



# **OPERATION OF COURTS IN THE CHILD PROTECTION SYSTEM**

**NSW DEPARTMENT OF COMMUNITY SERVICES  
SUBMISSION TO SPECIAL COMMISSION OF INQUIRY**

**FEBRUARY 2008**

**(Abridged)**

## **A EXECUTIVE SUMMARY**

In all actions and decisions within the care jurisdiction, the paramount consideration should be the safety, welfare and well-being of the children. In making decisions about children, history and principle are clear that decisions about the removal of children by the State and the reallocation of parental responsibility to the State need to be made by an independent body that acts transparently, requires accountability and proceeds fairly. But beyond these questions of removal and parental responsibility, it is also the case that the decisions that are to be made will need to be made on an almost daily basis as parental responsibility can impact on all aspects of the daily lives of children.

Decisions about the day to day activities of children need to be flexible while building stability for the child; they need to recognise complexities and constraints while building long term planning for the child, and they need to be made so that, to the greatest extent possible, the decisions can be accepted and adopted by everyone working for the child. These decisions will be significant in the life of the child and in the way a child welfare agency operates. It is not appropriate to leave these decisions to a court, as a court is not designed to have the ability to respond in the manner required.

It cannot be assumed that a court will always be the best decision-maker nor that alternative approaches adopted by other models or by other oversight agencies have less validity.

The current mix of court and tribunal arrangements, combined with the manner in which they are conducted, do meet many of the needs of children but are inadequate at:

- building suitable working arrangements between families, carers and child welfare agencies which will allow these parties to cooperate for the benefit of the child over many years. No matter how appropriate adversarial approaches might be to identifying a solution to a critical incident, they do not assist in

building mutual respect and an understanding of each relevant perspective within complex familial arrangements.

- building a specialist care jurisdiction that contains judicial or other officers who have skill, knowledge and a comprehensive coverage of matters across the State
- providing a consistent approach across all parts of the State
- providing oversight of the daily decision-making necessary for a child in out-of-home care rather than allowing out-of-home care arrangements to be developed within a framework that is judicially approved.
- Giving a clear and rational divide between the functions of the various courts and tribunals.

To reinstate the child as the paramount consideration, this submission argues that a fresh approach should be taken and the structure of the courts and tribunals should be looked at anew.

## 1. INTRODUCTION

### 1.1 Courts and tribunals in the child protection system

While it is often presumed that the Children's Court is the sole court operating within the child protection system this is not the case. There needs to be a general understanding of how a number of existing courts and tribunals operate.

The present role of Courts in the child protection system is that:

***Administrative Decisions Tribunal*** reviews a range of decisions especially concerning out-of-home care and including decisions about the authorisation of carers, the removal of a child from the daily care of an authorised carer, the interstate transfer of care orders and the disclosure of information about the placement of a child.

***Children's Court*** deals with applications where a child has been removed by the State from parental responsibility or the State seeks court orders concerning the exercise of parental responsibility.

***Coroner's Court*** deals with child deaths, particularly those children associated with the child protection system, and includes the making of recommendations that arise from the circumstances of the death.

***District Court*** hears appeals from interlocutory and final orders of the Children's Court.

**Family Court** hears applications under the *Family Law Act* which can deal specifically with the welfare of the child or where there has been an international child abduction. The Magellan Project of that Court has specifically involved this Department in a number of matters where there are allegations of child abuse.

**Federal Magistrates Court** hears applications under the *Family Law Act*.

**Guardianship Tribunal** hears applications concerning the special medical treatment of children as well as guardianship, financial management and medical treatment issues for young persons with an intellectual disability.

**Supreme Court** hears applications for prerogative writs concerning interim orders of the Children's Court; applications in its inherent jurisdiction concerning medical issues; determines parentage under the *Status of Children Act*, and deals with adoption applications.

Any suggestion that the child protection system currently uses only judicial decision-making within the Children's Court is therefore incorrect. The system as a whole already uses a mix of court and tribunal models – not always consistently or with the primary purpose of supporting the safety, welfare and well-being of the child.

The use of various models of judicial decision making is discussed in a separate paper (Tab A). This is done to enhance ease of reference to these alternative models and, where possible, to separate comments on new models from those on the existing system.

## **1.2 The purpose of the Children's Court**

In the recent Review of Statutory Child Protection, the submission of the Attorney General's Department dated March 2007 encapsulated a number of submissions where it described the purpose of the Children's Court in care proceedings as meeting a need to have judicial oversight and involvement in care matters because of the gravity of the decision being made; to provide an assurance that due process is being observed; to put appropriate safeguards in place, and to provide a level of detachment to remove decision making from being "entangled with caseworker values and issues with the family, the child and workloads." To these reasons can be added compliance with the UN *Convention on the Rights of the Child* (especially articles 9 and 19) which talks of the need for judicial review of the separation of a child from the child's family and such other judicial involvement as appropriate.

In compliance with the Convention, and because it is accepted that a court provides an independent examination and judicially determined decision, it is acknowledged that the decision whether the State should remove a child from its family (without the family's consent) is one to be made by a court. Within the current system this includes what is known as the "establishment phase" and orders as to parental responsibility. The "establishment phase" is to satisfy the preliminary threshold question of whether the child is in need of

care and protection. Without an affirmative answer to this question, the care jurisdiction has no further role. In satisfying this question, whatever other criticisms might be made, this Department is invariably successful in having the court determine that the child for whom an application is brought is in need of care and protection.<sup>1</sup>

While accepting the need for independent examination and judicially determined decisions there must be recognition that:

*“Child protection matters are very different from the usual legal contest and there is an important policy question as to how the framework for child protection should respond to these differences.*

*The Australian legal system primarily deals with the balancing of competing interests: the public interest via the conduct of individuals in criminal matters and the competing interests of individuals in civil matters. The process used is an adversarial contest between two or more parties. Child protection is not (or should not be) about balancing competing interests. It is about identifying the risk(s) to a child and protecting that child from the risk(s). An adversarial contest is unlikely to be the best way to arrive at a sound decision on such issues.*

*The difficulty of proving harm to the usual legal standards is another aspect where the tension between legal method and intervention to address a child protection risk is evident.*

*We should also note national and international literature which suggests that there are serious consequences that arise from a false Court finding that abuse if not occurring or is not likely to occur. These consequences relate to the impact on both the parent and the child. In a review of the impact of Court procedures in child protection in England, Hayes has observed.*

*“Where an attempt to obtain a care order has wrongly failed, this can prove to be one of the worst outcomes for a child. The parents are likely to be hostile to the helping agencies, and determined to conceal the truth from them. They may, for example, fail to take the child to a doctor... or to allow her to attend a local nursery. So no-one is in a position to keep a watchful eye on the child for signs of significant harm. In a case where an application was brought because the child confided in adults... but where she perceives that her account of what happened was not believed by the Court, the child is unlikely to trust in the ability of adults to come to her aid in the future.”*

*If it is agreed that child protection matters have an inherently different character and dynamic to typical legal disputes, then we need to ask*

---

<sup>1</sup> RJ McLachlan “Establishment in Care Proceedings” (2007) *Children’s Law News* No. 7 pp 26-35; Submission of the Legal Aid Commission to *Statutory Child Protection in NSW: Issues and Options for Reform* (2007) pp 45-46

*whether different arrangements are required to best enable us to conduct care matters in a manner that promotes the best interests of children and that is fair to all parties. Simply, how can the law reconcile safeguarding children from suffering harm with the obligation to dispense justice to parents?”<sup>2</sup>*

Having accepted that the Children’s Court has a role in independently and judicially determining whether the State should remove a child from the child’s parents, there remain two other questions. These are:

- (1) does the performance of the Court produce the optimal outcome for the child?; and
- (2) what (apart from the removal of a child by the State) if anything, should the jurisdiction of the Court extend to?

These are valid questions and the opportunity to improve how services (including judicial services) are provided to children should not be lost by false assertions that these efforts “appear to be aimed at making court proceedings easier for DoCS to get its desired results on the assumption that the DoCS position before the Court is always correct and should not be questioned.”<sup>3</sup>

## **2. HOW DOES THE COURT OPERATE?**

### **2.1 Does the performance of the Court produce the optimal outcome for the child?**

In understanding the current working of the Children’s Court, any discussion is severely hampered by an absence of reliable data and an inability to study a sample of cases.

In examining the workload of the Court, the data supplied by the Attorney-General’s Department indicates that there were 2,867 matters in 2004 increasing to 3,985 in 2005 and 4,993 in 2006. This appears to be a significant growth. The size of this growth is not however matched by the experience of legal officers within DoCS. They indicate that while their practices are growing, it is not a growth of 75% in three years. The growth in figures can, instead, be partially accounted for by a change in accounting within Attorney-General’s Department to consistently count children the subject of proceedings, and not family groups, the subject of proceedings. The figures also include duplication as when St James, Cobham and Lidcombe Courts closed to care matters those matters were included in the figure of 4,993 as well as the same matters upon transfer to the new Parramatta registry or Bidura as the case may be.<sup>4</sup>

---

<sup>2</sup> *Statutory Child Protection in NSW – Issues and Options for Reform* (Department of Community Services, 2007) pp 34-5

<sup>3</sup> Submission of the Legal Aid Commission to *Statutory Child Protection in NSW: Issues and Options for Reform* (2007) pp 45-6

<sup>4</sup> Bidura Court dealt exclusively with juvenile criminal matters prior to the closure of these other Courts.

Finally, the figures only count “matters”. Where a child is subject to an application for emergency care and protection orders and then an application for an assessment order and then a care application under section 61, this will show as three matters in these figures. In terms of understanding workload, these three matters only represent work done over a fortnight (or thereabouts) for a single child. While another matter may consist of a care application subject to defended hearings at both establishment and dispositions stages and last for over seven months.

Taking these factors into account, the workload of the Children’s Court in care is a very small percentage of the work of both the Local Court and of this Department. This can impact on a willingness to promote change or to provide it with resources.

In 2005, the Local Court dealt with 205,344 criminal matters; and 144,881 civil matters.<sup>5</sup> In that same year there were just 3,985 new care matters.

In comparison, amongst the work of this Department there were 286,033 reports in 2006/07 or, 201,208 reports referred for assessment,<sup>6</sup> and there were some 12,712 children in out-of-home care as at 30 June 2007. Numerically, court work therefore represents only a small percentage of the children with whom this Department is working at any point in time. This does not however recognise the significant amount of time and resources which the Children’s Court consumes and the significance of Children’s Court decisions in the work of this Department and, more importantly, the lives of the children.

Despite this, and while there are notable exceptions, it is unrealistic to suggest that in all cases the comments of a Magistrate regarding one child without any consideration to the larger canvas on which this Department works, will necessarily alter the overall approach adopted by the Department. Likewise, for this Department to expect the Local Court to change all of its practices to better accommodate care matters is unrealistic. Comments and suggestions made in this paper must be read against this background.

In terms of the split of work between the specialist Children’s Court and the Local Court sitting as the Children’s Court, the figures supplied by the Attorney-General’s Department (recognising their flaws as set out above), show that the specialist courts dealt with 1,945, 2,606 and 3,240 new matters in the years 2004, 2005 and 2006 respectively. As percentages of the total number of care matters, this means that the specialist courts dealt with 68%, 65% and 65% of care matters respectively. The respective percentages between the work of the specialist court and the non-specialist courts have remained relatively stable. With 35% of the work occurring outside of the specialist courts, this is a significant percentage of the work and any discussion of practices in the court should recognise this.

---

<sup>5</sup> *Local Court of NSW Annual Review 2005*. pp 9, 14

<sup>6</sup> *Department of Community Services Annual Report 2006-2007*

In relation to growth in work at different courts, it should be noted that between 2004 and 2006, significant growth took place at:

Newcastle	increasing from 295 matters to 500	i.e. 70%
Port Kembla	increasing from 195 matters to 269	i.e. 38%
Central Coast	increasing from 277 matters to 363	i.e. 31%
Lismore	increasing from 42 matters to 121	i.e. 112%
Dubbo	increasing from 24 matters to 90	i.e. 175%

For the length of time prior to matters finalising, there is some historical data that sets a benchmark. In 1997, a study of 1,758 care matters found that 63 matters (or 7.8%) took more than 200 days to complete, 14 (or 1.7%) took more than 300 days and 2 (or 0.2%) took more than 500 days.<sup>7</sup>

While the Chief Magistrate has since 31 January 2005 imposed time standards on the Children’s Court, no statistics have been made available to this Department as to compliance rates. Anecdotally, the Court has advised that the mean duration of matters is seven months and anecdotally, this Department would agree with this figure. Legal Services Branch within DoCS has irregularly checked this rate at Worimi/Broadmeadow Court and this has provided tentative confirmation. Legal Services, as well, maintains information on all care matters that take longer than 12 months to complete. The number of these matters is:

<b>Report date</b>	<b>No. of matters</b>	<b>No of children</b>
30 September 2005	13	18
30 December 2005	7	22
31 March 2006	7	21
30 June 2006	22	48
30 September 2006	16	37
31 December 2006	24	52
31 March 2007	13	28
30 June 2007	7	16
30 September 2007	2	5
31 December 2007	4	10

As at 31 December 2007, the longest duration of any current matter was one that commenced in November 2005. This would seem to indicate that despite a growth in the number of care matters, the Court has managed to overcome a blow-out in the length of the hearing of matters and restrained this time to roughly 1997 rates. This is a significant performance achievement to which staff in this Department (and in the Legal Aid Commission) have contributed.

<sup>7</sup> J Single quoted in *Care and Protection in the Children’s Court: Options paper prepared by the Legislation Review Project*, NSW Department of Community Services, 1997

It is difficult to locate comparative figures for other jurisdictions. Amongst Magellan cases in the Melbourne Registry of the Family Court, the mean duration of matters is 333 days (i.e. almost 12 months) in comparison with an anticipated mean in the Children's Court of 7 months. Further, in the Sydney Registry of the Family Court, the mean duration is higher at 498 days (i.e. 1 year, 4 months).<sup>8</sup>

In England, only a minority of care matters take less than 40 weeks (i.e. 9 months) and the mean time to complete a care matter appears to exceed 12 months.<sup>9</sup>

The duration of court proceedings is important for a child. Not only is the process stressful for the child and will disrupt other important activities (such as schooling, for those of that age) but pending the making of final orders, it defers the implementation of plans for the long term stability of the child and the formation of new stable, nurturing and loving relationships where these might be necessary. For the very young child, the best evidence available to this Department is that long term arrangements should be in place within six months. With some of the best court practices in achieving early resolution of matters, the Children's Court can average a duration of seven months. To achieve all that is required for the litigation, further shortening of this time is likely to impair the fairness of the process. The question therefore arises whether the process must be of this duration because it is trying to achieve too many things. A limiting of the Court's jurisdiction might permit earlier final orders – to the benefit of the child.

Beyond the data describing the operation of the Court, there is also a need to describe how the Court responds to those who appear before it.

In a study of the role of parents with a disability in care proceedings, which is now over a decade old, the conclusion in relation to the role of the Court was:

*"In describing and analysing Court processes it became immediately obvious that at the most basic level, the Court environment is alienating for parents with a disability. This environment exacerbates what is an already tense and potentially explosive situation. There is little opportunity throughout the Court process for the parents' voices to be heard. A concrete example of this is the fact that only 28% of parents with intellectual disabilities signed an affidavit...Much of what is conducted is "hidden" from the key parties – values, the parents and their children. The language used, the conventions adhered to and the interactions between articulate and educated personnel all serve to alienate and disempower parents for whom there is real and justifiable concern that they are left totally ignorant of what has been, or what is about to be, agreed. Worse still, lawyers representing parents feel ill equipped in terms of both training and time to adequately represent parents with a disability... In sum, this adds up to a totally inadequate*

---

<sup>8</sup> DJ Higgins *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan Case-management Model* (2007) p 212

<sup>9</sup> J Masson "Reforming Care proceedings – Time for a Review?" (2007) 19 *CMLQ* 411 at 418

*attention to the requirements under the Disability and Discrimination Act 1992 (Cwth) and the Anti-Discrimination Act 1997 (NSW) to eliminate discriminatory practices. The marginalisation of parents with a disability in court processes constitutes a discriminatory practice.”*

Apart from this comment on the way in which the Court system operates, the same study confirmed what was already known from other studies that:

*“Many lawyers feel ill-equipped in terms of both training and time to adequately represent parents with a disability. Parents with a disability require significantly more one-to-one time which is almost impossible to achieve given the limitations of Legal Aid funding and heavy caseloads.”<sup>10</sup>*

In that study 24.3% of all care matters had a parent with a disability.<sup>11</sup> Similar comments could be made of parents from various cultural and linguistically diverse (CALD) backgrounds or who are Aboriginal. Indeed, a slightly larger percentage of the children in the care jurisdiction are Aboriginal rather than have a parent with a disability. Further, it is unclear whether the experience of any parent would markedly differ from that of these two significant sub-groups.

Nothing is known which would question that these conclusions would not be found in another study conducted along similar lines in 2007.

The experience of caseworkers and legal practitioners<sup>12</sup> appearing for the Director-General is that they encounter far greater criticism, and sometimes intemperate and personal attack, than is usually the case elsewhere. These comments are made from both presiding judicial officers and other practitioners appearing in the jurisdiction. Experienced legal practitioners who are departmental legal officers have refused to practice at Parramatta Children’s Court or have asked to be transferred from that Court to other Children’s Courts exercising the care jurisdiction. Caseworkers appear to prefer to accept positions which do not require court attendance.

Caseworkers find that appearing in court is a stressful experience. They feel, and sometimes are, under personal and professional attack. This is exacerbated by caseworkers wishing to convey their general concerns about the child and the child’s circumstances and the Court and the legal profession wanting to concentrate upon the specific circumstances of why the matter is currently back before the court. This is not a circumstance unique to DoCS.<sup>13</sup>

---

<sup>10</sup> D McConnell, G Llewellyn & L Ferronato *Parents with a disability and the NSW Children’s Court* (2000) p 55

<sup>11</sup> D McConnell *ibid* p. iii

<sup>12</sup> This is an experience reported by both departmental and panel practitioners but is not an experience which is uniform or general

<sup>13</sup> Eg F Bates *anors The Australian Social Worker and the Law* (Sydney, 1996) p 6 ff; H Brayne & G Martin *Law for Social Workers* (London, 1990) pp 11ff

The cost of conducting care matters has also increased. Within DoCS, the staffing of the Legal Services Branch has remained at 2 team leaders and 11 legal officers for each of the financial years and the respective amounts spent on panel solicitors is (for the year ending 30 June):

2004	2,535,901.05
2005	2,737,908.77
2006	2,120,963.80
2007	3,375,931.89

In looking at increased legal costs in care proceedings in England, a recent report concluded that:

*“the increase in expenditure on care proceedings was due to the increase in number of proceedings, unnecessary delay in the processing of those cases through the courts, greater complexity in the cases due to the families’ more fragmented lives and greater appreciation of the effects on children, and the increased conflict in the cases, which was partly due to parents’ fears of losing their children permanently. These factors were interlinked: the longer cases took, the more pressure was placed on budgets, systems and resources, and this in turn could add to delay, for example, where there were more cases than the court system could handle.”<sup>14</sup>*

Apart from the factor of unnecessary delay (perhaps replaced in NSW by the constant shifting of court dates with little regard for legal representation continuity) the same factors apply here.

There is one further contributing factor. This relates to the apparently constant shifting of the listing of matters so that courts (and Magistrates) are always occupied. Dates for hearing are often moved between courts and even moved to earlier dates. Consideration is rarely given to the availability of legal representatives, instructing caseworkers or witnesses or to the need to maintain continuity of legal representation. This leads to hearings being conducted by legal representatives with less than 24 hours notice. It is now the full time work of a clerical officer within DoCS Legal Services to do nothing but re-arrange timetables and locate lawyers who may be able to handle matters at the last moment.

## **2.2 Legalism/excessive use of affidavits**

Undue formality in care proceedings creates a situation where it is more important to balance competing interests than to establish what is in the best interests of the child. The welfare of the child is enhanced by all parties working cooperatively together or, at least, allowing as great a degree of participation as is possible. This is impaired by a too rigid adherence to procedures and by the demonisation of one or more of the parties. This undue formality can be seen in a number of different ways, not all of which are

<sup>14</sup> J Masson “Reforming Care Proceedings – Time for a Review” (2007) 19 *CMLQ* 411 at 422

attributable to the Court, but all relate to how the Court operates and how the parties interact within the Court system.

One clear example is that the Children's Court by its Practice Directions stipulates that it is a court in which evidence can only be submitted by way of affidavit.

Not only is information supplied only by affidavit, but the *Children and Young Persons (Care and Protection) Act 1998* (the Act) provides in sections 61 and 68 that all orders sought, and supporting material must be filed at the commencement of the care proceedings. Subsequent material can only be filed with the leave of the Court. The initial material before the Court must currently be sufficient to justify the grounds upon which it is asserted that the child is in need of care and protection<sup>15</sup> and to provide comprehensive background information – recognising that the Court can make orders apart from those sought in the application.<sup>16</sup>

No other Australian care jurisdiction has this requirement for the submission of all evidence to be included in an affidavit e.g. as part of the innovations within the Family Court, the Magellan Project allows for the information to be supplied by the child welfare agency by way of a report. Similarly, the Family Court's practice in children's matters is to initially ask the parties to identify what is agreed and what is in dispute and then affidavits are only allowed to be filed about issues in dispute.

There is no requirement in the Family Law jurisdiction to file all affidavit material in parenting matters at the commencement of the proceedings. This flexibility is allowed even though the clients and their needs are usually far more stable and predictable than most families in care proceedings. To address a child's current best interest the status of the evidence needs to address family and planning arrangements that can be unstable and change dramatically.

Attempts have been made by DoCS over a number of years to obtain agreement of the Court and Legal Aid Commission to commence proceedings with either a document that gave greater flexibility in setting out the history of the child as known to DoCS and why DoCS considers the child to be in need of care and protection or else did not require the all encompassing nature of the current affidavit. If the former approach was to be adopted the document would seek to provide a more holistic picture of the child's circumstances and move away from an incident based response which is not always appropriate for a child in need. It would permit the preparation of a document in a format that caseworkers are more familiar with preparing and allow greater flexibility in style and approach. In advancing this suggestion, DoCS has consistently said that for any matter about which there is a real dispute then it will file evidence in support of the DoCS proposal by way of affidavit.

---

<sup>15</sup> *SB v Parramatta Children's Court* unreported 20 November 2007 per Price J: [2007] NSWSC 1297.

<sup>16</sup> Section 67

An alternative approach would be to file a far more limited document that merely addressed the evidence to support a determination that the child is in need of care and protection and interim orders. Detailed material to support final orders could then be filed at a later time in the process allowing greater time for deliberation and consultation over the proposals.

By requiring DoCS to file all material at the commencement of proceedings, DoCS is often unaware at that time as to the final orders which may be sought and will not have received the benefit of hearing from the child or the child's family. This means that DoCS must file comprehensive material to cover all possibilities. In filing any material that might be held, irrespective of whether it is later relied upon, DoCS can antagonise the child's family and induce unnecessary argument and anxiety. This can add to the adversarial nature of the proceeding.

A common response by the Court to affidavits is to seek to have the affidavit more focussed on a critical incident and, where there is a history of behaviour, such as in chronic neglect cases, to still seek an explanation why there is considered to have been a qualitatively worse response to the child now than may have been the case in the past. This insistence on a critical incident to justify court action may deflect caseworkers from looking holistically at the needs of a child and to minimise the impact of chronic neglect as the caseworkers wait to see if a critical incident may emerge.

Preliminary conferences were to be meetings held on an appointment basis which were to be less alienating than court proceedings and allow greater accessibility to people with low levels of literacy.<sup>17</sup> Because of this object DoCS made a decision prior to the introduction of the Act for staff not to be legally represented so that the meeting could concentrate upon those needs identified in the 1997 Review. In fact, the preliminary conference is often little different to a directions hearing and the Court consistently seeks all parties to be legally represented. This denies individuals the ability to directly participate and adds to the sense of formality.

No use of alternative dispute resolution (ADR) is made by the court.<sup>18</sup> Again, this failure restricts participation by the child and family members and limits the options that might otherwise be considered for the child's future.

Just as alternative dispute resolution is discounted, the Children's Court approach, is that once a matter has commenced before the Court it should proceed to a hearing. Where a Magistrate considers that, for example, a Children's Court Clinic assessment report may not assist in the final hearing then it will decline to order one. The fact that this report might assist in discussions between the parties leading to a settlement of the matter is not a factor that the Court appears to take into consideration. It is a settlement, at

---

<sup>17</sup> *Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform* (1997) pp 53-54

<sup>18</sup> For a short discussion of the use of alternative dispute resolution elsewhere see P Parkinson "Child Protection, Permanency Planning and Children's Right to Family Life" (2003) 17 *International Journal of Law, Policy and Theory* 147 at 150ff

this stage (i.e. after the child has been determined as needing care and protection) that may establish a better foundation for an on-going respectful working relationship between the family and DoCS staff.

While the Court and others reject the notion that Magistrates dismiss similar fact evidence, it is the case that once every few years a matter has to be brought before an appeal court<sup>19</sup> to reassert the relevance of this information in care proceedings. This would be unnecessary if there was uniform understanding of the relevance of this information and less emphasis on proof of actual harm to the particular child and reliance upon technical evidentiary argument derived from the general law, but without foundation in the care jurisdiction. The assertion by Magistrates that DoCS needs to establish that the particular child before the Court is in need of care and protection, and not just that the same circumstances apply to this child as to other siblings who have been removed, is an occurrence in the Local Courts exercising care jurisdiction. It is less frequently encountered in the specialist courts, but does also occur there. Indeed in a matter before the District Court in late January 2008, the Court said that in considering a stay application it was not even prepared to read the affidavits filed in the care proceedings for the same child but would only rely upon the information put afresh before the Court.

The Supreme Court has commented on even specialist Magistrates too readily dismissing an application rather than seeking to adjourn the matter and call for further evidence in the meantime;<sup>20</sup> or to refuse to permit cross-examination or taking an unduly restrictive approach to the admission of evidence.<sup>21</sup>

No provision is made within a grant of legal aid to provide incentives for the early resolution of matters.

Adversarial approaches inhibit participation, fail to explore all relevant options and contribute to caseworkers and families being considered as adversaries in a way that impairs the future ability of the caseworker to work with the family.<sup>22</sup> The concerns are not raised because officers of this Department seek less accountability.

### 2.3 Aboriginal children

*“The presence of past removal is evident in the current over-representation of indigenous children in child welfare systems and in the dysfunctional relationship between welfare departments and indigenous communities. The legacy of loss is compounded by the on-going imposition of dominant identity and values both in terms of*

<sup>19</sup> *Whale v Tonkins* (1984) 9 FamLR 410; *Cormack and Burton* (1984) 9 FamLR 666, *In the matter of Shantell White* unreported 11 December 1987 per NSWCA; *P v C* (1987) 11 FamLR 896 per Allen J (NSWSC); *B v B* unreported 4 December 1989 per Hodgson H (NSWSC); and *In the matter of Department of Community Services v Couley* unreported 14 June 2000 per Mahoney DCJ; *Tease v Department of Community Services* unreported 14 October 2002 per Phelan DCJ

<sup>20</sup> *Re Frances and Benny* (2005) 34 FamLR 523.

<sup>21</sup> *Re Katherine* unreported 29 September 2004 per Studdert L: [2004] NSWSC 899

<sup>22</sup> This has led to a court requesting that the out-of-home caseworker needs to be a different person to the investigating caseworker: *De Bono v McDougall* unreported, 17 June 1988 per Enderby J (NSWSC)

*specific institutions such as welfare, school and justice departments and in the more pervasive contexts of daily life and experience.*<sup>23</sup>

In response to this situation, the Act identifies that for Aboriginal children there is a need for a special response to Aboriginal children to encourage self-determination, participation by different groups and placement within communities. It also recognises that regrettably, child welfare records can be unique sources of recorded information about an Aboriginal child and the child's community and so also has special provisions about records and record-keeping.

Despite this clear importance, there is currently little by way of differential approaches adopted by the courts towards Aboriginal children. When dealing with Aboriginal children and their families, there are no procedures that seek to recognise the importance of the identity of these children being based in relationships with other people and the participation of kin and community members in determining the future of these children.

This Department has gained the agreement of the Attorney General's Department and the Children's Court to participate in a pilot program designed to allow kin and community participation in decision making about the future of Aboriginal children. Apart from the Care Circle pilot, other matters that might be considered could be the significance of the same Magistrates sitting in the same court room for both criminal and care matters; guidance from the court on who might be an expert witness on matters pertaining to Aboriginal children; access to court records by Aboriginal families seeking information and the conundrum of promoting self-determination within a judicial context.

The Legal Aid Commission has said that, "proposals to reduce or limit the Court's involvement in care and protection matters, in particular, would have a disastrous effect on Aboriginal overrepresentation in the care system."<sup>24</sup> It is unclear how this can be the case as there is no evidence that the Court as it currently operates has any impact on capping or reducing the number of Aboriginal children in the care system. Factors outside of the Court would instead have this result. Changes to the Court's involvement should have the consequence of focussing the Court on the need for State intervention and this should benefit, rather than harm, consideration of why Aboriginal children are being brought into care.

### **3. THE JURISDICTION OF THE CHILDREN'S COURT**

#### **3.1 Differential approaches**

If the child protection system is to address the needs of individual children, then it, and the court system which forms part of it, needs to be flexible enough to cope with complex family arrangements within the parameters of

---

<sup>23</sup> T Liberman "Can international law imagine the world of indigenous children?" (2007) 15 *International Journal of Children's Rights* 283 at 300-301

<sup>24</sup> Submission of the Legal Aid Commission to *Statutory Child Protection in NSW: Issues and Options for Reform* (2007) p5

the development of the child. To achieve this, there needs to be an ability to have a differential response depending upon the desired outcome. It was for this, and other reasons that parent responsibility contracts were introduced to add to the continuum of service responses. Previously there existed voluntary arrangements and temporary care arrangements on the one hand and court ordered arrangements on the other, without anything in between. There was no means to move from one response to the other without entirely re-commencing every separate process. A parent responsibility contract was intended to be a voluntary arrangement which could, if it was unsuccessful, still result in a child being brought before the court without having to repeat preliminary steps.

Within the court process, it has been established that interim orders need not comply with all of the requirements of a final order,<sup>25</sup> but there is no distinction between the steps that have to be undertaken for a final order that will last for 14 days or a final order that will last from when a child is a baby until when the child turns 18 years.

It is considered that there should be a different process where it is clear that final orders of short-term duration rather than for long term are being sought. The processes should reflect the need for a greater level of assurance and deliberation for the longer term final order.

### **3.2 Jurisdiction of the Children's Court beyond removal and parental responsibility**

Where a court in the care jurisdiction has made an order for the re-allocation of parental responsibility, or for the parents to comply with conditions upon their exercise of parental responsibility (by undertakings or supervision), there is a desire by a care court to continue to be involved in the child's life. This is a common feature of care courts which has been demonstrated by the need for both the Court of Appeal here in New South Wales and the House of Lords in England to discuss the demarcation in roles between the care court and the child welfare agency.

The House of Lords (per Lord Nicholls) stated that at one time the court:

*"In exercise of its wardship jurisdiction, retained power in limited circumstances to give directions to a local authority regarding children in its care. The limits to this jurisdiction were considered by your Lordships' House in A v Liverpool City Council [1982] AC 363, (1981) 2 FLR 222 and Re W (A Minor) (Wardship: Jurisdiction) [1985] AC 791, sub nom Re W (A Minor) (Care Proceedings: Wardship) [1985] FLR 879. The change brought about by the Children Act 1989 gave effect to a policy decision on the appropriate division of responsibilities between the courts and local authorities. This was one of the matters widely discussed at the time. A report made to ministers by an inter-departmental working party Review of Child Care Law (September 1985) drew attention to some of the policy considerations. The*

---

<sup>25</sup> *Re Edward* (2001) 51 NSWLR 502; *Re Brett* [2006] NSWSC 984; (2006) CLN 10 at 1

*particular strength of the courts lies in the resolution of disputes: its ability to hear all sides of a case, to decide issues of fact and law, and to make a firm decision on a particular issue at a particular time. But a court cannot have day-to-day responsibility for a child. The court cannot deliver the services which may best serve a child's needs. Unlike a local authority, a court does not have close, personal and continuing knowledge of the child. The court cannot respond with immediacy and informality to practical problems and changed circumstances as they arise. Supervision by the court would encourage 'drift' in decision making, a perennial problem in children cases. Nor does a court have the task of managing the financial and human resources available to a local authority for dealing with all children in need in its area. The authority must manage these resources in the best interests of all children for whom it is responsible.*

*The Children Act 1989, embodying what I have described as a cardinal principle, represents the assessment made by Parliament of the division of responsibility which would best promote the interests of children within the overall care system. The court operates as the gateway into care, and makes the necessary care order when the threshold conditions are satisfied and the court considers a care order would be in the best interests of the child. That is the responsibility of the court. Thereafter the court has no continuing role in relation to the care order. Then it is the responsibility of the local authority to decide how the child should be cared for.<sup>26</sup>*

Similar comments have been made by the NSW Court of Appeal when it has said:

*"The pool of funds available to DOCS for carrying out its manifold duties is finite. The pool is derived from the Consolidated Fund in accordance with the applicable Appropriation Act that is passed each year. No doubt, as with all government departments, DOCS works out its budget each year by reference to the amount allocated to it under the governing Appropriation Act. In doing so it will allocate a particular sum for the provision of services to children and young persons in need of care and protection. If the Children's Court is empowered to order DOCS to expend money other than in accordance with the current budget applicable, the result will be that some children who otherwise would have benefited will not receive the services intended. The money available for the services to be provided to them will have to be used to accommodate the orders of the Children's Court.*

*In essence, the allocation of money and other resources for the care and protection of children and young persons is a matter of policy. It is preferable that such policy decisions be made by the body vested with the administrative responsibility for the proper use of the resources in question, and not by a court on an ad hoc basis. This approach*

---

<sup>26</sup> *Re S (Minors) (Care order: implementation of care plan)* [2002] 1 FLR 815 at 823-824

*underlies the many instances in the CYP Act where the provision of services is expressly left to the discretion of the Director-General and the Minister. In my view there is no reason why the legislature intended this approach to be different in regard to the powers of the Children's Court under s 74.*

*Next, I would point out that the overall amount likely to be involved in the provision of transport and accommodation expenses to parents of children in foster care, generally, is not necessarily trivial.*

*Once the principle is established that the Children's Court may, on an ad hoc basis, order the Director-General to pay such expenses, it is likely that very many such applications will be made. Applications may then be made, for example, for the cost of transport by taxi where public transport is not available or is inconvenient. Any change of address by foster parents may give rise to all such applications. Even where there is no change of address, illness or disability or other difficulty experienced by the parents might result in them applying for orders that the Director-General pay their travelling expenses. To take an extreme example, foster parents may decide to live, say, in London for a year. The Children's Court may decide that it would be in the child's interests to accompany the foster parents, but it would also be in the child's interests for the parents to visit him or her in London. Once the principle is established that the Children's Court has power to order the Director-General to pay the parents' costs of travel and accommodation, so as to facilitate giving effect to a contact order, it would be open to the Children's Court to require the Director-General to pay the parents' costs of overseas travel. This would be a result of some incongruity, to say the least.*

*As Mr Temby pointed out, all parents have to make choices in regard to their children. These choices involve such matters as the place of family residence, the kind and place of education each child is to receive, and the kind and standard of medical treatment each child is to receive. The number of choices that parents are required to make through the lifetime of their children is infinite. While parents will ordinarily have the welfare of their children at heart, the choices that parents will make will be dictated, largely, by the funds that they have at their disposal. It would be unthinkable to compel parents to make choices which they could not afford simply because those choices would advance the interests of a child.*

*In my view, the same approach has to be taken when parental responsibility is allocated to the Minister pursuant to the CYP Act. What is in the best interests of the child one would readily expect to be left to the discretion of the Minister and the Director-General, having regard to the limited funds allotted to DOCS for the protection of children in need of care, generally.<sup>27</sup>*

---

<sup>27</sup> *George v Children's Court of New South Wales* (2003) 59 NSWLR 232 at 256-257

The Supreme Court restated this approach in *Re Josie* [2006] NSWSC 642.

This Department submits that the distinction being drawn in these cases is, with respect, correct. The Court is there to resolve particular disputes and the child welfare agency is there for day-to-day responsibility for a child within the constraints of the financial and human resources which any child welfare agency must have.<sup>28</sup> It is not the role or the possibility of a Court to deal with all disputes (such as about resource allocation) nor monitor situations to avoid disputes arising. It is unrealistic to expect that at any point in time, DoCS will be able to include in any care plan detailed information on all relevant issues, contingent or otherwise, in the child's future. Neither is it appropriate for this Department to act without any oversight or make far reaching decisions without independent recourse for those suffering the impact of those decisions. Just as the law has accepted that the need for continual court supervision is a sound policy justification for not making a decree of specific performance<sup>29</sup> so it is inappropriate to have continual court supervision for out-of-home care arrangements.

It is further the submission of this Department that the intent of the current legislation supports this position. The Act requires the Court to be satisfied that "permanency planning" rather than all details for the future life of a child is in place.<sup>30</sup> Likewise, section 82 was intended as a single report to the Court, within 6 months of final orders being made, to overcome court reluctance to make final orders.<sup>31</sup> Both of these provisions have been interpreted by the Children's Court as powers to permit it to monitor parental responsibility and to approve decisions about where, and with whom, children are to be placed.<sup>32</sup>

This attitude of the Court is further illustrated by changes which the Court is seeking as part of this Inquiry to:

- regulate how DoCS supervises a placement;
- regulate how DoCS interacts with carers and makes decisions to place a child with, or remove, a child from these carers;
- maintain and enhance powers concerning contact;
- direct DoCS to bring siblings into out-of-home care where a less interventionist approach may have been adopted by DoCS; and
- direct DoCS to provide specified services.<sup>33</sup>

In making these submissions, the Court either ignores or dismisses the existing oversight by the Children's Guardian, the Ombudsman and the

---

<sup>28</sup> For other aspects of community welfare, there are specific legislative provisions which make this distinction. See, for example, *Community Services (Complaints, Reviews and Monitoring) Act 1993*, section 5

<sup>29</sup> *J C Williamson Ltd v Lukey & Mulholland* (1931) 45 CLR 282.

<sup>30</sup> Section 83 (7) (a), *Children and Young Persons (Care and Protection) Act 1998*

<sup>31</sup> *Eg Children (Care and Protection) Act 1987: Recommendations for Law Reform* (1997) pp 92-93

<sup>32</sup> *Re Rhett* unreported 8 January 2008 pp 8-9, 11

<sup>33</sup> Submission of the Children's Court of 11 January 2008 pp 22-28, 32-37

Administrative Decisions Tribunal – all of which have oversight of one or more ways in which a designated agency (including DoCS) will exercise parental responsibility. The Court also ignores the possibility that the jurisdiction of one of these agencies might be enhanced or replaced by another tribunal that could have oversight over these day-to-day decisions made during the life of a child. While the Court also assumes that it is DoCS who will exercise parental responsibility, it is already the case that in about 30% of children, case management will be exercised by another designated agency (which was not party to the care proceedings) and this percentage is likely to increase.

Apart from the issue of principle, as to the proper role of courts and of other oversight agencies, the decision by the Court to maintain an oversight of out-of-home care arrangements means that where the child re-locates interstate, it is not possible to transfer the care orders to the new State under Chapter 14A of the Act. The most common example of this is that Queensland will not agree to the transfer of care orders which include contact orders or notations on orders about contact. As a consequence, when a child subject to a contact order relocates to Queensland, responsibility for monitoring the contact arrangement will not be transferred to the Queensland agency and there is no practical ability on DoCS to monitor compliance in another State.

### **3.3 Contact**

In reviewing the Act, this Department's discussion paper recognised the importance of contact to children and young people in out-of-home care. It said:

*"It is widely accepted that maintaining contact between children in care and their birth families is important for a range of reasons:*

- helping the child attain good mental health;*
- resolving issues of loss and trauma; and*
- achieving a strong sense of personal identity and genealogical connectedness.*

*However, it is also recognised that contact can be disruptive and distressing for a child and/or the alternative carers with whom the child is placed, to the point where inappropriate contact regimes may threaten the stability of an alternative placement. This raises specific issues in relation to the role of the Court.*

*For those who oppose the substantial legalised framework in relation to contact in NSW, the fundamental concern appears to be that the complexities and sensitivities of contact decisions are such that they are not susceptible to effective resolution by the Courts.*

*Expert opinion and research in this area recommends that the process of determining the frequency, duration and who should be involved in the contact be guided by decision-making frameworks that utilise a strong theoretical and evidence base. Further, arrangements for contact should be mindful of the individual needs, capacities and*

*circumstances of each child. For example, a child can be overwhelmed by contact that is too frequent, too long or accommodates the needs of a number of adults to visit the child, separately or together.*

*When a plan is in place for a child or young person to be restored to his or her birth parents, the literature recommends frequent and direct contact to maintain the parent-child relationship and facilitate the restoration. When a decision has been made for the child or young person to remain in long-term care, the literature argues that while contact is beneficial in preserving links and maintaining identity, it can be less frequent and take place by indirect means.*

*The need to maintain or encourage 'attachment' between a child and his or her birth parent(s), generally the mother, is often cited as a reason for more frequent contact. However, both the concept of attachment and the evidence that frequent, face-to face contact promotes attachment are not easily established.*

*It is also inevitable that the circumstances of the child, the birth parents or the foster family will change over time, just as the developmental needs of the child will vary over time. These changes will in turn require reconsideration and adjustment to the contact regime. As Selwyn notes:*

*"Contact by itself is not going to promote good outcomes for children. Contact is a process through which relationships can be repaired, maintained, or ended temporarily or permanently. It is dynamic, changing across time as individual circumstances change... The role of the social worker, once a thorough assessment has been completed and concluded that contact should continue, is to facilitate this work by ensuring that arrangements are made that are feasible, safe and supported by all parties."*

*In summary, the dominant practice perspective is that settling an appropriate contact regime involves a detailed appreciation of a complex range of factors relating to the dynamics of each of the family groups involved and the nature of the child's connection with each of these groups.<sup>34</sup>*

In 2005, DoCS Legal Services Branch collected 138 random contact orders to see the types of contact orders actually being made, and by whom. Of these orders, 34 or 25% were from non-specialist courts and so those orders are underrepresented in the sample collected.

This survey showed that the contact orders made could be described as follows:

---

<sup>34</sup> *Statutory Child Protection in NSW – Issues and Options for Reform* (Department of Community Services, 2007) pp 39-40

<b>N=138</b>	<b>Specialist</b>	<b>Non-Specialist</b>
Supervised contact	52%	25%
Contact ordered for a period in excess of 5 years	35%	31%
Contact at the discretion of DoCS	7%	7%
No frequency specified	24%	48%
Contact to occur at least once per fortnight or more frequently	17%	30%
Contact to occur monthly	31%	18%
Contact to occur quarterly	11%	0%

Between the specialist and non-specialist Children's Courts there is therefore a significant difference in practice in making orders as to contact. The specialist court orders far more supervised contact and less frequent contact. Both courts (31% of orders of the specialist court and 55% of orders made in the non-specialist courts) also make a significant number of orders of contact which effectively leave the contact arrangement to DoCS (either expressly or by not specifying frequency).

These figures suggest that there is little consistency in judicial decisions on contact. The suggestion that contact orders are necessary to give a right to contact, or provide an oversight of contact arrangements that would not otherwise exist does not seem well-founded in that the Court is actually making an order in between a third and a half of all cases which passes decision making to this Department. The need to have a court process to achieve this outcome is therefore questioned.

In relation to the process followed by the Courts to determine the nature of the contact ordered, this Department does not agree that *Re Helen* properly states how to assess contact. An alternative interpretation based upon the rationale expressed in some decisions of the Family Court is set out in a paper on contact written by departmental officers and supplied as part of this submission. In summary it is argued that *Re Helen* compartmentalises the needs of the child and does not look at the context in which the child's welfare is to be assessed in a holistic fashion. Apart from this disagreement with how the various factors should be assessed in determining the need for contact, DoCS also states (and considers that this view is supported by the literature) that as the needs of the child changes over the child's life so the needs for contact (and the forms which contact might take) should also change. Because of this, it is inappropriate to have a system that determines the level of contact by means of single, point of time, court orders. Such an arrangement builds inflexibility into the determination of contact that is contrary to the welfare and well-being of the child.

While the cost of providing contact should not be the sole consideration, it is also a relevant consideration. Because of the difficulty in gathering data any estimation of the cost to DoCS of providing contact will be difficult to estimate, but on the best available evidence, in 2007 it was estimated that the hourly cost of arranging for contact for a child in out-of-home-care (OOHC) (both supervised and unsupervised) was \$96.00 per hour with a total cost between \$29.8m and \$38.1m based upon the assumptions applied in making the calculations.<sup>35</sup>

In response to comments by the Court in its submission to this Inquiry, on its ability to make, and practice of making, contact orders:

- It is said that “the inclusion of a provision to make contact orders in the context of ‘final’ care orders was vigorously canvassed when the Act was before Parliament and vigorously opposed, even then, by the Department of Community Services.”<sup>36</sup> This is incorrect. This Department had carriage of the legislation on behalf of the Minister. The provision was included in the Bill when it was introduced into Parliament in the form that had been first approved within this Department. This is entirely contrary to the Children’s Court’s assertion.
- The Court alleges that while contact is an important element of any plan for restoration, contact can also be seen as a ‘back door’ towards restoration that is not otherwise agreed. Suggestions that the Court has a ‘power to effect restoration’<sup>37</sup> may imply this ‘back door’ approach, which should be rejected.<sup>38</sup>
- The Department of Community Services is concerned to reduce accountability and judicial oversight. This is not the case. The argument of this Department is that contact as ordered by the Children’s Court is inconsistent, is not linked to the safety, welfare and well-being of the children and should be made (subject to guidelines) by whoever exercises parental responsibility and so has close personal knowledge of the needs of the individual child. The decision of a designated agency (including DoCS) about contact would be oversights by the Children’s Guardian and the Ombudsman irrespective of the role of the Court.
- The Court states that it is best placed to make a decision about contact when it is not the case that one size fits all.<sup>39</sup> The Court does not have close oversight of the daily life of a child over a period of time that can extend over decades. While it is agreed that not one form of contact fits all children it is proposed that the underlying principles should be consistently applied and that this is best done by a designated agency rather than a court.

<sup>35</sup> *Revised Bottom-up Estimates – Provision of Contact Services Project reference Group meeting*, Department of Community Services Economics and Statistics Branch (March 2007)

<sup>36</sup> Submission of the Children’s Court (11 January 2008) p 23

<sup>37</sup> Submission page 23 para 59

<sup>38</sup> *Re Josie* [2006] NSWSC 642 supports the proposal that the Court doesn’t have jurisdiction to influence how the Minister exercises parental responsibility including by manipulating this parental responsibility to give care responsibility to the child’s parents

<sup>39</sup> Submission pages 25, 27

- “Almost without exception, the Director-General, in his care applications seeking orders for long term out of home care, proposes minimal contact of two to four occasions per year.”<sup>40</sup> This is not borne out by the data nor by the contact policy being prepared within this Department.
- This Department will set contact levels based on factors other than the best interests of the child.<sup>41</sup> This refers to the Department taking into account factors such as the financial and human cost of the proposed arrangements. These are matters which the Court of Appeal has said are quite properly taken into consideration. They are relevant factors in the consideration of any parent. They are certainly relevant for any agency who must decide how best to use the finite resources available to it. The imposition of a court order on one child without regard to the impact that this will have on the child’s extended family, carers and supervising agency will improperly skew the response of each of these groups towards that child to the detriment of others.

In summary, contact needs to be sufficiently flexible to meet the needs of the child within the context of the changing circumstances of the child’s family and also recognising that resources available to this Department are finite. To achieve this goal no other jurisdiction appears to give so extensive a power to order contact to the courts. It is suggested that this is because the courts are not the best way to accommodate complex and changing family dynamics over a long period of time in circumstances where there is (unlike in private law arrangements) a level of daily co-operation and support for the child.

The position which was recommended in *Statutory Child Protection in NSW: Issues and Options for Reform* was:

*“The efficacy and impact of the current NSW arrangements of the ordering of contact and a number of options for change were considered by the Ministerial Advisory Committee as part of this review. The Committee formed the view that there is no inherent reason why contact should be set by a Court and that agreement between parties is the most desirable and flexible outcome.*

*In a scenario under which the Court could not make contact orders, the case plan would be the primary vehicle for determining contact arrangements. The main benefits of this option include:*

- *more attention to comprehensive assessment and case planning by caseworkers including contact provisions that support case plan goals and foster permanent and stable placements for children*
- *early and effective engagement with birth families and/or foster carers in relation to contact arrangements*

---

<sup>40</sup> Submission p 26

<sup>41</sup> Submission page 27

*- inbuilt flexibility to alter contact arrangements as the needs and circumstances of parties change without the need to return to the Court*

*The main risks are that designated agencies may seek to minimise the need for contact, and particularly where a long term out-of-home care placement is the case plan goal that case plans could default to minimum standards and not sufficiently take into account individual circumstances and needs.*

*The Ministerial Advisory Committee therefore envisaged that there be clear guidelines for administrative decisions (including the processes that should be followed in setting contact arrangements) and an avenue for parties to appeal decisions. Referral to the Court was seen as one option for resolving disputes provided that contact orders made by the Court are time limited.*

*Under this model the Court (or an alternative quasi-legal body such as a Tribunal) would only be empowered to make contact orders as part of final orders when parties could not agree and such orders would only be able to be made for two years, after which time contact would be determined by the agency with case responsibility as part of case planning and management processes.*

*If this approach were to be adopted, the position that ought to be adopted in relation to contact associated with interim orders requires consideration. In this scenario, concerns about the capacity of the Court to deal with the complex individual and family dynamics still apply. However, the concern about the need for a more efficient and flexible approach to adjusting the arrangements over time is not as relevant because interim orders are generally not for lengthy periods. There is also the reality that the power imbalance between the Department and the parents is at its most acute during the period where the Department is yet to address the longer term position in relation to parental responsibility.”*

### **3.4 AVO powers**

This Department has opposed the Children’s Court in its care jurisdiction having the power to make apprehended violence orders because this would:

- Give to the Court for the first time an order the breach of which is an offence
- Involve the police directly in care proceedings and so alter the nature of those proceedings
- Involve DoCS staff in obtaining, serving and enforcing involuntary sanctions and so altering the nature of their work, which is already fraught when dealing with some families
- Make the person against whom the AVO is being taken out a party to the care proceedings, potentially giving them access to the full range of information before the court in those proceedings. Where that person is

not a parent but some other third party who might otherwise not have any involvement in the care proceedings, this may unduly compromise the privacy of both the child and the other parties (noting also the framework of confidentiality) in care proceedings set by sections 104 and 105 of the Act.

### **3.5 Grounds for a care order**

This Department has no objection to the proposal of the Court to amend section 71 so that the determination of the need for care and protection can be on any basis and is not limited to the sub-categories set out in that section.<sup>42</sup>

This Department would not be prepared to agree to delete the sub-categories (rather than making the definition one that included, rather than was limited to the sub-categories) for fear that Magistrates may not accept that certain circumstances support the need to establish that a child is in need of care and protection.

The Department does not agree to adding the words about risk of harm. This suggestion fails to recognise a significant role differentiation between this Department and the Court which the Act establishes. This differentiation is that this Department receives information about risk (section 23) but the response of both the Department and the Court is predicated not on the existence of possible harm but on whether action will achieve a better position for the child. If no action is possible, or no further action will improve the situation, then neither the Department nor the Court should be taking action – see sections 30 and 71.

As noted elsewhere, there is presently the same process to be followed whether the child is to be removed from the parental responsibility of the child's parents for a space of 14 days or 14 years. One element of this is that, in both cases, the same threshold grounds must be found by the Court. If a differential approach were to be followed then it may be appropriate to have different grounds.

### **3.6 Child able to apply under section 90**

This Department supports a proposed amendment to permit a child or young person being able to apply under section 90. A recommendation has been made to the Minister to approve such an amendment.

---

<sup>42</sup> Also see *Care Proceedings in the Children's Court: A discussion paper*, NSW Ombudsman July 2006 pp 16-17

### **3.7 Clarifying parental responsibility orders under sections 79 and 81**

The Court has suggested, and this Department agrees, that these provisions might usefully be clarified.

It is unclear as to the ramifications of the current provisions whereby it is possible for parental responsibility to be allocated to everyone (other than the Minister) while a child is placed under the parental responsibility of the Minister.

It is unclear why under the current provisions there should be a difference between the Minister and anyone else holding parental responsibility jointly under section 79 and the Minister having parental responsibility under section 81 but exercising it jointly with another. Section 81, does appear to give default parental responsibility to the Minister in a way that section 79 does not and the usefulness of this should be preserved.

Section 79 does not appear to permit the allocation of parental responsibility to an agency and it is submitted that parental responsibility might usefully be allocated to any designated agency – of which this Department will be one.

### **3.8 Children in need of care in criminal proceedings**

This will be the subject of comment in another submission.

### **3.9 Working with Children's Checks**

While this Department is not opposed to a recommendation that WWCC should be expedited, the Department is unaware of any delay on the part of the Commission for Children and Young People in processing these applications. The delays that do occur arise from checking commonly held names and checking possible hits against those names.

The suggestion that the Court can assess a carer without any search of criminal or disciplinary action is a matter that DoCS has previously opposed. It is also a further example of the incorrect assumption of the Court that it is the sole arbiter of all matters concerning the child – irrespective of the amount or nature of the information before it.

### **3.10 Compulsory assistance**

There are a small but consistent number of serious matters raised before the Court where the issue for the care and protection of a child relates to their medical wellbeing. These issues of medical wellbeing may be because of a religious belief of either the child or the parents concerning particular medical treatment (e.g. a Jehovah's Witness declining a blood transfusion) or because of an unwillingness to participate in medical procedures (e.g. because of a parental belief in the benefits of alternative health care). Medical conditions may also arise because of the particular nature of the condition with the result that parents do not accept that the difficulty arises from a physical cause (e.g. anorexia) or services are not available. An example of the latter is where a child is self-harming or harming others. If the child was over the age of 18 years, the person might be diagnosed as having a mental health concern. Because mental health diagnosis is not clear during a child's development

phase, classifications such as contained in DSM-IV are usually not applied to children and so neither the *Mental Health Act 2007* nor services provided under that Act are always available to children.

The current legislation originally intended that this should be addressed by a series of compulsory assistance orders. These provisions have never been proclaimed. Compulsory assistance orders require that there be an identified therapeutic treatment which, in a short period of time, would make a significant difference to improve the care and protection of the child. The information available to this Department is that such involuntary therapeutic services are unavailable in this State and it was unlikely either that such orders could be made or if an order could be made that it would have the appropriate successful outcome.

Traditionally the Department has, and continues to, apply to the Supreme Court for orders under the Supreme Court's inherent *parens patriae* jurisdiction. There have been a number of recent decisions of the Supreme Court of NSW in which this jurisdiction has been described. The orders made under this jurisdiction appear to have sufficient flexibility to be available in these circumstances. Any other orders in relation to the nature of compulsory assistance orders would appear to be redundant.

This was the view adopted by the Ministerial Advisory Committee (MAC) in looking at the review of the Act. The MAC did consider that there may be a need for the Supreme Court or another court, to have the power to have a child examined to determine what therapeutic treatment might be necessary. This preliminary stage, almost in the nature of discovery, but possibly consisting of court ordered short term compulsory assessment supported by appropriate residential services for the child, may not be currently covered within the *parens patriae* jurisdiction. The MAC therefore recommended to the Minister that a new power for medical intervention be included. The draft wording for this power suggested by the MAC is attached at Tab D.

While generally supportive of this proposal, this Department would want to ensure that in implementing this proposal it was clear that the length of stay for the child was no longer than absolutely necessary for the assessment, that there was a clear process available for children to quit the assessment process and that when they did leave the assessment there was treatment and support in the community for them.

### **3.11. Children's Court Clinic**

The Legal Aid Commission has suggested that the jurisdiction of the Clinic should be expanded, rather than contracted, to include the assessment of short term carers not seeking parental responsibility.<sup>43</sup> If this is sought to provide care pending final orders then, apart from an unwillingness to expand the role of the Clinic such a proposal would delay the making of final orders

---

<sup>43</sup> *Care Proceedings in the Children's Court: A discussion paper*, NSW Ombudsman July 2006 p18

by possibly six to eight weeks. Further discussion of the role of the Clinic will occur in a subsequent submission.

## **4. COURT INFRASTRUCTURE**

### **4.1 Magistrates**

At present the *Children's Court Act 1987*, section 7 (2) (b) requires that the Chief Magistrate must appoint a person to the Children's Court who has, in the opinion of the Chief Magistrate, "such knowledge, qualification, skills and experience in the law and the social or behavioural sciences and in dealing with children and young people and their families as the Chief Magistrate considers necessary to enable the person to exercise the functions of a Children's Magistrate."

Outside of the nominated Children's Courts all care matters are handled by the Local Court Magistrate sitting as the Children's Court. This amounts to (on rough calculations) approximately 35% of care applications. , This is a significant number of matters to be dealt with by a non specialist Judicial Officer who is required to make orders that will have a significant impact upon the children subject to the care proceedings. It is strongly recommended that an arrangement be put in place so that there could be circuits of specialist Children's Magistrates to cover the State so that, hearings of more than 95% of care matters may be dealt with by a specialist Children's Magistrate.

The Parkinson Review<sup>44</sup> which was the basis for the 1998 Act and the amendments to the Children's Court Act made at the same time, recommended that, "as in Victoria and other jurisdictions, the senior Judicial Officer in the Children's Court should be of a status equivalent to a District Court Judge." For the reasons set out in the Parkinson Review, this change is also supported.

### **4.2 Court locations**

The location of the specialist Children's Courts is presently uncertain. At the time of the opening of the Children's Court at Parramatta, indications were made that all city locations of the Children's Court would be closed. The current Court at Bidura is only a temporary location and the Court sits within unsatisfactory premises controlled by the Department of Community Services which is desirous of disposing of this property.

This has a consequence that an adult living in Sutherland who is subject to proceedings in the Local Court can have that matter heard within close geographical proximity to their home, whereas a child who may be subject to care (or criminal) proceedings must travel from Sutherland to possibly Parramatta.

It is strongly recommended that a Children's Court be maintained either in, or in close proximity, to the Central Sydney business district to facilitate ease of

---

<sup>44</sup> *Review of the Children (Care and Protection) Act 1987* (Department of Community Services, 1997)

public transport access and to cover the large number of families living in the inner west and along the beaches in the Sydney metropolitan area.

Elsewhere, Children's Court facilities are operating in locations where a courtroom might be available rather than responding to the needs of children or young people. An example is the operation of the Children's Court at Woy Woy which is a location where there were so few care matters that prior to the court opening at Woy Woy, the local DoCS office was closed. By way of contrast, the large number of children and families living in the Tuggerah area are accommodated by either having to travel to Newcastle and have their matters heard at Broadmeadow or else travel to Woy Woy. The operation of a Children's Court at Gosford would therefore be of greater benefit to children and their families who have to travel from the area between Gosford and Tuggerah to attend a court at Woy Woy.

Apart from court locations, most court houses are unsuitable for the conduct of care matters. Court houses, especially, but not limited to rural locations, have insufficient interview rooms for the number of participants, no space for those children who do attend, no space to read subpoenaed or discovered material and often create situations of risk for DoCS caseworkers who can only access the court room by passing through the space in which the child's family are located.

### **4.3 Children's Registrars**

While Children's Registrars as recommended in the Parkinson Review were introduced, the number of positions funded was less than proposed by this Department. Of the nine positions funded, it is noted that only approximately half of those positions are currently operating as Children's Registrars. This has had a significant impact on the ability of the Registrars to act in the manner envisaged in the Review. In particular, the Registrars have not been extensively engaged (if at all) in ADR nor referred matters for ADR elsewhere. Instead, the Registrars have adopted a position of a traditional court officer in terms of holding directions hearing and the like and have had a lesser impact on changing the culture of care proceedings than had originally been expected.

While Children's Registrars were initially all legal practitioners this no longer appears to be the case. If the occupiers of these positions are to conduct ADR or to assume a greater role in making consent orders and presiding at directions hearings, then legal qualifications should be a pre-requisite.

If Children's Registrars were legally qualified and were restricted to the type of activities in which they are currently engaged, then consideration might be given to extending their statutory functions to include making orders by consent and making emergency care and protection and assessment orders. This might permit a greater rationalisation of care lists and free available time for Magistrates.

Consideration should also be given to the employment of Aboriginal people as Children's Registrars as this should be a key position to be dealing directly with Aboriginal families.

#### **4.4 Alternative court structures**

There has been no apparent ongoing consideration of the suggested options for reform set out in the Parkinson Review. These options looked at firstly the appointment of a Judge to hear particular parts of matters, secondly for a Judge to hear appeals and thirdly for there to be a multi-disciplinary bench (including specific professions such as social work, psychology as well as members of the public). As recommended in that Review, where the decision of the court is about weighing up proposals of parental responsibility, residence, contact, supervision or associated issues, then the necessity for all members of the bench to have legal training is not warranted. Merit would exist in including a range of other skills and qualifications in making those decisions if they are left with the court.

Again, the notion that all matters must remain with the Court or all matters must be transferred to a tribunal appears to be too restrictive an approach.

#### **4.5 Legal representation**

At present the view of Legal Aid appears to be that unless a particular conflict of interest can be established then every child under the age of 12 years in a particular kinship group can be represented by one legal representative but that every child 12 years or older must be separately represented. Parents, grandparents and carers can each be represented by one or more legal representatives. This can regularly result in half a dozen legal representatives appearing in a single care matter.

Where it is not clearly established that there is a potential conflict of interest, this multiplicity of representation creates undue delay and complexity as each party has to serve the other, be heard and their views considered by the Court. The cost for all parties is usually met by the State – by this Department and Legal Aid.

While it is important for the Court to hear a diversity of views, little seems to be gained, in terms of an enhanced outcome for the children, once the number of legal representatives appearing for the children in a family exceeds 2 or 3 people. Unless a potential conflict of interest can be clearly demonstrated, it is recommended that there should be a grouping of people for representation purposes.

For children under the age of 12 years, representation is on a 'best interests' model. This places the onus on the lawyer to determine what these best interests might be – rather than advocating on the basis of instructions received. It would clarify the role of these lawyers if a guardian ad litem was appointed for the purpose of providing these instructions. A number of these guardians ad litem should be Aboriginal so that decision-making might be appropriately crafted to accommodate particular concerns of Aboriginal people.

#### **4.6 Care decision-making models**

A separate paper on various models of independent decision-making in care matters is being submitted. This discusses alternatives to a court based model. In addition, the Department is considering a range of alternative approaches to protect children from risk of harm without the necessity of approaching an independent decision maker. These are discussed in submissions on early intervention and child protection.

### **5. APPEALS**

At present the legislation provides that appeals from any order other than an interim order (i.e. including interlocutory orders) are to the District Court. This means that where a party wishes to appeal an interim order, but not an interlocutory order or final order, then it is necessary to seek appropriate redress in the Supreme Court. There does not appear to be any sound policy reason why this distinction should be made.

Information has been supplied to the Commission setting out all appeals to the District Court in which the Department has been a party over the period from June 2002 to June 2007. This table demonstrates that there has been a doubling in the annual number of appeals over this 5 year period. During this period 74% of these appeals were brought by parents and 82% by parents or other relatives. Of the 82% only 36% of appeals by parents or other relatives are successful. This compares with 16% of the appeals being commenced by DoCS with a success rate of 70% for the orders sought by DoCS.

Of the 35 on-going matters as at 30 June 2007, 3 had been on-going for at least 12 months, none for longer than 15 months and 18 more than 6 months. While these appeals are a hearing de novo it is possible for the District Court to rely upon the evidence received in the Children's Court. In terms of the impact on the child, it should also be recognised that the length of time that a child is without certain orders is the aggregate of the time before both the Children's and District Court. It is for this reason that any delay in the District Court unduly exacerbates the dislocation for the child.

Because the number of care appeals in proportion to the total workload of the District Court is insignificantly small, this Department has been advised by the Chief Judge that it is not possible for a specialist bench of the District Court to be created to deal with these appeals. It is unreasonable in these circumstances to expect District Court Judges to develop sufficient expertise in the area and will only bring to bear that expertise which they would have had prior to their appointment to the bench. However, the District Court Judge is fulfilling the same role as the Children's Court Magistrate who is expected to have particular skills and expertise of dealing with children and young people.

An appeal from a specialist court, unless made to a Supreme Court, should be expected to bring with it the same level of expertise (if not greater) than may have existed within the lower court. To overcome this concern, one possibility would be to create a Full Bench of the Children's Court. The

concern with this suggestion at the present time is the number of Magistrates within the Children's Court is quite small and specialist knowledge in children's law is limited. Accordingly, such a Full Bench may not amount to bringing a fresh or more experienced point of view to a particular approach being taken within the specialist court. It is also the case that the case load of magistrates in the care jurisdiction, particularly with the imperative to respond expeditiously, will result in few Magistrates having the time to then sit on a Full Bench of the same court.

These difficulties might be resolved if the number of specialist Magistrates were increased to also permit country circuits; those Magistrates were to form part of a discrete court who were not rotated out of the Children's Court on a regular basis, and the Senior Children's Magistrate presided over the Full Bench - only sitting at first instance in the Children's Court when permitted by not presiding over Full Bench appeals.

Matters which are subject to appeal have (contrary to the current provisions) previously been limited in various ways. Where the expertise of the Children's Court is of a sufficiently high standard, then the need for any appeal on merits should be questioned. In most situations, the expertise in considering and assessing evidence should be held within the Children's Court and is unlikely to be held in any other court. Appeals should therefore be limited to appeals on a matter of law – as occurs within other tribunals and courts. If the prior suggestion were to be adopted, it is only appeals on a matter of law that would proceed to the Full Bench. An appeal from the proposed Full Bench should proceed to the Supreme rather than the District Court.

## **6. CORONER'S COURT**

Comment on the role of the Coroner's Court will be made in another submission on oversight agencies. In this submission it is merely noted that while amendments made in 2002 were designed to clarify the role of the Coroner, Child Death Review Team and the Ombudsman in relation to individual child deaths, this remains a point of duplication with inquiries having quite different procedural requirements, each having the purpose of examining this Department's role in a specific child death and making recommendations for departmental change. If the Ombudsman were to rely upon the Coroner's findings after an inquest and then incorporate the individual findings as part of a more systemic review of child deaths some of this duplication might be avoided.

## **7. RECOMMENDATIONS FOR FUTURE CHANGE**

In summary, the recommendations made within this submission are as follows:

### **Section 2.1 Does the Court perform its role well?**

- The Children's Court to improve its data collection methods and procedures for all care matters.
- The Children's Court to adhere to the principles of continuity in judicial and legal representation, given the specialist nature of the jurisdiction and the significant impact Court orders will have on the lives of children, young people and their families.

## **Section 2.2 Legalism/excessive use of affidavits**

- Either the introduction of a tribunal or, if this is not to occur then adopt less adversarial court procedures as trialled in other courts.
- Dispense with the requirement that DoCS must file all material at the commencement of the proceedings.
- Without diminishing the obligation for accuracy and fairness to other parties, court documentation to be simplified and recognition to be given to the constraints of time in preparing such documents.
- Documents required to commence proceedings to be simplified so that the information provided supports a determination that the child is in need of care and protection and interim orders. Detailed material to support final orders could be filed at a later date.
- Magistrates to recognise that a Children's Court Clinic assessment report may have alternative uses other than being required for a final hearing, e.g. it may be a useful tool to assist discussions between the parties, leading to settlement of matters.
- Improve the consistency in the making of assessment orders.
- The establishment by the Court of information services to inform parents and family members as to court process and powers.
- Court ordered ADR to be used prior to the development of a care plan.

## **Section 2.3 Aboriginal children**

- The Children's Court to develop procedures to be used in how court cases are conducted that recognise the importance of Aboriginal identity being based in relationships with other people including community members. Currently there is no differential approach adopted by the Courts in court procedures applied to care matters involving Aboriginal children – despite examples in other jurisdictions of ways to involve relevant communities in decision making.

## **Section 3.1 Differential approaches**

- A differentiation of matters dependent upon the nature of the orders sought is required, e.g. there should be a different process for final orders of short-term duration than for long-term final orders.

## **Section 3.2 Jurisdiction of the Children's Court beyond removal and parental responsibility**

- Clarify the roles of the Court and designated agencies so that it is only the latter that has conduct of out-of-home care subject to: (a) review by a tribunal that considers the context in which a decision is made; and (b) accreditation and monitoring from a systemic perspective by the Children's Guardian.
- That consideration be given to the use of a tribunal model taking elements of the various models described in the attached paper.

## **Section 3.3 Contact**

- Limit contact orders to interim orders and for a specified period of time following the making of final orders.

### **Section 3.4 AVO powers**

- The power to make AVO orders should not be extended to the Children's Court.

### **Section 3.5 Grounds for a care order**

- The grounds for a care order to be simplified so that a determination of the need for care and protection can be on any basis and not limited to the sub-categories set out in section 71. However, the existing sub-categories in section 71 are to be maintained in the legislation.

### **Section 3.6 Child able to apply under section 90**

- A child or young person should be able to make an application under section 90 of the Act.

### **Section 3.7 Clarifying parental responsibility orders under section 79 and 81**

- Orders allocating parental responsibility (section 79) and the parental responsibility of the Minister (section 81) to be clarified.

### **Section 3.10 Compulsory assistance**

- The compulsory assistance orders contained within the Act to be repealed and strictly confined powers to be given to the Court to order short-term compulsory assessment supported by appropriate residential services.

### **Section 4.1 Magistrates**

- The current practice of rotating Children's Magistrates at the same time there is a rotation of Local Court Magistrates generally needs to end. The valuable experience built up in the Children's Court is being eroded by this rotation practice.
- Identified and publicly available training is required for those Magistrates sitting in the care jurisdiction for the first time.
- The numbers of specialist Children's Magistrates and Children's Registrars to be increased, thus permitting a greater coverage of the State.
- The Senior Children's Magistrate to be given the same status as a District Court Judge.

### **Section 4.2 Court locations**

- A Children's Court to be maintained in close proximity to the Central Sydney business district.
- Courts to be held in locations dependent upon the needs of children, rather than the availability of court space.
- Court premises to be designed specifically to accommodate care matters, e.g. increased numbers of interview rooms and appropriate spaces for children and young people who attend at Court.

### **Section 4.3 Children's Registrars**

- Children's Registrars to be required to hold legal qualifications and to be trained in ADR.
- Providing that Children's Registrars are legally qualified, consideration could be given to extending their statutory functions to include making short-term orders, orders by consent and issuing warrants and having all necessary powers to issue subpoena irrespective of consent.
- A cadetship or other recruitment methods be adopted to gain Aboriginal appointees as Children's Registrars.

#### **Section 4.5 Legal representation**

- The number of legal representatives in any one care matter to be limited in order to cause unnecessary delay and complexity unless a conflict of interest can be clearly demonstrated.
- Guardians ad litem to be appointed for all children under the age of 12 years and where the legal representative is receiving instructions on a 'best interests' model.
- A recruitment campaign be held to recruit and retain Aboriginal people as guardians ad litem.
- The establishment of practice guidelines for legal practitioners setting out a code of practice and permitting young practitioners to enter the jurisdiction under supervision.
- The introduction of a certification of a client's case having reasonable prospects of success to limit unmeritorious delays in the conduct of hearings.

#### **Section 5 Appeals**

- Contrary to the existing arrangement whereby most appeals are to the District Court on questions of merit, it is recommended that a Full Bench of the Children's Court should be created and presided over by the Senior Children's Magistrate (assuming this person has the status of a District Court Judge), to hear appeals on questions of law only.

Roderick Best  
Director, Legal Services  
Department of Community Services  
19 February 2008