* 1984 (Vic), s17(5); *Anti-Discrimination Act* 1991 (Qld), s11; *Equal Opportunity Act* 1984 (SA), ss 29(3)(5)(6), 51, 66, 85a; *Equal Opportunity Act* 1984 (WA), ss 9(2), 10(2), 36(2), 53(2).

68 Ibid.

69 Ibid.

unequal application of the curfew across racial lines, then there would be an onus on those supporting the curfew to show there was no unlawful discrimination.

OTHER LEGAL AUTHORITY FOR THE IMPOSITION OF CURFEWS IN AUSTRALIA

The above discussion suggests that the validity of curfews may be questioned on the basis that they conflict with basic democratic rights. A curfew with no legislative basis must surely be open to challenge, although it is conceded that the success of such challenge would depend on the extent to which the courts are prepared to develop the common law in accordance with Australia's international legal obligations and impute to citizens common law rights such as freedom of movement. Of course legislation which authorises the use of curfews can *prima facie* override the common law. But such legislation might be made subject to any implied rights in the Constitution to free movement and communication as well as anti-discrimination legislation.

These qualifications on the ability of government to impose curfews are nevertheless still in the realm of arguable propositions. The novelty of the curfew in the Australian context has meant that there has been little in the way of extensive discussion of their legal basis. For this reason it is necessary to consider other possible sources in current law for the imposition of a curfew on juveniles.

It is necessary to draw a distinction at this point between the imposition of a curfew on selected individuals and one upon the whole child population. While both raise concerns with respect to the infringement of basic rights, there may be less concern where there is an attempt to restrict the movement of those who have, or who are alleged to have, offended than those who *may* offend. In Australia there is some evidence that this distinction is being made through the application of curfews as a condition of bail for young people charged with an offence.[71]

But the legal basis of such bail conditions seems to be open to question. In New South Wales Heilpern cites s36(2)(a) of the *Bail Act* 1978 (NSW) as the section which authorises curfews as a condition of bail. It provides that bail can be granted on condition that "the accused person enter into an agreement to observe specified requirements as to his conduct while at liberty on bail". Other States have similar provisions which allow bail to be granted on conditions specified by the Court or relevant officer.[72] But the limits of the authority to prescribe conditions of bail remain unclear. It would seem odd indeed if the bail legislation by the use of general language allowed bail to be used to curtail a person's democratic rights when most legal authority suggests that clear language must be used to remove common law rights.[73] The need to strike a balance between the use of a

70 *The Age* 13 Nov 1990 at 16.

71 Heilpern, D, "Curfews: Bail Gone Mad" (1991) 16 *Leg Serv B* 204.

72 See *Bail Act* 1977 (Vic) s5; *Bail Act* 1980 (Qld) s11; *Justices Act* 1921 (SA) s150a; *Bail Act* 1982 (WA) s28, Schedule Part D; *Justices Act* 1939 (Tas) s35.

73 See eg Gifford, D, *Statutory Interpretation* (1990) at 185; Pearce, D C and Geddes, R S, *Statutory Interpretation in Australia* (1988) at 104. See also *Australian Capital Television v Commonwealth*, above n37, per Dawson, J at 629 citing *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523.

curfew and the young person's fundamental rights has been raised by Heilpern. He argues that curfews should only be imposed as a bail condition where there has been an assessment of the home by a welfare agency, consent on the part of the young person and her or his family, where there is a real possibility that the young person would be incarcerated if convicted and that there be a regular review mechanism.[74]

Whatever the legal status of curfews imposed as part of a bail condition, there seem to be even greater problems with the imposition in Australia of curfews on a whole section of the child population. Attempts to impose such "general" curfews in Australia have, to our knowledge, only taken place in regional towns with the support of local government. There are obvious practical reasons why this might be the case. A small community has a relatively higher chance of success in imposing a curfew. The sheer number of homeless children in the capital cities would make the imposition of curfews on young people doomed to immediate failure.[75]

Another reason why curfews might be proposed in such areas is that they are often self-contained local government areas. In capital cities it would be unlikely that all local government authorities in and around metropolitan areas would agree on the imposition of a curfew. This would raise immediate problems for policing as young people moved around the city. Distance may be another factor in explaining their appearance in regional towns. In the case of Cloncurry, for example, the community is far away from the State's political centre and so accountability for their actions is a little less immediate. In addition, in circumstances where a curfew was imposed with strong local appeal,[76] it would require a central government which sought to strike it down because it thought the curfew was an inappropriate exercise of power to consider the local political implications of doing so. But while these reasons relate to the realpolitik of curfews very little examination has been undertaken of the legal authority possessed by local govemment to impose such curfews.

When Port Augusta voted in favour of a curfew it was reported that the State Government would have to pass legislation to give effect to the curfew.[77] This would seem to be in accordance with the view that the right to move freely around the community is a fundamental right possessed by all people and clear legislation is required to take it away.[78] However, the likelihood of such legislation being passed in South Australia is remote given the form of its equal opportunity legislation.[79] This legislation prohibits age as a basis for discrimination in certain circumstances.[80] While it is not clear that such provisions may prohibit the use of juvenile curfews,[81] it would be against the

74 Aboven71 at 205.

75 The Western Australian Government have also acknowledged these factors in their policy on the use of juvenile curfews. It provides that curfews will only be implemented in country regions 'where there is support from the community, the local council and police': see above n5.

76 For example, the referendum held in Port Augusta recorded a vote of 3,707 in favour of the curfew as against 716 opposed to it. 4,500 voted out of 10,000 registered voters: *The Age* 13 Nov 1990 at 16.

77 *The Age* 13 Nov 1990 at 16.

78 This is apparently based on the view that freedom of movement is such a fundamental common law right that only clear and unambiguous legislation could abrogate it: see references at n73 above.

79 *Equal Opportunity Act* 1984 (SA).

80 *Equal Opportunity Act* 1989 (SA) ss85a–851.

spirit of such legislation to reinforce discriminatory practices based on age.[82] In addition, to the extent that curfews disguise racial discrimination, the equal opportunity legislation also prohibits such discrimination.[83] Again, even though the specific practice of curfews or police practices may not be covered in such provisions, it would be against the spirit of the legislation to implement such curfews. Of course, it would also be likely that such laws would offend Australia's international human rights obligations discussed above.[84]

In the case of Cloncurry, the legal basis for the curfew is unclear. It is likely that the curfew is based on a mixture of bluff and a particular view of "community policing" which the Queensland Police Service has embraced in the post-Fitzgerald era. This is evident from a description of the curfew as one where "members of the community patrol the town each night and the names of juveniles found on the streets in the early hours are passed on to police".[85] The police then "contact the parents and the kids and have a quiet chat".[86] The Cloncurry curfew is also reportedly linked to the establishment of a volunteer youth information officer who has initiated various activities to tackle youth boredom.[87]

Although it has not been claimed to be a local government initiative it is necessary to consider the extent to which the power to impose a curfew in Cloncurry could be claimed by local government in Queensland. The *Local Government Act* 1936 (Qld) charges local authorities "with the good rule and government" of their local government area including the power to make bylaws "for promoting and maintaining the peace, comfort. culture, education, health, morals, welfare, safety, convenience, food supply, housing, trade, commerce, and manufactures of the [local area] and its inhabitants, and for the planning, development, and embellishment of the [local area], and for the general good rule and government of the [local area] and its inhabitants". The section also lists specific by-law making powers, none of which are relevant for this discussion. The question is whether the general power conferred on local government in s30 would support a by-law imposing a curfew.

81 The Act prohibits discrimination on the basis of age in the areas of employment (s85b), agency (s85c), contract work (s85d), business partnerships (s85e), membership of associations (s85g), professional and trade bodies (s85h), education (s85i), sale of land (s85j), the provision of goods and services (s85k), and accommodation (s85l).

82 A curfew would clearly make it more difficult for a young person to exercise the rights which the *Equal Opportunity Act* seeks to make available.

83 See above n66.

84 It is not clear to what extent such international obligations would invalidate State laws which sought to impose curfews. It is probable that such obligations would have more political impact than legal effect, although the interaction between international law and State law in this area is still to be properly explored. A recent example of the conflict in this area occurred when the Western Australian Parliament enacted new juvenile justice laws which arguably conflicted with the United Nations Convention on the Rights of the Child which Australia has ratified. Although there was some threat of Federal legislation to invalidate the State law, nothing has as yet happened in this regard although the State legislation was apparently redrafted to deal with these concerns. However, the Convention still provides an avenue of complaint against Australia for breaching the Convention, and this may yet occur. See "Canberra Tries to Stop Tough Juvenile Laws on Human Rights Grounds" *Australian* 22 Jan 1992 at 1; White, R, "Tough Laws for Hard-core Politicians" (1992) 17 *Alt LJ* 58.

85 "Cloncurry Sets Curfew", *Courier-Mail* 15 Nov 1991 at 1.

86 Ibid.

87 Ibid.

There are no cases, of which we are aware, on point. But in *Boral Resources v Johnstone Shire Council*[88] the Supreme Court discussed the general effect of s30. The specific issue in the case was whether the Council could rely on the general powers in s30 to undertake quarrying activities. Connolly, J commented:

> [t]he functions and powers of local government are stated extensively in s30 of the *Local Government Act.* A local authority is charged with the good rule and government of the whole or any part of its area. Although this grant of power resembles the formula for the plenary grant of power to say the legislature of a State, so detailed are the heads of power subsequently committed to local authorities that the power of a local authority when challenged is not ordinarily referred to the general grant.[89]

He then found a specific power in the Act to support the Council's activities.

But Thomas, J was impressed by the extent of the general power given to Councils by the Act. He said that:

> [t]he breadth of s30 is sometimes overlooked, perhaps because it does go further than the powers conferred elsewhere in Australia. On its introduction it was apparently regarded in local government circles as remarkable, but it has not been copied elsewhere ... I do not think that this wide power of general competence has been weakened by the gradual accumulation of further specific powers. In my view, *quite apart from the general power,* the specific power in s30 as to the undertaking of or the provision of a quarry is sufficient to permit the Council to perform the activities which it has hitherto performed, unless there is some other limitation or provision in the Act which requires a narrower view to be taken.[90]

This conclusion may have significant implications for the power of local government to impose curfews on young people, at least in Queensland. In the climate of a perceived increase in juvenile offending, it would not be difficult to argue that a curfew on young people promoted the peace, comfort, health, morals, welfare, safety and convenience of the local govemment area as required by section 30.[91] Of course, such matters have not been traditional concems of local govemment, and as Connolly, J noted, local govemments have tended to take their cues from their specific powers rather than relying on a general power. However, the comments of Thomas, J may suggest that local governments need not so restrict themselves. Of course, the validity of a curfew which relied on this general power will still depend on the considerations discussed above with respect to the various human rights instruments to which Australia is a party and the relevant antidiscrimination legislation.

88 [1990] 2 Qd R 18.

89 Id at 19.

90 Id at 24 (our emphasis).

91 In the United States some States authorise the enactment of curfews by local government, while other local government authorities pass curfew ordinances pursuant to their 'home rule powers', that is a power under a State Constitution to make 'within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws': see generally Cahill, above n16 at 519–520 and this example cited from the California Constitution, at 520.

THE EFFECTIVENESS OF CURFEW IMPOSED ON YOUNG PEOPLE

Whether or not the use of curfews is lawful in Australia, there are also arguments against their use based on their ineffectiveness.[92] An Ontario Task Force on Vandalism in 1981 considered the use of curfews as a means of reducing vandalism. Although the Task Force could see some value in curfews it noted that:

> the curfew will be relevant only in certain circumstances, for example, where the damage is, indeed, being done after the curfew hour ... and where it is being committed by people under sixteen years old. Even if both of these are found to be the case, curfews are an indirect way of dealing with the problem: at best they include nonvandalizing youth in their net; at worst they trap a disproportionate number of nonvandalizing youth and miss those actually causing damage.[93]

The manner in which a curfew may be used to discriminate against certain groups of youths rather than being a legitimate attempt to contain juvenile crime has also been identified in the United States. The Task Force on Juvenile Justice and Delinquency Prevention noted the vagueness of many curfew ordinances which led to discrimination "with police tending to enforce them primarily against minority, lower class, or tough youth whom they assume are more likely than other youths to commit crimes".[94]

But even if curfews were administered in an evenhanded manner there are still problems in assessing their effectiveness. The fact that much crime goes undetected and that the relationship between detected crime and the actual crime rate depends on policing methods, means that it is almost impossible to ascertain accurately the amount of crime committed by juveniles.[95] There is thus little against which to measure the effectiveness of a curfew imposed on young people.

CURFEWS AND THE POLICING OF FAMILIES

The use of curfews to control juvenile crime appears to be fraught with difficulties. They offend basic democratic rights and their effectiveness is questionable. Yet they continue to be suggested as a way of dealing with the criminal activity of young people. Why? We submit that curfew proposals are not in fact primarily about crime control. It is only possible to understand the debate on curfews by understanding the broader function which they perform in regulating the behaviour of families. It is also this function which explains the resurgence of interest in curfews. This function is explicit in the often stated aims of the curfew as a means of reinforcing the traditional role of the family.

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92 Such an argument may also be relevant to the lawfulness of curfews if the United States approach is adopted of determining whether the restrictions imposed are justifiable in terms of whether the curfew achieves its purpose.

93 *Vandalism: Responses and Responsibilities*, Report of the Task Force on Vandalism, Ontario, 1981 at 143.

94 *Juvenile Justice and Delinquency Prevention*: Report of the Task Force on Juvenile Justice and Delinquency Prevention, National Advisory Committee on Criminal Justice Standards and Goals, Washington DC, 1976 at 311.

95 "Curfew Ordinances and the Control of Nocturnal Juvenile Crime", above n10 at 95; see also New South Wales Youth Justice Coalition, *Kids in Justice: a Blueprint for the 90s*: Full Report of the Youth Justice Project (1990) at 20–22.

> Some persons subscribe to the view that juveniles ought to be at home at night regardless of their individual dispositions to do wrong, and that therefore the curfew is thought by some to promote family life.[96]

Heilpern also refers to the role of curfews in placing responsibility back on to the parents and re-establishing family networks and support.[97] Curfews can thus be seen as part of a wider programme to shift responsibility for the behaviour of young people away from the state and on to families, thereby increasing family responsibility and reducing the economic burden placed on the state for the care of young people.[98]

But the dangers in the state abrogating responsibility for young people's welfare is apparent in the operation of curfews. Heilpern argues that the home can be a dangerous place for young people to be in terms of family violence, and even in homes where there may be no such danger the forcing together of a family may not promote a cohesive family but have the opposite effect.[99] As Heilpern says:

> [f]or a family to be forced together every night without relief or intervention is a recipe for disaster. This is particularly the case when the young person is also unemployed — a curfew can mean they are at home 24 hours a day. The parent has the ultimate weapon for disobedience — the police and arrest.[100] Similar problems have been raised by the Juvenile Justice Advisory Council of New South Wales in relation to home detention of juveniles. This body noted the problem of confining a young person in an environment which may have caused her or his offending in the first place as well as the pressure on the family to supervise the order. Notably, the Council has been unable to agree on the value of home detention for juveniles.[101]

The curfew can thus become a mechanism for imposing one view of how a family should conduct itself over another. Consider the basic practical point of the hours during which a curfew should apply. It cannot be assumed that this is a simple matter, even amongst those who accept the need for a curfew.

> The time at which a curfew should commence, for example, will be determined in part by what police statistics reveal to be the significant hours of crime commission, but in even greater measure should be determined by the community sense of the proper time for cessation of outdoor juvenile social activity. Parents of diverse cultural backgrounds might well disagree on the amount of evening social activity which is desirable for their children in order to mold mature and healthy adult personalities.[102]

Although these considerations may suggest even more compelling arguments as to why curfews should not be imposed on young people, they also provide the reasons why they are still on the social agenda. Curfews provide a mechanism whereby families can be

96 "Curfew Ordinances and the Control of Nocturnal Juvenile Crime", above n10 at 67.

97 Heilpern, above n71 at 294.

98 See, eg, Sawer, M, "The Battle for the Family: Family Policy in Australian Electoral Politics in the 1980s" (1990) 25 *Politics* 48–61; Eekelaar, J, "Parental Responsibility: State of Nature or Nature of the State?" (1991) *J Soc Welf & Fam L* 37–50.

99 Heilpern, above n71 at 294.

100 Id at 295.

101 Juvenile Justice Advisory Council of New South Wales, *Green Paper: Future Directions for Juvenile Justice in New South Wales*, 1993 at 175.

102 "Curfew Ordinances and the Control of Nocturnal Juvenile Crime", above n10 at 100.

regulated through the manner in which they reinforce a particular view of appropriate family behaviour. It is implicit in the concept of a curfew that parents are expected to keep their children indoors after dark and that they are responsible for their behaviour. Thus the use of curfews constructs the discourse surrounding the role of the family. Notions of increased family responsibility become the focus of debate at the expense of acknowledging structural inequalities which perpetuate perceived "family failure".

CONCLUSION

Curfews on youth are a neat way of sidestepping the important issue of how market forces disadvantage certain groups in our society. The economic restraint that has been witnessed during the 1980s and early 1990s has left us with an underbelly of youth who have never known employment, have little education and are sometimes left without family support. What role, for example, does the enforcement of a curfew play regarding homeless youth?

And what of those youth on the streets who do have a home to go to? It is clear that the economic circumstances in which we find ourselves has had a particularly harsh effect on the poorer and socially disadvantaged families in our society who are already subject to close scrutiny in a number of policy areas. This individualised focus on increasing family responsibility during troubled times is nothing new, for as Gittins comments:

> [the family] causes most concern during periods of economic recession where there is a change in the rate of population growth, and/or during times when fear of political unrest and upheaval is acute. The three often go together and all provide insight into why 'the family' becomes a political issue during such periods.[103]

In such times the role of the state in ensuring that families socialise their children to behave "appropriately" is of more importance than the immediate needs of young people.[104]

Thus although juvenile curfews can be critiqued on the basis that they assume too readily that the home is a safe place for the young person to be contained for lengthy periods of time and that placing a young person on a curfew could in some instances be placing the young person in a very dangerous situation, this critique, to some extent, misses the point. Curfews are fundamentally about seeking to promote the family as the responsible agency for the care of children while ensuring that the family conforms to a particular definition of correct conduct. The concern is that this definition will contain a bias in favour of those groups with power in society resulting in the promotion of an ideology based on individual responsibility and a reduced role for the state in social welfare. The likely consequence is that those most in need of social support will be those most likely to be subjected to a curfew and those most likely to fail its conditions.

A response to the use of curfews is that there should be greater concentration on the structural factors which lie behind juvenile crime rather than the positing of solutions which merely seek to reinforce this ideology. These "solutions" are more about

103 Gittins, D, *The Family in Question: Changing Households and Familiar Ideologies* (1985) at 155.

104 See eg Dingwall, R, Eekelaar, J M and Murray, T, "Childhood as a Social Problem: a Survey of the History of Legal Regulation" (1987) 14 *J L & Soc* 207.

controlling crime than eliminating the social conditions which cause it. It is a sad indictment on our society that a crime control strategy which has been used extensively in the United States for over 100 years with apparently limited success can still command serious attention. Curfews discriminate against the poor. The committal of young people to their places of residence for certain hours each day contains a subtle bias in favour of the children of the affluent. The concerns of 35 years ago still have relevance:

> [i]n a city with overcrowded or slum areas, the character of the actual housing facilities might be such that there simply is not adequate living space indoors to permit children, required to remain at home some hours before bedtime, to healthfully occupy their time — particularly in the summer when school vacations permit even later waking hours. In such a community the provisions of the curfew might be entirely intolerable and unreasonable while the identical law, providing the same hours and applicable to the same age groups, would be far less subject to attack in a wealthy suburban area where most homes are equipped with playrooms, television sets and the like. Similarly, the character of public recreational facilities provided in a particular community would have direct bearing on the reasonableness of a requirement that children remain in their homes in the evening. The danger of antisocial activity is far less where juveniles may constructively occupy themselves away from home than where they may only roam the streets.[105]

Curfews will also inevitably contain cultural biases as they depend on certain assumptions about the role of the family with respect to the care of children. The fundamental rights and freedoms upon which our society is based must be asserted in favour of those young people who would bear the brunt of a juvenile curfew. The striking down of such curfews on the basis that they infringe those rights and freedoms may be one way in which attention is focussed on the structural factors which reduce the quality of life for many young people and contribute to the incidence of juvenile offending.

105 "Curfew Ordinances and the Control of Nocturnal Juvenile Crime", above n10 at 100.