



**SPECIAL COMMISSION OF INQUIRY INTO
CHILD PROTECTION SERVICES IN NEW SOUTH WALES**

PUBLIC FORUM

ROLE OF COURTS

22 FEBRUARY 2008

FACTS SHEET

1. The “care” jurisdiction

- a. The civil jurisdiction of the Children’s Court of NSW deals with matters relating to the care and protection of children and young people. These matters are often referred to as “care matters” or “care proceedings”.
- b. The powers of the Children’s Court to make orders in care matters can largely be found in the *Children and Young Persons (Care and Protection) Act 1998* (“the *CYP Act*”).
- c. Under the *CYP Act*, the Children’s Court can (amongst other things):
 - i. Make orders in relation to the emergency care and protection of a child or young person who has been removed from his or her home by DoCS (s 46);
 - ii. Order that the health of a child or young person be assessed (s 53);
 - iii. Order that the parenting capacity of a person be assessed (s 54);
 - iv. Determine that a child or young person is in need of care or protection (s 71);
 - v. Make orders directing a person or organisation to provide support services to a child or young person (providing that the relevant service provider consents to the order) (s 74);
 - vi. In certain circumstances, order that a person attend a therapeutic program (s 75);

- vii. Place a child or young person under the supervision of the Director General of DoCS (s 76);
 - viii. Determine who will have parental responsibility for a child or young person (s 79); and
 - ix. Vary or rescind (or refuse to vary or rescind) an order previously made in care proceedings (s 90).
- d. In the 2006/07 financial year 4,993 care matters were commenced in the Children's Court¹ and 4,875 care matters were finalised.²

2. Principles

a. Paramount principles

The paramount principles to be applied in any decisions made under the *CYP Act* are found in s 9. In summary, these principles are:

- i. The safety, welfare and well-being of the child or young person must be the paramount consideration in any decision made (s 9(a));
- ii. A child or young person must be given an opportunity to express his or her own views in relation to his or her safety, welfare and well-being (s 9(b));
- iii. Consideration must be given to issues relating to culture, disability, language, religion and sexuality relevant to the case (s 9(c));
- iv. Any action taken to protect a child or young person from harm must be the least intrusive intervention that is consistent with the protection of the child (s 9(d));
- v. A child or young person who is removed from their family is entitled to protection and assistance from the State, and should be placed in a nurturing and secure placement without delay (ss 9(e) & (f)); and
- vi. A child or young person in out-of-home care should be able to retain relationships with significant people if this is in the child's or young person's best interests and in accordance with his or her wishes (s 9(g)).

¹ NSW *Local Courts Annual Review 2006* p22.

² *Ibid.*

b. Principle of participation

- i. A child or young person should be able to participate in decisions made about his or her life, and must be given adequate information to enable such participation, as well as an opportunity to express his or her views (s 10).

c. Aboriginal and Torres Strait Islander principles

- i. Aboriginal and Torres Strait Islander communities are to participate in the care and protection of their children and young persons with as much self-determination as possible, and are to be given the opportunity to participate in significant decisions in relation to their children and young persons (ss 11 & 12); and
- ii. If possible, an Aboriginal or Torres Strait Islander child or young person who needs to be placed in out-of-home care is to be placed with a member of his or her extended family or kinship group (s 13(1)).

d. Principles of intervention

In deciding the appropriate response to a report concerning a child or young person, the Director General of DoCS must have regard to the following principles (which are to be applied in priority to the principles in s 9 - see s 36(2)):

- i. The immediate safety, welfare and well-being of the child or young person, and of other children or young persons in the relevant home, must be given paramount consideration (s 36(1)(a));
- ii. Any action taken must be appropriate to the age, culture and circumstances of the child or young person (s 36(1)(b)); and
- iii. Removal of the child or young person may occur only where it is necessary to protect the child or young person from the risk of serious harm (s 36(1)(c)).

3. Contact

- a. Under s 86 of the *CYP Act*, the Children's Court has the power to determine the minimum amount of contact that a child or young person can have with his or her natural parents or other significant people.
- b. This section also allows the Court to order that contact be supervised.

- c. However, an order for supervised contact can only be made with the consent of the person (or agency) who is to provide the supervision (ss 86(2) & (4)).

4. Procedure in care matters

- a. Care proceedings should be carried out in a non-adversarial manner (s 93(1)); should be conducted with as little formality as possible (s 93(2)); and should be carried out expeditiously (s 94).
- b. The Children's Court is not bound by the rules of evidence unless it determines that those rules should apply to the proceedings (s 93(3)).
- c. The *Children's Court Rule 2000* ("the Rules") specify that a care application must be supported by an affidavit stating the facts and circumstances upon which the application is based (r 21(a)).
- d. The *Rules* stipulate that the affidavit in support of a care application must also indicate whether the child or young person is currently the subject of an order made by the Children's Court in care proceedings, or by any other Court in relation to issues of custody, guardianship or parental responsibility (r 21(b)).

5. Alternative Dispute Resolution

- a. Part 2 of the *CYP Act* is entitled "Use of alternative dispute resolution".
- b. The provisions of Part 2 are, in summary:
 - i. The Director General of DoCS must consider whether the use of an alternative dispute resolution process is appropriate in the circumstances of the case (s. 37(1));
 - ii. Attendance at a preliminary court conference is mandatory (s 37(2)); and
 - iii. Participation in all other forms of counselling and conferencing is voluntary (s. 37(3)).

6. Appeals from orders of the Children's Court

- a. A party who is dissatisfied with a final order of the Children's Court can appeal the order in the District Court (s 91).
- b. For the purposes of an appeal from an order made by the Children's Court, the District Court has all the functions and discretions of the Children's Court (in addition to its own functions and discretions) (s 91(4)), and can confirm, vary or set aside the order (s 91(5)).

- c. c. An appeal to the District Court can be by way of a new hearing with fresh evidence (s 91(2)). Otherwise, the Court can admit new evidence in addition to or in substitution for the evidence that was before the Children’s Court (s 91(2)), or the Court can admit the transcript of the Children’s Court proceedings into evidence in the appeal proceedings (s 91(3)).
- d. In the 2006/07 financial year, there were 85 appeals in the District Court from orders made by the Children’s Court in care proceedings.³ Statistics in relation to the outcomes of these appeals are not yet available to the Inquiry.
- e. Appeals from the District Court can be brought to the Supreme Court under its general jurisdiction.⁴
- f. Care matters can also be brought to the Supreme Court under its ‘parens patriae’ jurisdiction.⁵ In exercising the parens patriae jurisdiction, “the court’s concern is predominantly for the welfare of the person involved”.⁶
- g. In the 2006/07 financial year, a total of 17 care matters came before the Supreme Court.⁷ Statistics in relation to the outcomes of these matters are not yet available to the Inquiry.

7. Jurisdiction of the Administrative Decisions Tribunal in relation to child protection

- a. The Community Services Division of the Administrative Decisions Tribunal (“the ADT”) reviews decisions made by government and non-government agencies to:
 - i. Remove a child or young person from a foster carer;
 - ii. Authorise or not authorise a person to be a foster carer;
 - iii. Accredit or refuse to accredit an adoption service;
 - iv. De-register a family day care carer;
 - v. Grant or refuse to grant a licence to operate a children’s service; and
 - vi. Refuse to implement a recommendation made by the Ombudsman.⁸

³ NSW *Department of Community Services Annual Report 2006/07* p77.

⁴ *Supreme Court Act 1970* (NSW) s 23.

⁵ A common law doctrine that “derives from the royal prerogative and...the Queen’s power to do good to all her subjects, particularly to those who are children or otherwise incapable of looking after themselves”. *Re Frances and Benny* [2005] NSWSC 1207, 17 (Young CJ in Eq).

⁶ *Ibid.*

⁷ NSW *Department of Community Services Annual Report 2006/07* p77.

⁸ NSW *Administrative Decisions Tribunal Annual Report 2006-2007* p19.

- b. In the 2006/07 financial year, there were 18 applications for review filed in the Community Services Division of the ADT.⁹ Most of the decisions reviewed were in relation to the removal of children from foster carers or the revocation of a foster carer's authority.¹⁰
- c. The ADT also has original jurisdiction in relation to applications brought under the *Commission for Children and Young People Act 1998* ("the *CCYP Act*") by "prohibited persons" (individuals who have been convicted of a sex offence or an act of violence involving children - s 33B of the *CCYP Act*). Prohibited persons cannot be employed in child-related employment (s 33E) unless they receive a declaration from the ADT that they do not pose a risk to children (s 33H).¹¹
- d. In the 2006/07 financial year, there were 20 applications made to the ADT by "prohibited persons" under the *CCYP Act*.¹²

⁹ *ibid.*
¹⁰ *ibid.*
¹¹ *ibid.*
¹² *ibid.*