Children's Court of New South Wales

NGO LEGAL PRACTICE FORUM

Woolcock Centre, Glebe: Thursday 14 August 2014

JUDGE PETER JOHNSTONE

PRESIDENT OF THE CHILDREN'S COURT OF NSW

"THE CARE AND PROTECTION JURISDICTION OF THE CHILDREN'S COURT OF NSW"

INTRODUCTION

1. This paper has been prepared for the 2014 NGO Legal Practice Forum. I have been asked to provide information regarding the Care jurisdiction of the Children's Court of NSW to assist those working in and for non-government organisations (NGO's) [1]involved in the child protection system of New South Wales.

2. The Children's Court is established under the *Children's Court Act* 1987. It is a specialist court with jurisdiction over cases relating to children and young people. Its main areas of jurisdiction involve youth crime and the care and protection of children and young persons.

3. The Children's Court of NSW is one of the oldest children's courts in the world. It is a specially created stand-alone jurisdiction whose origins can be traced back to 1850. Prior to 1850, however, the criminal law did not distinguish between children and adults, and children were subject to the same laws and same punishments as adults and liable to be dealt with in the adult courts.

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[1] I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children's Court Research Associate, Paloma Mackay-Sim.

4. Indeed there were a number of children under 18 transported to NSW in the first fleet of 1788. The precise number of convicts transported in the first fleet is unclear, but among the 750 to 780 convicts in the fleet, there were 3 children under 14 years of age and some 72 young persons aged 15 to19.[2]

5. The first special provision recognising the need to treat children differently was the *Juvenile Offender Act* (14 Vic No 11) 1850. This legislation was enacted to provide speedier trials and to address the "evils of long imprisonment" of children.

6. Subsequently further reforms were introduced, including the *Reformatory Schools Act* (30 Vic No IV*)* 1854, which provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act* (30 Vic No11) 1866, under which public and private "industrial schools" were established, to which vagrant and destitute children could be sent.[3]

7. Without going into a detailed analysis of subsequent history, since those early beginnings there was a steady, albeit piecemeal, progression of reform that increasingly recognised and addressed the need for children to be treated differently and separately from adults in the criminal justice system.

8. Ultimately, in 1905, specialist, discrete Children's Courts were established at Sydney, Newcastle, Parramatta, Burwood and Broken Hill. Two "Special Magistrates" appointed from the ranks of existing magistrates commenced sitting at Ormond House, Paddington in October 1905.

9. Since then, the idea of a separate specialist jurisdiction to deal with children has prospered and developed till the present time.

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2 'First Fleet Convicts', State Library of NSW, Research Guides

3 Children's Court of NSW website: "The Children's Court & Community Welfare in NSW" by Rod Blackmore, with the kind permission of Publishers Longman Cheshire Pty Ltd and the author, a former Senior Children's Magistrate of NSW.

10. Over that time the legislation that governs the way in which the Children's Court deals with cases has become more complex but the fundamental principle upon which the Court was established remains the same: that children should be dealt with differently, and separately.

11. Today, the Children's Court of NSW consists of a President, 13 specialist Children's Magistrates and 10 Children's Registrars. It sits permanently in 6 locations, and conducts circuits on a regular basis to country locations across New South Wales.

12. The Children's Court is vested with its Care jurisdiction by the *Children and Young Persons (Care and Protection) Act* 1998 (the *Care Act*). It is a complex and challenging jurisdiction and I aim to provide an introduction to the primary principles underpinning the Act and the role of the Children's Court in the administration of the Act, and the care and protection of children in New South Wales.

THE CARE ACT

13. The *Children and Young Persons (Care and Protection) Act* 1998 (the *Care Act*) is the legislation that governs all aspects of care and protection in New South Wales.

14. The *Care Act* contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department's powers and responsibilities begin and end as opposed to those of the Court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the Court.[4] I will be concentrating, in this paper, on the judicial aspects of the legislation.

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[4] Report of the Special Commission of Inquiry into Child Protection Services in NSW, November 2008 (the "Wood Report") at 11.2.

15. The *Care Act* gives jurisdiction in Care matters to the Children's Court, and prescribes the processes, practices and procedures in the Court.

16. Decisions are to be made consistently with the objects, provisions and principles provided for in the *Care Act*, and where appropriate, the United Nations Convention on the Rights of the Child 1989 (CROC).

17. The *Care Act* is not the most precise or orderly piece of legislation one could hope for. There are, however, a small number of key concepts that principally occupy the exercise of the Court's jurisdiction, about which it is important for you to have some appreciation, which I will address shortly.

18. The *Care Act* contains a number of important Objects, which are set out in s 9. These Objects are intended to give guidance and direction in the administration of the Act. The objects of the *Care Act* are set out in s 8, which provides:

    (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and

    (b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and

    (c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

19. The *Care Act* defines children as persons under the age of 16. Young persons are persons aged 16 to 18.

20. For ease of reference, I will use the generic term ‘children’ to encompass both children and young persons, unless the context requires a distinction.

21. The *Care Act* sets out a series of principles that govern its administration. These principles are largely contained in s 9, but also appear in other parts of the Act. You will need to be familiar with these principles.

22. First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount. (The principle is partly reflected in Article 3 of the United Nations Convention on the Rights of the Child (1989)).

23. This principle, therefore, is the underpinning philosophy by which all relevant decisions are to be made. It operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

24. It is now well settled law that the proper test to be applied is that of “unacceptable risk to the child”: *The Department of Community Services v “Rachel Grant”, “Tracy Reid”, “Sharon Reid and “Frank Reid”* [2010] CLN 1 at [61]. Whether there is an “unacceptable risk” of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] Fam CA 1235.

25. This test of whether there is an “unacceptable risk” of harm to the child is the sine qua non for the application of the Act: see *M v M* [1988] HCA 68 at [25]. If ever in doubt, return to this principle for guidance.

26. The *Care Act* then goes on to set out a series of further, secondary principles that guide action and decision-making by the Children’s Court, subject always to the paramountcy principle.

27. I refer to these as “secondary principles”, and I will paraphrase them They include the following:

- Wherever children are able to form their own view, they are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child’s developmental capacity, and the circumstances: s 9(2)(a). Children are to be adequately provided with appropriate information, and given an opportunity to express views freely, according to their abilities: s 10.

- Account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child: s 9(2)(b).

- Any action to be taken to protect children from harm must be the least intrusive intervention in their life, and their family, that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c); *Re Tracey* [2011] NSWSC 43.

- Any out-of-home care arrangements are to be made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the child’s circumstances and that, the younger the age of the child, the greater the need for early decisions to be made: s 9(2)(e) and (f). This includes the retention of relationships with people significant to the child.

28. There are additional special principles that apply in respect of Aboriginal and Torres Straits Islanders: ss 11, 12 and 13. In particular, the *Care Act* specifies that Aboriginal and Torres Straits Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible.

29. Where possible, any out-of-home placement is to be with a member of the extended family or kinship group.

30. If that is not possible, the Act provides for a descending process of placement with an appropriate Aboriginal and Torres Straits Islander carer before, as a last resort, placement with a non-Aboriginal and Torres Straits Islander carer: s 13.

THE KEY CONCEPTS IN THE CARE ACT

31. As I said above, there are, in my view, a small number of key concepts that principally occupy the exercise of the Court's Care jurisdiction, about which it is important for you to have some appreciation.

32. These are:

    (i) Removal and assumption of children into care, and the need for care and protection, and establishment.

    (ii) Permanency planning:

        a) Where a realistic possibility restoration exists

        b) Involving out-of-home care

    (iii) Parental responsibility

    (iv) Contact and the retention of relationships with people significant to the child.

33. I will deal with each of these concepts separately, by providing a brief explanation of each concept and the role of the Department and the Court at each of these stages in proceedings before the Court.

Care and protection

34. If the Secretary forms the opinion that a child is in need of care and protection, he or she may take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child: s 34(1).

35. Such action might include seeking of orders from the Court: s 34(2)(d); removing the child from premises under a warrant: s 233; effecting an emergency removal: s 43, or assuming care responsibility for a child in a hospital or other premises: s 44.

36. Where a child is removed, or the care responsibility of a child is assumed by the Secretary, he or she is then required to make a Care application to the Children's Court within 3 working days and explain why the child was removed or assumed: s 45.

37. The Court may then make an interim Care order, including an order placing the child under the parental responsibility of the Minister for the time being: s 69.

38. An interim Care order is of a temporary or provisional nature pending "establishment" and generally speaking at this stage of proceedings it is not necessary to satisfy the Court of the merits of a claim: *In Re Jayden* [2007] NSWCA 35 [71] - [80]. The threshold test for an interim Care order is not onerous:

> "It is sufficient to say that, according to the Act, an interim Care order can be made if the Children's Court satisfies itself that it is not in the best interests of the safety, welfare and well-being of the child that he or she should remain with his or her parents or other persons having parental responsibility (s 69(2)), or that the making of an interim order is appropriate for the safety, welfare and well-being of a child or young person (s 70), or that an interim order is necessary, in the interests of the safety, welfare and well-being of the child, and is preferable to a final order or an order dismissing the proceedings (s 70A). The Children's Court may be satisfied, for example, simply by weighing the risks involved on the evidence available at the time (cf *M v M* (1988) 166 CLR 59)".

39. An interim Care order enables the Secretary to protect the child and take such further steps as may be appropriate to ensure the safety welfare and well-being of the child before the proceedings move towards "establishment".

40. Such action might involve the carrying out a full investigation of the circumstances surrounding the removal or assumption of the child into care, obtaining medical treatment for the child, placing the child into interim out-of-home care, and other necessary short-term interventions.

41. Proceedings will then move to the so-called establishment phase. Establishment requires the Court to be satisfied that the child is in need of care and protection. This finding is the trigger for the operation of the substantive remedial provisions of the *Care Act*, provisions, including permanency planning: s 83, and the allocation of parental responsibility: s 79.

42. It is important to note that a finding that a child or young person is in need of care and protection is not a final determination. The grounds upon which the Court may make the finding are unrestricted, but may include, for example, the following:

    a) There is no parent available as a result of death or incapacity, or for any other reason: s 71(1)(a),

    b) The parents acknowledge that they have serious difficulties in caring for the child: s 71(1)(b),

    c) The child or young person has been, or is likely to be sexually abused or ill-treated: s 71(1)(c),

    d) The child or young person's basic physical, psychological or educational needs are not likely to be met: s 71(1)(d).

    e) The child or young person is suffering or likely to suffer from serious developmental impairment or psychological harm as a result of the domestic environment: s 71(1)(e).

43. It is also important to note that the Court only needs to be satisfied on the balance of probabilities. The Secretary does not have to establish the need for care and protection beyond reasonable doubt: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250 at [68].

> "As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at 171, statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities".

44. This principle assumes particular importance in cases of sexual assault and unexplained injuries.

45. The Secretary will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable: *Re "Sophie"*. In that case, Sackville AJA went on to say:

> "It was not appropriate to find that the (Secretary) had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was highly improbable. To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father": at [67].

46. After 'establishment' the process moves towards 'final orders'. Prior to the making of final orders, the Secretary is required to undertake permanency planning for the child. The Court must not make a final care order unless it expressly finds that permanency planning has been adequately and appropriately addressed. As part of permanency planning the Secretary is first required to assess whether there is a realistic possibility of restoration of a child to the parents: s 83(1).

Realistic possibility of restoration

47. I turn now to discuss the concept of "a realistic possibility of restoration".

48. The phrase involves an important threshold construct, which informs the permanency planning that is to be undertaken in respect of any child that has been removed or assumed into Care. In many of the contested cases that come before the Children's Court the central issue for determination is often whether there is a realistic possibility of restoration of the child to the parent(s).

49. It is for the Secretary to make the assessment: s 83(1). It is for the Court to decide whether to accept that assessment: s 83(5). If the Court does not accept the assessment it may direct the Secretary to prepare a different permanency plan: s 83(6).

50. Regard must be had to two matters:

a) the circumstances of the child or young person, and

b) the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.

51. There is no statutory definition of the phrase 'realistic possibility of restoration'. And, until recently, there had been no judicial consideration of what it entailed. The leading superior court decision in respect of the phrase "realistic possibility of restoration" is *In the matter of Campbell* [2011] NSWSC 761, a decision by Justice Slattery.

52. I have discussed the relevant principles in a number of judgments including *DFaCS (NSW) re Amanda & Tony* [2012] ChC 13 at [29] - [32] and *DFaCS re Oscar* [2013] ChC 1 at [29] - [34].

53. The principles may be summarised as follows:

- A possibility is something less than a probability; that is, something that it is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible.

- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve. The possibility must be 'realistic', that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'. It needs to be 'sensible' and 'commonsensical'.

- It is at the time of the determination that time the Court must make the assessment. It must be a realistic possibility at that time, not merely a future possibility.

- It is going too far to read into the expression a requirement that a parent must always at the time of hearing have demonstrated participation in a program with some significant "runs on the board": *In the matter of Campbell* [2011] NSWSC 761 at [56].

- There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of whether the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care

- The determination must be undertaken in the context of the totality of the Care Act, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm.

Permanency planning

54. Having made the assessment as to restoration, the Secretary is then required to address the permanency planning for the child: s 78. The permanency plan is then placed before the Children's Court for its consideration: s 83(2) and s 83(3).

55. The Court cannot make a final Care order unless it has considered the Secretary's Care Plan: s 80, and is expressly satisfied that the permanency planning has been appropriately and adequately addressed: s 83(7).

56. Permanency planning means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs.

57. The permanency plan will generally consist of any Care Plan that has been prepared by the Secretary or on his or her behalf, together with details of other matters about which the Court is required to be satisfied: s 80. It may also include other documents, such as undertakings to be given to the Court by a parent or a proposed carer.

58. The plan must set out the proposed allocation of parental responsibility, the kind of placement proposed and how it relates in general terms to permanency planning, proposed arrangements for contact between the child and his or her parents, relatives, friends and other relevant persons, the services that need to be provided to the child or young person and the agency designated to supervise the placement in out-of-home care.

59. Where the Secretary has assessed that there is a realistic possibility of restoration, a permanency plan is to include:

    a) a description of the minimum outcomes the Secretary believes must be achieved before it would be safe for the child or young person to return to his or her parents,

    b) details of the services the Department is able to provide, or arrange in order to facilitate restoration,

    c) details of other services that the Children's Court could request other government departments or funded non-government agencies to provide to the child or young person or his or her family in order to facilitate restoration

d) a statement of the length of time during which restoration should be actively pursued: s 84(1).

60. Where the Secretary assesses that there is no realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the Court: s 83(3).

61. The Secretary may consider whether adoption is the preferred option: s 83(4).

62. Or, the child may be placed in out-of-home care, that is, residential care and control provided by a person other than a parent, at a place other than the usual home: s 135.

63. A long-term placement that provides a safe, nurturing and secure environment may be achieved by placement with a member or members of the same family or kinship group as the child or young person.

64. If it is proposed that the child be placed in out-of-home care, the child or young person is entitled to a safe, nurturing, stable and secure environment. Unless it is contrary to his or her best interests, and taking into account the wishes of the child or young person, this will include the retention by the child or young person of relationships with people significant to the child or young person, including birth or adoptive parents, siblings, extended family, peers, family friends and community.

65. Decisions concerning out-of-home care placement of children in need of care and protection are not decisions that the Court takes lightly or easily. A risk assessment is required in accordance with the principle that the safety, welfare and well-being of the children are paramount. It is now well settled law that the proper test to be applied is that of "unacceptable risk" of harm to the child: *M v M* [1988] HCA 68 at [25].

66. The Court is also guided by the theory of attachment when making decisions about the care and protection of children.

67. The Court is cognisant of the critical importance of socialisation and the formation of secure attachments in infancy and early childhood. It is vital that the Court avoids a situation where a child or young person is placed in a succession of different placements.

68. The need for expedition in care hearings is a key feature of the *Care Act*. Section 9(2)(e) provides:

> "If a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement."

69. The permanency plan need not provide details as to the exact placement but must provide sufficient detail to enable the Court to have a reasonably clear understanding of the plan: s 83(7A).

70. There is, however, ongoing debate as to what is meant by "sufficient detail" in the context of approval by the Children's Court of permanency planning under s 83(7). This is not the time or place to wrestle with that issue in any detail, but the Children's Court is having ongoing discussions with the Director, Legal Services, DFaCS with a view to formulating, if not a set of principles for a consistent approach, then agreement as to typical scenarios that do arise.

Parental responsibility

71. In addition to setting out the kind of placement proposed, the permanency planning must set out the allocation of parental responsibility.

72. The term parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children: s 3.

73. Before the Court can make final orders in relation to the allocation of parental responsibility, it must consider the Care Plan presented by the Secretary: s 80.

74. The Court is also required to give particular consideration to the principle of the least intrusive intervention, and be satisfied that any other order would be insufficient to meet the needs of the child: s 79(3).

75. The Children's Court may, however, make a variety of orders, including the allocation of parental responsibility, or specific aspects of parental responsibility: s 79(1). The specific aspects of parental responsibility that might be separately or jointly allocated are unlimited, but include residence, contact, education, religious upbringing and medical treatment: s 79(2).

76. For example, the Court can allocate complete responsibility to the Minister, or allocate only some aspects to the Minister and other aspects to the parents, or some other person. Or it might make orders for shared responsibility between the Minister and others: s 81.

77. Parental responsibility might be allocated to some other person such as the permanent out-of-home carer. But if sole parental responsibility is allocated to the Minister, he or she is required, so far as is reasonably practicable, to have regard to the views of the person(s) who previously had parental responsibility, such as the birth parent(s): s 81(2).

THE SPECIALIST ROLE OF THE CHILDREN'S COURT

78. The Children's Court consists of the President, a District Court Judge, 13 specialist Children's Magistrates, and 10 Children's Registrars.

79. Magistrates and the President have particular experience and expertise in the exercise of the care and protection jurisdiction, including a familiarity with the *Care Act*. They also have the benefit of specialised training, providing them with a comprehensive knowledge of the academia relevant to the jurisdiction.

The structure and geographical coverage of the Children's Court

80. The President and 7 of the Children's Magistrates are permanently located at Parramatta; two Children's Magistrates are permanently located at Glebe (Bidura) and one at each Broadmeadow, Woy Woy, Port Kembla and Campbelltown.

81. Specialist Children's Court Magistrates also sit regularly at circuit locations.

82. The Children's Court now effectively operates four Country Care Circuits, pursuant to which specialist Children's Court Magistrates hear Care cases at specified country locations: Northern Rivers, Mid-North Coast, Dubbo/Orange and the Riverina. The Country Care Circuit Roster details the standard sitting arrangements for these regions, which include Wyong, Nowra, Bourke, Kempsey, Orange, Griffith, Albury, Wagga, Port Macquarie, Coffs Harbour and Lismore.

83. The President and Children's Magistrates regularly visit other country locations to hear cases on an as needed basis pursuant to the operation of the Children's Court Country Assistance Protocol. Under this protocol, Local Courts are able to seek the assistance of the President of the Children's Court to allocate a Children's Magistrate to hear complex cases requiring specialist knowledge, matters that are likely to exceed time standards or matters that require a lengthy hearing that might otherwise disrupt the local list.

84. The capacity for audio visual links, digital recording, and telephone conference facilities allows the Children's Court to deal with cases in the one location more efficiently.

85. Thus, some 80% of Care cases involving children in the state are now dealt with by the President and the specialist Children's Magistrates. The other 20% of children's cases are conducted by Local Court Magistrates exercising Children's Court jurisdiction in other locations under an inter-dependent and collaborative relationship that exists between the Children's Court and Local Court.

86. Importantly, newly appointed magistrates have the opportunity to spend several months in the Children's Court at Parramatta before commencing their country rotation. Magistrates also have the benefit of various resources to assist and guide them in the relevant law and the practice and procedure applicable in Care matters.

Practice and procedure in the Children's Court

87. Care proceedings in the Children's Court are to be conducted with as little formality and legal technicality as the circumstances permit: s 93(2). The proceedings are not to be conducted in an adversarial manner: s 93(1).

88. Thus, the Court is both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured court setting and statutory context, provided ordinary common sense fairness is applied in the particular case.: *Re Emily v Children's Court of NSW* [2006] NSWSC 1009 at [48].

89. The Court is not bound by the rules of evidence, unless it so determines: s 93(3).

90. However, in *Sudath v Health Care Complaints Commission* [2012] NSWCA 171 Meagher JA said at [79]:

> "Although the Tribunal may inform itself in any way "it thinks fit" and is not bound by the rules of evidence, it must base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined."

91. Further, the *Care Act* provides that children and young people are afforded a voice and given the opportunity to participate in matters that affect them. The specialist jurisdiction of the Court recognises the fact that children and young people should be given access to adequate information in a manner and language that they can understand.

92. Children should also be given the opportunity to express their views freely subject to cognitive capacity. They should also be given any assistance necessary to allow them to express those views and information as to how their views will be recorded and taken into account. They should also be provided with information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision and the opportunity to respond to decisions.

93. Care proceedings are conducted in a closed court: s 104B and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or a witness must not be published: s 105(1) (subject to exceptions). This publication prohibition extends to any information, picture or other material that is likely to lead to identification: s 105(4).

Alternative dispute resolution in care matters

94. Over the past few years, the Children's Court has initiated and entrenched Alternative Dispute Resolution (ADR) processes. This has involved an expansion and development of the involvement of Children's Registrars in Care matters.

95. Prior to the introduction of these initiatives, the use of ADR in the Children's Court was restricted, not only by the available resources, but also by an adversarial culture within the jurisdiction that favoured traditional court processes. Magistrates encourage the use of the DRC process, even where practitioners express reticence, or even opposition. Good outcomes are being regularly achieved.

96. The Dispute Resolution Conference (DRC) model has now become an integral aspect of such proceedings. The conferences involve the use of a conciliation model. This means Children's Registrars function in both a facilitative and advisory capacity.

97. Conferences are now regularly conducted at the Court by Children's Registrars who have legal qualifications and are trained mediators. Children's Registrars are based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children's Courts and Albury and Lismore Local Courts.

98. Importantly, Children's Registrars will travel to any court throughout the State and conduct DRCs.

99. The use of DRC's has also brought about a significant cultural shift that has impacted on cases in the Court more generally. The Australian Institute of Criminology (AIC) evaluated the use of ADR in care and protection, and found high levels of participation and satisfaction. Family members involved found the process to be useful and they felt they were listened to and treated fairly.

100. The AIC evaluation found that approximately 80% of mediations conducted have resulted in the child protection issues in dispute being narrowed or resolved. It is also possible to schedule a second DRC later in proceedings where appropriate, and Legal Aid will support a second DRC.

101. The Children's Court also has a program of Care Circles pursuant to which Aboriginal families are able to meet with other parties involved in Care proceedings together with Aboriginal leaders and a Children's Magistrate to discuss issues relating to children at risk.

102. The Care Circle program has been successfully implemented in a pilot program in Nowra and recently expanded in Lismore.

103. A Care Circle advances culturally appropriate solutions when deciding whether a child may be restored to their parents' care and, if not, the appropriate placement for that child. Importantly, the process empowers Aboriginal communities by involving them in decisions that affect them.

Cultural planning and support

104. In addition to the paramountcy principle, the *Care Act* sets out other, particular principles to be applied in the administration of the Act. One of those principles requires that in administering the Act, account must be taken of the culture and language of the child and, if relevant, those with parental responsibility for the child: s 9(2)(b).

105. Further, there are the Aboriginal and Torres Strait Islander principles contained in sections 11, 12 and 13 of the *Care Act.*

106. Thus, it is a principle to be applied in the administration of the *Care Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible: s 11.

107. Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12

108. A general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is also prescribed: s 13(1). In summary, the order for placement is with:

a) a member of the child's extended family or kinship group, as recognised by the community to which the child belongs,

b) a member of the community to which the child belongs,

c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's usual place of residence,

d) a suitable person approved by the Secretary after specified consultations

109. A permanency plan for an Aboriginal or Torres Strait Islander child must address how the plan has complied with the requirements of s 13 as to placement.

110. The order for placement, however, is subject to the objects in s 8 and the principles in s 9 and are not to be blindly implemented without regard to those objects and principles, in particular, the paramount interests of the child: see *Re Victoria and Marcus* [2010] CLN 2 at [49].

111. Furthermore, the placement principles only apply when the child "needs to be placed in statutory out-of-home care", as defined in ss 135 and 135A of the *Care Act*. "Out-of-home care" does not include any care provided by a "relative", unless particular specified circumstances apply.

112. The Children's Court is increasingly concerned as to the over-representation of Aboriginal children are in the justice system. In the Children's Court, this over-representation is manifested in both the youth crime jurisdiction and in the care and protection jurisdiction.

113. The Court is undertaking a number of inter-related activities to attempt to address this problem. This includes developing a Koori Court model for the sentencing of Aboriginal children.

114. In the Care jurisdiction, the Court is increasing the focus on cultural planning and support for Aboriginal children and families. In 2011-2012, Aboriginal and Torres Strait Islander children were almost 8 times as likely to be the subject of substantiated child abuse and neglect as non-indigenous children (rates of 41.9 and 5.4 per 1,000 children respectively).[5]

115. It is vitally important that when making decisions about a child to examine the issue of culture.

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[5] 'Child Protection Australia: 2011-2012', Australian Institute of Health and Welfare, *Child Welfare Series* no 55, Cat. No. CWS 43, Canberra, p.16. *Please note: this data should be interpreted with caution due to the high proportion of children whose Indigenous status was unknown in Western Australia, Tasmania and the Australian Capital Territory.*

116. Understanding culture helps the Court to understand that our perception of difference will often inform our interactions with others.

117. By acknowledging the impact of culture, we can ensure that we do not allow difference to inappropriately affect or impact upon outcomes:

> "…culture is perhaps the most basic issue for child abuse and child protection. It is the context in which children live and something to which they contribute. It is the backdrop against which all circumstances and events affecting children occur. It provides the basis for both our definitions of abuse and neglect and the responses we have developed to protect children and prevent abusing acts from occurring and recurring[6]".

118. Some of you will be aware of remarks I have made in recent cases as to the inadequacy of the cultural plans contained within the permanency planning presented to the Children's Court in respect of Aboriginal Children. For example, in my decision in *Director-General of DFaCS and Gail and Grace* [2013] NSWChC 4, I made the following remarks at [94] - [95]:

> "The Aboriginal and Torres Straits Islander Principles are in the *Care Act* 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.
>
> I wish to place on record that this Court is increasingly frustrated by the lack of cultural knowledge and awareness displayed by some caseworkers and practitioners in their presentation of matters before it. The time has come for a more enlightened approach and a heightened attention to the necessary detail required, which may require specific training and education by the agencies and organisations involved."

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6 Gough, D and Lynch, MA (2002) 'Culture and Child Protection', *Child Abuse Review*, 11, pp.341-344 at 341

119. I also rejected the permanency planning in *DFaCS and Boyd* [2013] NSWChC 9 due to the inadequacy of the cultural planning: [35].

120. I am pleased to report that we have formed a working party in the Children's Court which is developing some agreed standards and a standard template for cultural plans to be included in permanency planning for Aboriginal children involved in Care proceedings, with a view to enabling cultural planning to become a standard and meaningful part of the process.

121. The template will provide for a minimum set of topics to be covered by the cultural plan, including for example, details as to country, nation, language group, totems, community links and organisations. The plan will then set out what is intended for the child in terms of learning about their origins, learning their language, participation in cultural events, cultural planning and other relevant detail.

122. The working group has representatives from the Aboriginal Services Branch of DFaCS, AbSec, the Aboriginal Legal Service and of course the Court. The AbSec Aboriginal Consultation Guide will be a highly helpful tool for caseworkers and lawyers involved in preparing Care Plans for Aboriginal children. It is online unde the AbSec website.

THE CHILDREN'S COURT CLINIC

123. The Children's Court Clinic (the Clinic) is established under s 15B(1) of the *Children's Court Act* 1987. Its functions include medical examinations of children, and the clinical assessment of children and others such as parents and relatives.

124. Clinic assessments are of great assistance to the Court, which can derive considerable assistance from an Assessment Report. In addition to providing independent expert opinion, the Clinician can provide a hybrid factual form of evidence not otherwise available. A clinician can provide impartial, independent, objective information not

contained in other documents, give context and detail to issues that others may not have picked up on.

125. Clinicians observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, clinicians can provide the Court with insights and nuances that might not otherwise come to its attention.

126. To illustrate the point, I set out now something I wrote about a Clinician a few years ago, as it seems to encapsulate some of the points I have been making:

> "I am persuasively guided by the opinion of the Clinician. He is, after all the court's witness (as counsel was at pains to remind me), and may therefore be presumed to be unbiased and objective. There was no suggestion that he wasn't. It is one thing for a judge to listen to the mother as she gave her evidence for a short period of time, and to observe her demeanour in the cloistered environment of the courtroom. She was undoubtedly on her best behaviour, which was at odds with some of the evidence emerging from the documentary material, and with the way she appears to have conducted herself at the hearing in the Children's Court…On the other hand, the Clinician has had extensive contact not only with the mother, but also with the children and the carers, including observation of them all during contact sessions, and at the homes of the carers. He has also carried out and interpreted the results of an extensive array of psychological tests and assessments. This and his experience as a clinician over many years of practice in this area make him far more equipped than me, and with respect, the Department's personnel, to evaluate the mother. I found the Clinician to be a most impressive witness. I've had occasion to hear evidence from a number of psychologists over the past eighteen months, and he was a stand out for lucidity, objectivity, thoroughness, careful reasoning and thoughtfulness."

127. Finally, I want to make a few observations about future directions in expert evidence. No doubt some of you have heard about conclaves,

and concurrent evidence from a group of experts. These techniques will be increasingly used in the Children's Court.

VARIATION AND RESCISSION of CARE ORDERS: S 90

128. A topic that will increasingly engage those working in or for non-government organisations with out-of-home care responsibilities is applications under s 90 of the *Care Act* for variation or rescission of previous Care orders made by the Children's Court.

129. Such applications require the applicant to obtain leave from the Court, which will only be granted if there has been "significant change in any relevant circumstances" since the original order: s 90.

130. Having been satisfied that a significant change in relevant circumstances has been established by the applicant, the Court must take into account additional mandatory considerations in determining whether to grant leave: s 90(2A):

a) The nature of the application, and

b) The age of the child or young person, and

c) The length of time for which the child or young person has been in the care of the present carer, and

d) The plans for the child, and

e) Whether the applicant has an arguable case and

f) Matters concerning the care and protection of the child or young person that are identified in:

i) a report under s 82 or;

ii) a report that has been prepared in relation to a review directed by the Children's Guardian under s 85A or in accordance with s 150.

131. Once leave is granted, another set of requirements that must be taken into account in determining whether the previous orders should be varied or rescinded: s 90(6).

132. The matters specified in s 90(6) are:

a) The age of the child or young person;

b) The wishes of the child or young person and the weight to be given to those wishes;

c) The length of time the child or young person has been in the care of the present caregivers;

d) The strength of the child's or young person's attachments to the birth parents and the present caregivers;

e) The capacity of the birth parents to provide an adequate standard of care for the child or young person;

f) The risk to the child or young person of psychological harm if present care arrangements are varied or rescinded.

NGO's AND THE CHILDREN'S COURT

133. The primary responsibility to the Children's Court remains with the Department.

134. No doubt, however, NGO personnel will be increasingly involved in the Court proceedings and in the preparation of reports to the Court, the presentation of evidence, usually on affidavit, and in giving oral evidence, usually by way of cross-examination. They will also be involved in Court processes such as issuing subpoenas and inspecting documents produced to the Court. Caseworkers from NGO's will increasingly be present during court proceedings.

135. It is important that Departmental officers develop and foster collaborative relationships with NGO's and their staff. This will facilitate

information sharing and assist in the efficient and effective disposal of care matters.

136. The Department has issued a fact sheet with frequently asked questions relevant to NGO involvement in proceedings.[7]

137. Rather than detailing the contents of the facts sheet here, I have summarised the key points. Specifically:

- Where the Court has ordered a s 82 report, the NGO will be responsible for preparing the report and will be required to forward the report to Community Services upon completion. These reports must be completed on time. If the NGO fails to provide the s 82 report on time, Community Services may need to subpoena the agency to attend Court to explain the delay. If the Court is not satisfied with the arrangements in the s 82 report, it may invite a s 90 application – to vary or rescind the orders allocating parental responsibility. In such matters, the NGO can discuss and negotiate the position taken by Community Services.

- It is vital that NGO's maintain accurate and current records so that they are able to facilitate information sharing.

- Where there have been significant changes in the child or young person's circumstances since the final orders were made, the agency with case management responsibility will need to give evidence to the Court by affidavit and possibly attend court as a witness.

- NGO's should also be aware of the need to continue to work with Community Services and assist with appeals to the District or Supreme Court.

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[7] Department of Family and Community Services, 'Care Proceedings when case management for a child or young person is assigned to a non-government OOHC agency', June 2014.

138. There are a number of helpful resources available to assist those involved in court processes or proceedings.

139. Firstly, the Children's Court website contains a lot of practical information, including recent developments in the Latest News section, a Forms and Fees section, Practice Notes, Guidelines and Relevant Legislation.

140. The Practice Notes contain useful guidance on a range of procedural matters within the Children's Court. Currently there are 9 Practice Notes.

141. Practice Note 2 relates to the initiation of proceedings for a Care Order and the requirements for a succinct accompanying report.

142. Practice Note 3 deals with Alternative Dispute Resolution procedures in the Children's Court, including listing arrangements, attendees, responsibilities, preparation and confidentiality.

143. Practice Note 5 deals with Case Management in Care Proceedings and Practice Note 6 deals with procedures surrounding assessment applications for assessment by the Children's Court Clinic.

144. An additional reference resource is the Children's Law News. The editorial committee charged with deciding on cases and papers of relevance for this publication includes Specialist Children's Magistrates and care and crime practitioners in the children's jurisdiction. In addition, there is a dedicated Children's Court CaseLaw site on which the President and Magistrates publish cases of particular interest.

145. In its role as a model litigant in Care proceedings, the Department has the obligation to furnish the Court with all relevant information. That duty will extend to NGO's. The core of the model litigant principles is cogently articulated thus[8]:

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[8] *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90, the full court stated at [42]:

"Being a model litigant requires the Commonwealth and its agencies to act with complete propriety, fairly and in accordance with the highest professional standards."

146. Some recent cases point to how NGO's and their personnel might become more directly concerned in Children's Court proceedings.

147. First is the decision in *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5. This was a complex case involving a number of issues, one of which was whether the Joint Investigation Response Team (JIRT) should be allowed to remain in court during the hearing.

148. I rejected the proposition that a person with a direct interest in proceedings must either be a party or at least to someone who is seeking an order: [184]:

"In my view, the Court should adopt a purposive approach to the construction of s 104B. Having regard to the general principles of open proceedings, the proper way to apply s 104B is to ask whether the police have an interest in the proceedings and, as I have already said, they clearly do, particularly the officers who conducted the JIRT investigation."

149. The second decision was made by the Supreme Court in *Re June* (No.2) [2013] NSWSC 1111.

150. That case involved a carer of children in out-of-home care and whether they could become involved in proceedings in the Children's Court. The decision revolved around the interpretation of s 87of the *Care Act* which reads as follows:

87 Making of orders that have a significant impact on persons

(1) The Children's Court must not make an order that has a significant impact on a person who is not a party to proceedings before the Children's Court unless the person has been given an opportunity to be heard on the matter of significant impact.

(2) If the impact of the order is on a group of persons, such as a family, not all members of the group are to be given an opportunity to be heard but only a representative of the group approved by the Children's Court.

(3) The opportunity to be heard afforded by this section does not give the person who is heard the status or rights of a party to the proceedings.

151. The Supreme Court examined the content of the "opportunity to be heard on the matter of significant impact", and said that what is required in a particular case will depend very much on the facts of that particular case. And what is sufficient in one case, to satisfy the statutory entitlement, may well be insufficient in another: at [192]; and that in considering the content of the statutory opportunity to be heard given by s 87, it is necessary to bear in mind the requirements of s 93, as to the general nature of proceedings before the Children's Court, and the paramount principle set out in s 9(1). The content of the statutory right given by s 87 cannot override that paramount principle: at [189].

152. Importantly, however, the Court also said:

"…if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then, in a particular case, the opportunity to be heard may extend to permitting cross-examination on that particular point": [187]

"…there will, no doubt, be cases where for one reason or another it is appropriate (and perhaps very desirable) for that person to have the benefit of legal assistance": [188].

Report writing

153. Finally, I would like to say a little about report writing. The Court is increasingly seeing reports under s 82 and s 67 prepared by NGO's.

154. The first point to make is that the Department cannot delegate its primary responsibility for complying with the Court order requiring such reports. Thus, as one Children's Magistrate recently made clear, it was not good enough just to send a s 82 Report to the Court without an express adoption or approval of the report on behalf of the Secretary.

155. Secondly, there is no need to repeat or set out the detailed background, or the detail of the final orders.

156. Thirdly, the Court does not want a detailed history or analysis of the placement, or supervision issues that have arisen.

157. All the Court wants to know is whether, in succinct general terms the placement s going well. If not, then some detail of the problems is required. Essentially, the Court will want to know whether the problems are being satisfactorily addressed, or if not whether the matter should come back to the Court for review.

158. In general terms, a report should be no longer than two pages, unless there are exceptional circumstances that dictate greater detail. We generally don't want school reports, contact reports, or other written material. It may be that in certain cases it would be helpful to annex the most recent medical report in a case where the child is receiving ongoing medical treatment or counselling.

159. What I have been advocating to caseworkers in their report writing is a short succinct executive summary on the first page of the report is helpful, that is couched in simple language, along the lines of how you might summarise a case to your partner or a friend or neighbour at the end of the working day.

CONCLUSION

160. It is to be hoped that this presentation has provided you with a greater understanding of the Children's Court and its processes, and that you will derive some assistance when dealing with the Court in the future.

Judge Peter Johnstone
President of the Children's Court

14 August 2014