



NSW Ombudsman

Discussion Paper:

Care Proceedings In The
Children's Court

January 2006

CARE PROCEEDINGS IN THE CHILDREN'S COURT

A DISCUSSION PAPER

INTRODUCTION

Under the *Community Services (Complaints, Reviews and Monitoring Act) 1993*, the Ombudsman has the function of reviewing the deaths of certain children, including children who were reported to the Department of Community Services (DoCS) in the three years prior to their death, and children who died in circumstances of abuse or neglect or in suspicious circumstances.

The focus of reviewing child deaths is to consider the circumstances prior to the death of a child and the role of human service agencies in their life, with a view to identifying issues that may inform strategies for the prevention of future deaths. This focus has required us to look closely at the child protection system in NSW. As care proceedings in the Children's Court represent a significant part of the child protection system, we decided that it was relevant for us to look closely at how care proceedings operate.

The purpose of this paper is to provide a detailed discussion of matters connected with the conduct of care proceedings. In doing so, we believe that this paper will assist people understanding the issues involved, and provide an opportunity for feedback for the purposes of further discussions. At the end of this paper, we point out that there might be value in the organisation of an appropriate forum to focus on a number of matters discussed in this paper.

OUR RESEARCH

DoCS is the lead agency in child care and protection, and brings care applications before the Children's Court. The Court is responsible for making orders on care applications by DoCS. The Legal Aid Commission (LAC) provides and funds legal representation for children and, separately, for parents and other people involved in care proceedings. The work of all these agencies is discussed in this paper.

Some of the issues that we are interested in exploring are:

- What are the relevant factors in decisions taken in the lead up to an application to initiate care proceedings?
- Are care applications being dealt with expeditiously once before the Court?
- Can similar care applications lead to different decisions because they are heard in different locations?
- How often do restoration plans achieve the goal of reuniting children with their natural parents?
- To what extent do restoration plans fail because unrealistic undertakings are being accepted from parents?
- What effect do supervision orders have on the lives of children?

One source of information to assist in answering these questions, or providing a platform for further research, would be accurate and reliable statistical data about the nature and outcome of care proceedings. However, it appears that there is relatively little accurate and reliable statistical information available.

For example, the Court currently has no computerised system to collect accurate and reliable data about its operations. We have been told that the proposed CourtLink computer system is to be installed in the Court by the end of 2007.

In 2005, Court officials established the latest in a series of attempts to collect accurate information manually, previous attempts having produced unreliable data. The new system started on 1 July 2005, and requires court staff to e-mail monthly reports to the Local Courts Statistics Unit. The reports comprise records of seven types of applications and basic case information including children's birth dates and the date of finalisation of applications.

The absence of sufficient data means there is a significant gap in knowledge about a key part of the child protection system in NSW.

For the purpose of our research, we interviewed more than 50 people, including:

- Children's Magistrates, Children's Registrars, and court officials
- senior officers and staff from DoCS
- senior officers and staff of the Legal Aid Commission
- private sector lawyers who specialise in care matters
- staff and clinicians from the Children's Court Clinic
- child welfare academics
- non-government child welfare workers and their peak association representatives.

We have had to rely on anecdotal evidence, supported in some cases by the scant statistics that are available.

DoCS has expressed some concern about our use of anecdotal material in this paper. We acknowledge that there are shortcomings in this approach, but take the view that it is reasonable to draw on the opinions of people with relevant knowledge and experience of the care jurisdiction. We have chosen to include anecdotal material in this paper where it consistently reflects the views of people we have interviewed.

We have also taken into consideration:

- the review of the previous care and protection legislation in 1997
- child protection literature
- the Australian Institute of Health and Welfare Child Welfare Series
- DoCS annual reports and policy documents.

THE CHILDREN'S COURT

The *Children's Court Act 1987* provides for the appointment of magistrates to the Children's Court and the management of the court. It also confers authority on the Senior Children's Magistrate to make practice directions that regulate the Court's practices in care matters.

The dedicated Children's Courts in Sydney are at St James (including an "annex" at Bankstown), Bidura, Lidcombe, Cobham and Campbelltown. There are also Children's Courts at Broadmeadow in the Hunter District, Woy Woy on the Central Coast (with an "annex" at Wyong and Hornsby), and Port Kembla (including an "annex" at Nowra) in the Illawarra region.

There are twelve Children's Magistrates, each appointed for a three-year term. A thirteenth magistrate is on a short-term appointment from the Local Courts.

Specialist Children's Magistrates do not sit in local courts but travel on a needs basis on the country circuit for Children's Court hearings. Non-specialist magistrates at local courts around the State also hear care matters.

The Children's Court has five Children's Registrars who exercise quasi-judicial powers. We have been told that nine Children's Registrars are budgeted for but four of the positions remain unfilled.

THE CARE AND PROTECTION LEGISLATION – LAW AND PRACTICE

The *Children & Young Persons (Care & Protection) Act 1998* ("the care and protection legislation") sets out the regime for responding to reports about children "at risk of harm" and the institution of care proceedings before the Children's Court. It also articulates various principles that must be taken into account in responding to risk of harm reports and instituting care proceedings.

The principles to be applied in the administration of the care and protection legislation – section 9

The legislation requires the Court, DoCS and other agencies to make the safety, welfare and well-being of children the "paramount consideration" in their decisions.

It also requires that the Court and agencies should make decisions that constitute the "least intrusive intervention" in the life of the child and their family consistent with the paramount concern to protect children from harm and promote their development.

When interventions do happen, children and their families must be consulted about problems and solutions. Legal action should be avoided where possible and pursued without delay when needed. If children are to be removed from their families, new care arrangements are to be made as quickly as possible. The legislation emphasises the importance of children retaining family ties through contact arrangements while in out-of-home care. Another important goal is to ensure the permanency and stability of care arrangements for children.

The principle of “least intrusive” intervention – section 9(d)

Section 9(d) of the legislation says that when administrative or legal decisions are made to protect a child, they should be ones that are “least intrusive” in the life of the child and family, consistent with the paramount concern to protect children from harm and promote their development.

There is no research to show how the Court and agencies are interpreting the principle of “least intrusive” action.

Many of those we talked to questioned DoCS' interpretation of the “least intrusive” principle. It was suggested that some care orders sought by the department are more intrusive than necessary. An example might be an application for an order seeking that parental responsibility of a child be given to the Minister when there is a suitable grandparent able and willing to care for the child. Some people also argued that substandard care plans and restoration planning undermine adherence to the principle. And sometimes, they said, a long-term order can be less intrusive than its short-term counterpart, because short-term orders may be based on an unrealistic assessment of the prospects for a child to return home.

The Legal Aid Commission provided us with examples of cases where its lawyers have challenged DoCS' applications for care orders on the ground that the care order sought was not the least intrusive option. In one case, a new mother with mental health problems was discharged from hospital with her baby. The pair entered a residential facility where women with a mental health diagnosis may live with their children. While the woman was at the facility, DoCS applied for long term care orders in the Court. The LAC told us it argued successfully that there were no current risk factors for the child and the orders sought by the department were not the least intrusive option. In another case, the LAC represented a woman with drug addiction problems who had agreed with DoCS to the restoration of her baby over a 12-month period. As part of the agreement, the mother was to enter a residential facility and undertake drug rehabilitation. While she was doing this and the baby was in hospital, DoCS filed an application for the long term care of the baby. The LAC says that there were clearly no serious concerns for the child's safety at the time the application was filed.

The Children's Court made the following comments on the examples provided by the Legal Aid Commission:

These examples may not be entirely fair to DoCS. In some cases, no matter what the co-operation of the parent, the risk to the child (sometimes the future risk) is so high that DoCS caseworkers will feel compelled to seek an order. They are required by the [legislation] to nominate the order to be sought in the body of the application and, accordingly, they are likely to make an “ambit claim” which, until matters are subsequently clarified and the application is amended, is probably not the least intrusive option. Nevertheless, when the Court comes to making an order, it is the least intrusive option which it seeks to reflect and, by that time, DoCS has very often focused its thinking.

DoCS made the comment that the examples provided by the LAC did not go to the question of whether there was confusion about the concept of “least intrusive” intervention, but were more concerned with disputes about the appropriate orders that should be made by the Children's Court.

However, DoCS said it was aware of instances where the application of the “least intrusive” principle was capable of clouding the application of other principles. For example, DoCS said it had been alleged that caseworkers had wrongly assumed that adopting a least intrusive approach will mean that court action should be a response of last resort, and that this erroneous assumption had led to unnecessarily detailed contact arrangements. However, DoCS said that to talk about a corporate DoCS “view” was wrong because it seeks to apply the principle appropriately in individual cases.

The department told us that, based on its understanding of concerns expressed by others and its own experience, it expected submissions to the current review of the legislation to comment on the application of the “least intrusive” principle.

In our own submission to the review, we noted our concern about how the principle is being interpreted and applied in practice. Specifically, we noted that our investigations and reviews have identified cases where the level of protective intervention by DoCS following reports of risk of harm was not commensurate with the apparent level of risk to the child or young person.

We also noted DoCS' July 2002 policy statement on taking action in the Children's Court:

The [Act] provides a number of options for meeting the safety, welfare and wellbeing [of] children and young people. Provision for action in the Children's Court is made where all less intrusive casework actions have not met the care and protection needs of the child or young person.

This policy provides some suggestion that court proceedings are not appropriate unless other casework actions have been previously attempted.

In addition, we noted practitioners in this area had advised us that the “least intrusive” principle is often interpreted as a presumption in favour of keeping a child with their family even if this involves ongoing significant risks to the child's safety.

As to the content of the DoCS policy statement quoted above, and the interpretation of the least intrusive principle by DoCS caseworkers, the Senior Children's Magistrate, Mr Mitchell, has made the following observations:

To the extent that the “least intrusive option” principle is often interpreted as a presumption in favour of keeping the children with the family, while this may be the mistaken view of individual DoCS caseworkers, it most certainly is not the view of the Court. In particular, it is not the view of the Court that the proper application of the “least intrusive option” policy should necessarily argue against the commencement of proceedings, and DoCS' July 2002 policy statement ... should be reworked.

In our submission to the review of the Act, we submitted that, where the grounds for a care order have been established under section 71 of the Act, and there are significant risks to the child's safety in keeping them within the family, there should be a presumption that a child should not be returned to the family unless and until the risks have been ameliorated, and that the Act should clearly reflect this position.

Senior Children's Magistrate Mitchell has said that he disagreed with our proposal on the following grounds:

Firstly, it seems to me that the proper principle is clear enough in the legislation as it stands and is well understood by lawyers and by the Court. If it is misunderstood by DoCS, the solution is proper education for departmental workers rather than further [amendment of] the Act.

Secondly, ... it is not clear whether the Ombudsman's proposal regarding a return to "the family" relates to the nuclear family or to one parent to the exclusion of the other or to extended family, and neither is the degree of amelioration clarified.

As to the second comment by the Senior Children's Magistrate, we should observe that, in making our submission to the review of the Act, it was not our intention to seek to provide a draft of the legislative amendment of the type that we contemplated. While we acknowledge the comments by the Senior Children's Magistrate, we believe careful drafting may be able to address his concerns about the need for appropriate clarity in relation to the term "family" in the context of any relevant legislative amendment.

The principle of participation – section 10

Section 10 requires DoCS to provide the child or young person with information about the reason for departmental intervention, an opportunity to express their views, information as to how those views are to be recorded, information about the outcome of any decision, and an opportunity to respond to those decisions. The aim of the section is to ensure that children are able to participate in decisions made pursuant to the Act that have a significant impact on their lives.

The Legal Aid Commission submitted that the Act should be amended to provide that it is the role of the child's lawyer to communicate with the child and explain court processes and decisions of the Court. It said that the responsibility of explaining the legal process should be that of the child's independent lawyer, who needed to carefully take a child's instructions for presentation to the court and formulate a position in the best interests of the child.

In this respect, the LAC pointed out that DoCS staff dealing with children are social workers and not lawyers. The LAC said it accepts that case workers must speak to children in the exercise of their casework responsibilities. However, it said that, once a child's legal representative is appointed, legal issues should be discussed with children only by their independent legal representatives.

In support of its submission, the LAC told us its practitioners frequently see transcripts of conversations between caseworkers and children in affidavits accompanying care applications. It appears that inclusion of these conversations in the affidavit is put forward in support of the case the department is mounting against the parent. The LAC said this illustrates that it is very difficult for caseworkers, who are not legally trained, to turn their minds to the subtle difference between explanation and evidence gathering. According to the LAC, there is a need to protect children in circumstances where discussions with children by caseworkers may become an evidence gathering exercise for the purposes of the court proceedings.

The LAC said that its practitioners understand their obligations as lawyers to their clients and the Court, and these obligations provide protections for children and for the proper administration of justice.

The LAC also argued that there is potential for a conflict of interest where the department seeks orders that are opposed to the views, wishes or instructions of a child or young person. LAC said these situations are not uncommon, and that the child's legal representative is best placed to independently keep the child informed about the court process and legal implications.

DoCS said that the comments by the LAC on the demarcation between the legal issues and casework responsibilities did not accurately reflect the responsibilities imposed on DoCS by the legislation – for example, its responsibility under section 10 to involve children and parents in decision making, and its responsibility under section 78(3) to prepare care plans in consultation. DoCS said that its responsibilities in this respect provided clear examples of where caseworker responsibilities would inevitably cover legal issues. In the view of DoCS, it was unrealistic to expect that all legal matters could be excluded from casework support to a child, because the child's history and current circumstances would involve an intricate web of issues that inevitably included elements of the legal processes involving the child.

We consider that a number of aspects of the LAC's observations are highly contentious. In our view, the crucial question is whether the manner in which information is provided to, and obtained from, a child in the context of care and protection matters is appropriate and in the best interests of the child. Accordingly, we believe that no consideration should be given to the possibility of any amendment to section 10 of the type suggested by the LAC until after there has been a proper and informed debate about the issues involved.

In addition, we note that some of the issues raised in this context are relevant to the question of whether care proceedings before the Children's Court are conducted in an unnecessarily "adversarial" manner. This question is the subject of detailed discussion later in this paper.

Aboriginal and Torres Strait Islander principles – sections 11, 12 and 13

The care and protection legislation makes specific reference to indigenous families, kinship groups and communities. Section 11 says Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children with as much self-determination as possible. Section 12 says indigenous families, kinship groups, representative organisations and communities are to be given the opportunity to participate in decisions concerning the placement of their children and in other significant decisions made under the Act. Section 13 provides that, subject to the general principles in section 9, the placement of a child who needs out-of-home care should be determined in accordance with the principles of placement listed in the section. The first option is for the placement to be with a member of the child's extended family or kinship group.

The practical application of these principles is discussed later in this paper.

Responding to risk of harm reports

Part 2 of Chapter 3 of the legislation establishes a scheme concerning the making of “risk of harm” reports to DoCS. Section 23 defines “risk of harm” concerns as follows:

current concerns exist for the safety, welfare or well-being of the child or young person because of the presence of any one or more of the following circumstances:

- the child or young person's basic physical or psychological needs are not being met or are at risk of not being met
- the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care
- the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated
- the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm
- a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm.

Under section 30, when DoCS receives a risk of harm report about a child, it is required to determine whether the child is at risk of harm.

If DoCS forms the opinion that the child is in need of care and protection, DoCS should take whatever action is necessary “to safeguard or promote the safety, welfare and wellbeing” of the child.

The actions that DoCS may take include:

- providing, or arranging for the provision of support services
- developing, in consultation with the parents, a “care plan” to meet the needs of the child and their family (these plans may be registered with the Children's Court or be the basis for consent orders made by the Court)
- using emergency protection powers under the Act
- seeking appropriate orders from the Children's Court.

In considering its options, DoCS must have regard to the grounds on which the Children's Court is entitled to make a care order. These grounds are set out in section 71 of the Act:

- there is no parent available to care for the child as a result of death or incapacity or for any other reason

- the parents acknowledge that they have serious difficulties in caring for the child and, as a consequence, the child is in need of care and protection
- the child has been, or is likely to be, physically or sexually abused or ill-treated
- the child's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents
- the child is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living
- in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service
- the child is subject to a care and protection order from another State or Territory that is not being complied with
- the child resides in out-of-home care that is not authorised by the Act or with an authorised carer who is in breach of the carer's authorisation.

Principles of intervention in responding to risk of harm reports - section 36

DoCS must consider specified principles of intervention when it decides how to respond to risk of harm reports about children.

DoCS must give paramount consideration to the "immediate" safety, welfare and well-being of the child in their usual residential setting. Removal of the child from their usual caregiver should occur only where it is necessary to protect a child from the risk of "serious harm". It should be noted that these principles must be applied in priority to the general principles set out in section 9 of the Act.

The people we interviewed said that most (perhaps 90 per cent) of cases brought to court involve a finding that a child is in need of care. In these cases, everybody – including the parents – agrees that the child needs care for at least one of the reasons set out in section 71.

The question of the need for care is reportedly contested only in a small minority of cases. Many of these cases tend to turn on the disputed facts of a single event. An example would be a contentious medical issue like shaken baby syndrome.

However, consensus among the people we interviewed is that DoCS tends to initiate legal action only in what they described as the most serious cases.

Those interviewed also suggested that, in many cases, there is a history of notifications that suggests intervention could and should have occurred sooner. Lawyers acting as separate representatives for children said they commonly subpoena DoCS files and discover extensive protection issues and previous allegations that appear not to have been investigated. These lawyers said that they were unable to discern what policy is being used to guide the department's determination of which child protection cases should end up in court.

DoCS said that, before any care application is commenced, it must make a decision as to whether the information it holds would justify the Court making a care order on one of the grounds under section 71 and whether such an order would assist the child in question. In this respect, DoCS told us that, if an adequate level of proof does not exist, or if the department determines that the same results can be obtained through working co-operatively with the family, then it will not institute care proceedings.

DoCS has also told us that it is developing a comprehensive framework for practice improvement, consistent with the recommendation in our “Report of Reviewable Deaths in 2004” that DoCS should undertake a systematic performance audit of each Community Service Centre in NSW. The department has suggested that issues in relation to consistency across all CSCs as to when a matter is taken to court, and how often reports are investigated and assessed, can be appropriately addressed in this context.

Alternative dispute resolution - *section 37*

Section 37 requires DoCS to consider the appropriateness of using alternative dispute resolution (ADR) services in responding to risk of harm reports about children. The aims set out in section 37 are:

- to ensure intervention so as to resolve problems at an early stage
- to reduce the incidence of breakdown in adolescent-parent relationships
- to reduce the likelihood that a care application will need to be made
- if an application for a care order is made, to work towards the making of consent orders that are in the best interests of the child.

Section 37 itself does not define “alternative dispute resolution services”. However, the explanatory note says: “Within this provision, models for counselling and conferencing may be developed to accommodate the unique requirements of a community (whether cultural, geographic or language), the complexities of the case, or the nature and severity of the abuse suffered by the child or young person”. Parliament’s intention therefore appears to be to provide for flexibility regarding ADR options and approaches.

The people we spoke to said that ADR is rarely used before and during care proceedings for cases that do reach court. People familiar with the Court at St James and Campbelltown said they saw little evidence of DoCS using ADR at any stage in care proceedings. Other sources said that they had never seen ADR used on the country circuit. Public and private sector lawyers also told us that ADR is very rarely used to seek to avoid care applications, work towards applications for consent orders, or reduce the incidence of breakdown in adolescent/parent relationships.

DoCS caseworkers may be using ADR in cases that do not reach court. However, the affidavits in support of care applications to the court are reportedly short on evidence of the alternatives considered before applications were made.

Our inquiries show that DoCS caseworkers sometimes reach temporary care agreements with parents or carers in attempts to resolve child protection concerns. The existence of such

arrangements may be interpreted as a form of ADR. Temporary agreements may be linked to voluntary undertakings by parents or carers. These agreements do not involve formal care orders by the Court and therefore cannot be enforced. Evidence from the Ombudsman's reviewable death function shows that temporary care arrangements may sometimes be used inappropriately and in the absence of proper risk assessments.

DoCS told us that attempts were made early in the life of the current legislation to train DoCS staff in ADR and to bring Community Justice Centres into the process. However, DoCS told us that it is not currently providing ADR training to its caseworkers, although negotiation skills training is available. Nevertheless, DoCS told us that it supports the increased use of ADR, and has been working with Legal Aid to achieve this.

One of the real difficulties in assessing the use of ADR before and during care proceedings relates to how the concept and use of ADR is viewed by the key players.

DoCS said that the Court had consistently indicated opposition to, or failed to be supportive of, ADR approaches and therefore training its staff in ADR seemed irrelevant in relation to the operations of the Children's Court.

Senior Children's Magistrate Mitchell went on to make the following comments on the observations of DoCS:

There is no basis whatsoever for the allegation by DoCS that the Court has consistently indicated opposition to, or failed to be supportive of ADR approaches ... Moreover, even had the Court been opposed to ADR as a matter of principle ... that would have presented no impediment whatsoever to DoCS initiating ADR "designed to address problems at an early stage and to reduce the likelihood that the care application will need to be made".

In this respect, Senior Children's Magistrate Mitchell also noted DoCS' previous failure to provide ADR training to its caseworkers.

Senior Children's Magistrate Mitchell made the following general observations on the use of ADR:

Although care proceedings are often not appropriate for compromise and settlement (like cases involving only the interest of litigants), the Children's Court acknowledges that there is a place for ADR in the child care and protection regime...

The Children's Court employs "in-house" ADR in the shape of preliminary conferences, presided over by Children's Registrars, where each party and the child's interests are represented. No care case goes to a hearing without a preliminary conference and a very high settlement rate is achieved. In many cases, though, resort to external ADR would seem to suffer from the difficulties [that there is a significant power imbalance between the parties in care proceedings, and that the rights and interests of vulnerable children should not be compromised] ... In the case of early ADR [there would be] the additional shortcoming that there would be somebody to express the interests of DoCS and somebody to represent the interests of the parents [but] nobody to represent the needs and interests of the child.

The use of external ADR in the context of child care and protection is perhaps more evident in Victoria, with its very heavy emphasis on the reunification of families, than in NSW, with its emphasis on care and protection of “at risk” children. Perhaps the usefulness of ADR is not unconnected with the result one is trying to achieve and the particular interests one is seeking to advance.

It is clear from Senior Children's Magistrate Mitchell's comments that the Court sees preliminary conferences as a vehicle for ADR in relation to matters before the Court. Before discussing the implications of this further, it will be helpful to examine some of the features of preliminary conferences.

Under section 65, a preliminary conference must be held after DoCS has notified the parents of a child or young person of a care application, and served them with copies of the application. The conference is arranged and conducted by a Children's Registrar of the Children's Court. There are options for the Children's Registrar to defer or dispense with a conference according to circumstances specified in the section.

Section 65 lists the purposes of a preliminary conference:

- identifying areas of agreement and issues in dispute between parties
- determining the best way of resolving any issues in dispute, including by referring the application to independent dispute resolution
- setting a timetable for the hearing of the application by the Court
- formulating any interim orders that may be made by consent.

DoCS said that it has deliberately made a policy decision not to have legal representation at section 65 preliminary conferences. The department said that part of the reason for that decision was to address issues of power imbalance. The department said that the Court has frequently sought to have DoCS legally represented, and that this is inconsistent with its comments about power imbalance.

Senior Children's Magistrate Mitchell said that the decision by DoCS not to be legally represented at preliminary conferences appeared to be indicative of the lack of the department's commitment to ADR. In his view, the lack of legal representation was irrelevant to addressing the power imbalance between DoCS and a parent and, if anything, was likely to exacerbate the imbalance because an experienced and properly instructed lawyer was likely to act in a considered way, respecting the interests of others and the nuances appropriate to the ADR process.

The Legal Aid Commission argued that an ADR process to encourage settlement at an early stage can only work where all parties present can make decisions as needed during the conference. LAC told us, that where an agreement is reached, it commonly cannot be finalised at preliminary conference because the caseworker or manager is unable to make the decision without legal advice. According to LAC, this was not conducive to the settlement process. It said the departmental legal representatives should either be present at preliminary conferences or delegate decision-making powers to a DoCS representative at the preliminary conference.

The Sydney Regional Aboriginal Corporation Legal Service said that they understood that preliminary conferences were intended to provide an opportunity for open and frank discussion and negotiation about the substantive issues involved, to enable parties to be actively involved in decision-making and to avoid the need for litigation. However, it said that, in practice, conferences did not involve meaningful negotiation and were often merely used as a means of making directions for the further conduct of the proceedings. The Service submitted that the effectiveness of preliminary conferences was directly linked to the skills and expertise of Registrars – in particular, their mediation skills and capacity to engage parties in the negotiation process – and the willingness of DoCS and legal representatives to actively participate in discussion and mediation.

In light of the above discussion, why has DoCS argued that the Court has “consistently indicated opposition to, or failed to be supportive of, ADR approaches”? The answer appears to lie in the fact that DoCS is of the view that the legislation does not “give the role of ADR to the preliminary conference”. In this respect, DoCS has made the following observations:

There seems to be some confusion about the respective positions of DoCS and the LAC concerning ADR and preliminary conferences. Section 65(2) says that the preliminary conference can “refer the application to independent dispute resolution”, not that ADR takes place at the preliminary conference. This is consistent with recommendation 6.3 of the Parkinson Review [of the Act]. That recommendation was about holding these conferences away from the court house ... and avoiding the use of “list days” ... The way in which the preliminary conference has been used by the Court, and not whether DoCS is legally represented at them, is what has changed the nature of the preliminary conference. Both LAC and DoCS are very supportive of the appropriate use of ADR. Neither the Review nor the Act gives the role of ADR to the preliminary conference.

We would observe that the legislation supports the use of alternative dispute resolution services that are designed to resolve problems at an early stage and to reduce the likelihood that a care application will need to be made. The legislation also envisages the use of ADR services after a care application is made “to work towards the making of consent orders that are in the best interests of the child”.

While we acknowledge that ADR will not be appropriate in all cases, we would support moves to expand its application in a range of ways before and during care proceedings. We would also support associated research on how such expansion might best be achieved.

In saying this, we recognise the value of the Court's employment of a form of “in-house ADR” in the shape of preliminary conferences. From the above discussion, there is clearly room for further consideration of how the better resolution of issues can be achieved through this process.

We also acknowledge the concerns of the Senior Children's Magistrate relating to the use of “external” ADR where care proceedings have been commenced. Nevertheless, this need for caution should not exclude the use of external ADR in all cases where proceedings have been commenced. It is clear from the legislation that this is envisaged. It has the support of both DoCS and the LAC. We believe there is scope for the mediator or conciliator involved in ADR of this kind to address power imbalances between parties.

We would therefore be keen to see the major players come together in exploring further options for, and approaches to ADR, and that future use of ADR should be supported by associated research that evaluates the outcomes of the various ADR strategies that are employed.

We also note the recommendation made in the review of the previous Act that “the Minister should have the responsibility for the establishment and funding of alternative dispute resolution services which are independent of the Department.” This was to ensure that the mediator or conference facilitator was not a party to the negotiations and was independent of DoCS. Consideration could again be given to this recommendation.

Development and enforcement of care plans – section 38

Section 38 provides that a care plan developed by agreement in the course of ADR may be registered in the Children's Court and used as evidence of an attempt to resolve the matter. A care plan that allocates all or some aspects of parental responsibility to a person other than the parents takes effect only if the Children's Court makes an order by consent to give effect to the proposed changes.

The Children's Court may make orders to give effect to a care plan without the need to be satisfied of the existence of a ground for a care order under section 71 if it is satisfied that the proposed order will not contravene the principles of the Act and the parties understand the plan, have freely entered into it, and have received independent advice about it.

A number of lawyers specialising in care matters report that section 38 is rarely used.

The Sydney Regional Aboriginal Corporation Legal Service said that, while its experience of section 38 care plans was limited, the fact that parties are required to obtain legal advice before signing a section 38 care plan and before a care plan can be registered suggests that either the requirement was not being complied with or that section 38 care plans were infrequent.

We have been told that, at Campbelltown, only a handful of care plans are registered each year, and that, of these, few involve reallocation of parental responsibility and therefore orders by the Court. At St James, section 38 care plans, and supervision orders, are said to make up less than five per cent of all cases.

There is some contention about the use of section 38 care plans at Port Kembla. Some people said that the use of section 38 care plans there is very rare. And the Court provided figures which showed that the total number of applications in the 12 months from 1 April 2004 was 183. Of these, there were 103 applications for parental responsibility orders, 49 applications to vary or rescind a care order, but only four applications under section 38.

However, DoCS has said that section 38 is frequently used at Port Kembla. In support of its contention that section 38 plans were frequently used at Port Kembla, DoCS said that a departmental legal practitioner had advised that section 38 plans had been provided on a regular basis.

It is not easy to resolve these competing accounts of the use of the care plans at Port Kembla. However, one possible explanation is that the legal practitioners and the Court are referring to applications for care plans involving the reallocation of parental responsibility, where the care plan must be approved by the Court, whereas DoCS is referring to the use of care plans generally.

DoCS said that in courts where section 38 is not used extensively, an explanation may be that the Court, in a number of early cases, held that registration of a section 38 care plan required that the matter come before the Court. DoCS also said that, once an order is made under section 38, it is unclear as to whether other provisions such as section 90 apply (section 90 concerns applications for the rescission or variation of care orders). The department said that, when these two considerations were taken into account, its staff might decide that it was simpler and more productive to proceed by way of a care application.

The Children's Court made the following submissions on the use of section 38 care plans:

Whether or not section 38 care plans are often or rarely presented to the Court is a matter for the parties and, in particular, for DoCS. Those plans which involve an allocation of parental responsibility may not be especially attractive to DoCS because, due to section 38(2), such matters have to go to the Court at any event. Furthermore, in the early stages of its involvement with an "at risk" child and his/her family, DoCS may believe that a section 61 care application is appropriate and the possibility of agreement and settlement emerges only later. When that happens, consent orders will probably be as attractive to the parties and convenient to all concerned as will a section 38 care plan.

In our view, the submissions on these points by DoCS and the Children's Court raise questions about the application of section 38, given that its intention appears to be to provide a way to resolve care matters as an alternative to taking action in the Court.

There is a need for reliable data and associated research to provide a solid platform for a more informed debate about the issues. We were advised at one stage that the Court intended to initiate a central register of section 38 care plans. The information in the register would have been collected by requiring each of the State's Children's Courts to supply the Manager of Children's Court Services with relevant data about care plans. However, we have recently been advised that this initiative did not proceed.

The legislative requirement under section 38(3) for parents to have received independent advice about a care plan does not stipulate the source of advice. However, this is likely to be a lawyer.

As to the availability of legal advice, Legal Aid has said that it operates free legal advice services out of each of its twenty regional offices, and that people seeking advice on care matters would be able to avail themselves of these services, although in some cases conflict of interest might limit the nature of the assistance available. Legal Aid also said that appointments to obtain legal advice are not necessary at the Sydney and Parramatta offices, but are necessary at the small regional and country offices. Legal Aid also pointed out that LawAccess is funded to provide legal advice throughout the state.

DoCS has told us that parents who consent to care plans are receiving independent advice before the matter is heard at court and that this advice is usually self-funded.

However, we have been told that, in some cases where parents have not obtained legal advice about the care plan prior to the court hearing, lawyers have advised parents to reject or renegotiate agreements, thus delaying resolution of the matter.

Emergency applications and care applications – section 46

Under section 43, the department and police are empowered to remove a child from an immediate risk of serious harm, without prior court approval, if the making of an apprehended violence order is not sufficient to protect the child. Under section 44, the department may also act in such circumstances to assume care of a child. In either case, section 45 requires the department to make a prompt application to the Court for an emergency care and protection order, an assessment order, or any other care order.

Emergency care and protection orders involve an order that places the child in the care responsibility of the Director-General or some other person specified in the order. Emergency care and protection orders have effect for a maximum of 14 days. An application for an extension for a further 14 days may be made.

DoCS has told us that it has no data on applications for emergency care and protection orders, including data on which such orders are sought and whether or not they are granted.

The LAC suggested court attendances could be by video link, and that these facilities need to be developed and promoted. The Court has noted that video link and associated facilities are not available at St James or Cobham, but will be available at the Parramatta Court which, from late 2006, will accommodate the majority of care cases. The Court also observed that the use of video link should be encouraged.

An alternative to an application for an emergency care and protection order is an application for the care and protection of a child. The application must specify the particular care order sought and the reasons for it.

We have been told that applications for care orders are the most common way that proceedings begin in the Court.

There is a distinction between the threshold for an emergency care and protection order and that for a care order. To make an emergency order, the Court has to be satisfied that the child is at risk of serious harm. For a care order, the Court must find that a child is in need of care and protection based on any one of the eight grounds listed in section 71.

At St James court, in at least 90 per cent of applications, the finding that a child is in need of care is not contested. At Campbelltown, it is said to be very rare to have hearings to establish grounds. Specialist lawyers with experience representing children and parents also say most cases come to court with lengthy histories and all parties concede the need for care.

There is no empirical evidence available on the frequency of use of any of the eight grounds. However, some people we interviewed suggest that parents are more likely to concede on ground (b) - that they have serious difficulty in caring for the child - or on ground (e) - that the child is suffering or is likely to suffer serious developmental impairment or psychological harm as a consequence of the domestic environment. These grounds are more general than ground (c), that the child has been or is likely to be physically or sexually abused or ill-treated. Parents probably seek to avoid the stigma of conceding responsibility for these specific forms of abuse.

In *Re Irene*, the Supreme Court found that establishment of any one of the grounds sought is sufficient to pass the threshold test. Some people we have talked to hold the view that information about the breakdown of use of various section 71 grounds would serve no useful purpose.

It is interesting to note that the UK legislation has only one ground for the making of a care order - that the child has suffered or is likely to suffer significant harm. The Children's Court has said that it would welcome an amendment to the legislation in NSW, substituting this one ground for the various grounds currently listed in section 71 of the legislation.

Examination and assessment orders - sections 52-59

Section 53 provides that the Children's Court may make an order for the physical, psychological, psychiatric or medical examination of a child.

The section also provides that the Court may order the "assessment" of a child.

Section 55 provides that an assessment order may be made on the application of the Director-General of DoCS or, if a care application has been made, by a party to the application.

If the child is of sufficient understanding to make an informed decision, the child may refuse to submit to an assessment.

Section 54 provides that the Court may, for the purpose of an assessment order, appoint a person to assess the capacity of a person with parental responsibility, or a person who is seeking parental responsibility, to carry out that responsibility. However, such an assessment may only be carried out with the consent of the person whose capacity is to be assessed.

Section 56 provides that the Court must have regard to the following factors in considering whether to make an assessment order:

- (a) whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere
- (b) whether any distress the assessment is likely to cause a child will be outweighed by the value of the information that might be obtained
- (c) any distress already caused the child by any previous assessment for the same or another purpose
- (d) any other matter the Court considers relevant.

The Court must also ensure that the child is not subjected to unnecessary assessment.

Section 58 provides that, where the Court makes an assessment order, it must appoint the Children's Court Clinic to prepare and submit the assessment report, unless the Clinic informs the Court that it is unable or unwilling to prepare the assessment report or is of the opinion that it is more appropriate for the report to be prepared by another person. Where the Clinic so informs the Court, the Court is to appoint a person whose appointment is, as far as possible, agreed to by the child, the parents, and DoCS.

The Children's Court Standard Directions provide for six weeks for the preparation of the Children's Court Clinic Report.

The Children's Court Clinic does not undertake any physical or medical examinations of children. There is a memorandum of understanding between DoCS and the Department of Health in relation to medical assessments. Medical assessments are said to be not uncommon and tend to be of an unobtrusive nature. Cases involving allegations of sexual assault tend to come to court with medical assessments already completed.

Clinicians appointed by the Children's Court Clinic usually do "assessments". The most common assessments are for parental capacity. We have been told that there is no specific clinical test available to measure a person's abilities as a parent.

It should be noted that section 54 restricts assessments to the issue of parental capacity for a person "seeking parental responsibility". The Legal Aid Commission told us that there are often relevant parties requiring assessment where parental responsibility is not sought. The LAC said that section 54 should be broadened to provide for the assessment of other family members or proposed short term carers who do not seek parental responsibility. The LAC gave the example of where a grandmother seeks that a child with a disability be placed with her, but does not seek parental responsibility. The only assessment currently available as to her capacity to provide for the child's needs is the department's in-house placement assessment.

In response to the comments of the LAC, DoCS said that the director of the Children's Court Clinic has said that seeking assessments of a range of people on the "off chance" that some may be considered for caring for the child is a waste of the Clinic's resources and one which the Clinic positively discourages.

We acknowledge that the observation by the Director of Children's Court Clinic makes good business sense. However, we are not sure that this point adequately deals with the point made by the LAC that section 54 does not allow for the assessment by the Clinic of short term carers who do not seek parental responsibility, leaving the assessment of such carers to an "in-house" placement assessment by DoCS.

The LAC argued that an independent assessment of parenting capacity should be available to the court in circumstances where the department does not approve a proposed carer. The LAC also said that there is little ability to test the department's in-house assessment.

In response to these comments by the LAC, the Children's Court said that, if there is disagreement between DoCS and a party about the parenting capacity of a person who might otherwise be seen as an appropriate carer for a child, that party is entitled to cross-examine departmental caseworkers, the author of the assessment, and any other witness upon whom DoCS seeks to rely.

The Clinic has supplied data to us based on a survey of 249 assessments done by clinicians in the six months ending 30 December 2003. Clinicians are required to submit a Clinical Survey Form with each assessment report. The survey covers client types and characteristics including drug and alcohol, domestic violence, mental illness, disability, and culturally/linguistically diverse background. The survey form also records whether the person to be assessed is indigenous.

Drug and alcohol is the most prevalent characteristic, followed by domestic violence. The data does not indicate the prevalence of people with more than one characteristic.

Separate Clinic analysis of survey results for September 2001-June 2002 shows a disproportionate appearance of mothers in the group representing all clients with a diagnosed mental illness. It is noted that mothers are more likely to be subject of an assessment than fathers, grandparents and other carers.

There are many more assessment orders issued at the St James court than at any other court. Data for the 2004-05 financial year shows that St James issued 115 assessment orders, almost twice as many as Campbelltown (65) and almost three times as many as Toronto (45). Cobham, which has two courts, ranks at number four. However, it should be noted that Cobham deals with a significant amount of criminal matters.

One clinician suggested that St James dominates the rankings simply because it has more courts and magistrates than elsewhere.

During the 2004-2005 financial year, of the 56 courts throughout the State, both specialist and non-specialist, 48 made fewer than 20 assessment orders. 30 courts made more than four assessment orders and the remaining 26 made fewer than four assessments.

The data may appear to show a stark divide between the specialist Sydney courts and country courts. The latter are much less likely to order assessments. However, there is no data to directly compare the number of assessment orders against care applications in particular courts. One available comparison relies on a count of new care applications per court in 2003 and, compared to assessment orders made in 2004-2005. This showed that Dubbo had 25 new care matters in 2003 and one assessment order in 2004-05. Equivalent figures for other towns were Cooma (15/1), Cootamundra (4/1), Macksville (22/1), Batemans Bay (21/1) and Kempsey (15/1).

People familiar with the specialist courts said that DoCS uses the Clinic to inform its casework decisions, including the question of whether there is a realistic possibility of restoration. The Court made the observation that all of those involved in a care case, including the Court, will regard the assessment report as part of the material upon which to base a decision regarding the placement of the child, including whether there is a realistic possibility of restoration.

As noted above, the Court must ensure that a child or young person is not subjected to unnecessary assessment. There is no information available on the extent to which magistrates reject applications for assessment orders on the basis that the child should not be subjected to unnecessary assessment. Variations in the rate of the making of assessment orders by different courts suggest a need to further explore this issue.

DoCS said that the Clinic might be used more frequently than DoCS considers necessary. In DoCS' view, a partial explanation for this is a frequent rejection by magistrates of the professional opinions of DoCS' staff and a resulting search for a decision by an "expert". However, DoCS said it is unaware of any data to support this view.

In the absence of data, we can draw no firm conclusions about this aspect of the use of assessment orders in care proceedings.

Care orders - section 71

As noted above, the Court can make a care order if it finds that there is a need for care and protection on one of the grounds set out in section 71.

Evidence of prior alternative action – section 63

DoCS is required under section 63 to provide evidence of the alternatives to a care order that were considered before lodging a care application, and the reasons why those alternatives were rejected.

We would expect evidence provided under section 63 to be a source of information about the use of ADR. However, we have been told that DoCS meets its obligations under the section in a “cursory” way, usually within one paragraph of an affidavit. Section 63 reports do not appear to be regularly challenged during court proceedings.

DoCS has said that the level of information required is set at the standard required by the Court and that, if the Court were to reject applications because DoCS supplied inadequate information, then DoCS would supply more information. DoCS also noted that the scheme established under the legislation has also been in operation for five years. In addition, the claim that DoCS provided only “cursory” information ignored the fact that the amount of information supplied might be the amount required to serve the interests of the child, rather than some abstract legal purpose.

This raises questions about whether current practice in relation to section 63 accords with the intentions of the legislation, and whether this issue should be considered during the current review of the Act.

Preliminary conferences – section 65

As noted above, a preliminary conference must be held after DoCS has notified the parents of a child or young person of a care application, and served them with copies of the application. The conference is arranged and conducted by a Children's Registrar of the Children's Court.

Section 65 lists the purposes of a preliminary conference:

- identifying areas of agreement and issues in dispute between parties
- determining the best way of resolving any issues in dispute, including by referring the application to independent dispute resolution
- setting a timetable for the hearing of the application by the Court
- formulating any interim orders that may be made by consent.

We note that the use of preliminary conferences has already been extensively canvassed in our previous discussion of alternative dispute resolution. The following discussion contains some additional points about the use of preliminary conferences.

Some of the people we interviewed described preliminary conferences as a way to clarify issues. They claimed that parents frequently leave such conferences saying they now understand the goals of DoCS. Some people reported that section 65 conferences were used to seek

clarifications and amendments of draft care plans, draft orders, and associated undertakings and contact arrangements.

Some of our respondents said that the focus by DoCS was on obtaining a finding that a child is in need of care, and that care plans that might be a basis for discussion at a preliminary conference tended to be unformed.

In response to such claims, DoCS noted that the preliminary conference would frequently be held before the receipt of any report by the Children's Court Clinic, which only had to be filed before any final orders were made. Against this background, DoCS commented that to suggest that the care plan should be anything other than "unformed" at the time of the preliminary conference did not adequately recognise the timing of when the production of a care plan was required. DoCS also emphasised that the fact that care proceedings were a dynamic process underlined the difficulty of preparing a care plan too early in the proceedings.

The Senior Children's Magistrate also said that it was not his impression that DoCS focused on obtaining a finding that a child was in need of care to any improper or excessive degree.

Some respondents claimed that many preliminary conferences in country courts proceed without the involvement of any of the five current Children's Registrars. However, Senior Children's Magistrate Mitchell has said that he was not aware of this occurring, and that he had been informed by a very experienced Children's Registrar that he had never heard of any preliminary conference (whether in the country or otherwise) proceeding without the involvement of a Children's Registrar.

Interim orders - sections 62, 70 and 70A

Under section 62, the Court may make a care order as an interim order or as a final order. In making an interim order, section 70A requires the Court to be satisfied that the order is necessary, in the interests of the child, and is preferable to the making of a final order or an order dismissing the proceedings.

Section 70 provides the Court with the power to make "such other care orders" as it considers appropriate for the safety, welfare and well-being of a child, pending the conclusion of the proceedings.

There is no reliable data on the use of interim orders but most appear to involve allocating parental responsibility to the Minister.

Few contested hearings on interim orders are reported at St James. Given that most cases are not contested at the interim phase, parents may believe, or may be advised, that they should focus on the final result and thus not contest interim issues.

Disputes about interim contact arrangements tend to be addressed in section 65 preliminary conferences chaired by a Children's Registrar. As with many other areas of our research, there is little information available about the frequency of interim orders prohibiting contact. The Court at Campbelltown reports few interim contact orders being made, and more occur at St James.

Once a court awards interim parental responsibility to the Minister, DoCS has the authority to determine contact arrangements. The exception is when the Court makes a contact order under

section 86. If the order requires contact to be supervised by DoCS, the department can exercise its discretion on the number of supervised contacts it will provide. There is a dearth of information about the frequency of use of minimum requirements for contact visits on an interim basis. The range and variety of cases appear to lead to a similarly broad range of contact arrangements, including those that are supervised.

One other issue that arose in the context of applications for interim orders was that of the use or otherwise of affidavit evidence.

DoCS said that it was the practice at St James to hear evidence without an affidavit in support of an application for interim orders, rather than merely relying upon the affidavits filed. DoCS suggested that this practice explained why there were more applications for interim orders at St James. DoCS also said that there are cases in the Family Court which do not support the practice at St James, such as In the Marriage of C (1995) 20 Family Law Reports 24. However, in our view, the case cited by DoCS merely supports the proposition that, in the circumstances of the case, it was properly within the discretion of the Family court to refuse to allow cross-examination by one of the parties. It does not suggest that a court is prohibited from allowing cross-examination – indeed, it recognises the discretion to do so.

In response to the observations made by DoCS, Senior Children's Magistrate Mitchell made the following comments:

If the DoCS allegation is that, at St James, the Court insists on hearing and determining interim applications without an affidavit, that is untrue. If the complaint is that, in addition to affidavits, St James and other registries of the Children's Court allow oral evidence and even some cross-examination, that is true. Where time permits, even in an interim application where placement and/or contact is involved, an effort is made to allow a parent and a child representative to express his/her case and to test the departmental evidence which quite often proves unreliable. This practice is consistent with natural justice and is the best available method for the Court to discover the truth as to the best interests of the child.

It is submitted that DoCS' reference to the Family Court discouraging evidence in the context of interim applications is unhelpful. Notwithstanding the practice of allowing DoCS' evidence to be challenged and tested, unacceptable delay, in contrast with the situation in the Family Court, has been eradicated from the care jurisdiction of the Children's Court.

It should be noted that these issues are also relevant to the question of whether proceedings are conducted in a "non-adversarial" manner – a question discussed in more detail later in this paper.

Orders accepting undertakings – section 73

If the Children's Court is satisfied that a child is in need of care and protection, the Court may make an order accepting undertakings given by a parent with respect to the care and protection of the child. The Court may also make an order accepting undertakings given by the child, with respect to the conduct of the child, or an order accepting undertakings from both parent and child.

DoCS or a party to the proceedings may notify the Court of an alleged breach of an undertaking.

The Court must respond to a notification of an alleged breach of an undertaking by:

- giving the parties an opportunity to be heard on the allegation
- determining whether the undertaking has been breached
- making such orders as it considers appropriate if it finds that an undertaking has been breached

Orders accepting undertakings are often linked to restoration plans. Undertakings can also be used when children are removed from home on a long-term basis. A parent might promise, for example, not to use drugs during contact visits.

Significantly, the Court cannot require a parent to give an undertaking, and neither the Court nor DoCS can require a parent to, for example, undertake drug testing and disclose the results. This can only occur on a voluntary basis.

Some of the people we talked to raised concerns about the realism of proposed undertakings in certain circumstances and, commonly, a perceived failure by DoCS caseworkers to consider their appropriateness in the context of the care history. For example, restoration planning may involve requirements for urine analysis of parents with long records of drug abuse. It is claimed that DoCS does not always test the undertakings by checking the parents' drug use in the period between the care application and final orders. Similarly, we have heard claims of children being placed with drug-abusing relatives pending final orders, with the department allegedly ignoring evidence of the drug use.

It could be that caseworkers are motivated to take undertakings at face value so that interim arrangements or proposed care plans are kept intact. And it is acknowledged that caseworkers may be under pressure to find scarce interim or longer-term placements for children. But final orders may establish a link between undertakings, a child's placement and care arrangements, and proposed restoration. If there is no realistic prospect that the undertakings can be met, this may undermine prospects for restoration and the legislative goal of a stable placement.

The Legal Aid Commission told us that it sees another problem with section 73. The section states that undertakings may only be provided by a parent or child. Under section 3 of the Act, a parent means a person having parental responsibility for a child or young person. LAC says a natural parent in the Court's care jurisdiction often has no parental responsibility and certainly not during a period of proposed restoration. LAC says the problem is that undertakings cannot be sought from either a parent without parental responsibility, or a person seeking contact such as step-parents, grandparents, and other people of importance to the child. LAC says that it may be entirely appropriate to seek undertakings from such people regarding matters such as behaviour and abstinence from use of drugs or alcohol during contact periods. Without these protections, LAC says, total prohibition of contact is often the result.

The issue of the Court's power to make an order accepting undertakings has been dealt with by the Children's Court in the matter of *Cristian, Tamsin, Jennifer and Karen (No 2)*. This issue arose during proceedings brought in August 2005 by the Director-General of DoCS, alleging a breach of undertakings by the mother. The order accepting the undertakings was made in June 2005, together with orders placing the children under the parental responsibility of the Minister for a period of three years (previously, parental responsibility for the children had been granted

to the Minister under interim orders made in September 2004 and in May 2005). The respondent (the natural father) argued that the Court had acted beyond power in making an order accepting undertakings from the mother, because at that time the mother did not have parental responsibility for the children and therefore did not fall within the definition of "parent" under the Act. The Director-General's legal representative argued that section 73 should be read as meaning that the Court was empowered to accept undertakings from natural or adoptive parents even when they do not have parental responsibility. In its judgement in February 2006, the Court found in favour of the respondent, ruling that the meaning of "parent" in section 73 is to be defined in accordance with the definition of the term "parent" in section 3 of the Act.

LAC said that, in order to manage the problem, token parental responsibility is often given to those from whom undertakings are sought. For example, a mother seeking frequent contact retains parental responsibility for religion so appropriate undertakings can be provided. However, the LAC said that this gives rise to unnecessary litigation about allocation of parental responsibility or contact with a child where it cannot otherwise be offered without appropriate undertaking protections.

We have been told that applications to the Court involving alleged breaches of undertakings are not brought often but are not unheard of. The use of realistic undertakings would appear to be one method whereby parents can work towards the restoration of children. For this reason, the appropriateness of the current language in section 73 could be considered in the review of the Act.

Support services - section 74

Section 74 allows the Court to order the provision of support to a child for a maximum period of 12 months. However, section 74 also states that the court cannot make an order unless the individual or organisation consents to it.

DoCS has said that an appeal court judgement has found that the Director-General of DoCS cannot be compelled to provide support services.

The Senior Children's Magistrate is one of a number of people who have told us that the Court's power under section 74 is rarely used. He suggested this was because DoCS cannot be compelled to co-operate in providing services.

DoCS has told us that it cannot comment on this claim because no data is held on the use of section 74 orders. However, DoCS does note that it has increased its spending in supporting placements and arranging for the delivery of services. However, DoCS cannot distinguish from its records between support services arranged as a result of departmental decisions, and those provided as a result of a court order.

Once again, lack of data limits consideration of this issue.

Attendance at a therapeutic or treatment program - section 75

The Court has the power to order treatment for a child who has behaved in a sexually abusive way. This power cannot be used if a child is 14 or older, or if the alleged sexual abuse has led to criminal proceedings.

We have been told that this power is rarely used.

We have also been told of cases where treatment was deemed appropriate but could not be required because the child was 15. The reason for the age limit is not explicit in the legislation but may be tied to the age at which children have the legal capacity to make decisions for themselves and the age at which children are presumed to be capable of crime (*doli capax*).

DoCS agrees that there is rare use of section 75 treatment orders. The department says this is because most treatment programs proceed upon the basis of an admission of guilt by the child. DoCS says the child will rarely make an admission of guilt in the context of care proceedings because such an admission could potentially be used against them in forthcoming criminal proceedings.

The department says a legislative amendment to section 75 is being considered. DoCS has not told us the nature of the amendment under consideration, so we are not in a position to comment further.

Supervision - sections 76 and 77

Under section 76, the Court may make an order placing a child under the supervision of DoCS, if the Court is satisfied that the child is in need of care and protection. The maximum period of a supervision order is 12 months.

Section 77 authorises DoCS to inspect the premises where the child lives for the period of supervision and to meet and talk with the child. The child is required to accept the supervision and to obey "all reasonable directions" of DoCS staff. The Court may make such orders as it considers appropriate if it determines that a supervision order has been breached.

The Court can require reports about the progress of the supervision and whether its purposes have been achieved. There is an option to renew the supervision for up to 12 months and to require reports on the supervision.

Final supervision orders are said to be common in cases where children are allowed to remain at home or where a restoration plan has been approved.

There is no data available on the use or effectiveness of supervision orders, including whether children and young people the subject of supervision orders are allocated a DoCS caseworker during the period of supervision.

Care plans - section 78

If DoCS applies for a care and protection order for the removal of a child from their family, the department must present a care plan to the Court before final orders are made.

The care plan must provide for:

- allocation of parental responsibility for the child

- the kind of placement proposed for the child
- arrangements for contact between the child and their parents and other people
- the agency designated to supervise the placement in out-of-home care
- the services that need to be provided to the child.

The care plan is to be made “as far as possible” with the agreement of the parents and child.

The care plan is only enforceable to the extent that its provisions are embodied in or approved by orders of the Court.

Some of the people we interviewed described care plans as cursory. Some said DoCS staff do not draft care plans until after the need for a child's care and protection had been established in court. It was argued that this tended to delay the use of section 65 conferences.

Various respondents criticised care plans for failing to address the requirements set out in section 78. Care plans might fail to address sibling contact or a child's special needs. In the latter case, examples were cited of plans that referred to special needs but made no reference to how these would be met. In other cases, care plans for indigenous children were said to omit details about kinship contact arrangements.

Participants in conferences said they would propose changes to care plans. DoCS was seen to be amenable to such proposals. The Court was said to rely on lawyers representing children – the separate representatives – to consider whether care plans were in the best interests of their clients. Some people we talked to said that Children's Magistrates and Local Court Magistrates would themselves subject care plans to varying degrees of scrutiny.

DoCS says that, if a care plan does not comply with the requirements of section 78, then the Court should not be proceeding to make final orders. In DoCS' view, since there are very few adjournments to ensure that care plans do comply with the legislation, the only available evidence is that the Court is satisfied that DoCS is complying with the requirements.

DoCS has further observed that care plans are designed to address both casework decisions and to explain the proposed course of action to the Court, and that these objectives can be inconsistent. DoCS has not elaborated on this point in its submissions to this paper, nor has it indicated its view of the consequences of such inconsistency.

It is our view that the care plans that DoCS presents to the Court must be consistent with the paramount consideration of a child's safety, welfare and wellbeing. Section 78 does not require that care plans include a provision about the way that DoCS explains the plan to the Court.

DoCS has told us that improvements in the way information is given to the Court is the subject of ongoing discussions between the Court, the Legal Aid Commission and DoCS.

Restoration planning and permanency planning – sections 78A, 83 and 84

The legislation provides for the fact that some children may be able to return to their families. The department is thus required to decide whether there is a realistic possibility of restoration, based in part on consideration of the child's circumstances. Also required is consideration of any evidence that the parents are likely to be able to satisfactorily address the issues that led to the removal of their child. A plan will have to include the important notion of permanency planning outlined in section 78A. The goal is to ensure that children get secure, stable and enduring placements for as long as needed, whether or not there are plans to try to restore them to their families. Permanency planning seeks to avoid disrupting children's lives by shifting them from place to place and from one carer to another.

People familiar with the Children's Court at Campbelltown suggest that as many as half of all care applications result in short term orders and a restoration plan. Our sources also estimate that, at St James, the court approves 90 per cent of DoCS applications which involve proposed consent orders linked to restoration. Whether orders with restoration plans are more common than those without is unknown. Nobody knows how many restoration plans are successful and how many fail. There is no data to answer the question.

There has been criticism of permanency planning for indigenous children. However, there is no evidence indicating any pattern in the quality and consistency of application of the relevant principles.

The Legal Aid Commission has said that, in its experience, the majority of care plans are developed without any knowledge of where the child will be placed in the long term. The LAC has said that DoCS' permanency plan is to approach one or more agencies for the purpose of making a referral for long term placement. However, the LAC has said that the agencies contracted to the department to provide out of home care will not accept a referral for long term care of a child until the Court makes a final order.

As to permanency planning, DoCS has made the following comments:

It is accepted that planning may often be undertaken without the knowledge of the desired ultimate permanent carer. This is not just a practice of agencies, as implied by the comments of the LAC, but a recognition that most carers will have decided whether they are prepared to care for children on a short term or long term basis. If the carer has intellectually and emotionally prepared to care for a child on a long term basis, the emotional anguish that can be involved in starting to care for a child for whom no long term final orders are in fact made can be very traumatic. It is for this reason that section 83(7)(a) places an obligation on the Court to expressly make findings "that permanency planning for the child or young person has been appropriately and adequately addressed", and so concentrates on the planning rather than the actual arrangements.

It is the submission of DoCS that the present role of the Court is to look at what is planned, and not to consider whether individual care arrangements will adequately meet what is planned. To hold otherwise would be to require the Court to assess individual carers and to directly require all carers and their suitability to be interrogated by the Court.

While noting DoCS' submissions, we believe that it is difficult to make a clear distinction between the question of whether permanency planning has been "appropriately and adequately

addressed”, and the question of whether individual care arrangements will adequately meet what is planned.

This is another area where no agency is collecting or keeping data that might serve as a basis for analysis of the extent to which Parliament's intentions are being given effect in relation to the important principle of permanency planning and the goal of planned restoration of children to their families. However, it is not only data that is needed – this is an area that needs further research to paint an accurate picture of the practical issues that arise, including their implications for carers and children in need of care.

Adoption

The Children's Court has no power to approve adoptions – that is the province of the Supreme Court.

The department's last annual report noted that a total of 11 children under the parental responsibility of the Minister were adopted during 2003-04.

The people we interviewed said they never saw adoption proposals in care plans.

In June 2005, DoCS' Director of Legal Services advised the department's legal representatives that adoption should be considered as one possibility in care applications involving permanent placement. The advice noted that a number of legal representatives had been incorrectly providing advice that the possible adoption of a child should not be mentioned in care applications or care plans lodged in the Children's Court, and that a proposed application for adoption could legitimately be included in the permanency plan provisions of a care plan filed with the Court.

DoCS has told us that it agrees that adoption might be used less frequently than it could be.

Parental responsibility orders - section 79

Section 79 provides for different ways of allocating parental responsibility for a child. The Court may make an order allocating parental responsibility to one parent to the exclusion of the other parent, to one or both parents and the Minister or another person jointly, another suitable person or to the Minister alone. Specific aspects of parental responsibility may also be allocated.

None of the people we interviewed offered a view on estimated numbers and types of parental responsibility arrangements sought or obtained, or the frequency of various types of parental responsibility orders.

The Australian Institute of Health and Welfare Child Welfare Series contains national data on care and protection orders. The most recent data available for NSW is for the 2004-2005 financial year, when 2,537 children and young people were subject to care orders. Of these, 1,718 children and young people were subject to orders for the first time. The largest group by age of children subject to care orders was children aged 10-14, comprising 665 children.

Unlike a number of the other states, NSW did not supply any data on supervisory orders to the AIHW survey.

The AIHW data does not shed any light on the nature and frequency of use of the various options outlined in section 79. However, nearly 90 per cent of all children in care in 2002-03 were subject to final orders reallocating parental responsibility for them. This means that for nine out of 10 children, the Court was satisfied that no other order would be sufficient to meet their needs.

Monitoring of orders concerning parental responsibility – section 82

Section 82 allows the Court the option of requiring written reports about the suitability of care arrangements relating to orders reallocating parental responsibility. DoCS produces the reports for the consideration of the Court. If the Court is not satisfied that proper arrangements have been made for the child, the case can be recalled for a review of “existing orders”.

Section 82(1) empowers the Court to require the written report within six months or such other period as it may specify.

Some people we have talked to said that the magistrates do not all agree on the meaning of section 82. Children's Magistrate John Crawford published a paper on the subject in October 2004, in which he observed that section 82:

... does not enlarge upon the nature and scope of such ‘review’ and this has given rise to some uncertainty of its meaning. Any uncertainty may have contributed to what have been few review hearings.

Our sources say there are two current interpretations of section 82. One is that a review allows for existing orders to be changed. The other is that the Court can express its concerns, but that new orders will require an application by a party to the proceedings.

In the view of DoCS, there are questions about whether the Court is using its power to review appropriately, and whether that power is appropriate in principle.

DoCS has told us that not all magistrates will arrange for matters to be re-listed upon receiving a report. The department observes that if a matter is not re-listed, it is difficult to see the use of the report. (DoCS notes that as well as section 82 reports, the Court can require reports under section 76(4) on the effects of supervision.)

DoCS says that sometimes a series of reviews is ordered over a period of years. The department has said that that this has the consequence of rendering ineffective the notion of the finality of an order and the permanency of a placement. DoCS also argues that this means that emphasis during any subsequent work is placed on a need to respond to a Court timeline, with a potential incapacity to address the needs of a child as they arise.

DoCS also questioned the extent of the Court's ability to judge the changing needs of a child by relying solely on a section 82 report. The department said the Court was not prepared to rely upon a single report from DoCS at the time of making initial or final orders, but was prepared to make new orders based upon a single report. In DoCS' view, this appeared to be an inconsistent approach.

DoCS said there is no data on the use of section 82 reports, but that, anecdotally, it is understood that they are used frequently.

Magistrate Crawford has said that “most section 82 reports point to a favourable outcome for the child”. Evidence to corroborate this assertion is not available.

Some lawyers we talked to said some magistrates are assiduous in following up on section 82 reports. However, one source says there is no judicial function available to monitor compliance with section 82 orders.

For its part, the Legal Aid Commission said there is a problem in the lack of consistent court practice of notifying parties that section 82 reports have been provided to the Court. The LAC said there is no provision in the Act as to who should be served. It says some DoCS offices send the report to the Court, and others serve the parties. Each court also has its own procedure for dealing with the reports. There is no obligation to provide copies to the former parties.

LAC also argued that a section 82 report has no proper status and it is unclear whether the report is confidential. LAC says that inconsistent orders and practice are prevalent as there is no guidance in the Act or in the practice directions about how to treat them.

LAC said that it has become good practice for the former child lawyer to follow up on section 82 reports. However, this was a decision for individual lawyers and there was no standard practice in this regard. If a lawyer changed employment or retired, there would be no follow up at all.

As to lawyers following up section 82 reports, DoCS observed:

This appears to be happening without any participation of, or involvement with, any other party to the proceedings, including the child. Irrespective of the child's wishes for the matter to be brought before the Court, the former child's lawyer is having matters relisted. Whatever the merits of enforcing court orders and reviewing care matters, this practice of lawyers acting without instructions needs further consideration.

LAC told us that, in its experience, section 82 reports are often incomplete or even inaccurate. Furthermore, the LAC said that, while the system requires that orders are made for the long term placement of children in out of home care, no actual placement is identified or even guaranteed. The Court and legal representatives must rely on section 82 reports to provide information as to the placement and stability of the child.

LAC said that, at St James, DoCS is arguing in each case where section 82 reports are sought that only one report can be sought under the Act. One case where this argument was not successful is being taken on appeal to the District Court.

Court officials say a section 82 register may be set up in future. This is clearly desirable.

It is clear that this is an area that warrants legislative review to deal with the procedural problems outlined by DoCS and LAC, and to clarify the scope of the Court's powers.

We believe that provisions such as sections 82 and 76 (the latter relating to reports on supervision orders) that enable the court to require reports, provide important safeguards for children who have been removed from the care of their parents or have been placed under the supervision of DoCS. Accordingly, we believe that the Court's power to require reports at whatever periods the court considers appropriate should not be restricted or narrowed. We

consider that any issues of procedural fairness could be addressed through legislative amendment or court rules.

The question of whether, and in what circumstances there should be a review of existing orders, and when and how such orders are followed up, raises important issues. Law and policy should reflect the resolution of these questions. One of the more difficult questions is what sort of cases should be followed up in the best interests of the child. This should certainly not be determined upon the basis of individual practice, but grounded in a solid policy position.

Contact orders – section 86

Under section 86, the Court has the power to allow or deny contact between the child and their parents. The Court can stipulate minimum arrangements for contact. It may also require that contact be supervised, subject to the consent of the parent and the proposed supervisor.

There are numerous possibilities relating to the duration and frequency of contact, including increasing contact over time. There is no information about the use of different types of contact orders.

Some of the people we talked to criticised the quality of contact regimes proposed by DoCS as being often short on detail. DoCS has commented that it accepts that the Court appears to make contact orders on the basis of little information. The department says this is particularly so in relation to the impact of these orders on the child and the child's placement. However, DoCS argues that since contact orders are made by the Court, and the Court is not restricted by DoCS' application, then whatever material might initially be supplied by DoCS does not restrict deliberations of the Court in reaching its decision as to the orders to be made.

Some welfare agencies oppose anything other than minimum contact, such as four short meetings per year, for children in long-term foster placements.

The Legal Aid Commission says that some non-government organisations have stated on the record that they will not accept referrals for children where the Court has ordered an amount of contact which they considered inappropriate. In the LAC's view, in some circumstances this may be because the non-government organisation considers that the contact arrangements could adversely impact on potential foster carers and therefore on a placement.

Where the Court orders DoCS to supervise contact arrangements, it appears that, in practice, DoCS can ultimately determine the amount and frequency of contact, because the Court can only order that contact be supervised by DoCS with the consent of DoCS.

DoCS made the following general observations on the question of contact orders:

It should be noted that only the ACT and Northern Territory have similar levels of court involvement in contact to those in NSW. In South Australia and Victoria the court's involvement in contact is limited to interim or short term orders. This is also the practice in Tasmania. In Queensland and Western Australia the court has no involvement in contact. From DoCS' recent enquiries with other jurisdictions, there are no proposals to expand the role in contact for their respective courts.

It should also be noted that in 2002 the Family Law Council (chaired by Patrick Parkinson, the architect of the NSW legislation) recommended that all jurisdictions should extend the role of care courts to encompass contact. Despite reviews of the legislation in Victoria, Queensland, South Australia and Western Australia since that time, no government has adopted this recommendation.

It is DoCS' view that, once a decision has been reached that a child is to be removed from the parents for an extended period (ie restoration is not considered viable), then contact is a social work decision that should only consider the best interests of the child, including the stability of the placement. If any "rights" of the parents are extinguished by this point in time, then the court has no particular expertise to offer in this context.

In any event, a specific order for contact for a young child is unlikely to be consistent with the best interests of that child for the next decade or more and repeated recourse to the legal process to adjust the order makes no sense.

The situation where restoration is potentially viable and an interim order is appropriate will be different. If the parties can agree on the contact regime that will maximise the chances of a successful restoration, then the court should not have a role. However, if the contact regime cannot be agreed, then the court can provide an avenue to resolve the matter. Any court-ordered contact should have a limited duration that reflects the fact that the child's circumstances will change and that such changes should be dealt with as part of normal case management.

Senior Children's Magistrate Scott Mitchell has referred to the struggle over contact decisions among the Court, welfare agencies and DoCS. In a speech to a Legal Aid Commission conference last year, he referred to "powerful and influential forces at work, which oppose the concept of contact or, at least, oppose the court's involvement in it".

We recognise that the current arrangements present a challenge to all parties to work in the best interests of children and come up with flexible solutions regarding the important issue of children's contact with family and other significant people in their lives.

We also acknowledge that there are divergent views about the circumstances in which contact is in the child's best interests and about the extent of contact that is appropriate. We would make several points in relation to this debate.

It is clear that adequate information and further research is needed to inform the debate. In this respect, we note that DoCS has supported the need for further research. It is our view that lack of research in this area makes it difficult to assess the precise nature of and reasons for the perceived flaws in the current system. This in turn makes it difficult to determine whether an overhaul of the current arrangements is required (and, if so, what the changes should be) or whether adjustments to the approaches employed under the current system might be a better way forward.

In these circumstances, we believe that there should be an opportunity for informed public debate between all of the key players on the issues involved, with a view to deciding on a pathway for effectively promoting the maintenance of ties between children and their family – but only where this is clearly consistent with the best interests of the child.

“Non-adversarial” conduct of proceedings – section 93

Section 93 says that proceedings are not to be conducted in an adversarial manner. The section also says that proceedings are to be conducted “with as little formality and legal technicality and form as the circumstances of the case permit”.

Some of the people we talked to were concerned that, despite the aims of the care and protection legislation, Children's Court proceedings seem to be handled on an adversarial basis.

Senior Children's Magistrate Mitchell told us the requirement that hearings should proceed with as little formality and technicality as possible does not permit the Court to dispense with natural justice and standards of procedural fairness. Magistrate Mitchell said that oral cross-examination of witnesses and the receiving of submissions by parties are two ways of giving effect to procedural fairness principles.

Senior Children's Magistrate Mitchell also told us that care proceedings in the Children's Court could be summarised as a hybrid between an adversarial model and a modified inquisitorial model. He said that where there are disputed matters of fact the Court more closely follows a traditional adversarial model of cross-examination. Where there are not factual issues in dispute, the procedure more closely follows an inquisitorial model. It should also be noted that the Court must determine the matter on the evidence the parties choose to place before the Court.

DoCS has told us that it is aware that the Children's Court is considered to be unnecessarily adversarial.

In this respect, DoCs has referred to research in Victoria by Ms Thea Brown and others on the Magellan Project Pilot in Victoria which, the department said, showed that caseworkers considered that they were treated with more respect in the Family Court than in that state's Children's Court. DoCS told us that responses by caseworkers involved in the Magellan Project in the Sydney Registry of the Family Court suggested that this experience is being replicated in NSW.

Senior Children's Magistrate Mitchell said that he had not seen the research to which DoCS referred. However, he said that the question was not whether DoCS officers are respected, but whether their casework and the cases that they present to the Court are adequate. In this respect, he observed that sometimes DoCS work was adequate and sometimes not.

DoCS cited its legal costs and some data relating to appeals to point to differences between the operations of certain Children's Courts in NSW.

DoCS said that to undertake care litigation at St James, it fully engages three legal officers and, between 1 July 2005 and 31 January 2006 paid \$283,520 to external panel legal practitioners. By contrast, for a roughly equivalent number of care matters at Campbelltown, only one legal officer was engaged, and \$12,519 was paid for external panel legal practitioners. DoCS said there is no significant demographic difference between the areas that would explain the difference in outcomes at St James and Campbelltown.

As to DoCS employment of more lawyers at St James than at Campbelltown, and the more detailed treatment of cases at St James, Senior Children's Magistrate Mitchell suggested that this reflected cultural differences between central Sydney and the south western suburbs, particularly

among the legal profession, and that a similar effect could be detected in comparing the Family Courts at Sydney and Parramatta.

DoCS told us that it believes that the number of interim hearings and the amount of judicial time per care matter at St James far exceeds any other Children's Court in NSW.

DoCS also told us that little evidence is admitted at St James without contest in that court – even when no other party has led contrary evidence. As to this, the Children's Court said that this was “simply untrue”, and went on to say:

... if parties, advised and represented by competent lawyers, wish to “contest” evidence led by DoCS, they are entitled to do so. Experience has shown that, not infrequently, DoCS evidence is unreliable and needs to be tested in order to ascertain what are the best interests of the child.

The Court also observed that, notwithstanding the practice of submitting evidence to scrutiny, undue delay in the disposition of care cases was not a feature at St James.

DoCS said it is collecting and analysing data on the number of hearings that last three days or more. It says the initial data seems to indicate that 27% of hearings at St James went for three days or more, whereas only 6% of matters at Campbelltown lasted this long.

In relation to appeals, DoCS said that there were 108 appeals of care matters to the District Court between June 2002 and January 2006, with DoCS being the appellant in only 9% of these cases. Further, while St James heard 23% of all care matters, 42% of all appeals concerned matters before that Court. DoCS said that no other single court accounted for more than 9% of the appeals.

Another view of proceedings at St James came from the Legal Aid Commission. It has been reviewing the operations of its care and protection program since October 2005.

LAC told us that, historically, private practitioners at St James would apply for grants of legal aid to represent children and young people. Applications for grants to represent parents were extremely rare. LAC said that, when it sought to be included on the roster to represent children, this move was met with hostile resistance by private practitioners. However, LAC said that there is now a workable and collegiate relationship between its in-house lawyers and private practitioners whom LAC has appointed to a care and protection panel. There is a roster alternating duty days for parents and duty days for children.

LAC told us that there is a view that the standard of legal representation at St James has been raised significantly since arrangements were put in place for both Commission and private practitioners to represent parents as well as children.

LAC said its people came to St James with the organisational experience of acting as separate representatives for children in the Family Court, bringing a culture of proactive child representation to care proceedings that required casework involving investigation and presentation of material that was in the best interests of the child. Before this, LAC said, the approach of many practitioners in care proceedings was based on the assumption that DoCS would act in the best interests of the child and file material relevant to that issue. Practitioners would rarely issue subpoenas or file affidavits. Instead, they would simply read the material produced by DoCS and provide oral submissions.

LAC said that the culture of challenging DoCS through proactive representation of children in care proceedings set the benchmark for quality legal representation. And it said that practitioners are also now taking a more proactive approach to the representation of parents.

Some respondents suggested another possible reason why proceedings might be conducted in an adversarial matter was the number of parties involved in the case. Cases at St James are said to feature numerous parties – the child, the mother and the father, various grandparents and other relatives – all of whom are represented. Cobham is known colloquially as “grandma’s court” for its apparently high number of grandmothers joined as parties. By way of contrast, there are said to be fewer cases at Campbelltown involving multiple parties.

There may also be variations in the degree to which matters are contested in particular courts. In this respect, some Sydney-based private practitioners told us they had opposed DoCS’ proposals for restoration plans or argued for long-term care orders where the Department sought short-term orders. They suggested that the relative scarcity of specialist care and protection lawyers in country areas could mean that practitioners involved in care proceedings in these areas are less likely to oppose the position adopted by DoCS.

As to the comments of the Legal Aid Commission, DoCS made the following observations:

While not questioning the standard of representation by lawyers in St James, and even accepting the proposition of LAC that this standard has significantly improved in the last few years (while noting that no evidence is supplied in support of this proposition), this does not address the question raised by the evidence supplied by DoCS of a difference in practices between St James and other Children’s Courts.

There are LAC in-house legal practitioners undertaking care matters not only in St James but also at Campbelltown, Cobham, Newcastle, Lismore and Dubbo. It would seem that the LAC submission suggests that its in-house legal practitioners at these other locations do not provide the same level of legal representation, nor the same proactive response, as do practitioners at St James. Comments of departmental legal officers would dispute this suggestion. Departmental legal officers state that (while recognising individual differences) there is the same high level of legal representation by all LAC in-house legal practitioners in care across the State. If the standard of representation is the same, this does not appear to justify data relating to St James being significantly different to other courts.

The discussion above has canvassed the perspectives of the Children’s Court, DoCS, Legal Aid and legal practitioners about whether proceedings before the Court are unnecessarily adversarial in light of the broad stipulation in section 93 that such proceedings “are not to be conducted in an adversarial manner”. That discussion leads us to the following observations about this issue.

One question that arises is what Parliament intended in introducing a requirement that proceedings before the Children’s Court must not be conducted in an “adversarial” manner. In this respect, it could also be observed that there are probably difficulties necessarily inherent in such a broad legislative requirement.

Be that as it may, it seems to us that the fundamental issue in this area is determining the best way to conduct child care proceedings in a way that is both fair to all parties and promotes the best interests of children.

We acknowledge the perspectives of legal practitioners in this area. However, the experience of lawyers has usually been to vigorously represent the interests of their clients in civil or criminal proceedings. Accordingly, they will almost inevitably approach their role in child care proceedings from a similar perspective. It must be said that such an approach does not necessarily assist in facilitating the conduct of care proceedings in a way that promotes the best interests of children.

That said, lawyers do bring other valuable experience to the conduct of court proceedings. For example, they will be attuned to the need to properly test evidence that is presented in the proceedings, so that the court will be in a position to reach informed findings where factual matters are in dispute. And lawyers will also be focussed on attempting to ensure fairness to their client in course of the proceedings.

We also appreciate the perspectives that DoCS and the Children's Court have brought to the consideration of whether proceedings are conducted in an unnecessarily adversarial manner.

What can be said is that the various key players in the conduct of care proceedings are understandably interpreting whether or not proceedings are conducted in an "adversarial" manner from their own background and experience.

In those circumstances, we believe that the appropriate approach to resolve the issues involved would be further discussion, focussed on achieving a much more consensus-based understanding about the expectations surrounding the conduct of child care proceedings before the Children's Court. Any appropriate legislative amendments, practice notes or code of practice to provide guidance to magistrates and legal practitioners in this area should only be developed following the outcome of such a discussion.

Affidavit evidence

We have heard concerns expressed about the quality of evidence that DoCS presents to the Court in its affidavits. Some matters are said to contain voluminous information, but little or no analysis that could assist the court. A common view among the people we interviewed was that the affidavit evidence may be of poor quality despite the fact that many cases arrive in court with lengthy histories of child protection concerns.

As to the issue of affidavit evidence, DoCS made the following general comments:

The NSW Children's Court is the only care court in Australia that only permits evidence by means of affidavit. The Family Court in the Magellan Project, its Children's Cases Program and in the recent (2006) amendments to the Family Law Act permit casework information to be supplied by way of report rather than affidavit. The weight of evidence from each of these other jurisdictions is that requiring all evidence from the child welfare agency to only be supplied by way of affidavit might be what is creating the difficulties – rather than the difficulty being the capacity of caseworkers to produce a quality affidavit.

While not disagreeing with the need to get the best available evidence before the Court, a comment made in relation to the English care jurisdiction might be apposite. In this recent study one of the conclusions was that "the pursuit of an unattainable level of certainty is a major factor in court delay and therefore a cause of avoidable harm to

children.” The question should be asked as to whether it is unrealistic and misguided to have an expectation that affidavits in care proceedings, which are often filed within the same week as the removal of the child, will be of the same quality as documents filed in criminal or commercial proceedings where the documents are filed after very intensive and extensive investigation and relate to simpler factual situations than the complexity of the past and future lives of an individual child.

Given that the court has not been prepared to change its position, DoCS has been forced to employ additional legal officers to assist caseworkers to prepare affidavits. Of the 26 additional legal positions from the funding reform package, it is estimated that 18 EFT are fully engaged in this task. Whilst this has undoubtedly improved the legal quality of affidavits in those locations where the new positions are deployed, DoCS' view is that it will have done little to improve the outcomes for children.

Legal representation – sections 98 and 99

Section 98 deals with the rights of appearance of various parties. Section 98(2) says that the Children's Court may require a party to be legally represented if it is of the opinion that the party is not capable of adequately representing himself or herself.

Section 99 says that the Children's Court may appoint a legal representative for a child if it appears that the child needs to be represented in the proceedings.

The Legal Aid Commission has told us that its statistics, although not completely reliable, indicate significant growth in its care and protection practice since the commencement of the current legislation in December 2000. The LAC said legal representation in care proceedings is invariably funded by the Commission. There is no means test applicable to children or young people. While there is a means test for parents, the LAC told us the demographic of this group is such that it would be a rare case where a parent applicant would be refused legal aid on the basis of means.

Legal services are provided sometimes by in-house practitioners and sometimes by private practitioners. Many of the latter are selected from care and protection panels which began operating in August 2004. At that time 113 practitioners were appointed for a period of two years. The LAC said some lawyers were appointed to represent adults only, because they lacked the necessary expertise to represent children. The remaining appointees were appointed to represent both adults and children. All appointees are required to comply with guidelines and practice standards, and are subject to audit by the LAC.

Some respondents claimed that parents have no access to legal aid and advice before the day of the first court appearance, after DoCS had already removed the child.

We were told repeatedly that parents in care and protection matters tended to be clients with significant problems ranging from drug/alcohol abuse to mental illness and intellectual disability. Sometimes their capacity to keep appointments or assist the Court with evidence was called into question.

Some specialist private practitioners said that they continue to pursue the interests of child clients after their cases are finalised in court. For example, some practitioners reported maintaining their own records of section 82 monitoring orders in order to ensure compliance by

DoCS. There were also examples of separate representatives successfully opposing restoration plans in court.

Questions have been raised about the inconsistent quality of legal representation in country courts, where there are said to be few practitioners well versed in the legislation and sufficiently experienced in care proceedings. Some people we interviewed told us that inconsistency in the quality of legal representation is not confined to country areas but would apply to all areas of legal practice.

The LAC said that, in regional locations where there are no panels, it has no quality controls to ensure that private practitioners have the necessary expertise to deal with care matters.

DoCs has told us that it agrees that there is a scarcity of expert legal practitioners in care litigation, especially in rural areas. However, it also notes that with only about 3,000 care matters in any one year, and most of these being conducted in metropolitan courts, there is not a solid core amount of work to justify large numbers of practitioners. DoCS says most practitioners will be paid either by it or Legal Aid and in both cases the rate of payment is not generous.

DoCS has said that, together with Legal Aid, it is attempting to correct this imbalance by encouraging practitioners to acquire specialist accreditation in child law, encouraging secondment of staff between firms, holding training days in rural locations, and making arrangements for panel practitioners to train junior staff.

Guardians ad litem – sections 100 and 101

The Court can appoint a guardian ad litem (GAL) to represent a child if special circumstances apply, including a child's special needs. The Court can also appoint a GAL for a parent where the parent is incapable of giving proper instructions to their legal representative.

The functions of the GAL are to safeguard and represent the interests of the child or parent, as the case may be, and to instruct their legal representative.

A panel of GALs has been in existence since January 2002. There are no Aboriginal GALs.

There is no data available on the frequency of use of GALs. However, respondents say they are often used.

One lawyer has suggested that GALs do not get invited to care plan meetings, thus limiting their effectiveness. On the other hand, one veteran GAL reports no problems in obtaining sufficient information in order to represent a child or parent.

DoCS has told us that it has had some experience with GALs where they appeared not to understand their role and assumed the position of a lawyer advocating for their client. However, the department says its experience is limited and current practice appears to be improving.

It appears that there is relatively frequent use of GALs. In light of the possibility that some GALs may not fully appreciate the scope and limits of their role, we suggest that guidelines should be developed to clearly explain to GALs how they are expected to perform their functions. The guidelines should also canvass whether and how GALs should be involved in care plan meetings, and their entitlement to information to assist them in performing their role.

Timeliness

The Children's Court time standards applicable from 1 January 2005 require that 90 per cent of care matters should be finalised within nine months of commencement, and that all care matters should be finalised within 12 months of commencement.

Lawyers practising in the Court report that in most cases, matters are finalised within the current time standards. However, some cases are said to take longer. Reasons for delays include orders for assessments, which can add six to eight weeks to a matter. Assessments of parental capacity that involve criminal record checks are said to slow down proceedings. One lawyer reports that 10 to 15 per cent of cases involve an interstate link (for example, a potential family carer), and that interstate inquiries can take six to eight weeks to complete.

DoCS has told us that the average time from filing to the conclusion of a care matter in NSW is approximately seven months, and that only a few matters take longer than 12 months. DoCS has also indicated that the duration of care matters compares favourably with other comparable public law care jurisdictions – in England, the average duration appears to be about 12 months, while matters in the Family Court of Australia's Magellan project took about 8.7 months..

DoCS attributed the improvement in timeliness in the Children's Court to greater rigour being exercised by the Court, and to improvements by DoCS in the standard of its affidavit preparation and presentation of material because it has located legal officers in Community Services Centres.

DoCS said it has started collecting quarterly data on all cases which are taking more than 12 months to conclude, so that these cases can be identified and more intensively case-managed internally. Data for two quarters is now held, but DoCS has said that this data was "not reliable".

It is pleasing to see that DoCS has started to keep data on some aspects of the duration of care matters. This data should assist in establishing benchmarks which should be used to drive improvements to the timeliness of care proceedings, and provide a platform for further research in this area.

We also believe that it is important that the data be available to the public, to enhance the accountability of DoCS and the Court in relation to the timely conduct of care proceedings.

The Aboriginal and Torres Strait Islander principles – sections 11-14

Part 2 of Chapter 2 of the legislation sets out a number of principles that should be applied in care and protection matters involving indigenous people.

Section 11 says that indigenous people are to "participate" in the care and protection of their children with as much self-determination as possible.

Section 12 says that indigenous families, kinship groups, representative organisations and communities must be given the opportunity to "participate" in decisions about significant decisions under the legislation, including the placement of indigenous children.

Section 13 sets out an order of preferred placement for indigenous children, with the first preference being for a member of the child's extended family or kinship group.

The Sydney Regional Aboriginal Corporation Legal Service told us that compliance with the principles varies significantly between Community Service Centres and between caseworkers. It also said that some private practitioners enthusiastically advocate for compliance with the principles, while others are oblivious to them or, at least, do not engage with them. In addition, it said that magistrates vary in the degree to which they enforce compliance with the principles.

The Service also said that it was important to note that Aboriginal culture was not adequately understood by caseworkers, possibly as a result a lack of training, and possibly as a consequence of a lack of genuine interest in the principles. We note that these points are relevant to later discussion about practical ways of applying the indigenous principles.

Children's Magistrates, Children's Registrars, the Children's Court Clinic and lawyers all say that they would expect to see more applications for care orders in relation to indigenous children given the level of disadvantage in Aboriginal communities.

One explanation as to why they do not see these applications may be that DoCS handles some indigenous matters through informal family or kinship care arrangements. Our reviewable death function has revealed that some indigenous matters are handled in this way. However, we have not obtained information that clearly indicates the number of arrangements that are not seen by the Court.

Significantly, statistics supplied by the Court show very low numbers of care applications in some NSW country areas with indigenous communities.

For example, in Bourke, only six applications for care orders were lodged in the local court in 2002 and 2003. (The information provided by the Court does not indicate whether these applications were for indigenous children.) Furthermore, there were no section 38 consent agreements lodged in the court during the same two-year period.

This situation should be considered in the context of information about the number of indigenous families and children in Bourke, together with information about the social circumstances of the indigenous community.

The 2001 census data for Bourke shows a third of the town's population was indigenous. Half of all children under 14 in Bourke were indigenous, but only 20 per cent of the non-indigenous population was aged under 14.

Of Bourke's single parent families with children under 15, 57 per cent were indigenous. Of all two-parent families, with children under 15, 46 per cent were indigenous.

Rates of school attendance for indigenous children were lower than for non-indigenous children. While 97 per cent of non-indigenous children aged 5-14 were at school, only 80 per cent of indigenous children aged 5-14 were at school.

Bourke's total unemployment rate was 7.7 per cent. Indigenous unemployment was much higher, at 20.8 per cent.

Against this background, some of the people we talked to expressed surprise about what they saw as a very low number of care applications in Bourke. A former local court registrar in Bourke said the number of indigenous juveniles brought before the Children's Court on criminal matters seemed disproportionately high compared to the number of applications for care orders in relation to indigenous children.

As discussed earlier, it is possible that local DoCS caseworkers are handling care matters in a way that does not require or involve these matters coming before the Court. However, there may be other explanations for the low number of applications for care orders involving indigenous children.

DoCS told us it does not have specific data on this issue. However, it said the reasons for the low number of care applications in Bourke would be varied and complex. Unfortunately, the department has not elaborated on this in its response to our questions.

We note that DoCS considered issues relating to care proceedings involving indigenous children during an internal review of the death of an Aboriginal child who died in 2003. The DoCS review report included the following observations:

The reality of the environment in [the community] is such that regular application of Children's Court action would have a significant social impact, not all of it necessarily beneficial. Child protection assessment and intervention in [the community] is open to a high level of misapplication of solutions. In particular a predominantly indigenous community needs to be treated, in child protection terms, with constant sensitivity to the historical impact of Commonwealth and state government policy that led to the "stolen generations". Wide scale removal of children in such communities is not a simple option as a child protection response.

Some of the people we interviewed suggested that there are a number of factors which may contribute to the relatively low number of care applications in relation to indigenous children in particular locations. For example, caseworkers may feel inhibited in bringing care applications because of the legacy of the "Stolen Generations". There is community suspicion of, and even hostility towards, welfare agencies. There are low numbers of indigenous DoCS caseworkers in some locations. And there may be a lack of suitable out-of-home placements for Aboriginal children.

For the purposes of the current discussion, it is also relevant to have regard to data collected by the Australian Institute of Health and Welfare. This shows that indigenous children are put into out of home care at more than eight times the rate for other children. In NSW in 2002-2003, indigenous children were in out of home care at a rate of 36.4 per 1,000. By way of contrast, the rate for non-indigenous children was 4.3 per 1,000. Furthermore, of all children in out-of-home care in NSW during the period, a third were indigenous.

Against the background of the above discussion, we would make the following observations.

Our work in reviewing the deaths of children over a number of years indicates that about 20 per cent of the child deaths that we review involve indigenous children. Our significant investigative work has revealed that the level of protective intervention by DoCS and other agencies in the lives of these indigenous children was not always commensurate with the risks that they faced in their particular situation.

We note that DoCS has introduced Aboriginal Intensive Family Based Services to assist parents and carers to create a safe environment for their children. These services aim to help reduce the number of indigenous children being placed or remaining in out-of-home care through providing intensive support to vulnerable families. Important elements of this initiative are to identify and use culturally appropriate services and service providers and to re-establish family and community ties. There are services of this sort in Redfern, Casino, Bourke and Dapto. In its 2004-2005 annual report, DoCS noted that planning was well underway for the expansion of the Casino service and the establishment of a new service at Campbelltown.

It will be critical to evaluate the success of these services in strengthening the family environment. However, in circumstances where the basic rights of indigenous children cannot be protected within their family situation, there will be a need to apply for care orders, including orders involving the removal of children from their immediate families.

Furthermore, applications for care orders must be considered not only in the context of services to strengthen family environments, but also in the larger context of the need for the greater participation of indigenous families, kinship groups, representative organisations and communities in significant decisions about indigenous children.

Over the past four years, this office has engaged in a program of visiting a large number of Aboriginal communities. During our visits, we have held discussions with thousands of members of these communities, community leaders, elders and indigenous organisations about their concerns. They have increasingly told us of their concerns about the situation of children within their community, and of the need for practical measures to address the problems involved.

It has emerged from the discussions during our visits that one issue that needs more attention is how local people from indigenous communities can participate more effectively with government agencies in the fight against child abuse that occurs in local communities, as envisaged by the legislation. While the principles in the legislation recognise in broad terms the need for such participation, there is no detail about how this participation is actually to be achieved. In light of the growing concerns of Aboriginal communities and the general public about the situation of indigenous children, practical measures are needed to facilitate the "participation" in "significant decisions" contemplated by the Act. Decisions made in connection with possible care proceedings clearly fall within the scope of the term "significant decisions" under the Act.

The starting point would be determining those people who can properly represent local indigenous communities. In this respect, there is a need for safeguards to ensure that the people involved are appropriate representatives of their community in the promotion of child protection, and are perceived and respected as such by their community.

A further issue that needs to be addressed is ensuring that there can be a full and frank exchange of information between the representatives of local indigenous communities and officers of DoCS and other government agencies involved in child protection, in order to arrive at practical solutions. There may be a need for a legislative mandate to facilitate this, given that there are possible concerns about the scope of the current legislative provisions regulating and restricting the disclosure of information by public sector agencies working in the child protection area.

We acknowledge that this is a very difficult area. For example, we appreciate that there may well be substantial challenges involved in determining who should be regarded as appropriate spokespeople for, and representatives of, particular indigenous communities.

Nevertheless, we believe that it is now essential that indigenous communities, government agencies, and other key players work constructively towards facilitating more meaningful participation by indigenous people in strategies for child protection. In this respect, we suggest that there is room for trialling models which involve genuine participation by indigenous representatives in child care and protection decisions, as envisaged by the Act itself. Indeed, we note that this sort of work is being explored in other Australian jurisdictions. This experience could be used for indigenous participation models in NSW.

General observations about DoCS

Respondents suggest that the shaping of final orders will be influenced by various factors such as the policy and practice of particular DoCS Community Service Centres, as well as the attitudes and skills of caseworkers, and by the approaches of particular solicitors. There is reportedly no uniform approach.

Lawyers said the response by DoCS to “similar fact” situations was unpredictable. One CSC may respond to a case by seeking short term orders and a restoration plan, while another may want long term orders in a very similar case. There may be different local policies in DoCS offices – some are said to see restoration plans as requiring short-term orders, while others will link restoration to a long-term allocation of parental responsibility to the Minister. In the latter case, if restoration does not work out, the caseworkers will not have to return to court for new orders. High DoCS staff turnover is also said to contribute to inconsistent approaches to care matters before the Court - some people we spoke to said changes to case plans before the Court would sometimes be preceded by changes in the caseworkers dealing with the plans.

This is another area that cannot be tested because of the absence of relevant data and review mechanisms.

The reported variations in approach among caseworkers and their managers raise questions about their training and supervision, and access to specialist and legal advice. Whatever the case, the variations also suggest an inconsistent approach to the application of the legislative principles, including that of “least intrusive” action to protect children, consistent with the paramount need to protect them and promote their development.

General observations about Children's Magistrates

Section 7 of the Children's Court Act permits the Chief Magistrate to appoint a magistrate as a Children's Magistrate if the Chief Magistrate is of the opinion that the magistrate has “such knowledge, qualifications, skills and experience in the law and 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”.

Section 7 also provides that a Children's Magistrate must undertake and complete ongoing courses of training required by the Chief Magistrate in consultation with the Senior Children's Magistrate.

Lawyers who specialise in the jurisdiction have complained that the current legislation was introduced with an initial promise of specialist magistrates, but that this promise has not been kept.

The proportion of care matters handled by non-specialist magistrates is not known. However, we have been told that matters in country courts are often settled by consent.

In some country courts – including Albury, Wagga Wagga, Nowra, Kempsey, Coffs Harbour, Port Macquarie and Lismore – Children's Registrars conduct monthly callovers. The Children's Registrars will identify the more complex or contested matters and may request the provision of specialist Children's Magistrates to hear them. We have been told that magistrates in country centres often request assistance from the specialist Children's Magistrates for contested hearings.

DoCS has said:

DoCS is unaware of, and therefore cannot comment on, the extent to which appointees as specialist Children's Magistrate meet the qualification requirements of the Children's Court Act and whether the training they undertake is either of sufficient duration or depth. It is noted that, unlike other jurisdictions, a Children's Court does set minimum prescribed standards in these areas. A comparison of steps to meet these standards, as opposed to recruiting and training magistrates in the Local Court generally, may be a useful exercise.

DoCS has also made the following comments on "variations" among Children's Magistrates:

DoCS accepts that there will always be variations between Magistrates and, indeed, considers that this may be beneficial in creating an environment of debate and learning. However, the variation is not helpful when it occurs without reference to what is done in a care court (as distinct from being a conscious decision to reach a contrary conclusion) or through a lack of knowledge or experience of matters in the care jurisdiction.

Apart from the issues of qualifications and training, there is the question of consistency in decision-making and practice by the Children's Court.

There are a range of factors that may lead to variations in decisions and practice. We note that research on the situation in Victoria has been conducted by Rosemary Sheehan and published in her 2001 book Magistrates' Decision Making in Child Protection Cases. Research of this kind in NSW would be a valuable exercise.

OTHER ISSUES

Parents with a disability

We have taken account of research into care matters in the Children's Court involving parents with a disability. The researchers reviewed the outcomes of 407 care and protection cases that were finalised at Campsie and Cobham Children's Courts from January 1998 to July 1999, a period when the previous Act was in force.

The researchers reported that just under a quarter of all cases featured parents with a disability. The researchers said that parents with a psychiatric or an intellectual disability were significantly

over-represented in care proceedings, and that their children were significantly younger than children in matters featuring parents without a disability.

The researchers also said that DoCS intervention to remove children from parents with a disability was often driven by prejudicial beliefs about parenting and disability. During court processes these parents were said to be sidelined and discriminated against because of their disabilities, partly because of a reliance on diagnostic models of assessment, rather than assessment of parenting performance.

The authors of the report directed recommendations for improvement to the Attorney General's department, the Children's Court and DoCS. One of the authors told us that, to their knowledge, none of the recommendations had been implemented. If that is the case, then it should also be said that the reasons for this are not clear. This is a matter that may require further exploration.

Juveniles

Some people we interviewed raised concerns about what they saw as the exclusion of some juveniles from the care jurisdiction of the Children's Court. We heard suggestions that DoCS was concerned with taking action in court for the care and protection of younger children but refrained from doing so for juveniles. Some people we interviewed argued that some young people were being categorised as a "Juvenile Justice problem", even though they might have long histories of child protection concerns.

Senior Children's Magistrate Scott Mitchell has said that what he calls an "unwelcome consequence" of the division between the criminal and care jurisdictions of the Children's Court is that DoCS only comparatively rarely makes an appearance in the criminal jurisdiction. He said that DoCS is not present in the court in a majority of cases where juvenile offenders are already under the parental responsibility of the Minister.

Section 7 of the *Children (Protection and Parental Responsibility) Act* provides that a court exercising criminal jurisdiction with respect to a child may require the attendance of one or more parents of the child. However, the section specifies that the term parent does not include the Minister for Community Services or the Director-General of DoCS. Senior Children's Magistrate Mitchell argues that there should be an arrangement, either through a legislative amendment or an administrative agreement, requiring the Minister to ensure that juvenile offenders already in her parental responsibility are properly supported at court.

Magistrate Mitchell said that the absence of DoCS from juvenile justice proceedings is even more troubling when a Children's Magistrate learns of care and protection concerns relating to a young person who is before the Court's criminal jurisdiction.

Procedures were introduced through a Court Bulletin whereby Children's Magistrates would report any of their concerns by facsimile to DoCS, rather than ringing the DoCS Helpline. In addition, Children's Magistrates are able to make after hours reports by telephoning the Department's Director of Legal Services.

Senior Children's Magistrate Mitchell has said that the experience of Children's Magistrates who have made reports to DoCS is that it is often not clear what action, if any, DoCS would be able and prepared to undertake. He acknowledged DoCS is bound by its resources and it is not unreasonable that the department prioritises certain cases. However, he said the present

arrangement provided by DoCS is inadequate as an aid to keeping a young person out of trouble and reassuring a judicial officer that a young person will be safe if released on bail or on probation.

Magistrate Mitchell says what is needed is a formal method of invoking the assistance of DoCS where it becomes clear that a child or young person is in need of assistance in the course of proceedings in the Children's Court in its criminal jurisdiction. He said that a Children's Magistrate sitting in the criminal jurisdiction should be entitled to enumerate his or her concerns and call upon DoCS to provide a prompt report as to the care and protection issues surrounding any young person before the Court. The report should indicate what steps DoCS has taken or proposes to take to address those issues and, if no steps are to be taken, the reasons for that decision.

For its part, DoCS noted that the two jurisdictions of the Court had been combined under the *Child Welfare Act 1939* but that legislation separating them was enacted in 1987. DoCS told us that, since July 2004, the Court has put in place its own system to report to DoCS children that Magistrates consider are at risk of harm, with 32 children being reported to DoCS through this system in 2005.

DoCS says that, if its role is to provide a report on the care and protection of the child, then the Department of Juvenile Justice which is already present in all cases in the criminal jurisdiction can obtain this information under section 248 of the *Children and Young Persons (Care and Protection) Act*. DoCS also argues that the report is likely to contain information that would not normally be available to a court prior to a finding of guilt. The department says this then raises the question of whether this would be appropriate as a matter of procedural fairness. DoCS told us that there are discussions between the Directors-General of DoCS and Juvenile Justice and the Chief Magistrate on the issue of providing reports and subsequent services.

We would observe that the question is not whether the information would normally be available to the Court, but whether it might be appropriate for proper sentencing. As to procedural fairness, we believe that this is something that could be addressed in consultation with the Court.

Finally, DoCS says if its role is to be a provider of services, then the particular needs of a number of children before the criminal jurisdiction must be identified. DoCS says it must be recognised that it has no powers greater than those of a parent. The department says that the range of services that it can provide is no broader than any parent can provide (assuming that the parent has the financial capacity). However, the Department of Juvenile Justice has access to other services available to children in detention. DoCS has therefore questioned the merit of a proposal that would see it ordered to provide a report to the Court.

We would observe that, while the Court's criminal and care jurisdictions are indeed separate, there is ample evidence that children who are at risk of harm may also be at risk of involvement with the criminal justice system. In 1997, the Bureau of Crime Statistics and Research (BOCSAR) reviewed national and international evidence on family factors and juvenile delinquency, reporting that child neglect was more likely to lead to juvenile delinquency than drug use or poor school performance. In 2005, BOCSAR reported on the results of a study of 5,476 juvenile offenders who appeared in the NSW Children's Court for the first time in 1995. More than 68 per cent of these offenders reappeared in a NSW criminal court within the next eight years, and 13 per cent ended up in an adult prison within that period. BOCSAR said that its study highlighted the critical importance of intervening as early as possible to break the cycle of juvenile crime.

Our own work in reviewing child deaths has also shown that some children – notably adolescents – had lives marked by extensive involvement with DoCS, police and the Department of Juvenile Justice. In our Report of Reviewable Deaths in 2004, we noted the inherent difficulties of protective intervention for young people who may be prone to risk taking behaviour and who may be unwilling to accept the services of human services agencies. DoCS has no powers of coercion under the *Children and Young Persons (Care and Protection) Act* and cannot force young people to accept or engage with services. Although sections 123 to 133 of the Act provide for 'compulsory assistance', these sections have not been proclaimed.

Given the difficulties referred to above, it is our view that when opportunities for protective intervention do arise, these should be accepted by human services agencies. The appearance of a young person in the criminal jurisdiction of the Children's Court may present such an opportunity. For this reason, we would hope for positive results from the discussions between the Court, DoCS and Juvenile Justice on the issue of providing reports and subsequent services for children and young people who are charged or convicted of criminal offences.

DoCS has expressed concern that the position of the Court on this issue does not adequately take into account the distinction between care and criminal proceedings. Specifically, DoCS has referred to the observations of Brennan J in the High Court decision of *J v Lieschke* (1987) 162 CLR 447:

The two classes of proceedings are distinct. There is some uniformity of treatment of children when they are apprehended and some similarity of incidents attendant on the respective classes (for example, requiring a parent or guardian to attend the Court), but the nature and purpose of 'neglect proceedings' are quite distinct from the nature and purpose of criminal proceedings.

In response, we would observe that there is nothing in our view on this issue that would contravene the principle set out by Brennan J. Instead, we believe that the Children's Court being provided with adequate information to assist them to understand the general lifestyle of young people in appropriate cases will assist the Court in properly exercising its role in its criminal jurisdiction which includes the appropriate sentencing of young people according to law.

Finally, we note that BOCSAR has proposed new research that aims to build on the study of juvenile offenders reported in 2005. BOCSAR put a proposal to DoCS to find out whether there was anything about the pattern of contacts children had with DOCS that would allow predictions about which young people would go on to become recidivist offenders. DoCS proposed a "broader, more robust" analysis that would include the Health and Education departments. DoCS has said to us that it is still keen to pursue the broader research project with BOCSAR.

CONCLUSIONS

Decisions in care proceedings concerning child care and protection may have profound and far-reaching consequences for children, their families, and other people who may become their carers.

The lack of accurate and reliable data in relation to many aspects of care proceedings in the Children's Court is therefore of significant concern. The absence of such data means that there is

a considerable gap in information about key aspects of the child care and protection system. One effect of this gap is to make it extremely difficult to draw conclusions about sometimes competing or conflicting positions on issues of process and practice in care proceedings.

However, it is also important to recognise that data collection and associated research are not the only matters that need to be addressed. This paper demonstrates that there are divergent views about a number of important issues such as:

- how the principle of “least intrusive” action should be applied
- how the principle of the participation of children and young people should be applied
- how the principles of indigenous participation should be applied
- the quality and consistency of the application of the indigenous placement principles
- the role of ADR in care proceedings
- how evidence should be put before, and tested by, the Court
- circumstances relevant to the level and frequency of the granting of interim orders
- the interpretation of the requirement that proceedings should not be conducted in an “adversarial” manner
- the adequacy and appropriate use of care plans
- the use of preliminary conferences
- the use of examination and assessment orders
- the use of undertakings
- the extent to which the principle of permanency planning is being given effect
- the use of contact orders
- the quality of the assessments undertaken regarding the possibility of restoration
- the effectiveness of arrangements for the monitoring of orders concerning parental responsibility
- the extent to which there may be greater use of the option of adoption
- the role of Guardians ad Litem
- the handling of care and protection matters involving juveniles appearing in the criminal jurisdiction of the Children's Court.

Clearly, data collection and analysis alone will not guarantee progress on many of these issues. With some of them, there might be a need for a simple legislative amendment. With others, this will not be sufficient.

The review of the legislation provides a timely opportunity to clarify the legislation. We have referred in this paper to specific provisions possibly requiring legislative amendment, such as sections 54, 73 and 82.

The review also allows for consideration of some of the broad principles in the legislation. From our discussions, there seems to be a general acceptance of these principles, although there is contention as to how some of them should be interpreted. For example, there are clearly differences in interpretation of the “least intrusive” principle. There are also differences about the appropriate manner in which care proceedings should be conducted – in particular, the role of ADR in the process, and how “adversarial” proceedings should be. Again, different interpretations of the principles have led to debate about the appropriateness of contact orders. What would constitute good progress on some of these issues is a complex matter.

For many issues, it is important to recognise that legislative change at this stage might not be desirable or might only be part of the solution. For example, while there would be benefit in the legislation “fleshing out” issues such as ADR, how proceedings before the Court should be conducted, and the nature of indigenous participation in care and protection decisions, legislative change alone will not ensure best practice.

Progress on these issues will also need to involve appropriate research and/or ongoing debate. In this regard, it is important to recognise that many issues involve principles that are heavily value-laden. As this paper reflects, there is considerable scope for different parties seeking to apply the principles in different ways.

The fact that there is already discussion on a number of these issues is healthy. However, to ensure that there are good outcomes, the discussion needs to be open and transparent, involve a broader range of stakeholders, and lead to concrete outcomes within reasonable timeframes.

In this paper, we have sought to outline some of the important issues arising in connection with care proceedings. We intend to circulate the paper broadly to assist people understanding the issues involved and to promote further discussion. We look forward to receiving constructive feedback that would assist in further consideration of the issues.

In a draft version of this discussion paper, we suggested that there might be value in considering the organisation of a forum to focus on a number of the matters discussed in this paper. We also suggested the possible creation of a standing committee or working party comprising a broad range of experts, which could advise the government and Parliament of proposals for improvements in practice and, where necessary, the need for legislative reform.

In response to these suggestions, DoCS observed that our suggestions appeared to have given inadequate consideration to the existence of two forums in which relevant issues were already discussed. One of these was a working party consisting of the Children's Court, DoCS and the LAC, with other parties such as the Attorney General's Department, the Department of Juvenile Justice, and the Department of Ageing, Disability and Home Care being involved for specific issues. This working party is “endorsed” by the Attorney General and the Minister for Community Services. The working party deals with “technical” matters involving legal processes and procedures.

There is also a Ministerial Advisory Council, which comprises:

- the Chief Executive Officer of the NSW Council of Social Service
- the Chief Executive Officer of the Association of Children's Welfare Agencies
- the Chief Executive Officer of the Aboriginal, Child, Family and Community Care State Secretariat
- the Children's Commissioner
- Dr Judy Cashmore
- a representative of DoCS.

This Ministerial Advisory Council considers broad issues, and has been working intensively on advice to the Minister for Community Services about the review of the legislation.

We acknowledge the valuable contribution of the Ministerial Advisory Committee. However, the question is whether the current arrangements of the Committee would be adequate to ensure that the many complex and critical issues canvassed in this discussion paper are fully addressed. The creation of a standing committee or one or more working parties to research and debate many of these issues may serve to complement the work of the Committee. We recognise that research of the kind that we have proposed needs to be supported by appropriate funding.

It would also seem that the current working party involving the Children's Court, DoCS and the LAC appears not to have been able to resolve many of the issues raised in this discussion paper. Furthermore, there is a need for an open and transparent process with clear timeframes that entails the involvement of other stakeholders beyond those represented. In these circumstances, we maintain our recommendation that consideration be given to the creation of an additional forum to research and consider the issues involved.