Children's Court of NSW

Resource Handbook

Children's Court of NSW Resource Handbook

Judicial Commission of New South Wales

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Currency

Update 24, May 2026

Care and protection matters

Important cases have been updated, with new cases included in the following areas:

- **Care plans** at **[3-1080]**
- **Contact orders** at **[3-1140]**
- **Parens patriae** at **[3-1340]**
- **Permanency planning** at **[3-1380]**

Criminal matters

Principles and jurisdiction has been updated:

- **Socioeconomic circumstances of young offenders — 2022 young people in custody health survey report — selected findings** revised to 2022 findings at **[8-2000]**.

Important cases have been updated, with new cases included in the following areas:

- **Appeal** at **[9-1040]**
- **Bail — Other bail matters** at **[9-1110]**
- **Forensic procedure** at **[9-1200]**
- **Sentencing — Full-time imprisonment** at **[9-1348]**
- **Serious indictable offences** at **[9-1353]**

Practice and procedure, practice notes, guide and protocols has been updated:

- **Guide — criminal jurisdiction** revised and updated at **Doli incapax** at **[11-3040]**.

Articles and other resources has been updated:

- **Review of the operation of doli incapax in NSW for children under 14** has been included at **[12-9900]**

Foreword

The Children's Court of New South Wales is a specialist jurisdiction for children and young people who are subject to care applications, criminal charges, applications for Apprehended Violence Orders and Compulsory Schooling Orders.

The *Children's Court Resource Handbook* provides information about practices, procedures and policies that impact the children, young people, families and carers who appear before the court. It is intended to assist registrars, magistrates, judges and lawyers who appear in the Children's Court. Hopefully it will be useful for others who have an interest in the Children's Court jurisdiction.

The *Resource Handbook* provides articles, checklists, summaries and references to relevant case law and legislation to assist practitioners and decision makers in high quality consistent and effective practice in the Children's Court jurisdiction.

The *Resource Handbook* is reviewed and updated at regular intervals and when there is a significant change to law or practice. The Children's Court and the Judicial Commission of NSW welcome feedback on the scope and content of the *Resource Handbook* and suggestions for improvement to ensure it remains beneficial for users.

Her Honour Judge Ellen Skinner
President of the Children's Court,
Children's Court of New South Wales

Acknowledgements

First edition (June 2013)

Children's Court of NSW

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How to use this Resource Handbook

The *Children's Court of NSW Resource Handbook*, or any section of it, can be read in its entirety or sections selected as the need arises.

The *Resource Handbook* is available online only. To enable speedy access, a detailed Contents list and cross-references in the text are hyperlinked to enable immediate access to the linked section of the *Resource Handbook*. Also all statutes, regulations and rules, and their provisions, cases, and court practice notes referred to in the text have been hyperlinked.

Your feedback

The Children's Court of NSW and the Judicial Commission of NSW welcome your feedback on how the *Resource Handbook* could be improved.

We are particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific sections of other Bench Books, discussion or research material.

Please send your comments, by email, to the Editor — Children's Court of NSW Resource Handbook at: benchbooks@judcom.nsw.gov.au

Alternatively, you could send mail to the Judicial Commission of NSW at:

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[1-1000] Introduction to the Children's Court*

Last reviewed: June 2024

The Children's Court of NSW is a unique specialist court that deals predominantly with youth crime and the care and protection of children and young persons. It is established and governed by the *Children's Court Act 1987* and derives its jurisdiction principally from the *Children's (Criminal Proceedings) Act 1987*, the *Young Offenders Act 1997*, and the *Children and Young Persons (Care and Protection) Act 1998*. It also has the youth parole jurisdiction, pursuant to the *Children (Detention Centres) Act 1987*.

A brief history

The Children's Court of NSW is one of the oldest children's courts in the world. It is a specially created stand-alone jurisdiction whose origins can be traced back to 1850.

Historically, the criminal law did not distinguish between children and adults, and children were subject to the same laws and same punishments as adults and were dealt with in adult courts.

Indeed there were a number of children under 18 years transported to NSW in the First Fleet of 1788 as convicts.

The precise number of convicts transported is unclear, but among the 750–780 convicts, there were 34 children under 14 years of age and some 72 young persons aged 15–19.[1]

The first special provision in NSW recognising the need to treat children differently was the *Juvenile Offender Act 1850*.[2] This legislation was enacted to provide speedier trials and to address the "evils of long imprisonment" of children.

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* Derived from an address by his Honour Judge Peter Johnstone, then President of the Children's Court of NSW, NSW Bar Association CPD Conference, 30 March 2019, Sydney Hilton, Sydney.

1 State Library of NSW Research Guides, "First Fleet Convicts" at www.sl.nsw.gov.au, accessed 15/5/23.

2 14 Vic No II, 1850.

Then, in 1866, further reforms were introduced, including the *Reformatory Schools Act 1866*,[3] which provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act 1866*,[4] under which public and private "industrial schools" were established, to which vagrant and destitute children could be sent.[5]

Since those early beginnings there was a steady, albeit piecemeal, progression of reform that increasingly recognised and addressed the need for children to be treated differently and separately from adults in the criminal justice system.

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

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

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

The Children's Court today

In 2024, the Children's Court of NSW consists of a President, 16 specialist Children's judges and 14 Children's Registrars. There are four courts specifically designated as Children's Courts located at Parramatta, Surry Hills, Woy Woy and Broadmeadow.

Specialist Children's jagistrates also deal with Children's Court cases at shared Local Court facilities at Campbelltown, Dubbo, Sutherland, Wyong and in the Illawarra, Hunter, Mid-North Coast, Northern Rivers, Western and Riverina regions as well as Moss Vale and Goulburn. In rural and regional areas outside these locations, the sittings of the Children's Court coincide with the sittings of the Local Court and are conducted by Local Court judges.

The President of the Children's Court is a District Court judge who has judicial leadership and other, statutory responsibilities as prescribed by the *Children's Court Act 1997*, which include the administration of the court and the arrangement of sittings and circuits; the appointment of Children's judges in consultation with the Chief Judge; convening meetings of Children's judges and overseeing their training; convening and chairing meetings of the Advisory Committee which is responsible for providing advice to the Attorney General and Minister for Family and Community Services; and conferring regularly with community groups and social agencies on matters involving children and the court.

The current President is her Honour Judge Ellen Skinner.

[1-1020] Introduction to new Children's judges

Last reviewed: June 2024

Welcome to the Children's Court of NSW.

3 30 Vic No IV, 1866.

4 30 Vic No II, 1866 (otherwise known as the *Industrial Schools Act 1866*).

5 R Blackmore, "History of children's legislation in New South Wales — the Children's Court", extracted from R Blackmore, The Children's Court and community welfare in NSW, Longman Professional, 1989.

We hope the material in the *Children's Court of NSW Resource Handbook* (the Resource Handbook) will be useful for your induction into the field. Please remember that your colleagues are very happy to help and you should not feel awkward about asking.

The *Resource Handbook* has been divided into two main types of matters that you will need to address — care and protection matters (from **[2-1000]**ff) and criminal matters (from **[8-1000]**ff). Some common issues are highlighted here but proceed to the type of matter you are dealing with to access resource material on specific issues, applicable Acts and Regulations, relevant court practice notes, important cases, useful articles, papers and information available in other media, such as podcasts.

Care and protection matters

Emergency care and protection orders, made under ss 43–45 *Children and Young Persons (Care and Protection) Act 1998* are common and it is worth discussing the procedure with someone before you embark on a care day.

Criminal matters

The Children's Court is the State Parole Authority for most parolees who are sentenced for offences committed when they were under 18 years of age (see s 40 *Children (Detention Centres) Act 1987*). This jurisdiction is exercised by any Children's Court judge (but not a Local Court judge sitting in the Children's Court): s 41. Parole matters are dealt with only at Parramatta.

Judicial Commission of NSW Bench Books

The *Local Court Bench Book*, which has basic information about both care and protection matters and criminal matters, provides a useful introduction: links will be provided under the relevant headings in the Resource Handbook.

The *Sentencing Bench Book* has a chapter on the *Children (Criminal Proceedings) Act 1987*. The chapter refers to the leading cases involving this piece of legislation and other helpful material. You may access these bench books from here or from relevant points within the Resource Handbook.

Legislation

For your convenience, legislation to all the relevant pieces of legislation has been hyperlinked within this Resource Handbook. The hyperlinks are to the JIRS collection of legislation. If you wish to access hard copies of the legislation, apart from printing out the relevant provision, you may wish to check the 4 volume looseleaf LexisNexis publication *Criminal Practice and Procedure NSW*, which is available within the court.

Other sources of information

Children's Law News

A further source of help in care matters especially is Children's Law News, which you can access online or receive by email. Children's Law News contains judgments which may be of assistance, as well as articles and news regarding such areas as legislative change and practice matters. You are strongly encouraged to read all the issues of CLN to-date.

Criminal Law News from LexisNexis

This 16 page newsletter can be used to keep up-to-date with current developments in criminal law.

Useful websites

The following websites are helpful:

- Australian Institute of Family Studies
- Australian Institute of Criminology
- NSW Bureau of Crime Statistics and Research
- National Drug and Alcohol Research Centre

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Note: All references to sections in this chapter are, unless otherwise stated, references to sections in the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act). Where "child" is referred to herein, the reference also includes a "young person".

[2-1000] Care and protection jurisdiction of the Children's Court

Last reviewed: June 2024

Care and protection proceedings in the Children's Court are governed substantively and procedurally by the *Children and Young Persons (Care and Protection) Act 1998* (Care Act). The Care Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount: s 9(1). Decisions in care proceedings, at first instance and on appeal, are to be made consistently with the objects, provisions and principles provided for in the Care Act, and where appropriate, the United Nations Convention on the Rights of the Child 1989 (CROC).[1] The objects of the Care Act are set out in s 8 and principles for its administration are in ss 9, 9A, 10, 10A, 11, 12, 12A and 13.

1 *Re Tracey* (2011) 80 NSWLR 261; *Re Henry* [2015] NSWCA 89 at [208]ff.

The Act applies to children who ordinarily live in NSW, are present in NSW, have a sufficient connection to NSW, or are subject to an event or circumstances occurring in NSW that gives rise to a report, including those outside of NSW: s 4(1), (2). Section 4(3) provides a list of factors which may be considered in determining whether a child has a sufficient connection to NSW.

The special principles of self-determination and participation to be applied in matters regarding the care and protection of Aboriginal and Torres Strait Islander children are found in: ss 11, 12, 12A and 13. See further **[2-1060]** below. Issues relating to Aboriginal children need to be considered in each phase of judicial decision-making.

Where caseworkers, who act on behalf of the Secretary of the Department of Communities and Justice (DCJ), assess that it is no longer safe for a child or young person to remain living with one or both of their parents or their current carer, an application must be made to the Children's Court for court orders to ensure the safety, welfare and wellbeing of the child or young person.

[2-1005] "Unacceptable risk" of harm test

Last reviewed: February 2024

In making determinations regarding removal, restoration, custody, placement and contact, the legal test to be applied is that of "unacceptable risk" of harm to the child(ren) concerned: *M v M* (1988) 166 CLR 69 at [25]; *Re Tanya* [2016] NSWSC 794 at [69]. A positive finding of an allegation of harm having been caused to a child should only be made where the court is so satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336. An unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned. When considering the issue of unacceptable risk, with a focus on the safety, welfare and wellbeing of the child, a finding of fact to the *Briginshaw* civil standard is not relevant: *Isles & Nelissen* [2022] FedCFamC1A 97 at [6].[2] Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: *Johnson v Page* [2007] FamCA 1235. The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated.[3]

See further *Local Court Bench Book* at **[40-000] Objects and principles of the Act.**

[2-1010] Principle of active efforts

Last reviewed: February 2024

Relevant legislation: Care Act, ss 3, 9A, 63, 79AA(2)(c), 83(3A)(b), (5B)(b), 83A(2)(a), 266

For applications made on or from 15 November 2023, subject to the "paramountcy principle", functions under the Act must be in accordance with the principle of active efforts: s 9A(1), (5); Sch 3 Pt 14 cl 57(2)(a).

This principle provides that DCJ must make active efforts to both prevent a child or young person entering out-of-home care s 9A(2)(a)) and for a child who has been removed, to make active efforts to restore the child to their parents or if that is not practicable or in the child's best interest to be restored, to place the child with family, kin or community: s 9A(2)(b).

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2 The *Isles & Nelissen* decision has been followed in the Children's Court: *Department of Communities and Justice (DCJ) v Janet and Xing-fu* [2022] NSWChC 7.

3 See further P Johnstone, "Care appeals from the Children's Court" at **[17-4000]**.

Under this principle, DCJ must ensure that active efforts are timely, practicable, thorough and culturally appropriate and purposeful and aimed at addressing the grounds on which the child or young person is considered to be in need of care and protection and conducted in partnership with the child or young person and the family kin and community of the child or young person, amongst other things, and can include providing, facilitating or assisting with access to support services and other resources — considering alternative ways of addressing the needs of the child, family, kin or community if appropriate services or resources do not exist or are not available: s 9A(3), (4).

DCJ has set out what "active efforts look like in practice":[4]

- involving families and support networks much earlier in the process, from assessment through to case closure
- using family-led decision-making processes, including Aboriginal Family-Led Decision Making (AFLDM) to guide assessments, planning, and care and restoration decisions
- informing families about their legal rights and supported to access independent legal advice at multiple stages throughout the involvement with the child protection system
- using alternative options to removal including Parent Responsibility Contracts, Parent Capacity Orders, Temporary Care Arrangements and Alternative Dispute Resolution
- referring families to relevant services, supporting their engagement, and monitoring their progress
- timely restoration casework to prevent children from drifting in care and improve support for parents
- ensuring children in care are supported to maintain connection to family and culture
- making cultural plans for Aboriginal children. There are additional requirements for permanency plans, including evidence of compliance with the Aboriginal and Torres Strait Islander Child Placement Principle
- ongoing support and monitoring of family time to ensure children in care maintain connections to their parents, siblings, and extended family and support network.

[2-1015] Evidence of active efforts etc

Last reviewed: February 2024

For applications made on or from 15 November 2023, s 63 Care Act mandates that in making a care application, DCJ must provide evidence to the court of:

(a) the active efforts made before the application was made and the reasons the active efforts were unsuccessful

(b) the alternatives to a care order considered before the application was made and the reasons the alternatives were not considered appropriate.

The active efforts made by DCJ must be made in accordance with the "principle of making active efforts" defined in s 9A (see **[2-1010]**, above).

4 Department of Communities and Justice, "Family is Culture, New Laws" accessed 11/12/23.

Underpinning this, and of particular importance, is the principle contained in s 9(2)(c) which provides:

> In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development.

The *Family is Culture review report*[5] (FiC Report) considered that Children's judges are uniquely placed to scrutinise the pre-entry into care casework of DCJ caseworkers and made recommendations to that effect.[6] It is important that DCJ provides sufficient information to the court about what prior alternative actions were considered and taken before children enter care. These include:

- *Parent responsibility contracts (PRC)*: ss 38A–38E. A PRC is an agreement between DCJ and a child's parents that contains provisions to support the improvement of parenting skills of the primary care-givers and to encourage them to accept greater responsibility for the child. A PRC may make provision for attendance at a substance abuse centre, counselling, behavioural and financial management courses, and for the monitoring of compliance with the terms of the PRC. Note that a breach of a PRC does not give rise to a presumption that a child is in need of care and protection. The applicability of PRCs extends to expectant parents: s 38A(1)(b). See further at **[17-5000] Child protection legislative reforms**.
- *Parent capacity orders (PCO)*: ss 91A–91I. PCOs, defined in s 91A, can be made on application by DCJ or by the Children's Court on its own initiative if it determines under s 90A that a prohibition order has been breached: s 91B. The court must be satisfied that there has been an identified deficiency in the parenting capacity of a parent or primary care-giver that has the potential to place the child or young person at risk of significant harm and it is reasonable and practicable to require the parent or primary care-giver to comply with the order. The court must be satisfied that the parent or primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapeutic service required by the order unless the order is made: s 91E(1). The Children's Court can make a PCO by consent: s 91F. See further *Local Court Bench Book* at **[40-180] Parent capacity orders**.
- *Temporary care arrangements (TCA)*: ss 151–152. DCJ may make a TCA for a child that DCJ has care responsibility for if DCJ is of the opinion the child is in need of care and protection: s 151. An authorised carer looks after a child for a period of up to three months (with an option for the period to be extended by a further three months): s 152(1)(c). A temporary care arrangement can generally only be made with the consent of a parent of the child; and can only be made when a permanency plan involving restoration is in place or if the parents are incapable of consenting: s 151(3).

5 M Davis, *Family is Culture review report: Independent review of Aboriginal children in OOHC*, 2019, p 250, accessed 11/12/23.

6 ibid, pp xxxiv; xlvi; 211.

- *Dispute resolution conferences (DRC)*: s 65 provides that the Children's Court may refer the application to a Children's Registrar to be dealt with before or at any stage of the care application. The Children's Registrar is to act as a conciliator between the parties or persons specified in s 86(1A)(b).
- *Family group conferences*: Family group conferencing is a form of ADR promoted by DCJ to bring family members together with an impartial facilitator to make a plan for their child or young person. Section 65A of the Care Act empowers the Children's Court to make an order that the parties to a care application participate in an alternative dispute resolution process (external ADR) in relation to the proceedings before the Court or any aspect of those proceedings. See further Children's Court of NSW Practice Note No 3 "Alternative Dispute Resolution Procedures in the Children's Court".

Section 63(5) provides that: "If the Children's Court is not satisfied with the evidence provided by the Secretary under subsection (1), the Court must *not* take either of the following actions unless the Court is satisfied that taking the action is in the best interests of the safety, welfare and well-being of the child or young person—

(a) dismiss a care application in relation to the child or young person,

(b) discharge the child or young person from the care responsibility of the Secretary [emphasis added]."

Section 63 gives effect to Recommendation 54 of the FiC Report. This amendment applies to both Aboriginal and non-Aboriginal children and includes the above mechanism for the court to dismiss a decision about the care application until it is satisfied that DCJ had made active efforts.

[2-1020] Culture

Last reviewed: February 2024

The need to take account of culture is enshrined in the *Children and Young Persons (Care and Protection) Act 1998* (Care Act). Subject to the paramount principle in s 9(1) of the Care Act, s 9(2)(b) provides that:

> in all actions and decisions made under this Act (whether by legal or administrative process) that significantly affect a child or young person, account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person.

Where Aboriginal and Torres Strait Islander children and young people are involved in care applications and casework under the Act, including cultural planning, permanency planning and placement decisions, the five elements of the Secretariat of National Aboriginal and Islander Child Care (SNAICC) Aboriginal and Torres Strait Islander Children and Young Persons Principle (ACPP) must be applied: see below at **[2-1060]** and see also *Family is Culture review report*.[7]

The Winha-nga-nha List (commenced 4 September 2023) is a dedicated court list for Aboriginal and or Torres Strait Islander families involved in care and protection cases at Dubbo Children's Court. The List was developed following a co-design process with Aboriginal community

7 M Davis, *Family is Culture review report: Independent review of Aboriginal children in OOHC*, 2019, pp 247–251, accessed 11/12/23.

representatives and key stakeholders in response to Recommendation 125 of the *Family is Culture review report*. A factsheet is available here. See also **[15-1000] NSW Youth Koori Court and Winha-nga-nha list, Dubbo**

[2-1025] Family is Culture review report

Last reviewed: June 2024

The 2019 *Family is Culture review report*[8] (FiC Report) to the NSW Government, chaired by Professor Megan Davis, is an independent review of Aboriginal children and young people in out-of-home-care (OOHC). The report made 125 recommendations to address why Aboriginal children and young people are disproportionately represented in OOHC in NSW. Several of those recommendations are directed to Children's judges in their decision-making in the care and protection jurisdiction. These include:

- Recommendation 55: "The Children's Court of NSW should update its internal judicial guidance to ensure Magistrates require the Department of Communities and Justice to provide information to the Court about what prior alternative actions were considered and taken before children entered care."
- Recommendation 80: "The Judicial Commission should, in conjunction with the President of the Children's Court, develop educational materials for all judicial officers about the identification and de-identification of Aboriginal children in judicial proceedings."
- Recommendation 82: "The Judicial Commission should, in consultation with the Children's Court of NSW and the NSW Child, Family and Community Peak Aboriginal Corporation (AbSec), design and implement an ongoing program of judicial education for Magistrates regarding the intent and elements of the Aboriginal Child Placement Principle, as well as how judicial decision-making may help to support their implementation."
- Recommendation 114: "The Judicial Commission should, in partnership with Aboriginal educators, provide opportunities for further education to Children's Court of NSW Magistrates and staff regarding the research on intergenerational trauma, the effects of colonisation, domestic violence, poverty, substance abuse and mental health issues that may affect Aboriginal parents' interactions with the Court."

The Children's Court continues to strive to meet the report's other recommendations directed to it. In 2022, the Court published Practice Note 17 "Designated Agencies in Children's Court care proceedings" to allow judges to utilise powers under s 85 of the Care Act to direct service provision in restoration cases in line with Recommendation 115. The Court has also developed the Winha-nga-nha List (commenced 4 September 2023) in Dubbo in line with Recommendation 125. A third Youth Koori Court was established in Dubbo and commenced on 24 March 2023. See **[15-1000] NSW Youth Koori Court and Winha-nga-nha list, Dubbo**.

The government's response in *Family is Culture legislative recommendations: Consultation findings report*,[9] led to the *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022*, which partially commenced on 25 November 2022, with the remainder commencing on 15 November 2023.[10]

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8 M Davis, *Family is Culture review report: Independent review of Aboriginal children in OOHC*, 2019, accessed 11/12/23.

9 DCJ, *Family is Culture legislative recommendations: Consultation findings report*, September 2022, accessed 11/12/23.

10 LW 10 November 2023.

[2-1030] Care plans

Last reviewed: February 2024

Section 78(2) of the Care Act requires:

(a) the allocation of parental responsibility between the Minister and the parents of the child or young person for the duration of a period for which the child or young person is removed from the care of the child or young person's parents,

(b) the kind of placement proposed to be sought for the child or young person, including—

(i) how it relates in general terms to permanency planning for the child or young person, and

(ii) the interim arrangements proposed for the child or young person pending permanent placement and the timetable proposed for achieving a permanent placement,

(c) the arrangements for contact between the child or young person and the child or young person's parents, relatives, friends and other persons connected with the child or young person,

(d) the agency designated to supervise the placement in out-of-home care,

(e) the services that need to be provided to the child or young person.

The *Children and Young Persons (Care and Protection) Regulation 2022* sets out at Sch 3(1) further mandatory requirements:

(1) In addition to the matters specified in the Act, section 78(2) a care plan must include the following—

(a) the date the plan is made,

(b) the method used to obtain the views of—

(i) the parents of the child or young person, and

(ii) the child or young person,

(c) whether the persons who gave a view under (b) were spoken to separately or together,

(d) for the agency or body with overall responsibility for coordinating the plan and the delivery of services to the child or young person and the child or young person's family —

(i) the name of the agency or body and the relationship the agency or body has to the child or young person, and

(ii) the responsibilities of the agency or body under the plan, and

(iii) the initial date on which the agency or body must assess the progress of the plan and the frequency of subsequent assessments,

(e) for each other person, agency or body participating in the plan—

(i) the name of the person, agency or body and the relationship the person, agency or body has to the child or young person, and

(ii) the responsibilities of the person, agency or body under the plan and the approximate period during which the responsibilities are to be carried out,

(f) the resources required to provide the services that need to be provided to the child or young person and the availability of the resources,

(g) the plans or arrangements to meet the education and training needs of the child or young person,

(h) whether the contact arrangements for the child or young person may require an application for a contact order under the Act, section 86,

(i) the indicators to be used to assess the success of the plan,

(j) if restoration of the child or young person is to be considered at a later time—

(i) the goals to be achieved by the parents to facilitate restoration, having regard to the child or young person's age and developmental needs, and

(ii) the approximate period during which the goals are to be achieved.

The *Children and Young Persons (Care and Protection) Regulation 2022* sets out at Sch 3(2) matters to be included:

(1) A care plan must contain the following information relevant to the circumstances of the child or young person—

(a) the family structure and significant family and other relationships of the child or young person,

(b) the relationship between the child or young person and the child or young person's parents,

(c) the history, development and experience of the child or young person,

(d) the cultural and linguistic background and religion of the child or young person,

(e) whether the child or young person is of Aboriginal or Torres Strait Islander descent and, if so, the communities the child or young person identifies with,

(f) the principal language spoken in the family home of the child or young person,

(g) issues of social, cultural, educational or economic significance in relation to the child or young person or the child or young person's family,

(h) the nature of the relationships between members of the child's or young person's family and the capacity of the parents to adapt or deal with circumstances affecting the family,

(i) a disability of the child or young person,

(j) the views of the following about the services that need to be provided to the child or young person and the child or young person's family—

(i) if practicable—the child or young person,

(ii) the parents of the child or young person,

(iii) the Secretary,

(k) if for paragraph (j)(i) the views of the child or young person were not obtained—the reasons the views of the child or young person were not obtained,

(l) if for paragraph (j)(ii) the views of the parents of the child or young person could not be obtained—the reasons the views of the parents of the child or young person could not be obtained,

(m) other matters the Secretary considers appropriate.

(2) The care plan must be accompanied by a copy of a relevant report on the health, educational or social well-being of the child or young person that, in the opinion of the Secretary, should be considered by the Children's Court.

(3) The care plan must refer to the views of a person who has expressed disagreement with a provision of the plan.

The *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022* inserted s 78(2A) into the Care Act (commenced 15 November 2023) to mandate additional requirements for a care plan made for an Aboriginal or Torres Strait Islander child or young person.

A care plan for an Aboriginal or Torres Strait Islander child or young person must include:

(a) (i) the child's or young person's connection with their Aboriginal or Torres Strait Islander family and community

(ii) the child's or young person's Aboriginal or Torres Strait Islander identity

a cultural plan that sets out how the following will be maintained and developed—

The care plan must be developed in consultation with the child or young person, their parents family and kin and relevant Aboriginal and Torres Strait Islander organisations: s 78(2A)(b). The care plan must also address how the plan has complied with the ACPP (s 12A of the Care Act)) and the Aboriginal and Torres Strait Islander Placement Principles in s 13 of the Care Act: s 78(2A)(c).

[2-1035] Cultural care planning mandate

Last reviewed: February 2024

The purpose of DCJ's cultural care planning mandate is "to acknowledge the continued trauma and impact of colonisation, racism and the forced removal of Aboriginal children".[11] For every Aboriginal or Torres Strait Islander child and every child with a cultural and linguistically diverse background, including an asylum seeker, refugee and new migrant child, it aims to ensure that the DCJ work with the child or young person, their family and community to support them to meet a child's cultural needs, maintain and enhance a child's connection to family, country, community and culture (including language).[12]

[2-1040] Removal of child into care and protection

Last reviewed: February 2024

For commentary on the "establishment" phase under ss 71(1) and 72(1) of the *Children and Young Persons (Care and Protection) Act 1998*, see *Local Court Bench Book* at **[40-060] The "establishment" phase**. See further, *Local Court Bench Book* at **[40-080] The "placement" or "welfare" phase**.

[2-1060] Aboriginal and Torres Strait Islander principles

Last reviewed: February 2024

The Aboriginal and Torres Strait Islander principles are contained in Ch 2, Pt 2 of the *Children and Young Persons (Care and Protection) Act 1998* (Care Act). These include s 11: that

11 DCJ, "Identity and culture casework practice mandate: Case planning for culture", 9 August 2021.
12 ibid.

Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children with as much self-determination as is possible and s 12 that provides for Aboriginal and Torres Strait Islander participation in decision-making.

Section 12A sets out the Aboriginal and Torres Strait Islander Children and Young Persons Principle (ACPP).[13] The ACPP must be applied in care applications and casework under the Care Act, including cultural planning, permanency planning and placement decisions: s 12A. They also govern how Aboriginal and Torres Strait Islander family members, kinship groups, representative organisations, relevant Aboriginal Community Controlled Organisations and communities participate in decision-making under the Care Act: *Family is Culture legislative recommendations: Consultation findings report*.[14]

The *Family is Culture review report*[15] notes that the ACPP is not simply a hierarchy of options for the physical placement of an Aboriginal child in OOHC. The ACPP is one broad principle made up of five elements aimed at enhancing and preserving Aboriginal children's sense of identity, as well as their connection to their culture, heritage, family and community: s 12A(2).[16]

Proper implementation of the ACPP requires an acknowledgement that the cultural identity of an Aboriginal child is "intrinsic" to any assessment of what is in the child's best interests: *Secretary of the Department of Communities and Justice (DCJ) and Farmer* [2019] NSWChC 5 at [116], [117].

Section 12A(2) of the Care Act, as amended by the *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022* (the Amendment Act), sets out the five elements which make up the Aboriginal and Torres Strait Islander Children and Young Persons Principle:

(a) prevention

(b) partnership

(c) placement

(d) participation, and

(e) connection,

which apply to the administration of the Act, as relevant to the decision being made, in relation to Aboriginal and Torres Strait Islander children and young persons: s 12A(1), (3).

These are aimed at enhancing and preserving Aboriginal children's sense of identity, as well as their connection to their culture, heritage, family and community: Second Reading Speech, Legislative Council, Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022; *Family is Culture review report*.[17]

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13 Note, "ACPP" is used as an abbreviation in the FiC report and other "scholarly and grey" literature to refer to the principle set out in s 12A.

14 DCJ, *Family is Culture legislative recommendations: Consultation findings report*, September 2022, p 23, accessed 11/12/23.

15 M Davis, *Family is Culture review report: Independent review of Aboriginal children in OOHC*, 2019, pp 248–251, accessed 11/12/23.

16 ibid p 250. See also, Second Reading Speech, Legislative Council, Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022.

17 ibid p 250. See also P Gray, "Beyond placement: realising the promise of the Aboriginal and Torres Strait Islander Child Placement Principle" (2021) 33 *JOB* 99.

Particular principles regarding Aboriginal and Torres Strait Islander children and their special heritage are enunciated by s 13 and are reflected particularly in ss 78(2A), 78A(4) and 83A(3). Broadly speaking, these principles provide that if Aboriginal and Torres Strait Islander children are to be removed from their parents, they should be placed with (s 13(1)):

- extended family or kinship group members or,
- members of their community or, if that is not practicable
- a member of another Aboriginal and Torres Strait Islander family residing nearby or, as a last resort
- a suitable person(s) approved by DCJ after consultation with members of the extended family or kinship group and appropriate Aboriginal and Torres Strait Islander organisations: s 13(1).

Section 5 provides the relevant definitions in relation to the identification of Aboriginal and Torres Strait Islander children. The decision of *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83, although relating to the *Adoption Act 2000*, provides guidance in respect of the application of s 5. "There is no requirement in order … to be an Aboriginal child for the child to have a specified proportion of genetic inheritance" and "descent is different from race": *Hackett* per Leeming JA at [53]; [86]; *Adoption Act*, s 4(1), (2).

If a child has one Aboriginal and Torres Strait Islander parent and one non-Aboriginal and Torres Strait Islander parent, the child may be placed with the person with whom the best interests of the child will be served having regard to the principles of the Care Act: s 13(4). Arrangements must be made to ensure the child has the opportunity for continuing contact with the other parents' family, community and culture: s 13(5).

In determining placement, account is to be taken of the child's expressed wishes and whether they identify as an Aboriginal and Torres Strait Islander person: s 13(2).

In relation to placement with non-Aboriginal and Torres Strait Islander persons, no final order allocating sole parental responsibility for an Aboriginal and Torres Strait Islander child to a non-Aboriginal and Torres Strait Islander person may be made except after extensive consultation and with the express approval of the Minister for Aboriginal Affairs and the Minister for Community Services: s 78A(4).

Further, if an Aboriginal and Torres Strait Islander child is placed with a non-Aboriginal and Torres Strait Islander carer, the following principles are to determine the choice of a carer (s 13(6)):

(a) subject to the child's best interests, a fundamental objective is to be the reunion of the child with his/her family or Aboriginal and Torres Strait Islander community

(b) continuing contact must be ensured between the child and his/her Aboriginal and Torres Strait Islander family, community and culture.

The Aboriginal and Torres Strait Islander Child and Young Person Placement Principles (ATSICPP) under s 13 are an aspect of the important principle in s 9(2)(d) that a child's cultural ties should be preserved when they are removed from their family. However, s 13(1) must not be blindly implemented without regard to the principle of paramountcy and the other objects and principles set out in ss 8 and 9: *Re Victoria and Marcus* [2010] CLN 2. In the exceptional case of *Re Victoria and Marcus*, the children were placed with carers who were not Aboriginal rather than their Aboriginal grandparents as the court found there was a real risk the grandparents

would actively discourage the children from identifying with their Aboriginal cultural links, "contrary to the whole purpose and spirit of the Aboriginal Placement Principles set out in s 13(1)": at [52].

The principles in s 13(1) do not apply to emergency placements to protect a child from serious risk of immediate harm, or to a placement of less than two weeks duration: s 13(7).

The cultural identity of Aboriginal and Torres Strait Islander children is not a peripheral consideration in the making of orders, nor is it something that exists in conflict with "best interests" — it is intrinsic to what is in their best interests.[18]

Sections 78A(4) and 83A(3) also have application: see below at **[2-1080]**.

Note: The definition of statutory out-of-home care means that the application of the ACPP is not just about court proceedings when having to provide a long-term placement proposal, but is applicable once an interim order is made or within two weeks of removal of a child from their parents.[19]

In relation to the development of cultural care plans (see s 78(2A)) when working with Aboriginal and Torres Strait Islander children and young people, judicial officers should ensure:

- the minimum number of consultations have occurred and evidence is provided
- that minimum supports are planned for within the cultural care plan
- the child, family, kin and relevant extended family/community consulted and evidence provided as to their views.
- the plan complies with the permanent placement principles, Aboriginal and Torres Strait Children and Young Persons Principle (s 12A)) and the placement principles for Aboriginal and Torres Strait Islander children and young persons set out in s 13.

[2-1065] Identification of Aboriginal children

Last reviewed: February 2024

The late identification, or the de-identification, of children by the Department of Communities and Justice can have consequences for planning and placement so, in cases where identification is an issue, the court will be assisted by timely evidence from the parties.

Section 5 of the Care Act defines an Aboriginal child or young person as "a child or young person descended from an Aboriginal". An Aboriginal person is defined as having the same meaning as Aboriginal person has in s 4(1) of the *Aboriginal Land Rights Act 1983* as follows:

(a) is a member of the Aboriginal race of Australia, and

(b) identifies as an Aboriginal person, and

(c) is accepted by the Aboriginal community as an Aboriginal person.

The Children's Court may determine that a child or young person is Aboriginal for the purposes of the Care Act if the court is satisfied that the child or young person is of Aboriginal descent, notwithstanding the definition in the *Aboriginal Land Rights Act*: s 5(2) Care Act.

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18 Aboriginal Legal Service (NSW/ACT) Ltd, "Understanding the Aboriginal and Torres Strait Islander child placement principles as a framework for best practice", paper presented at the ACWA Conference on Cultural Identity in Aboriginal children in OOHC, 2020, p 3, accessed 11/12/23; P Gray, ibid.

19 ibid, p 4.

The legal test for who is an "Aboriginal child" was the subject of some uncertainty. In *Fischer v Thompson (Anonymised)* [2019] NSWSC 773, the court held that for a child to be an "Aboriginal child" for the purposes of the *Adoption Act 2000*, it was necessary to identify an ancestor of the child who was "a member of the Aboriginal race of Australia, and identified as an Aboriginal person, and was accepted by the Aboriginal community as an Aboriginal person." However in *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83, the definition in *Fisher* was disapproved as being too narrow. The Court of Appeal held that a child is an Aboriginal child for the purposes of the *Adoption Act* in circumstances where evidence established that she or he was descended from the people who lived in Australia before British colonisation. Further, the court has a discretion under s 4(2) *Adoption Act* to determine that a child who qualifies as being of "of Aboriginal descent" is an "Aboriginal child" even if they or their forebear do not satisfy the three-limb definition in the *Aboriginal Land Rights Act*: at [57], [60], [82], [86].

The court in *Hackett* made clear that there is no requirement in order for a child to be Aboriginal for the child to have a specified proportion of genetic inheritance (at [53]), and also made it clear that descent is different from race: at [86].

Although the *Hackett* decision was specifically directed to s 4(2) of the *Adoption Act*, the definition of "Aboriginal" is found in s 4 of the *Aboriginal Land Rights Act* and referenced in s 5 of the Care Act and in s 4 of the *Adoption Act*.

See further **[3-1000] Aboriginal and Torres Strait Islander placement principles** for a list of relevant cases which have considered the principle.

[2-1070] Issues arising from de-identification of Aboriginal and Torres Strait Islander children

Last reviewed: February 2024

It is not unusual for Aboriginal families to be reluctant to self-identify to statutory child protection systems, given justified mistrust of these systems and their treatment of Aboriginal peoples.[20] As the Secretariat of National Aboriginal and Islander Child Care (SNAICC) has noted, "without correct and early cultural identification, Aboriginal and Torres Strait Islander children at all levels of child protection involvement are at risk of being deprived of culturally safe support, case planning and placements".[21]

The *Family is Culture review report* ventilated concerns about the late identification of Aboriginal children and the de-identification of children resulting in the Aboriginal and Torres Strait Islander Children and Young Persons Principle (ACPP) not being applied to them.[22] For example, failing to record a child's Aboriginality will have a flow on effect in terms of cultural planning and casework for the child and will limit their connections to culture in OOHC.[23] The report recommended (Recommendation 80) that judicial officers receive educational materials about the identification and de-identification of Aboriginal children.[24] Recommendation 76 is directed to developing regulations about identifying and "de-identifying" children in contact with the child protection system as Aboriginal for inclusion in the *Children and Young Persons*

20 NSW Government, DCJ," Aboriginal case management policy rules and practice guidance", March 2019, p 6, accessed 11/12/23.
21 M Davis, *Family is Culture review report: Independent review of Aboriginal children in OOHC*, 2019, p 258, accessed 11/12/23.
22 ibid pp 259–263.
23 ibid p 261.
24 ibid p 264.

(Care and Protection) Regulation 2022. To this end, the *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022* amended s 264 to insert s 264(1A)(b1) to allow for regulations to make provision for processes to be used when identifying children and young persons as Aboriginal or Torres Strait Islander persons for the purposes of administering the Care Act.

[2-1080] Permanency planning

Last reviewed: February 2024

Relevant legislation: ss 83, 83A, 84, 85A

Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security, has regard to the principles set out in s 9(2)(e) and (g), meets the needs of the child, and avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A. Permanency planning recognises that long-term security will be assisted by a permanent placement: s 78A(2). If DCJ assesses that there is a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan involving restoration and submit it to the Children's Court for its consideration: s 83(2). If DCJ assesses that there is not a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan for another suitable long-term placement for the child or young person and submit it to the Children's Court for its consideration: s 83(3).

From 15 November 2023, a permanency plan prepared under s 83(3) must include the following (s 83(3A)):

(a) the reasons for the Secretary's assessment that there is not a realistic possibility of restoration within a reasonable period, and

(b) details of the active efforts the Secretary has made to—

  (i) restore the child or young person to the child's or young person's parents, or

  (ii) if restoration to the child's or young person's parents is not practicable or in the best interests of the child or young person— place the child or young person with family, kin or community.

The Children's Court may, before deciding whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period, direct DCJ to provide the Court with reasons for the assessment there is not a realistic possibility of restoration within a reasonable period and evidence of the active efforts DCJ has made to restore the child or place the child with family, kin or community if restoration is not practicable of in the child's best interests: s 83(5B).

Pursuant to s 83(7), the Children's Court must not make a final care order unless it expressly finds that "permanency planning for the child or young person has been appropriately and adequately addressed" and that prior to approving a permanency plan involving restoration, there is a realistic possibility of restoration within a reasonable period, having regard to the circumstances of the child or young person, and the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care. As noted above, for placement of an Aboriginal or Torres Strait Island child with non-Aboriginal and Torres Strait Islander persons,

no final order for adoption may be made except after consultation as specified and with the express approval of the Minister for Aboriginal Affairs and the Minister for Community Services: s 78A(4).

The *Family is Culture review report*[25] submitted that the Children's Court of NSW is uniquely placed to actively supervise DCJ's compliance with the ACPP.

[2-1085] Additional requirements for Aboriginal or Torres Strait Island child or young person: s 83A

Last reviewed: February 2024

From 15 November 2023, there are additional requirements about which the Children's Court must make express findings before making a final care order in relation to an Aboriginal or Torres Strait Islander child or young person (Note after s 83(7); s 83A(3)). The Children's Court must not make a final care order unless it expressly finds that the plan complies with the permanent placement principles, the ACPP (s 12A of the Care Act) and the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles (ATSICPP) (s 13 of the Care Act) : s 83A(3)(a). Further, the Court must expressly find that the plan includes a cultural plan that sets out how the child will maintain and develop connection with family, community and identity (s 83A(3)(b)); that has been developed in consultation with the child or young person, their parents, family and kin and relevant Aboriginal and Torres Strait Islander organisations: s 83A(3)(c).

The requirements set out in s 83A(3) are in addition to the requirements set out in s 83: s 83A(1).

[2-1090] Permanent placement principles — points to consider

Last reviewed: February 2024

- Ensure there is a record that all placements options have been thoroughly explored and considered including:
  - preservation or restoration to a child's parent (within the meaning of s 83)
  - guardianship with a relative, kin or other suitable person
  - open adoption (except in the case of an Aboriginal or Torres Strait Islander child or young person)
- ensure there is evidence as to how a decision was made that restoration is not realistic, what information was taken into account and who was consulted
- ensure there is evidence of how the active efforts made to ensure the permanency plan for an Aboriginal or Torres Strait Islander child or young person addresses how the plan has complied with the Aboriginal and Torres Strait Islander Child Placement Principles
- for an Aboriginal or Torres Strait Islander child or young person, a final care order must not be made unless the Children's Court expressly finds the permanency plan complies with the matters set out in s 83A(3) in addition to the requirement in s 83.

25 M Davis, *Family is culture review report: independent review of Aboriginal children in OOHC*, 2019, accessed 11/12/23.

[2-1120] Care plan template

Last reviewed: February 2024

This Care Plan template is in a downloadable zip file and produces an interactive pdf document for entering and recording a child's care plan. See Care Plan template.

The template contains an option to display the Aboriginal and Torres Strait Islander cultural plan and the multicultural plan sections.

[2-1140] Operating a trauma-informed court

Last reviewed: February 2024

Although the traumatic histories of care-experienced children is often recognised, it appears the management of their problematic behaviour is often prioritised over a holistic understanding of their individual circumstances. Following the introduction of the NSW Therapeutic Care Framework in 2017, trauma-informed care (also referred to as therapeutic care) in the OOHC system has been accepted as best practice to avoid the criminalisation of children in care.[26] It is paramount that therapeutic care be culturally sensitive and responsive and recognises the trauma of separation. Therapeutic care must be holistic in its approach, address intergenerational trauma and promote healing.[27]

The Youth Koori Court (YKC) has made some critical modifications and additions to the way in which the court operates as a trauma-informed court. At the heart of the YKC is the acknowledgement and respect offered to the Aboriginal and Torres Strait Islander people of Australia. The goals of the YKC include a desire to "increase Aboriginal community, including Aboriginal young people's confidence, in the criminal justice system in NSW". YKC goals also include reducing the rate of non-appearances by young Aboriginal offenders in the court process in NSW; reducing the rate of breaches of bail by Aboriginal young people in NSW; and increasing compliance with court orders by Aboriginal young people in NSW. See further **[15-1000] Youth Koori Court**.

[2-1160] Further reading

Last reviewed: February 2024

- Aboriginal Legal Service (NSW/ACT) Ltd, "Understanding the Aboriginal and Torres Strait Islander child placement principles as a framework for best practice", paper presented at the ACWA Conference on Cultural Identity in Aboriginal children in OOHC
- M Allerton, "Apart from shortness, vegephobia and addiction to technology, how are children different?" at **[18-2000]**
- M Allerton, "The relevance of attachment theory in care proceedings" at **[18-1000]**
- F Arney et al, "Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations", CFCA Paper No 34, 2015
- M Davis, *Family is Culture review report: Independent review of Aboriginal children in OOHC*, 2019

26 NSW Government, NSW Therapeutic Care Framework, March 2017, accessed 11/12/23.
27 A McGrath, A Gerard, E Colvin, "Care-experienced children and the criminal justice system" (2020) 600 *Trends & Issues in crime and criminal justice*, Australian Institute of Criminology, accessed 11/12/23.

- Department of Communities and Justice, "New child protection laws", 2023
- S Duncombe, "The trauma-informed approach of the NSW Youth Koori Court" (2020) 32(3) *JOB* 21
- V Edwige and P Gray, "Significance of Culture to wellbeing, healing and rehabilitation", Report, 2021 (via the Bugmy Bar Book)
- P Gray, "Beyond placement: realising the promise of the Aboriginal and Torres Strait Islander Child Placement Principle" (2021) 33 *JOB* 99
- Intergenerational trauma resources published on JIRS
- P Johnstone, "Care appeals from the Children's Court" at **[17-4000]**
- P Johnstone, "Child protection legislative reforms" at **[17-5000]**
- P Johnstone, "Children's Court: driving a paradigm shift" at **[17-3000]**
- P Johnstone, "Children's Court of NSW: 2019" at **[2-4000]**
- P Johnstone, "Children's Court update 2016" at **[17-2000]**
- P Johnstone, "Children's Court update 2019 (care and protection jurisdiction)" at **[2-5000]**
- P Johnstone, "Children's participation: a look towards the future" at **[17-1000]**
- P Johnstone, "Expert clinical evidence in care proceedings" at **[7-3000]**
- NSW Government, *Family is Culture legislative recommendations: Discussion paper*, April 2022
- NSW Government, *Family is Culture legislative recommendations: Consultation findings report*, September 2022
- B O'Neill, "Decolonising the mind: working with transgenerational trauma and First Nations people" (2019) 31(6) *JOB* 54
- Piaget's stages of cognitive development at **[18-6000]**
- J Sackar, "Prioritising identity and culture for Aboriginal and Torres Strait Islander children", paper presented at the NSW Child Protection Legal Conference, 4 February 2021, Sydney
- SNAICC, "The Aboriginal and Torres Strait Islander Child Placement Principle: A guide to support implementation", 2019
- SNAICC, "Reviewing implementation of the Aboriginal and Torres Strait Islander Child Placement Principle", 2020
- SNAICC, "Understanding and applying the Aboriginal and Torres Strait Islander Child Placement Principle: a resource for legislation, policy and program development", 2017.
- SNAICC, *Family matters report*, 2023.

Care tree

Definitions ..... [2-2000]

Glossary ..... [2-2010]

Closed court — s 104B ..... [2-2020]

Children and young persons to whom Act applies — s 4 ..... [2-2030]

Parties ..... [2-2040]

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The principle of participation — s 10

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[2-2000] Definitions

Last reviewed: March 2025

Note: All references to sections are, unless otherwise stated, references to sections in the *Children and Young Persons (Care and Protection) Act 1998*.

Where "child" is referred to herein, the reference also includes a "young person".

If wording is in a box, it is suggested wording that may be said in court.

See also **Parties** at **[2-2040]** for definitions.

[2-2010] Glossary

Last reviewed: March 2025

CDPVA	*Crimes (Domestic and Personal Violence) Act 2007*
CROC	United Nations Convention on the Rights of the Child
DLR	Direct legal representative
DRC	Dispute resolution conference
GAL	Guardian ad litem
ILR	Independent legal representative

MOCO	Minute of care order
NRPOR	No realistic possibility of restoration
PN	Practice Note
PR	Parental responsibility
RTN	Registrar to notify
SOPP	Summary of proposed plan

[2-2020] Closed court — s 104B

Last reviewed: November 2024

Section 104B provides:

> At any time while the Children's Court is hearing proceedings with respect to a child or young person, any person who is not directly interested in the proceedings must, unless the Children's Court otherwise directs, be excluded from the place where the proceedings are being heard.

[2-2030] Children and young persons to whom Act applies — s 4

Last reviewed: November 2024

Section 4 of the Care Act provides:

(1) The functions conferred or imposed by this Act and the regulations may be exercised in respect of children and young persons—

(a) who ordinarily live in New South Wales, or

(b) who do not ordinarily live in New South Wales, but who—

(i) are present in New South Wales, or

(ii) have a sufficient connection to New South Wales, or

(c) who are subject to an event or circumstances occurring in New South Wales that gives or give rise to a report.

(2) This Act is intended to have extraterritorial application in so far as the legislative powers of the State permit, including in relation to children and young persons who do not ordinarily live in, or who are not present in, New South Wales.

(3) In determining whether a child or young person has a sufficient connection to New South Wales for subsection (1)(b)(ii), the following may be considered—

(a) whether the child or young person is the subject of a care order under this Act,

(b) whether members of the child or young person's family, kin or community live in New South Wales,

(c) any time the child or young person spends in New South Wales, including under arrangements for contact,

(d) whether the child or young person attends school or participates in other programs or services in New South Wales,

(e) any plans for the child or young person to return to live in New South Wales, including plans for the child or young person to be restored to the child or young person's parents in New South Wales,

(f) whether the particular matter could be dealt with by another court in another jurisdiction.

[2-2040] Parties

Last reviewed: November 2024

Right of appearance — s 98

(1) In any proceedings with respect to a child or young person—

(a) the child or young person and each person having parental responsibility for the child or young person, and

(b) the Secretary, and

(c) the Minister,

may appear in person or be legally represented or, by leave of the Children's Court, be represented by an agent, and may examine and cross-examine witnesses on matters relevant to the proceedings.

Practice Note 5 The appointment of a legal representative to act for a child or young person under s 99(1) shall be deemed to have been made to a solicitor or barrister employed or engaged by Legal Aid NSW. When a legal practitioner has filed a Notice of acting as a child's or young person's legal representative that legal practitioner is taken to be the child's or young person's representative for all future proceedings. Otherwise, the court should appoint if requested by a practitioner.

"child" except in Ch 13, means a person who is under the age of 16 years.

"young person" means a person who is aged 16 years or above but who is under the age of 18 years.

"Direct legal representative"

- the child or young person is capable of giving proper instructions, and
- a guardian ad litem has not been appointed for the child or young person: see s 99A(1).

Note: See s 99B, there is a rebuttable presumption that a child who is less than 12 years of age is not capable of giving proper instructions to his or her legal representative.

"Independent legal representative"

- the child or young person is not capable of giving proper instructions, and
- a guardian ad litem has not been appointed for the child or young person: see s 99A(2).

Note: See s 99C, there is a rebuttable presumption that a child who is not less than 12 years of age, or a young person, is capable of giving proper instructions to his or her legal representative. This presumption is not rebutted merely because the child or young person has a disability.

However, the Children's Court may, on the application of a legal representative for a child who is not less than 12 years of age make a declaration that the child is not capable of giving proper instructions s 99C(2).

Therefore s 99A(2) allows a legal representative for a child is to act as an "independent legal representative" with the leave of the court.

Refer to s 10 — the importance of the participation of the child.

The principle of participation — s 10

(1) To ensure that a child or young person is able to participate in decisions made under or pursuant to this Act that have a significant impact on his or her life, the Secretary is responsible for providing the child or young person with the following—

(a) adequate information, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department's intervention, the ways in which the child or young person can participate in decision making and any relevant complaint mechanisms,

(b) the opportunity to express his or her views freely, according to his or her abilities,

(c) any assistance that is necessary for the child or young person to express those views,

(d) information as to how his or her views will be recorded and taken into account,

(e) information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision,

(f) an opportunity to respond to a decision made under this Act concerning the child or young person.

(2) In the application of this principle, due regard must be had to the age and developmental capacity of the child or young person.

(3) Decisions that are likely to have a significant impact on the life of a child or young person include, but are not limited to, the following—

(a) plans for emergency or ongoing care, including placement,

(b) the development of care plans concerning the child or young person,

(c) Children's Court applications concerning the child or young person,

(d) reviews of care plans concerning the child or young person,

(e) provision of counselling or treatment services,

(f) contact with family or others connected with the child or young person.

Support person

Any participant in proceedings before the court may, with leave, be accompanied by a support person: s 102(1). Leave must be granted unless:

- the support person is a witness
- the court is of the opinion, having regard to the child's wishes, leave should not be granted, or
- there is some other substantial reason not to grant leave: s 102(2).

Case workers

Allow case workers and case work managers to remain in court. They can provide information and may be informed first hand of changes needed to be made, eg to a care plan, if required.

Others

If no compelling objection by a party, then allow a person, whom any proposed order might have a significant impact upon, to remain.

Media

The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But the common law principle of open justice is secondary to the principles in s 9, in particular the principle that the safety, welfare, and well-being of the children are paramount: *AM v DoCS; Ex parte Nationwide News* [2008] NSWDC 16.

Section 105 is usually sufficient protection to not have to exclude the media. The name of any child must not be published: s 105(1).

[2-2060] Service

Last reviewed: November 2024

The Secretary is required to make reasonable efforts to notify the parents: s 64. Personal or postal service is permitted: s 256.

A matter can proceed without service in the absence of parents (s 97), but time limit interim order.

> **256A Children's Court may dispense with service**
>
> (1) If the Children's Court is satisfied that an unacceptable threat to the safety, welfare or well-being of a child or young person or a party to any proceedings would arise if any notice or other instrument required or authorised by this Act was given to, or any document served on, a particular person, the Children's Court may make an order dispensing with the giving of notice or instrument to, or service on, the person concerned.
>
> (2) An order under this section excuses every other person from the requirement to comply with any provision of this Act that requires notification to, or service on, that person.

Where it is not possible for service to be affected the court may order substituted service. The rule permits substituted service to be taken as personal service: Children's Court Rule 2000 r 30J. An affidavit of attempted service might form the basis of an application for substituted service.

If a matter is adjourned for establishment, leave, care plan or hearing, and a party is not present or represented, then have the Registrar notify the absent party of the timetable and next listing.

[2-2080] Parties are encouraged to consult but this is not a consent jurisdiction

Last reviewed: November 2024

If a common position is reached as to what orders, undertakings and/or directions should be made, the parties should record these in a draft minute of order.

However, this is not a consent jurisdiction and the court must still consider all directions and orders.

Justice Lindsay recognised the protective purpose of the Children's Court jurisdiction in *CAC v Secretary, DFaCS* [2014] NSWSC 1855 at [16]:

> The jurisdiction the Court is called upon to exercise is not a "consent jurisdiction" in the sense of its being bound to make a particular order, or to adopt a particular course, because a person in need of protection, or a significant other person, seeks it or agrees to it. The Court is bound

to exercise an independent judgement because of the public interest element in the decisions it is called upon to make, and the possibility, if not the fact, that the person in need of protection lacks the capacity requisite to informed decision-making.

[2-2100] Minute of care order

Last reviewed: November 2024

Note: A minute of care order (MOCO) will always be provided by one of the parties when making final orders.

The court is invited to make orders in accordance with a minute of care order which proposes that …

The orders sought pursuant to the Care Act are consistent with the standardised wording per Practice Note 14.

Each of the parties before the court support the orders in accordance with the minute of care order.

The court, in exercising independent judgment, makes the orders in accordance with the minute of care order.

[2-2120] Expedition and adjournments — s 94

Last reviewed: November 2024

(1) All matters before the Children's Court are to proceed as expeditiously as possible in order to minimise the effect of the proceedings on the child or young person and his or her family and to finalise decisions concerning the long-term placement of the child or young person.

…

(4) The Children's Court should avoid the granting of adjournments to the maximum extent possible and must not grant an adjournment unless it is of the opinion that—

(a) it is in the best interests of the child or young person to do so, or

(b) there is some other cogent or substantial reason to do so.

Age

Attachment behaviours are the means by which infants elicit care and even ensure their survival, and different patterns of attachment result from each individual's adaptation to the quality of care-giving he or she has received.

To break an attachment is distressing, and can potentially place a child at risk. Transient effects are expected when the first change in placement occurs before 6–9 months of age. After 9–12 months of age, there will be distress, with long-term effects of the change increasing with the child's age. From 1–3 years, separation is a traumatic loss and a developmental crisis. Even if the loss occurs after approximately 3–5 years of age, some persistent loss of security in new relationships is to be expected.

See M Allerton, "The relevance of attachment theory in care proceedings", at **[18-1000]**.

Practice Note 5 — Case management in care proceedings

The Children's Court aims to complete 90% of care cases within 9 months of commencement, and to complete all cases within 12 months of commencement: see PN 5 [5.1].

[2-2140] Legal test

Last reviewed: November 2024

The paramount principle under which the Act is to be administered is that in any action or decision concerning a particular child, their safety, welfare and well-being is paramount: s 9(1).

In making determinations regarding establishment, the legal test to be applied is as a matter of probability.

In making determinations regarding removal, restoration, custody, placement and contact, the legal test to be applied is that of "unacceptable risk" of harm to the child(ren) concerned: *M v M* (1988) 166 CLR 69.

Proving a fact

Onus applies

It is a fundamental principle that a party who asserts facts bears the evidentiary onus or burden of proving them to the requisite standard: *Isles & Nelissen* [2022] FedCFamC1A 97 at [39].

Standard of proof

The standard of proof is on the balance of probabilities: see s 93(4).

When the law requires the proof of any fact, the Court must feel an actual persuasion of its occurrence or existence before it can be found.

The Court is not required to have a subjective belief.

The standard is not a mathematical standard but a reasonable attempt to find the facts in the circumstances of the case.

However, in *M v M* (1988) 166 CLR 69 the High Court distinguished between proof of historical facts decided on the balance of probabilities and possibilities.

Regarding possibilities, the High Court had consideration to both existing possibilities (had taken place) and the prediction of future possibilities (might take place).

The Court accepted the welfare of the child is the paramount consideration.

Consequently, when assessing unacceptable risk, a court is entitled to consider any matter which it finds probative or convincing even if it is not satisfied that it is a fact on the balance of probabilities.

Issues in dispute in hearings — generally

In care matters, often the first issue is to decide whether on the balance of probabilities, harm was done to a child/young person.

The second issue to decide (if the Court does not find that harm was done) is whether there is a possibility that harm was done.

The third issue is to consider, accumulatively, all other matters of risk or benefit that the Court finds probative or convincing — both existing and the prediction of future possibilities.

The fourth issue is to determine whether an order would expose a child/young person to an unacceptable risk of harm.

If there is not an unacceptable risk of harm the Court is required to determine what orders best suit in securing the child's safety, welfare and wellbeing.

Section 79(3) states that the Children's Court must not make an order allocating parental responsibility unless it has given particular consideration to the permanent placement principles and is satisfied that the order is in the best interests of the child/young person.

Briginshaw applies

The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2 at [201].

Briginshaw requires clear and cogent proof of serious allegations but does not change the standard of proof; it reflects the perception that members of the community do not ordinarily engage in serious misconduct: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66 at [171].

When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues. But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected: *Briginshaw*.

Evidence-based

In *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 Meagher JA said at [79]:

> [the court] must base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined.

The court must draw its conclusions from material that is satisfactory, in a probative sense, to avoid decision-making that might appear capricious, arbitrary or without foundational material: *Department of Communities and Justice (DCJ) and Bloom* at [199].

In *Briginshaw*, Dixon J stated:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

Proving a fact is retrospective.

The court, on the evidence, determines facts.

If the allegation is proven

If an allegation is made out on the balance of probabilities, allowing for *Briginshaw*, it does not follow that the Court must make that finding.

The High Court in *M v M* (1988) 166 CLR 69 said:

> There are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has taken place unless impelled to do so by the particular circumstances of the case.

Additionally, there needs to be calm consideration before making a positive finding involving serious criminal allegations when it is not required. The court conducts care hearings without the safeguards of criminal procedure or protections of the *Evidence Act 1995*.

However, in appropriate cases, findings of truth is in the best interests of children.

The court then assesses risk — without conflation: *Isles & Nelissen* [2022] FedCFamC1A 97 at [83].

If allegation is not made out

It does not follow if an allegation is not made out on the balance of probabilities, allowing for *Briginshaw*, that this determines the wider issue of the best interests of the child: *Isles & Nelissen* [2021] FedCFamC1F 295 at [61].

The court then assesses risk — without conflation: *Isles & Nelissen* [2022] FedCFamC1A 97 at [83].

Assessing risk

Onus is not relevant

Any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount: *Department of Communities and Justice (DCJ) and Bloom* at [127].

Unlike in other civil litigation, no party bears an onus of proving the factual elements of a common law, equitable, or statutory cause of action to justify an entitlement to remedy. Rather, each party adduces evidence and propounds a suite of orders which he or she contends meets the child's best interests, which gives the proceedings a different character: *Isles & Nelissen* [2022] FedCFamC1A 97 at [50], per *Fitzwater v Fitzwater* [2019] FamCAFC 251.

Standard of proof

In *Isles & Nelissen* [2022] FedCFamC1A 97 the Full Court considered the unacceptable risk test laid down in *M v M* (1988) 166 CLR 69 and rejected the proposition that a finding of unacceptable risk is made according to the civil standard of proof.

The court distinguished between past events decided on the balance of probabilities and hypothesising about future possibilities.

In *Isles & Nelissen* at [140] it was said:

> It cannot be correct that the unacceptable risk of a child's sufferance of harm through future sexual abuse can only ever be established if it is proven as a fact, on the balance of probabilities, that the child (or another) has already been sexually abused in the past. Depending upon the strength of the evidence placed before the Court, the possibility of past sexual abuse may of itself be sufficient to establish the chance of future sexual abuse.

The Full Court at [50] referred to *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 that concluded:

> a comparatively small risk of really serious harm can justify action, while even the virtual certainty of slight harm might not.

The standard of proof in assessing risk is not on the balance of probabilities. Instead, the court looks more to possibilities: *Isles & Nelissen* at [82] adopting the primary judge's remarks.

Briginshaw is not applicable

The resolution of an allegation against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child: *M v M*.

Where there is past allegation, the focus of proof is upon the person and that issue. Where that is done the *Briginshaw* civil standard of proof applies: *M v M.*

However, where the issue is unacceptable risk, the focus is on the safety, welfare and wellbeing of the child. *Briginshaw* is therefore, not relevant.

Evidence-based

Risks of harm are not susceptible to scientific demonstration or proof (*CDJ v VAJ* (1998) 197 CLR 172 at [151]) but are instead postulated from known historical facts and present circumstances: *Isles & Nelissen* at [7].

The assessment of risk is an evidence-based conclusion and is not discretionary … The finding about whether an unacceptable risk exists, based on known facts and circumstances, is either open on the evidence or it is not: *Isles & Nelissen* at [85].

> Fogarty J stated it is necessary for a judge to give real and substantial consideration to the facts of the case and to decide whether or not, and why or why not, those facts could be said to raise an unacceptable risk of harm. Furthermore, the qualitative analysis of the evidence must be directed not just to the existence of the risk of harm but also to the magnitude of the possible harm: *Isles & Nelissen* at [12].

In *Isles & Nelissen* at [82], agreeing with the primary judge:

> The notion of "an unacceptable risk", is, however, a predictive or prospective exercise for the court in determining whether there is a "risk" into the future.

Consequently, the consideration of an unacceptable risk is an evidence-based one but, at the same time, a prospective one. This is not a two-step or default approach but one requiring separate and independent consideration: *Isles & Nelissen* at [63].

Unacceptable risk of harm

The following passages in *Department of Communities and Justice (DCJ) and Bloom* at [127]–[131], [133]–[135] sets out the law relating to unacceptable risk:

1. First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.
2. This principle, therefore, is the underpinning philosophy by which all relevant decisions are to be made …
3. It is now well settled law that the proper test to be applied in care proceedings in respect of final orders is that of "unacceptable risk to the child": *M v M* at [25]: *Nu v NSW Secretary of Family and Community Services* [2017] NSWCA 221 at [45].
4. The decision in *M v M* dealt with past sexual abuse of a child but the principles there set out apply equally to other forms of harm, such as physical and emotional harm.
5. A positive finding of an allegation of harm having been caused to a child should only be made where the Court is so satisfied according to the relevant standard of proof (ie balance of probabilities), with due regard to the matters set out in *Briginshaw*. Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned: *M v M* at [26].
6. Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] Fam CA 1235. This is an exercise in foresight.

7. The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated, for example, the nature and extent of parental contact, including any need for supervision: from a paper by Justice Stewart Austin delivered at the 2015 Hunter Valley Family Law Conference.
8. Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

The court's method of decision is to then apply the facts (and circumstances) found, to the law.

Identify the risk of harm	**Assess the seriousness of the risk — in the context of the severity of possible consequences**	**The likelihood of the risk occurring**	**Whether that risk might be satisfactorily managed or otherwise ameliorated and the likelihood of compliance**	**Balanced against the possibility of benefit to the child**
Examples: • mental health • drug and alcohol • domestic violence • risk of physical abuse • exposure to sexual acts • psychological harm • risk of significant neglect • inadequate hygiene • educational neglect • transient living • inadequate supervision • inadequate clothing • inadequate bedding • criminal activity • child coached when lack independent recollection they will not distinguish between a false memory and a real one creates a sense of victimisation and aligns the child with a false reality to fear those who otherwise are loving and protecting towards them • a failed restoration	Scale: • insignificant • minor • moderate • major • catastrophic	Scale: • rare • unlikely • possible • likely • very likely • inevitable	Examples: • in custody • restricted by DCJ • supports • scaffolding • treatment • training and education • AVO under s 40A under the CDPVA	The majority of children are raised by their parents, the relationship between parent and child is one of the closest, if not the closest, of all relationships and the mere fact of the relationship will invariably receive substantial weight in any given case.

Best interests of the child

The test to be applied in care proceedings in respect of final orders is that the Court must not make an order allocating parental responsibility unless it has considered the permanent placement principles and is satisfied that the order is in the best interests of the child: s 79(3).

Determining the best interests of children demands a comparative examination of available options that best suits in securing the child's safety, welfare and wellbeing.

The meaning of best interests is informed by the Care Act.

The Act recognises that the primary means of providing for the safety, welfare and well-being of children is by providing long-term, safe, nurturing, stable and secure environments in accordance with the permanent placement principles: see s 8(a1).

This may involve an analysis of a range of relevant and conceivably competing factors.

For example, the permanent placement principles set out a preference order if it is practicable and in the best interests of the child. The first preference for permanent placement is for the child to be restored to the care of a parent or parents to preserve the family relationship: s 10A(3)(a). The second preference is if it is not practicable or in the best interests of the child or young person to be placed in accordance with s 10A(3)(a), the second preference for permanent placement of the child or young person is with a relative, kin or other suitable person in accordance with a guardianship order: s 10A(3)(b).

Section 12A(2) of the Act relevantly states that the Aboriginal and Torres Strait Islander Children and Young Persons Principle includes:

> (a) **prevention** — recognising that a child or young person has a right to be brought up within the child's or young person's own family, community and culture.

Section 13(1) of the Act sets out the general order of placement:

> (a) a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
>
> (b) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or it would not be in the best interests of the child or young person to be so placed — a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
>
> (c) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or (b) or it would not be in the best interests of the child or young person to be so placed — a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence …

The Act also dictates the course to be followed to be the least intrusive intervention in the life of a child and their family that is consistent with the paramount concern to protect from harm and promote the child's development: s 9(2)(c).

The Court must give due weight to the views of the child and consider the culture, disability, language, religion, and sexuality of the child, and those with parental responsibility for the child.

The Children's Court must not make a final order for the removal of a child from the care and protection of his or her parents, or for the allocation of parental responsibility in respect of the child unless it has considered a care plan: see s 80.

To reinforce the obligation and power of the Court to make an order in the best interests of the child, s 67 allows the Court to make an order different from the order for which the application was made, provided all prerequisites are satisfied, and without the necessity of a particular form to be filed.

[2-2160] Hearings

Last reviewed: November 2024

Decision structure:

- introduction/parties
- background: recite the matter and show the way in which the matter comes before the court
- onus of proof
- standard of proof
- witnesses
- issues not in dispute
- issues in dispute
- submissions
- state findings of fact relevant to issues in dispute
- state the law applicable dealing with the essential elements of the offence and rule on legal argument
- decision: integrating the facts and law.

Rules of evidence

The court is not bound by the rules of evidence, unless it so determines: s 93(3). For example, before issuing a s 128 Certificate under the *Evidence Act 1995* make a ruling that the *Evidence Act* applies.

Whilst the *Evidence Act* does not apply, in *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 Meagher JA said at [79]:

> Although the Tribunal may inform itself in any way "it thinks fit" and is not bound by the rules of evidence, it must base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined. Thus, material which, as a matter of reason, has some probative value in that sense may be taken into account: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491–493; *The King v The War Pensions Entitlement Appeal Tribunal* (1933) 50 CLR 228 at 249–250, 256.

Hearing procedure

Preliminary

Are the parties ready to proceed with the hearing? What are the current views (of each of the parties)?

The following suggested procedure for marking exhibits is:

(a) the written report under s 61(2) of the Care Act as exhibit 1 and the SOPP as exhibit 2, (for s 61 applications)

(b) the care plan as exhibit 3 (if applicable)

(c) the report from the authorised clinician (if there is one) as exhibit 4

(d) all documents produced under subpoena upon which a party proposes to rely at the hearing, including by way of cross-examination — marked as a single exhibit (subpoena bundle) as exhibit 5.

> I will confirm each affidavit to be relied upon by each party as indicated in their case management document not required for cross examination: Affidavit of … is formally read as the evidence of the witness and marked each as an exhibit, exhibit …
>
> I will confirm each affidavit to be relied upon by each party as indicated in their case management document required for cross examination: Affidavit of … etc.
>
> Is there any other evidence in chief that the parties are relying upon?

Note: The court will not usually permit a witness to be called if no affidavit of that witness has been filed: see PN 5.

The court may, however, give leave for such a witness to be called and give oral evidence. In determining whether to grant such leave, the court will consider the interests of justice, the interests of the child or young person who is the subject of the proceedings, the opportunity the party has had to place the evidence before the court and any prejudice caused to another party.

The court may grant leave to enable a party to supplement the affidavit evidence of the witness called by that party with further oral evidence or to clarify matters within the written evidence by further oral evidence. In determining whether to grant such leave, the court will consider the interests of justice, the interests of the child or young person who is the subject of the proceedings, the opportunity the party has had to place the evidence before the court and any prejudice caused to another party.

Where a witness is required for cross-examination, the usual procedure will be for each witness to be called and the affidavit or affidavits of that witness will be identified and formally read as the witness's evidence in chief and each affidavit marked as an exhibit.

Normally, the order of evidence is:

(a) the applicant

(b) the Secretary if not the applicant

(c) the parents

(d) DLR

(e) ILR.

Note: The clinician is the court's witness but will usually be introduced by the legal representative of the Secretary. The clinician report need not be in affidavit form.

[2-2180] Unreasonable conduct

Last reviewed: November 2024

Care proceedings can be very stressful. It is helpful to make it clear from the outset as to why the matter is in court and what we need to focus on.

Use s 94 (Expedition and adjournments) to minimise delay: see **[2-2120]**.

If there is no possibility of settlement, set a hearing date as soon as possible and work backwards for any interlocutory matter. This also places restrictions on the issuing of subpoenas.

The *Managing unreasonable conduct by a complainant* manual by the NSW Ombudsman is a helpful and an interesting resource. For example, if a person is telling their story or giving an explanation, paraphrasing is a powerful communication tool which allows you to:

- interrupt without triggering resistance or being seen as disrespectful
- get them to listen to you, because people listen very hard to people repeating their views back to them
- take control of the conversation and ensure you have "got it right"
- create empathy because the other person believes you are trying to understand their point of view
- cause the other person to feel they need to listen to your point of view because you have listened to theirs.

Avoid arguments or trying to reason with people who are unwilling to consider other logical and reasonable points of view. No amount of reasoning is likely to convince such people to calm down or to accept your point of view or decision.

Unrepresented litigants

If there are unrepresented litigants, the following text may be helpful.

> In care matters everyone should be acting in the best interests of the child. These proceedings are not against you rather they are about the child.
>
> The court needs to decide on the issue of … in the limited time set aside for the listing.
>
> The court needs to ensure everyone is treated with respect and courtesy and all people are to be treated equitably and fairly so everyone will be given an opportunity to be heard on this issue today in the available time.
>
> For other issues, evidence is usually given in affidavit form and often there will be an opportunity to file and serve affidavit material and make submissions during the other stages of the proceeding. The benefit of evidence in affidavit form is that you can take your time to carefully put your evidence in writing and all parties can take time to consider the written material and respond in writing. Another benefit is that parties are not taken by surprise.

[2-2200] Section 61 and s 90 applications

Last reviewed: November 2024

The most common applications are s 61 applications and s 90 applications.

Application for care orders under s 61

There are three stages under s 61:

- consideration of an interim order
- a finding that the child is in need of care and protection (establishment), and
- final order.

Note: Establishment and final order are generally dealt with separately, other than for unexplained injury matters.

The grounds for the making a finding that the child is in need of care and protection are found under s 71(1).

There are two alternatives in establishing the matter:

- the finding that the child is in need of care and protection, or
- was in need of care and protection when the circumstances that gave rise to the application occurred or existed (s 72(1)(a)), and whether the child would be in need of care and protection but for the present arrangements (s 72(1)(b)).

There are two questions in determining a final order:

- is there a realistic possibility of restoration, and
- is permanency planning appropriately and adequately addressed?

Frequent interlocutory applications:

- application to be joined
- applications for assessment orders under ss 53, 54 and 55
- applications for dispute resolution conference (DRC)
- applications for Children's Court to dispense with service under s 256A.

Application for rescission or variation of orders under s 90

There are two steps under s 90:

- leave, and
- final order.

There are three questions in determining a final order under s 90:

- is there a realistic possibility of restoration?

  Note: If an order is parental responsibility to Minister or from Minister to another, then consider age, views, time with carers, attachment, capacity of birth parents, risk to child per s 90(6).

- should the court rescind or vary the previous order?
- is permanency planning appropriately and adequately addressed?

Frequent interlocutory applications:

- applications for assessment orders under ss 53, 54 and 55
- applications for DRC.

Other applications

- applications for emergency care and protection orders under ss 45(1)(a) and 46
- applications on breach of undertakings under s 73(5)

- applications on breach of supervision under s 77(3)
- applications for contact orders under s 86
- extension of the period of a supervision order
- applications for Children's Court to dispense with service under s 256A.

Other reviews

- progress review.

[2-2210] Active efforts

Last reviewed: November 2024

For applications made on or from 15 November 2023, subject to the "paramountcy principle", functions under the Act must be in accordance with the principle of active efforts.

Consideration of active efforts is required upon the making an interim order, at establishment and when making final orders.

Definition

Section 3 defines active efforts by referencing s 9A.

Section 9A sets out the principle of making "active efforts":

(1) The Secretary must act in accordance with the principle of active efforts in exercising functions under this Act.

(2) The "principle of active efforts" means—

(a) in taking action to safeguard or promote the safety, welfare and well-being of a child or young person — making active efforts to prevent the child or young person from entering out-of-home care, and

(b) for a child and young person who has been removed from the child's or young person's parents or family—

(i) making active efforts to restore the child or young person to the child's or young person's parents, or

(ii) for a child or young person for whom it is not practicable or in the child's or young person's best interests to be restored to the child's or young person's parents—to place the child or young person with family, kin or community.

Note: See the permanent placement principles in section 10A and the placement principles for Aboriginal and Torres Strait Islander children and young persons in section 13.

(3) Under the principle of active efforts, the Secretary must also ensure active efforts are—

(a) timely, and

(b) practicable, thorough and purposeful, and

(c) aimed at addressing the grounds on which the child or young person is considered to be in need of care and protection, and

(d) conducted, to the greatest extent possible, in partnership with the child or young person and the family, kin and community of the child or young person, and

(e) culturally appropriate, and

(f) otherwise in accordance with any requirements prescribed by the regulations.

(4) Without limiting subsections (1)–(3), active efforts include—

(a) providing, facilitating or assisting with access to support services and other resources, and

(b) if appropriate services or resources do not exist or are not available—considering alternative ways of addressing the relevant needs of the child or young person and the family, kin or community of the child or young person, and

(c) activities directed at finding and contacting the family, kin and community of the child or young person, and

(d) the use of any of the following—

(i) a parent responsibility contract,

(ii) a parent capacity order,

(iii) a temporary care arrangement under Chapter 8, Part 3, Division 1,

(iv) alternative dispute resolution under section 37, and

(e) another matter, activity or action prescribed by the regulations.

(5) To avoid doubt, this section is subject to the requirement under section 9(1) that this Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

Evidence required

Section 63 sets out the evidence required of active efforts to take alternative action:

(1) When making a care application in relation to a child or young person, the Secretary must provide evidence to the Children's Court of the following—

(a) the active efforts made by the Secretary, in accordance with the principle of active efforts, before the application was made and the reasons the active efforts were unsuccessful,

(b) the alternatives to a care order that were considered by the Secretary before the application was made and the reasons the alternatives were not considered appropriate.

(2) Without limiting subsection (1), the Secretary must provide evidence that, before making the care application, active efforts were made to—

(a) provide, facilitate or assist with support for the safety, welfare and well-being of the child or young person, including support for the parents of the child or young person, and

(b) consider any of the following actions that are relevant—

(i) a parent responsibility contract,

(ii) a parent capacity order,

(iii) a temporary care arrangement under Chapter 8, Part 3, Division 1,

(iv) an alternative dispute resolution process under section 37.

(3) Subsections (1)(a) and (2) do not apply in relation to a care application that is seeking an emergency care and protection order.

(4) The Children's Court may adjourn proceedings if the Court is not satisfied with the evidence provided by the Secretary under subsection (1).

Note: See also sections 69 and 70, which provide that the Children's Court may make interim care orders in relation to a child or young person and any other interim orders the Children's Court considers appropriate for the safety, welfare and well-being of a child or young person pending the conclusion of the proceedings, including less intrusive interim orders.

(5) If the Children's Court is not satisfied with the evidence provided by the Secretary under subsection (1), the Court must not take either of the following actions unless the Court is satisfied that taking the action is in the best interests of the safety, welfare and well-being of the child or young person—

(a) dismiss a care application in relation to the child or young person,

(b) discharge the child or young person from the care responsibility of the Secretary.

Section 79AA includes active efforts in the consideration of special circumstances for restoration that warrant allocation of parental responsibilities to Minister for more than 24 months.

Section 83 requires details of details of active efforts in the preparation of permanency plans.

What does the Court determine as "active efforts"?

Onus

The onus is on the Secretary.

Section 9A of the Act requires the Secretary to act in accordance with the principle of active efforts in exercising functions.

The language of s 9A provides guidance as to the quality and standard of active efforts.

The Secretary must also ensure active efforts are timely, practicable, thorough and purposeful.

Active efforts denotes a rigorous and concerted level of casework.

Active efforts is of a higher standard than reasonable efforts.

For example, a definitive statement of non-cooperation from a parent in response to a reasonable and achievable task to mitigate an identified risk would be viewed more favourably by a Court when considering active efforts than a mere inference that a parent does not wish to co-operate. But even that may not be enough.

How is the evidence acquired?

The Court will look to engagement with child, family and community.

Section 9A speaks to risks and mitigation being conducted, to the greatest extent possible, in partnership with the child or young person and the family, kin and community of the child or young person; and culturally appropriate.

Purpose of the evidence

Section 9A of the Act refers to the intent of active efforts.

Active efforts aim at addressing the grounds on which the child or young person is considered to be in need of care and protection.

So the court will look to the identification of risks, the magnitude of the risks, the likelihood of those risks and how those risks are to be addressed.

Active efforts per s 9A(4) include:

(a) providing, facilitating or assisting with access to support services and other resources, and

(b) if appropriate services or resources do not exist or are not available — considering alternative ways of addressing the relevant needs of the child or young person and the family, kin or community of the child or young person, and

(c) activities directed at finding and contacting the family, kin and community of the child or young person …

Evaluation of the evidence

Section 63 sets out the requirement and analysis for evidence of active efforts in care applications including:

- active efforts, before the application was made and the reasons the active efforts were unsuccessful,
- the alternatives to a care order that were considered and the reasons the alternatives were not considered appropriate.

The Court would look to what the Secretary did to provide, facilitate or assist with support for the safety, welfare and wellbeing of the child or young person, including support for the parents.

Active efforts denotes a rigorous and concerted level of casework that actively engages the family, targeting identified risks and benefits, with some qualitative analysis, for example, what didn't work and why.

Per s 63(2)(b) the Court would consider, if relevant—

(i) a parent responsibility contract,

(ii) a parent capacity order,

(iii) a temporary care arrangement under Chapter 8, Part 3, Division 1,

(iv) an alternative dispute resolution process under section 37.

It is not possible to set out an all-encompassing list of active efforts, because "active efforts" is a deeply fact sensitive question — impacted by the nature and circumstances of the case.

For example, the Court's expectations of active efforts would differ in a case of a newborn removed at birth where the mother has a significant DCJ history compared to a case involving a 4 year old child with an unexplained injury. In the former, active efforts may include assessing the maternal grandmother prior to the birth of the child.

If a child is identified as First Nations, some active efforts could include:

- An Aboriginal consult
- Early advice — referral to Legal Aid NSW or Aboriginal Legal Service
- Legal consult for a parent responsibility contract
- Legal aid family partnership agreement referral
- Family Group Conference
- Conversations with maternal and paternal families — discussions how to support families
- Building trust — in Aboriginal communities

- Discuss barriers to services
- Discuss motivation — honest conversations
- Identify supports in home visits
- Reminder of appointments
- Mobile phones to assist
- Safety plans
- Chapter 16A — counselling services.

Newborns

- Pregnancy family meetings
- Book antenatal care.

Drugs

- Referral to drug and alcohol assessment and/or treatment
- Residential rehab — Odyssey House, Jarrah House, William Booth House
- Your Town referral to engage in early intervention and accommodation service — San Miguel Family Centre
- Request to participate in uranalysis — reduce to writing — clear, supports to be able to do this — funding, text reminders.

Capacity risk

- Parenting programs
- 24-hour in-home supports observe capacity.

Domestic violence

- Financial support for accommodation to escape domestic violence
- Food, clothing
- Family violence support services
- Appointment outside of home if domestic violence
- ADVO
- Centrelink
- School uniforms
- 24-hour in-home supports observe capacity.

Mental health

- Headspace
- Seeing Red Program.

Review

Why not — degree of problem, pattern of behaviour.

[2-2220] Application under s 61 — first return date

Last reviewed: November 2024

Note: The Children's Court may vary interim orders at any time including on oral application in matters currently before the court.

This is an application pursuant to s 61(1) of the Care Act by the Secretary seeking … (most often it will be an interim care order allocating parental responsibility to the Minister — until further order).

(a) I am satisfied with the notification requirements under s 64,

or

(b) If not satisfied with the notification requirements:

Whilst I am not satisfied of the notification requirements, the safety, welfare and well-being of the child is paramount, and it is in the best interests of the child to deal with the application today.

What are the views of each of the parties with respect to the application?

If there are unrepresented parties, the following text may be helpful:

The court is to decide today whether to make an interim order. I can only do this on the evidence currently before the court. The court must decide who has parental responsibility for your child in the short term. The person who has parental responsibility makes decisions about where a child lives, who a child lives with and has contact with, and makes decisions about medical and health treatment and educational needs.

Short reasons for interim order

After considering the onus, the standard, the application, the material contained in the application, the supporting report and the views of the legal representatives (including the concessions from the parents), I am satisfied that it is not in the best interests of the safety, welfare and well-being of the child that the child remain with the parents (or other persons having parental responsibility) at this time (s 69(2)); that the making of an interim order is appropriate and necessary for the safety, welfare and well-being of a child (s 70); and that the order is the least intrusive which is consistent with the principles of the Act.

Pursuant to s 69 of the *Children and Young Persons (Care and Protection) Act*, all aspects of parental responsibility for [*name/s of child*] are allocated to the Minister for Families, Communities and Disability Services until further order.

The court sets the following timetable:

- Secretary to file and serve SOPP (14 days) together with any affidavit (sometimes Secretary will ask for a longer period for a historical affidavit)
- parents to file and serve evidence in reply to Secretary's application (24 days)
- if no affidavit filed, affidavit of service to be filed by next date
- adjournment for establishment (28 days).

Long order

Under s 69 of the Act, the Children's Court may make interim care orders in relation to a child after a care application is made and before the application is finally determined if the court is satisfied that it is appropriate to do so.

Section 69(2) states that the Secretary, in seeking an interim care order, has the onus of satisfying the court that it is not in the best interests of the safety, welfare and well-being of the child that the child should remain with his or her parents or other persons having parental responsibility: s 69(2). This may be done by the Children's Court weighing the risks involved on the evidence available to it at the time: *Re Jayden* [2007] NSWCA 35.

Option — interim care orders

The Children's Court may make interim care orders if the court is satisfied that an interim order is necessary, and is preferable to an order dismissing the proceedings: s 70A, see *Re Jayden*, above, per Ipp J at [70].

Option — other orders

The court may make other orders if it is appropriate for the safety, welfare and well-being of the child: s 70.

Long order (cont)

The care application is accompanied by a written report as required under s 61(2).

This report sets out the facts on which the Secretary argues that the court should find that the child is "in need of care and protection" and the interim order sought: Practice Note 2.

Risk factors include:

- mental health
- drug and alcohol
- domestic violence
- risk of physical abuse
- exposure to sexual acts
- exposure to sexual acts
- risk of significant neglect
- inadequate hygiene
- educational neglect
- transient living,
- inadequate supervision/clothing /bedding.

Option — s 106A

Section 106A applies:

> By operation of s 106A of the Act, evidence adduced about the previous removal of a child or children must be admitted in these proceedings. Section 106A(2) says that such evidence is prima facie evidence that the child or young person the subject of the subsequent proceedings is a child in need of care and protection.

Where such evidence is adduced the parent may rebut the prima facie evidence by satisfying the court on the balance of probabilities that: "The circumstances that gave rise to the previous removal of the child or young person no longer exist".

In *SB v Parramatta Children's Court* [2007] NSWSC 1297, Price J said that it was permissible to identify the circumstances that gave rise to an earlier removal of children for the purpose of determining whether the circumstances that gave rise to the previous removal of the children still exist or not.

Option — interim order

In essence, an interim order is an "order of a temporary or provisional nature pending the final resolution of the proceedings". Generally speaking, an applicant for an interim order would not be required to satisfy the Children's Court of the merits of the applicant's claim on the balance of probabilities. This can be inferred from ss 69, 70 and 70A.

One should not attach labels such as "prima facie case" or "arguable case" to the standard applicable to the granting of interim orders. Rather, an interim care order can be made by satisfying the relevant tests set out in ss 69, 70 and 70A: namely, if the Children's Court satisfies itself that it is not in the best interests of the safety, welfare and well-being of the child that he or she should remain with his or her parents or other persons having parental responsibility (see s 69(2)); that the making of an interim order is appropriate for the safety, welfare and well-being of a child or young person (see s 70); or that an interim order is necessary, in the interests of the safety, welfare and well-being of the child, and is preferable to a final order or an order dismissing the proceedings: s 70A. This may be done by the Children's Court weighing the risks involved on the evidence available to it at the time: *Re Jayden* [2007] NSWCA 35 at [77] Ipp JA.

Long order (cont)

The care application also specifies evidence of prior alternative action as required under s 63(1) as to:

- the support and assistance provided for the safety, welfare and well-being of the child or young person, and
- the alternatives to a care order that were considered before the application was made and the reasons why those alternatives were rejected.

The usual interim order is for the allocation of parental responsibility to the Minister until further order: *Re Mary* [2014] NSWChC 7.

Pursuant to s 69 Care Act, all aspects of parental responsibility for (*name/s of child/ren*) are allocated to the Minister for Families, Communities and Disability Services until further order.

Timetable

- Secretary to file and serve Summary of Proposed Plan (14 days) together with any affidavit (sometimes Secretary will ask for a longer period for historical affidavit)
- parents to file and serve evidence in reply to second application (24 days)
- if no affidavit filed, affidavit of service to be filed by next date
- adjournment for establishment (28 days).

If there are unrepresented parties, the following suggestions may be helpful:

The Summary of the proposed plan for the child should briefly and succinctly set out the following:

(a) the alleged risk and/or safety concern(s) for the child/young person

(b) whether the Secretary is presently of the view that restoration is a realistic possibility

(c) the tasks and demonstrated changes the parents need to undertake in order for the child/young person to be returned to their parents safely (including relevant time frames for the tasks/changes to occur)

(d) the kind of placement presently proposed (both on an interim basis and long-term)

(e) the kind of contact presently proposed (including frequency and duration of proposed contact and whether contact is to be supervised both on an interim basis and long-term).

In most cases the orders sought are an interim care order allocating parental responsibility to the Minister till further order.

Usually the court will make an interim care order. This is because there is generally no evidence other than the application and report in support of the application.

Less often, the court will make an interim care order allocating parental responsibility to another person. This may be a reliable family member, if one is available and accepted by the Secretary. All things being equal, a child or young person is likely to be better suited by an interim family placement, if a safe and reliable one is available, than by a foster placement.

The court may be asked to consider whether other orders, that is, supervision, contact, etc, should be made as alternatives or together with an order allocating parental responsibility. An interim supervision order or an interim order requiring undertakings may be appropriate in some situations. Generally, as with contact, this is best noted by the Secretary and can be followed up on the next return date.

Interim contact orders

In making an interim order the court must to some extent predict the likely outcome of the proceedings and make orders that are in keeping with this. Interim orders can assist transition. For example, it may be appropriate to provide for more frequent contact in an interim order than will be contemplated long term. It may also be appropriate to provide for declining or increasing amounts of contact that are in keeping with a move to the likely outcome.

Generally, early on in the proceedings, when the future is uncertain contact requests are best noted by the Secretary if they have parental responsibility. Contact can be asked about on the next return date.

[2-2240] Establishment — second return date

Last reviewed: November 2024

The court is considering whether to make a finding that the child is in need of care and protection, sometimes referred to as establishment. Do the parties have any views?

If there are unrepresented parties, the following text may be helpful:

The court is considering establishment. This means that the court is to answer the question:

> Is the child in need of care and protection or was at the time of removal and would be but for the existence of arrangements for the care and protection of the child?

The application sets out the grounds and is accompanied by a written report. This report sets out the facts on which the Department argues that the court should find that the child is "in need of care and protection". The court can take into account other filed material.

The law provides a number of grounds which a child may be considered to be in need of care and protection. The court is not limited to those grounds.

The Secretary is seeking to establish this matter on a number of grounds under s 71(1).

The grounds identified are:

(a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,

(b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,

(c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,

(d) subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers, (the court cannot conclude that the basic needs of a child are likely not to be met only because of s 71(2)

  (i) a parent's disability, or

  (ii) poverty,

(e) the child or young person 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,

(f) 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,

(g) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with.

If the Children's Court makes a care order in relation to a reason not listed in s 71(1), the court may only do so if the Secretary pleads the reason in the care application, see s 71(1A).

If the Children's Court finds that the child is in need of care and protection the matter is established. The case then moves to the next stage which is the placement stage (see **[2-2260] Directions in relation to the placement stage — third step**).

Do you agree to establishment? You may agree, you may disagree, you may not wish to be heard on this issue or you may agree without making any admissions.

If the issue of establishment is conceded

Short form Under s 72 a care order may only be made if the court is satisfied that a child is in need of care and protection or was at the time of removal and would be but for the existence of arrangements for the care and protection of the child.

Section 71 provides a number of grounds.

I will note the (*parents*) consent on a without admissions basis.

The court will now make directions in relation to the placement stage (see **[2-2260] Directions in relation to the placement stage — third step**).

Option — child is in need of care and protection

After considering the application, the material contained in the application, the supporting report, evidence filed and the views of the legal representatives I am satisfied that it is appropriate to make a finding that the child is in need of care and protection.

Option — other orders

The court may make other orders if it is appropriate for the safety welfare and well-being of the child: s 70. The grounds are: s 71(1)(a), (b), (c), (d), (e), (f), (g).

If establishment is contested

As establishment is contested the following timetable is set:

- the Secretary has leave to file and serve further evidence on the issue of establishment by … (within 14 days), and
- the respondent mother/father/other party is to file and serve evidence in reply by … (within 14 days after the filing of the Secretary's further evidence), and
- (if appropriate), the matter is listed for a dispute resolution conference on the issue of establishment at the earliest opportunity following service of any further evidence by the Secretary and the respondent mother/father/other party. (Note in DRC diary. No return date required)

Or:

Parties are to file an application for a hearing date.

If adjourned for compliance and establishment is still contested

Note: Rather than apply the Practice Note and adjourn for compliance it is not uncommon to list an establishment hearing once you are advised it is to be contested. This is because there is often significant case work already conducted and documented and parties have had time to consider the issue of establishment. This approach reduces further delay.

The Hearing will proceed on the filed material and written submission. Written submissions are to be filed two days before the hearing date. Parties will be given an opportunity to make oral submissions at the hearing on the written submissions received by the other parties. Adjourned for hearing on establishment. The estimated time is two hours.

Note: The hearing of a contested application on establishment must be no longer than two hours, except in exceptional circumstances. Applications are to be heard expeditiously. Cross-examination will be allowed only in exceptional circumstances.

Note: A party can seek to have the issue of establishment re-determined.

Note: For unexplained injury matters, it may be appropriate to conduct an establishment and final hearing together.

Establishment hearing

These proceedings relate to the child … now aged …

The child's mother is … The father is …

Since … the Secretary has received … risk of significant harm reports in relation to:

- significant neglect
- parental drug use
- exposure to domestic violence
- physical harm, or
- parental mental health issues.

The Secretary conducted ongoing casework since … in an effort to address the child protection concerns within the family. The casework included:

- homes visits
- referrals to services
- a family group conference.

It was assessed there was a continued lack of progress to adequately address the ongoing child protection concerns in the household despite significant intervention.

Or:

On … the child was removed.

The Secretary commenced these proceedings by filing an Application on … pursuant to s 61 Care Act.

The onus is on the Secretary.

The standard of proof is on the balance of probabilities: s 93(4) Care Act.

The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved.

The burden of proof is upon the preponderance of probabilities, but the seriousness of the allegation, the gravity of the consequences flowing from a decision, and its inherent likelihood are matters to be taken into account in assessing the standard to be applied: s 140 *Evidence Act*; *Briginshaw v Briginshaw* (1938) 60 CLR 336.

The hearing was conducted on the filed material and oral and/or written submissions.

The issue before the court is whether the court is satisfied that these children are in need of care and protection. Section 71 sets out the grounds for the making of a care order. Section 72 defines the determination which must be made.

The Secretary is seeking to establish this matter on a number of grounds under s 71(1).

The grounds identified are:

- there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason
- there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason
- the child or young person has been, or is likely to be, physically or sexually abused or ill-treated
- subject to s 71(2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers (the court cannot conclude that the basic needs of a child are likely not to be met only because of a parent's disability or poverty: s 71(2).)
- the child or young person 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 or young person is subject to a care and protection order of another State or Territory that is not being complied with
- s 171(1) applies in respect of the child or young person, ie, removal of children and young persons from unauthorised out-of-home care
- Or, s 71(1A) if the Children's Court makes a care order in relation to a reason not listed in s 71(1), the court may only do so if the Secretary pleads the reason in the care application.

In the broad sense, the Secretary submits that such findings can be found in the following evidence: …

The Secretary submits, when considering the whole of the evidence, the court would find that the children are children in need of care and protection as at the date of the application.

(a) Mother's submissions

(b) Father's submissions

(c) The ILR's submissions

Findings of fact

The court is not bound by the rules of evidence unless it so determines: s 93(3). Nevertheless the court must draw its conclusions from material that is satisfactory in a probative sense so as to avoid decision making that might appear capricious, arbitrary or without foundational material: *JL v Secretary DFaCS* [2015] NSWCA 88 at [148].

The court can consider and rely upon risk of harm reports concerning the subject children and siblings going back many years. The evidence is relevant and, if credible, should be taken into account by the court in determining the issue.

In *Whale v Tonkins* (1984) 9 Fam LR 410 the Supreme Court (Hutley JA) said at 411:

> The court is concerned with all evidence which is relevant, that is, evidence which can make more probable or less probable a finding as to the kind of guardianship the child is experiencing. This enquiry may cover years.

Hutley JA goes on to say later at 411:

> it is wrong for the hearing to be confined within narrow limits.

In *VV v District Court of NSW* [2013] NSWCA 469 Barrett JA noted at [26] Flannery J made the following statement, referring to *D (A Minor)* [1987] AC 317:

> I must look at the situation both as it was at the time, as it had been in the past and as it would have been likely to continue if the process of protection had not been put in motion.

In *Director General, DoCS v Dessertaine* [2003] NSWSC 972, it was stated that in determining:

> whether a child is in need of care and protection the Court is not concerned in determining whether all factually pleaded matters under all grounds have been sustained or not. It is simply concern whether there is some evidence to support one of grounds. Once it has reached that point there is no need for a further wide range of enquiry to be undertaken

The rationale for the requirement that the protective proceedings be established has been described as a safeguard against arbitrary intervention by the State into the lives of children and their families: *Re Alistair* [2006] NSWSC 411 at [64]–[65] per Kirby J.

The establishment issue is a threshold issue: *Re Alistair* at [65]. It is not concerned with the issue of restoration nor with considerations of unacceptable risk of harm, nor with the amelioration of risk and scaffolding considerations as dealt with in cases such as *Re Tanya* [2016] NSWSC 794, *M v M* (1988) 166 CLR 69, *Johnson v Page* [2007] Fam CA 1235 and *Bell-Collins Children v Sec FACS (No 2)* [2016] NSWSC 853 at [26]. These are properly matters for the placement stage of protection proceedings.

In *Director General, DoCS v Dessertaine* [2003] NSWSC 972, James J stated that a Local Court judge, when considering the grounds, exercises "discretion whether to make an order" and that "discretion must be exercised in accordance with proper judicial principles".

As to what constitutes "need of care and protection", the Act provides a number of grounds under s 71(1), without limitation subject to s 71(1A), which a child may be considered to be in need of care and protection.

Section 9(1) states that the Act is to be administered under the principle that the safety, welfare and well-being of the children are paramount.

At the establishment stage, the issue is whether the grounds have been established, as a matter of probability, such as to warrant a finding that the child is in need of care and protection or was at the time of removal and would be but for the existence of arrangements for the care and protection of the child. Relevantly, the court is concerned whether, as a matter of probability, s 71(1)(a)–(h), (1A) has been established.

Option — if parents say that they have changed

The parents contend that the circumstances at the time that the child was taken into care is no longer prevalent or relevant for the court in making a finding.

However, the complaint regarding lack of care focuses upon a number of strands of behaviour, acts and omissions which are simply not cured over a short passage of some months. They involve cumulative issues:

- mental health
- drug and alcohol
- domestic violence, and
- general poor parenting.

Experience tells that those matters are not obviated or resolved over a short period of time and therefore, while progress is acknowledged the court finds that they have not been removed.

Option — s 106A applies

By operation of s 106A of the Act, evidence adduced about the previous removal of a child or children must be admitted in these proceedings. Section 106A(2) says that such evidence is prima facie evidence that the child or young person the subject of the subsequent proceedings is a child in need of care and protection.

Where such evidence is adduced the parent may rebut the prima facie evidence by satisfying the court on the balance of probabilities that: "The circumstances that gave rise to the previous removal of the child or young person no longer exist."

Justice Price in *SB v Parramatta Children's Court* [2007] NSWSC 1297 said that it was permissible to identify the circumstances that gave rise to an earlier removal of children for the purpose of determining whether the circumstances that gave rise to the previous removal of the children still exist or not.

The presumption under s 106A is not itself a ground for making a care order: *SB v Parramatta Children's Court* — unless pleaded under s 71(1A).

However, this is relevant to my findings in relation to s 71(1)(a)–(h).

The court is satisfied as a matter of probability … s 71(1)(a)–(h), (1A).

Option — finding

After considering the evidence before the court I am satisfied that it is appropriate to make a finding that:

- the child is in need of care and protection on grounds s 71(1)(a)–(h), s 71(1A), or
- was at the time of removal on grounds s 71(1)(a)–(h), s 71(1A) and would be but for the existence of arrangements for the care and protection of the child.

That now been established, the issue changes. In determining the final orders, including the issues of parental responsibility (s 79) or contact (s 86) the court would be guided by the test defined by the High Court in *M v M* (1988) 166 CLR 69.

The court will now make directions in relation to the placement stage.

Section 72(1) alternative — if a previous unavailable parent now seeks the return of the child, but the court is satisfied of s 71(1)(a)–(g)

The court is not satisfied that the child is in need of care and protection under s 71(1).

The issue now is whether the court is satisfied that the child is in need or care and protection under s 72(1) of the Act.

The court must be satisfied that both the circumstances identified in paragraphs (a) and (b) of s 72(1) exist: *VV v District Court of NSW* [2013] NSWCA 469.

The established circumstances that gave rise to the application occurred or existed (s 72(1)(a)):

- there is no parent available to care for the child or young person 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 or young person and, as a consequence, the child or young person is in need of care and protection,
- the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,
- subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers, (the court cannot conclude that the basic needs of a child are likely not to be met only because of (a) a parent's disability, or (b) poverty: s 71(2)).
- the child or young person 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 or young person is subject to a care and protection order of another State or Territory that is not being complied with.

In evidencing the first part of the threshold, the proof of the facts in the care of one parent is sufficient to satisfy s 72(1)(a).

The focus is upon whether the grounds have been proven at the time the application was pleaded. It does not matter whose care the child was in.

As the court has found on the balance of probabilities certain conduct, acts and omissions then the fact that there is an innocent non-participative parent is a sufficient answer for the court in making a finding that the child was in need of care and protection at the time the events in question occurred.

Section 72(1)(b) looks at events at the time the determination is called upon to be made.

It is potentially available to such a parent to demonstrate that now that they have returned to the life of the child that there is no evidence suggestive that they can offer anything other than a protective environment. This however, requires an explanation for their exclusion from the life

of their child, the provision of evidence to indicate their capacity to care and that there are no factors in and about themselves that may disqualify in the short term such as significant drug taking, mental health, criminal history or domestic violence.

The court is satisfied that both the circumstances identified in paragraphs (a) and (b) of s 72(1) exist.

The court is satisfied that the child is in need of care and protection.

The court will now make directions in relation to the placement stage.

Finding option

The court is not satisfied that the child is in need of care and protection.

However, if the evidence relied upon by the Secretary is insufficient, and relevant evidence otherwise exists, the care application should not be dismissed but adjourned to give the Secretary sufficient time to bring that evidence before the court. *Re Frances and Benny* [2005] NSWSC 1207.

If there is nothing further, the application is dismissed.

Appeal rights after establishment

In *GA v Director General, Department of Human Services* [2011] NSWDC 57 it was found that at establishment there is a decision of the court — but not an order.

Section 91 of the Act states that a party to proceedings who is dissatisfied with an order of the Children's Court (other than an interim order) may appeal to the District Court against that order.

Consequently, in *GA* it was found that the court has no jurisdiction to hear "an appeal" from the decision of the Children's Court on establishment.

GA referred to *Re Alistair* [2006] NSWSC 411. In that case the court said at [81]:

> Any right of appeal comes at the end of the process, once final orders have been made. The proceedings remained inquisitorial until the final orders, they being orders seeking an outcome in the best interests of the child.

[2-2260] Directions in relation to the placement stage — third step

Last reviewed: November 2024

Timetable

- Secretary is to file and serve a care plan and permanency plan, a draft minute of order and a copy of the birth certificate for each child within 28 days of the receipt of a clinic assessment report or establishment
- mother/father/other to file and serve evidence in reply to care plan and permanency plan within 14 days
- adjournment for consideration of the care plan and a completed application for hearing date form, if required.

If there are unrepresented parties, the following text may be helpful:

> The care plan should include the following:
>
> - a brief overview of the history of the case
> - the needs of each child, including any medical, educational or cultural needs
> - who is proposed to have parental responsibility for the child such as a parent/s, family member, or the Minister for Families, Communities and Disability Services
> - and if it is proposed that someone other than the parents are to have parental responsibility for the child, the future arrangements for contact between the child and their parents, family members or other significant persons in the child's life.
>
> Each party is given an opportunity to respond to the care plan and let the court know whether they agree or whether they have a different proposal.

Note: There are a number of interlocutory applications that are often made following establishment and during the placement stage.

[2-2280] Joined application — first listing

Last reviewed: November 2024

This will usually be an adjournment sought for instructions.

> This is an application pursuant to s 98(3) of the Care Act. The applicant is … The applicant does not have automatic standing under the Act and seeks to be joined as parties to these proceedings.
>
> [Obtain the views of parties?
>
> **Note:** Often most parties will seek an adjournment to get instructions.]
>
> There is an application for the matter to be adjourned by … so instructions can be taken on the consideration of the Joinder application.

Note: If at least one party opposes the application it is best to set a timetable as below:

- file and serve affidavit evidence by applicant (7 days)
- response (21 days)
- adjournment for compliance (28 days).

Leave to be joined supported by parties and court — s 98(3)

> The application filed on … by the applicant is that they be joined, pursuant to s 98(3) as a party to these proceedings.
>
> The parties support the joinder application.
>
> I find that the applicant has a genuine concern for the safety, welfare and well-being of the children and the person satisfies the test under s 98(3) for the following reasons:
>
> - previous carer
> - close relative (but check actions — just being a relative is not always enough).

I have considered whether the joinder will cause further delay, whether the applicant to the joinder has an arguable case and whether the applicant to the joinder brings a unique voice to the proceedings.

The court considers that it is an appropriate exercise of the discretion of the court to grant leave to join the person to the proceedings. Leave is granted for … to be joined as a party.

If leave to be joined opposed — s 98(3)

The Hearing will proceed on the filed material and written submission. Written submissions are to be filed two days before the hearing date. Parties will be given an opportunity to make oral submissions at the hearing on the written submissions received by the other parties. Adjournment two hours estimate.

Note: The hearing of a contested Joinder application must be no longer than two hours except in exceptional circumstances — to be heard expeditiously. Cross-examination will be allowed at such a hearing only in exceptional circumstances.

Leave to be joined hearing — s 98(3)

The Care Act provides for three kinds of possible status for a person who wishes to appear in Care Act proceedings: two under s 98 and the other under s 87.

Section 98 grants a right of appearance to limited classes of persons, namely the Secretary, the Minister, and the "child or … person having responsibility for the child": s 98(1). But the section also provides a broader right of appearance with the leave of the court to a person who "has a genuine concern for the safety, welfare and well-being of the child or young person": s 98(3). This additional class of person may only appear "by leave of the Children's Court". The right of appearance, once granted, allows the party to access all documents and "examine and cross-examine witnesses on matters relevant to the proceedings".

- These proceedings relate to the child …
- The application filed on … by the applicant is that they be joined, pursuant to s 98(3) as a party to these proceedings
- The applicant is …
- The child's mother's is …
- The father is …
- The court made interim orders on the … vesting parental responsibility in the Minister
- A summary of proposed plan was filed …
- On … the Children's Court found that the child was a child in need of care and protection.
- On … the Secretary filed a care plan setting out the Secretary's assessment that there was/was not a realistic possibility of restoration to either parent.

The applicant is seeking other orders including interim parental responsibility with respect to the child:

- the onus is on the applicant
- the standard is on the balance of probabilities

- in proceedings under the Care Act, any decision concerning a child must take into account the paramount principle of the safety, welfare and wellbeing of the child: s 9(1) of the Care Act
- the statutory hierarchy of the permanent placement principles set out in s 10A of the Care Act must be observed where a parental placement is determined to be unsuitable
- all proceedings in the Children's Court should proceed to finality as expeditiously as possible, that is without unreasonable delay, in order to minimise the effect of the proceedings on the child and the child's family: s 94(1) of the Care Act
- the court has considered the documents and affidavit evidence filed and submissions
- the applicant contends that …
- the application is supported by the … for the following reasons …/the application is opposed by the … for the following reasons …
- the section requires the court to consider only whether leave should be granted, but prescribes that leave cannot be granted unless the court forms the opinion that the applicant has a genuine concern for the safety, welfare and well-being of the child or young person. It would be an error to consider separately from the overall question whether leave should be granted, whether a genuine concern has been established. The facts and circumstances pertinent to the expressed concern will almost inevitably be relevant to the exercise of the discretion. The overall facts before the court, including the relationship of the claimant to the child and the nature and gravity of the concern, should be considered as a whole. In the process of determining whether the occasion is appropriate for the grant of leave, the court should form (or not form) the opinion as to genuine concern
- to exercise the discretion in favour of the grant of leave, the court must actually form an opinion that:
    1. the person has a concern, and that concern is one which is for the safety, welfare and well-being of the child; and
    2. the concern is genuine, that is:
        - real, meaning not artificial or contrived and not trivial, and
        - honestly held
- whether a relevant factor involves subjectivity, objectivity or both will depend on the particular factor in the particular circumstances of the case
- the issues in dispute/not in dispute are: …

Facts demonstrating whether the applicant has a genuine concern for the safety, welfare and well-being of the children

In *EC v Secretary DFACS* [2019] NSWSC 226, Sackar J found that the court has to be objectively satisfied from the totality of the evidence that such a genuine concern exists.

- the nature of the relationship — current carers
- subjective claims — set out in affidavits
- actions taken — the provision of home, love and clear affection/not taken
- role to be played — seeks PR till child turns 18.

Contrasted with:

- disregards sibling shared placement
- non-compliance with safety plan.

I am prepared to assess that the applicant has a genuine concern both subjectively and objectively as required by Care Act, s 98(3).

When also considering whether to join a person to the proceedings the court, in the exercise of its' discretion, the court is to consider:

- whether the joinder will cause further delay? Would threaten the timely disposition of the proceedings
- whether the applicant to the joinder has an arguable case
- whether the applicant to the joinder brings a unique voice to the proceedings
- matters of public policy.

Alternate finding:

I am not satisfied that the applicant has a genuine concern, objectively, as required by Care Act, s 98(3). The application is dismissed.

Delay

A grant of s 98 full party status will have greater potential to lengthen the proceedings than allowing a person to be heard for example, under s 87.

In *Bell-Collins children v Sec FACS* [2015] NSWSC 701, Slattery J stressed the significance of delay noting anything which is likely to unduly delay proceedings is an important relevant consideration.

It is argued that if other parties were added who would be permitted to put questions, make submissions and advance evidence on all issues in the proceedings, this would be likely to add considerably to the length of time that the proceedings would take and delay the hearing.

The submission responds to the objectives of the Care Act, s 9(2)(c), that any consideration of "the paramount concern to protect children from harm and promote their development". This will usually involve giving priority to bringing proceedings to finality as quickly as possible. Anything which is likely to unduly delay these proceedings is an important relevant s 98(3) consideration, noting s 94 requiring the court to proceed as expeditiously as possible:

- age of child
- delays have an impact on the well-being of a child due to future placement remaining uncertain
- applicant basing their claims on hearsay allegation or misinformation

- the issue of restoration has not yet been determined. The … contends that whether there is a realistic possibility of restoration of the children to the … has not been determined and the joinder application is premature and whilst the court is determining that issue delay will occur.
- in *AB and JB v The Secretary* [2021] NSWDC 626 Levy J stated:

> It hardly needs stating that delay in litigation of all kinds is best avoided, but especially so in relation to child care proceedings.
>
> In considering the potential impact of delay due to the conduct or involvement of a litigant, it is relevant to contextually stratify its causes on account of the conduct of the litigants seeking discretionary relief from the court.
>
> This is because disentitling conduct can weigh decisively against the exercise of the discretion that is sought to be invoked in this case: s 58(2)(b)(i) and (ii) of the *Civil Procedure Act 2005*. Those provisions apply to litigation once it is in this court. It therefore becomes relevant to examine past delays as well as future sources of delay in terms of those principles.

Contrasted with:

- delay in making the application for joinder should not be seen to be a material delay
- no undue litigation delay incurred on account of any conduct on the part of the applicant in the case management phase of the proceedings in this court, or during the course of the hearing of the appeal
- in reality, litigation, properly conducted, takes time and appropriate preparation
- the granting of leave necessarily means there will be a further element of delay. However, the issues at stake and the importance of the need for scrutiny and testing of nebulous evidentiary positions, decisively outweighs the articulated concerns about further procedural delay. This factor of delay is not a sufficient basis to require that the discretion to grant leave for joinder not be exercised: *EC v Secretary, NSW DFaCS* [2019] NSWSC 226 at [20].

Unique position

In *Bell-Collins children v Sec FACS* [2015] NSWSC 701 at [33]–[34], Slattery J noted that there will be circumstances when non-parties will be in a unique position to fill particular gaps in evidence that parties to the proceedings cannot. In certain circumstances it is in the child's interest for such evidence to be tested thus joining that person can fill the evidentiary gap:

- observations made — it is not just the written material that might be presented, but it is also the nuances of cross-examination that come to bear in the determination of such conflicting viewpoints as are likely to emerge at the hearing of this dispute
- excluding a voice that had a detailed knowledge of the history in this particular case would not be acting in a way that ensures the safety, welfare and well-being of the children
- they are relevant contradictors who are well placed to seek to forensically test contentious evidence.

In this case, the applicant fits within the array of persons to be considered in that statutory hierarchy. This is so particularly where it is not disputed that it would be inappropriate to consider restoration of the child to a parent and lingering questions remain unanswered as to the role of the … that led to the assumption into care.

In *AB and JB v The Secretary* [2021] NSWDC 626 Levy J stated at [138]:

> [it] would have the effect of denying to the child the benefit of the input of relevant contradictors, his maternal grandparents, in the process of testing the obviously nebulous elements within the foundations of Secretary's case and care plan.

The applicant is a relevant contradictor who is well-placed to seek to forensically test contentious evidence: *Bell-Collins children v DFaCS* [2015] NSWSC 701 at [34].

Contrasted with:

The applicant's case is similar to another party … Both are seeking the same … accords with the applicant.

The applicants' likely prospects of success

Justice Slattery agreed with the then President of the Children's Court, Marien P, that the interpretation of "arguable case", as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is "reasonably capable of being argued" and has "some prospect of success" or "some chance of success".

The applicant is the … The issue of prospects of success must be viewed in terms of s 10A of the Care Act, which provides a statutory hierarchy for the placement of children, where the first preference is to return a child to parents or a parent, and if that option is not practicable, or in the child's best interests, the Children's Court must then consider a kinship placement: see *AB and JB v The Secretary* [2021] NSWDC 626.

Other factors are:

- s 13 Aboriginal and Torres Strait Islander Child and Young Person Placement Principles, see **[2-2560] Aboriginal or Torres Strait Islanders**
- Secretary is not considering the applicant as a placement option
- should be by way of a placement assessment and application is premature.

Matters of public policy

Care Act, s 87 making of orders that have a significant impact on persons

The other mode of appearance under the Care Act is under s 87. This section affords an "opportunity to be heard".

The opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)). Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses, at least generally. Cross-examination may still be permitted under s 87 but this is dependent on the circumstances.

Option — leave granted

I find that the applicant has a genuine concern for the safety, welfare and well-being of the children and the person satisfies the test under s 98(3).

The court considers that it is an appropriate exercise of the discretion of the court to grant leave to join the person to the proceedings. Leave is granted for … to be joined as a party.

Option — application refused

The court considers that it is not an appropriate exercise of the discretion of the court to grant leave to join the person to the proceedings. The application is refused.

[2-2300] Assessment order

Last reviewed: November 2024

An assessment application under ss 53 and 54 of the Care Act is to be made to the court as soon as possible after establishment and is to be filed and served on all other parties no later than two days before the application is made to the court.

If unrepresented parties, the following text may be helpful:

The Children's Court Clinic (the clinic) assists the Children's Court in care and protection matters, by providing independent expert clinical assessments of children and young persons, and the capacity of parents and others to carry out parental responsibility.

An assessment report by the clinic is an independent report to the court rather than evidence tendered by a party. The Children's Court Clinic's authorised clinician who prepares a report is available for cross-examination at the hearing if required.

The most comprehensive relevant documentation, on which to base the assessment, is provided to the authorised clinician conducting the assessment as soon as possible.

The clinic is not currently resourced to provide physical or medical examinations.

An assessment application under ss 53 and 54 of the Care Act must be in the prescribed Form 7 Application for Assessment Order.

Note: An independent parenting capacity assessment, "Private assessment", requires leave from the court for a clinician to see a child or documents. The court needs to carefully understand the risk of a child being over-assessed: see *Re Bailey and Blake (No 2*) [2012] NSWSC 394 per Rein J. A private assessment is very rare.

If the assessment application is supported by all parties

This is an assessment application under ss 53 and 54 of the Care Act made by … for the assessment of a child/young person (s 53), and an assessment of the capacity of a person who has parental responsibility or seeks parental responsibility: s 54. It is supported by all parties.

The assessment application:

- consolidates multiple children in a sibling group into the one application
- outlines the reasons why an assessment order is required
- outlines the circumstances of the persons to be assessed

- includes a brief list of issues to be addressed by the authorised clinician
- identifies any specific expertise required of the authorised clinician conducting the assessment
- includes contact details for parties to be assessed, their legal representatives, and the relevant caseworker or casework manager, and
- lists all the documents upon which the assessment is to be based, including all relevant previous clinical assessments undertaken of the child, children or family.

Having regard to s 56 and the view that the assessment is likely to provide relevant information that is unlikely to be obtained elsewhere an order is made consistent with the proposed terms of the assessment order.

I am satisfied that the child or young person will not be subjected to unnecessary assessment.

Consistent with PN 6, the order will be taken to contain a direction that the applicant for the assessment order (or other party as directed by the court) will, within seven days, provide all the documents listed in the application (the file of documents) to the clinic.

The matter is adjourned for eight weeks for consideration of the assessment report. The assessment report is to be filed within seven weeks.

Note: If the court is asked to make an order appointing a particular person to prepare an assessment report then the court may recommend a clinician who might have specific expertise or someone similarly qualified.

If the assessment application is not supported by all parties

The hearing will proceed on the filed material and written submission. Written submissions are to be filed two days before the hearing date. Parties will be given an opportunity to make oral submissions at the hearing on the written submissions received by the other parties.

Two hours estimated.

Note: The hearing of a contested application for an assessment order must be no longer than two hours except in exceptional circumstances — to be heard expeditiously. Cross-examination will be allowed at such a hearing only in exceptional circumstances.

Assessment hearing

This is an assessment application under ss 53 and 54 of the Care Act made by … for the assessment of a child/young person (s 53) and an assessment of the capacity of a person who has parental responsibility or seeks parental responsibility to carry out that responsibility: s 54. It is supported by … and not supported by …

The assessment application:

- consolidates multiple children in a sibling group into the one application
- outline the reasons why an assessment order is required

- outline the circumstances of the persons to be assessed
- includes a brief list of issues to be addressed by the authorised clinician
- identifies any specific expertise required of the authorised clinician conducting the assessment
- includes contact details for parties to be assessed, their legal representatives, and the relevant caseworker or casework manager, and
- lists all the documents upon which the assessment is to be based, including all relevant previous clinical assessments undertaken of the child, children or family.

Having regard to s 56 and the view that the assessment is likely to provide relevant information that is unlikely to be obtained elsewhere an order is made consistent with the proposed terms of the assessment order.

I am satisfied that the child or young person will not be subjected to unnecessary assessment.

Consistent with PN 6, the order will be taken to contain a direction that the applicant for the assessment order (or other party as directed by the court) will, within seven days, provide all the documents listed in the application (the file of documents) to the clinic.

The matter is adjourned for eight weeks for consideration of the assessment report. The assessment report is to be filed within seven weeks.

Note: If the court is asked to make an order appointing a particular person to prepare an assessment report, then the court may recommend a clinician who might have specific expertise or someone similarly qualified.

[2-2320] Dispute resolution conferences

Last reviewed: November 2024

If there are unrepresented parties, the following text may be helpful:

The Children's Court may make an order that the parties to a care application attend a dispute resolution conference (DRC) to provide the parties with an opportunity to agree on an action in the best interests of the child: s 65.

The purpose of DRC is to provide a safe environment that promotes frank and open discussion between the parties in a structured forum to encourage agreement on what action should be taken in the best interests of the child or young person, including identifying the issues in dispute, developing options, considering alternatives and trying to reach an agreement.

If appropriate, more than one DRC may be held at different stages of the proceedings. Dispute resolution conferences are the most common form of Alternative Dispute Resolution (ADR) for care and protection cases in the Children's Court. However, other forms of ADR can be used, including external mediation and Aboriginal care circles?

Ordinarily, if a party requests a DRC the court would approve the request. You may enquire as to how a DRC will assist, but it is mostly self-evident.

Note: If a party does not wish to be involved in the DRC then they cannot be forced to attend however, it usually is in their best interest to attend and they should be encouraged to attend. Refer to a DRC if you think it will assist.

The matter is referred to a DRC to be held on … at am/pm.

(Record in DRC Diary.)

No return date is required if referred to DRC.

[2-2340] Hearing date sought

Last reviewed: November 2024

Is there an application for hearing date signed by all parties?

Have all directions of the court been complied with? (Including the parties attending an alternative dispute resolution conference).

Note: Hearing dates will ordinarily only be allocated after the DRC has failed to settle the matter.
See Form 13 — Application for a hearing date form.

Adjourned to … for hearing.

Adjourned for readiness listing (1 month prior to hearing date).

Further standard directions apply: including the service of a bundle of any documents produced under subpoena, the filing and serving on the other parties a case management document which contains a list of all affidavits (and other documents) to be relied upon by the party at the hearing, a detailed statement of the real issues in dispute, confirmation of the witnesses required for cross-examination, the filing and serving of a minute of care order and case management documents all prior to the readiness listing.

Note: Complete clinician notification on Bench sheet.

Where an authorised clinician is required for cross-examination at the hearing, the party seeking such attendance should consult the authorised clinician, by contacting the Children's Court Clinic and the other parties to determine the most appropriate date and time the authorised clinician is to attend. The party seeking the attendance of the authorised clinician must then notify the court of the authorised clinician's availability when seeking a hearing date.

The Registrar of the court is to send a Notice to Authorised Clinician to attend court to the Director of the Children's Court Clinic within seven days following the matter being set down for hearing.

Further standard directions apply — PN 5

The following further standard directions will apply in all contested hearings (other than a contested hearing on an interim order application or a contested hearing for leave under s 90) unless the court otherwise directs.

The Secretary will serve on the other parties a bundle of any documents produced under subpoena upon which the Secretary proposes to rely at the hearing, including by way of cross examination at least 14 days before the readiness hearing.

Any other party will serve on all the other parties a bundle of documents produced under subpoena upon which the party proposes to rely at the hearing and that have not been already served by the Secretary at least 7 days before the readiness hearing.

The parties, other than the independent legal representative of a child, shall, at least 7 days before the readiness hearing, file and serve on the other parties a proposed minute of order.

All parties shall, at least 7 days before the readiness hearing, file and serve on the other parties a case management document which contains:

- a list of all affidavits (and other documents) to be relied upon by the party at the hearing
- a schedule of all documents produced under subpoena upon which a party proposes to rely at the hearing, including by way of cross-examination
- a detailed statement of the real issues in dispute (for example, a statement that an issue in dispute is "whether there is a realistic possibility of restoration" is not sufficient), and
- confirmation of the witnesses required for cross-examination.

[2-2360] Readiness hearing

Last reviewed: November 2024

A readiness hearing is to be held one month prior to the hearing date.

Have all directions of the court been complied with?

Do the parties agree that the matter is ready to proceed?

- Is the clinician notified? The Registrar of the court is to send a Notice to Authorised Clinician to attend court to the Director of the Children's Court Clinic within 7 days following the matter being set down for hearing.
- Have all parties served a bundle of any documents produced under subpoena upon which they rely on at the hearing, including by way of cross examination? (Secretary at least 14 days before the readiness hearing; others at least 7 days before the readiness hearing).
- Have all parties, other than the independent legal representative, filed and served on the other parties a proposed minute of order (at least 7 days before the readiness hearing)?
- Have all parties other than the independent legal representative filed and served on the other parties a case management document which contains:
  (a) a list of all affidavits (and other documents) to be relied upon by the party at the hearing
  (b) a schedule of all documents produced under subpoena upon which a party proposes to rely at the hearing, including by way of cross-examination
  (c) a detailed statement of the real issues in dispute (for example, a statement that an issue in dispute is "whether there is a realistic possibility of restoration" is not sufficient), and
  (d) confirmation of the witnesses required for cross-examination.

If all possibilities of reaching agreement have been fully explored, and the issues to be addressed at the final hearing are clearly identified the hearing date is confirmed.

Children's Court — Care

Readiness Hearing Checklist

(IMPORTANT — This document is to be prepared through consultation between the Department of Communities and Justice and all other parties to the proceedings prior to the Readiness Hearing.)

Child/ren or young person/s name:		
Case number:		
Date and place of Readiness Hearing:	/ /	**CHILDREN'S COURT**
How many parties will be involved in the hearing?		
Has a case management document been filed by each party?	Yes	No (If no, when it will be filed?)
Has all material/evidence/ reports to be relied upon been filed and served? (including subpoena bundles and material agreed upon to be provided to expert witnesses, including an authorised clinician)	Yes	No (if no, please specify when all material will be filed/served?)
What issues remain in dispute?		
Have all possibilities of reaching an agreement been explored?	Yes	No (if no, has a further DRC been sought?)
Have copies of birth certificates for each child been filed?	Yes	No (If not, why?)
Is any party/legal representative seeking to appear by video conference, including a party in custody? **If so, specify place of appearance**		

and proposed video conference method.				
Name of witness as set out in Application for hearing date filed.	**Witness required for cross-examination and estimated length of time.**		**Witness availability reconfirmed** (including days and times)	
1.	Yes / No	min/hr	Yes	No
2.	Yes / No	min/hr	Yes	No
3.	Yes / No	min/hr	Yes	No
4.	Yes / No	min/hr	Yes	No
5.	Yes / No	min/hr	Yes	No
6.	Yes / No	min/hr	Yes	No
7.	Yes / No	min/hr	Yes	No
8.	Yes / No	min/hr	Yes	No
9.	Yes / No	min/hr	Yes	No
10.	Yes / No	min/hr	Yes	No
Do any witnesses have particular vulnerabilities due to age or pre-existing medical conditions?				
Is it appropriate/ practical for any witness, including experts, to give evidence by video conference? **If so, please specify place of appearance and proposed video conference method.**				
If an interpreter is required for a party or witness, what language and for whom? **If so, can suitable arrangements be**				

made to properly assist the conduct of the hearing?			
Does any party/witness seek to bring a support person to court? **If so, which party and how many support persons?**			
Is it proposed that another room within the court complex will be used for the hearing, such as the remote witness room or a room equipped with AVL facilities?	Yes	No	If yes, has the availability of this room been discussed with the registrar?
Is there any evidence other than oral evidence that will be relied upon during the hearing? **Eg, Record of interview** **If so, how is the evidence to be tendered/played if some parties/witnesses are not physically present?**			
Is there any objections to evidence or admissibility of any evidence which, once determined, may shorten the hearing?			
Is there any negative impact on any persons involved in the case if the hearing is delayed due to Covid-19 concerns? **Eg, stability of placement, health, including mental health and**			

wellbeing of the child/ren and/or parents. **If so, whom?**			
Is a party likely to be prejudiced by conducting the hearing in the manner proposed?			
Do all parties agree with the proposed arrangements for the conduct of the hearing?	Yes	No (if no, please provide details)	
Number of persons that will be physically present at court at any given time during the hearing?		Parties	
		Legal representatives	
		Witnesses	
		Support persons	
		Total	
Estimated duration of hearing: (including submissions)			HOURS/ DAYS

Readiness checklist prepared by Applicant/Respondent/Child Representative

Name:

Signed:

Date:

In consultation with:

Name:	**Applicant/Respondent/ Child Representative**

[2-2380] Final order — s 61 — supported by all parties and court agrees

Last reviewed: November 2024

Check the following:

- service
- orders are consistent with orders that a party not in attendance were advised of
- matter is established
- if finding has previously been made or required; otherwise:
  (a) there is no realistic possibility of restoration within a reasonable period to the care of the mother/father with respect to the child
  (b) there is a realistic possibility of restoration within a reasonable period to the care of the mother/father with respect to the child
- Birth Certificate filed.

I have considered the permanency plan and am satisfied that the permanency planning proposed by the Secretary aims to provide the child with a stable placement that offers long-term security and involves the least intrusive intervention in their life and their family that is consistent with the paramount concern to protect the child from harm and promote her/his development (s 9(2)(c)), and pursuant to s 83(7) of the Act, the court finds that permanency planning has been appropriately and adequately addressed.

The court is invited to make orders in accordance with a minute of care order which propose that …

The orders sought pursuant to the Care Act are consistent with the standardised wording per PN 14.

Each of the parties before the court support the orders in accordance with the minute of care order.

The court makes the orders in accordance with the minute of care order.

Note: The MOCO will usually include s 82 order for at least one report but more appropriately two reports.
Section 82(2) states the report must:

(a) be provided to the Children's Court within 24 months or such earlier period as the court may specify

The MOCO may include a s 76 order for supervision. If so, the court makes an order placing the child under the supervision of the Secretary.

In making an order under this section, the court notes the history and previously identified risks and the order is made to ensure the safety, welfare and well-being of the child. The order is made for … months.

Section 76(3A) provides that the Children's Court may specify a maximum period of supervision that is longer than 12 months (but that does not exceed 24 months) if the Children's Court is satisfied that there are special circumstances that warrant the making of an order of that length and that it is appropriate to do so.

Section 76(4) provides that the Children's Court may require the presentation of the following reports:

(a) a report before the end of the period of supervision stating the following:
  (i) the outcomes of the supervision
  (ii) whether the purposes of the supervision have been achieved
  (iii) whether there is a need for further supervision to protect the child or young person
  (iv) whether other orders should be made to protect the child or young person
(b) one or more reports during the period of supervision describing the progress of the supervision.

Note: The MOCO may include a s 73 order for undertakings.

The court, noting the history and identified risks, makes an order accepting the undertakings provided in writing, signed by the person giving it, and remaining in force before the day on which the child or young person attains the age of 18 years to ensure the safety, welfare and well-being of the child.

Final order — structure of proceedings

These proceedings concern the child …

The child is … of age.

The child's mother is …

The child's father is …

The child is currently resides …

The authorised carer …

The child's sibling is …

Background:

The Secretary commenced care proceedings by way of an application initiating care proceedings filed on …

The court made interim orders on … vesting parental responsibility in the Minister.

A summary of proposed plan was filed on …

In that plan, the Secretary identified the following as matters the parents had to do for the Secretary to consider the viability of restoration: …

On … the Children's Court found the child was a child in need of care and protection.

On … the Secretary filed a care plan setting out the Secretary's assessment that there was/was not a realistic possibility of restoration to either parent.

On … the child was placed in the care of their current authorised carer.

An assessment report dated … was provided to the court prepared by an independent clinician appointed by the clinic, …

Separately, there had been a parenting capacity assessment of the …

On … the Secretary filed a care plan. The Secretary assessed that there was not a realistic possibility of restoration of … to either parent.

… appeared for the Secretary.

The Father appeared in person as a self-represented litigant.

The Mother was represented by …

… was appointed by the court as the ILR.

Onus of proof and standard of proof

The burden of proving the case falls upon the Secretary.

The standard of proof is on the balance of probabilities: s 93(4) of the Care Act.

The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved.

Witnesses/Evidence

The court has had the benefit of reflecting on all of the evidence and the written and oral submissions.

There was a significant amount of documentary evidence that was filed prior to the hearing or tendered during the hearing.

A number of witnesses were called to provide additional oral evidence; and were cross-examined.

These witnesses included …

Caseworker … gives evidence that: …

Issues not in dispute

It is not in dispute that there is no realistic possibility of restoration to the …

Issues in dispute

The issue for the court is …

Submissions

The Secretary submits that …

The father submits …

The mother submits …

The ILR submits …

State findings of fact relevant to issues in dispute

Child is … years of age.

Given child's tender age and immaturity, only limited weight should be placed on her views.

The child has resided in … since …

The child identifies … as the primary caregiver.

There are risk factors pertaining to the parent … regarding mental health, use of drugs and parenting capacity. The magnitude of those risks are great. They are of a long-standing nature. The consequences to the child's safety, welfare and well-being in the context of their circumstances would be significant.

The likelihood of those risk occurring is high because there has been a significant period of time where the parent has not addressed those concerns.

It is difficult to see how those risks might be satisfactorily managed, albeit it is acknowledged that the parent has recently begun addressing the risk factors.

There are benefits to the child in having a family placement but those benefits can be achieved with an appropriate contact regime without risking the impact of psychological harm that would follow if there is a disruption to the current care arrangement. A failed restoration would be devastating.

The applicable legal context for the determination of the matter

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

The objects of the Care Act are set out in s 8.

> The objects of this Act are to provide—
>
> (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and
>
> (a1) recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and

The Care Act sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear elsewhere.

First and foremost is the principle per s 9(1) requiring that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

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

The point is that the primary issue for the court is not about the parent or whether the carer would be significantly impacted by restoration to birth family or not — it is about the safety, welfare and well-being of a child — it is that that is paramount.

Secondary to the paramount concern, the Care Act sets out other, particular principles to be applied in the administration of the Act.

These are set out in ss 9(2) and 10 and include the following:

> (a) Wherever a child or young person is able to form his or her own views on a matter concerning his or her safety, welfare and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances. (See also s 10.)
>
> How much weight a child's views are given depends on a number of things. The age and level of maturity of the child, how strongly they hold their views and how long they have held them for; whether they were pressured to form the views and the circumstances in which the views were expressed will all be taken into consideration.

(b) … account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person.

(c) [any action] to protect a child or young person from harm, the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development.

Section 10A(3) of the Care Act establishes:

> The "permanent placement principles" are as follows—
>
> (a) if it is practicable and in the best interests of a child or young person, the first preference for permanent placement of the child or young person is for the child or young person to be restored to the care of his or her parent (within the meaning of s 83) or parents so as to preserve the family relationship

In *Director of Family and Community Services v Jack* [2012] NSWChC 7 at [21], that:

> There is nothing in the Act which specifically indicates that a child should remain with a parent unless the court is positively satisfied that such a placement would be contrary to the child's best interests. The statutory provisions outlined above, however, suggest to me that an order giving responsibility of a child to the Minister should only be made as an order of last resort. The majority of children are raised by their parents, the relationship between parent and child is one of the closest, if not the closest, of all relationships and the mere fact of the relationship will invariably receive substantial weight in any given case. This view receives support from decisions of the High Court and courts in the Australian Capital Territory and New South Wales.

As was said by the High Court in *M v M* (1998) 166 CLR 69 at [20] in the context of proceedings in the Family Court for custody or access:

> In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents.

The second preference for permanent placement is guardianship of a relative, kin or other suitable person. The paternal grandmother is such a relative.

The next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted.

The last preference is for the child to be placed under the parental responsibility of the Minister. The Secretary must assess whether there is a realistic possibility of restoration of the child to the parent(s) within a reasonable period.

Section 83(8A) states "reasonable period" for the purposes of this section must not exceed 24 months.

The principles relating to the phrase "a realistic possibility of restoration" may be summarised by reference to *Re Campbell* [2011] NSWSC 761 and *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2:

- a possibility is something less than a probability; that is, something that is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible
- the concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve

- the possibility must be "realistic", that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". It needs to be "sensible" and "commonsensical"
- in *Department of Communities and Justice (DCJ) and Bloom* the President of the Children's Court's examined the phrase of a realistic possibility of restoration:

  > A realistic possibility may be evidenced at the time of hearing by a coherent program already commenced and with some significant "runs on the board", or by the development of and commitment to a cohesive and viable plan that is sensible, practicable and viable within a reasonable time: at [173].

- the words "may be evidenced" indicate an exercise of discretion contrasted with *DFaCS & the Steward Children* [2019] NSWChC 1 and more in keeping with the Slattery J and Johnston J's interpretation in *Re Campbell* [2011] NSWSC 761 and *Re Saunders and Morgan* [2008] CLN 10. The proper interpretation is that usually this needs to be evidenced but the bar is too high for must be evidenced
- the comma before "or" in *Department of Communities and Justice (DCJ) and Bloom* — begins an independent clause — that sets a lower test than in *DFaCS & the Steward Children* allowing for the development of and commitment to a cohesive and viable plan that is sensible, practicable and viable within a reasonable time
- this test is consistent with Practice Note 5 that defines the Summary of Proposed Plan (SOPP):

  > the tasks and demonstrated changes the parents need to undertake in order for the child/young person to be returned to their parents safely (including relevant timeframes for the tasks/changes to occur)

- Practice Note 5 contrasts *DFaCS & the Steward Children* in having already commenced a process of improving parenting where there has already been some significant success
- reference to the court needing to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted is not referred to in *Department of Communities and Justice (DCJ) and Bloom*
- there are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, that the parent(s) are likely to be able to satisfactorily address the identified risk issues
- the court may take into account the progress of parents in relation to their rehabilitation, their progress in respect of gaining insight into their parenting deficiencies, and their ability to satisfactorily address the issues that have led to the removal of the child
- the court may also have regard to any plan that prepares, educates or assists parents in moving towards a restoration, which involves for example, supports, scaffolding, treatment, training and education, provided it is viable and practicable
- the determination must be undertaken in the context of the totality of the Care Act, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm
- it is now well settled law that the proper test to be applied in care proceedings in respect of final orders is that of "unacceptable risk to the child": *M v M* (1988) 166 CLR 69 at [25].

The principles set out apply equally to all forms of harm, such as physical and emotional harm.

Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] Fam CA 1235. This is an exercise in foresight.

The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated. Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

Integrating the facts and law

The objective evidence is that …

Option if no restoration

I have serious concerns about disrupting that environment by interfering with the current arrangement for the care of the child, and even deeper concerns as to the capacity of the parent to bring to that task the necessary level of skill and understanding, either on his own or jointly with the …

Option if no restoration

I also have serious concerns about disrupting that environment having regard to the risk factors set out regarding the … and their ability to manage the stressors of own mental health if parental responsibility is allocated to …

Option if no restoration

Restoration of the child to the would involve an unacceptable risk of harm which is not capable of mitigation to a level that safeguards her safety, welfare and well-being.

Option if no restoration

I am satisfied, therefore, having regard to the circumstances of the child and a consideration of the evidence that there is no realistic possibility of restoration of the child being restored in a reasonable time.

I also have serious concerns about disrupting that environment having regard to the risk factors set out regarding the … and their ability to manage the stressors of own mental health if parental responsibility is allocated to …

The Children's Court therefore accepts the assessment of the Secretary that there is no realistic possibility of restoration of the child being restored to the father within a reasonable time: s 83(5) Care Act.

Then consider permanency planning.

Option if restoration

I am satisfied, therefore, having regard to the circumstances of the child and a consideration of the evidence that there is a realistic possibility of restoration of the child being restored in a reasonable time.

The Children's Court therefore does not accept the assessment of the Secretary that there is no realistic possibility of restoration of the child being restored to the father within a reasonable time: s 83(5) Care Act.

Having made the assessment as to restoration, the Secretary is then required to address the permanency planning for the child. As the court does not accept the assessment the court directs the Secretary to prepare a different permanency plan: s 83(6).

A new care plan is directed.

Option

I am satisfied, therefore, having regard to the circumstances of the child and a consideration of the evidence that there is no realistic possibility of restoration of the child being restored in a reasonable time.

The Children's Court therefore accepts the assessment of the Secretary that there is no realistic possibility of restoration of the child being restored to the parent within a reasonable time: s 83(5) of the Care Act.

Leave under s 90(2) of the Care Act having been granted, the issue for the court now is therefore, whether the previous care orders should be varied or rescinded: s 90(6) and (7).

(6) Before making an order to rescind or vary a care order that places a child or young person under the parental responsibility of the Minister, or that allocates specific aspects of parental responsibility from the Minister to another person, the Children's Court must take the following matters into consideration—

(a) the age of the child or young person,

(b) the views of the child or young person and the weight to be given to those views,

(c) the length of time the child or young person has been in the care of the present caregivers and the stability of present care arrangements,

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

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

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

(7) If the Children's Court is satisfied, on an application made to it with respect to a child or young person, that it is appropriate to do so—

(a) it may, by order, vary or rescind an order for the care and protection of the child or young person, and

(b) if it rescinds such an order— it may, in accordance with this Chapter, make any one of the orders that it could have made in relation to the child or young person had an application been made to it with respect to the child or young person.

I have given consideration to each:

- the age of each child: this is often a relevant and persuasive factor, particularly with older children or young persons, but I do not consider it significant in the circumstances of the present case
- the wishes of the child and the weight to be given to those wishes: I have dealt with this issue above
- the length of time the children have been in the care of the present caregivers: this is a factor of some weight in this case
- the strength of the child's attachments to the birth parents and the present caregivers: the question of attachment weighs against a restoration, in favour of maintaining the current placement, in accordance with the clinician's view
- the capacity of the birth parents to provide an adequate standard of care for the children: I have dealt with this issue above,
- the risk to the children of psychological harm if the present care arrangements are varied or rescinded: I am satisfied that for the reasons given that more probably than not, restoration poses an unacceptable risk of psychological harm to these children.

For all the reasons articulated, I am satisfied that the previous care orders should not be rescinded: s 90(6).

Decision option

The Children's Court does not accept the assessment of the Secretary that there is no realistic possibility of restoration of the child being restored to the parent within a reasonable time: s 83(5) of the Care Act.

Leave under s 90(2) of the Care Act having been granted, the issue for the court now is therefore, whether the previous care orders should be varied or rescinded: s 90(6). In making this determination the court is required have regard to the matters set out in s 90(6). I have given consideration to each:

- the age of each child: this is often a relevant and persuasive factor, particularly with older children or young persons, but I do not consider it significant in the circumstances of the present case
- the wishes of the child and the weight to be given to those wishes: I have dealt with this issue above
- the length of time the children have been in the care of the present caregivers: this is a factor of some weight in this case
- the strength of the child's attachments to the birth parents and the present caregivers: the question of attachment weighs in favour of restoration
- the capacity of the birth parents to provide an adequate standard of care for the children: I have dealt with this issue above,
- the risk to the children of psychological harm if the present care arrangements are varied or rescinded: I am satisfied that for the reasons given that more probably than not, restoration does not pose an unacceptable risk of psychological harm to these children.

For all the reasons articulated, I am satisfied that the previous care orders should not be rescinded: s 90(6).

Note: Interim order regarding a variation or rescission application:

Where an application to vary or rescind an order is made but not determined, the court may make an interim order. An interim order may have the effect of varying the original order but not rescinding it. For a discussion of the nature of a leave application: see *Re Edward* [2001] NSWSC 284 and P Mulroney, "Preparing and running a section 90 case: a perspective from the Bench" [2008] 7 CLN.

Final order — guardianship

Decision

An application for a guardianship order may be made by the following:

(a) the Secretary, or

(b) with the written consent of the Secretary.

Each parent has being given a reasonable opportunity to obtain independent legal advice about the application and was entitled to be heard in this matter.

Pursuant to *Children and Young Persons (Care and Protection) Regulation 2022* cl 13 the applicant for the guardianship order has presented a suitability statement prepared by the assessment body to the Children's Court prior to this date.

A care plan has been filed.

I have considered the financial plan.

If appropriate:

As the child or young person is 12 or more years of age and capable of giving consent, the consent of the child or young person is given in the form and manner prescribed by the regulations: cl 12. (See below.)

If appropriate:

as the child or young person is an Aboriginal or Torres Strait Islander child or young person — permanent placement of the child or young person under the guardianship order the guardianship order is in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that apply to placement of such a child or young person under s 13.

The court is satisfied that:

(a) there is no realistic possibility of restoration of the child or young person to his or her parents, and

(b) that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so into the future.

Order

The guardianship order is made. This means the guardians have been allocated all aspects of parental responsibility for the child or young person until the child or young person reaches 18 years of age.

No s 82 reports are required.

Consent in writing

Note: 14 days

Clause 12 Form of child's or young person's consent to guardianship order

(1) For the Act, section 79A(3)(d), the consent of a child or young person must—

(a) be written, and

(b) be signed by the child or young person in the presence of a relevant witness, and

(c) include a statement from the relevant witness that the witness complied with subsections (2) and (3).

(2) The relevant person must explain to the child or young person the nature of the guardianship order to which the consent relates.

(3) The explanation must—

(a) be given at least 14 days before the consent is signed by the child or young person, and

(b) be given in a way and use language the child or young person can understand, and

(c) include the following information—

(i) if the order is made, all aspects of parental responsibility for the child or young person will be allocated under the order to a specified person or persons,

(ii) an order may be rescinded or varied under the Act, section 90,

(iii) the child or young person is entitled to obtain independent legal advice before signing the consent.

(4) In this section—

"relevant witness" means—

(a) the principal officer of the designated agency responsible for supervising the placement of the child or young person, or

(b) an employee of the designated agency responsible for supervising the placement of the child or young person who has been directly involved in the supervision of the child or young person's placement, or

(c) an Australian legal practitioner.

[2-2400] Section 90 application

Last reviewed: November 2024

First listing — usually an adjournment sought for instructions

This is an application pursuant to s 90 of the Care Act. The applicant is … and is seeking that the Children's Court rescind or vary previous care orders. Leave may be granted if there has been a significant change in any relevant circumstances since the order was made or was last varied (s 90(2)) and after taking into account the primary and additional considerations set out in s 90(2B) and (2C).

Seek the views of various parties?

Note: Often most parties will seek an adjournment to get instructions. This is an application for the matter to be adjourned so instructions can be taken on the consideration of leave. If at least one party opposes the application, it is best to set a timetable as below:

Timetable

- file and serve affidavits
- responses
- adjournment for compliance.

Second listing — s 90 leave supported by all parties and court agrees

Short order

Seek the views of various parties?

This is an application pursuant to s 90 of the Care Act. The applicant per s 90(1AA) is:

- the Secretary
- the child or young person
- a person having parental responsibility for the child or young person
- a person from whom parental responsibility for the child or young person has been removed
- a person who considers himself or herself to have a sufficient interest in the welfare of the child or young person.

The applicant is seeking that the Children's Court rescind or vary previous care orders.

An application under s 90, however, may only be made pursuant to a grant of leave: s 90(1). The parties support leave being granted.

Leave may be granted if there has been a significant change in any relevant circumstances since the order was made or was last varied: s 90(2).

The following significant changes are identified and established:

- carer deceased
- the parents have not met their responsibilities under an applicable care plan
- there has been positive progress and steps made by the parents, or
- there is an application for guardianship.

Children and Young Persons (Care and Protection) Regulation 2022 cl 4 sets out factors which indicate a significant change in the relevant circumstances of a child or young person since a care order was made or last varied include:

(a) the parents of the child or young person concerned have not met their responsibilities under a care plan or permanency plan involving restoration,

(b) the Children's Court, having conducted a progress review under the Act, s 82(3), is not satisfied proper arrangements have been made for the care and protection of the child or young person,

(c) an application has been made for a guardianship order for the child or young person,

(d) for a guardianship order — the guardian is unable or unwilling to meet the guardian's responsibilities to the child or young person.

If there are significant changes made out before granting leave the Children's Court must consider the matters set out in s 90(2B) and (2C).

After considering the matters set out in s 90(2B) including:

- the child's views
- length and stability of care arrangements,

and s 90(2C), including:

- whether the applicant has an arguable case.

Decision

The court finds that there has been a significant change in relevant circumstances since the order was made or was last varied. The circumstances are … Further, the court's view is that it is an appropriate exercise of the court's discretion to grant leave and leave is granted.

Second listing if s 90 leave is not supported by a party or not agreed to be the court

The hearing will proceed on the filed material and written submission. Written submissions are to be filed 2 days before the hearing date. Parties will be given an opportunity to make oral submissions at the hearing on the written submissions received by the other parties.

Adjournment: 2 hours estimate.

Note: The hearing of a contested application under s 90(1) of the Care Act must be no longer than two hours except in exceptional circumstances — to be heard expeditiously. Cross-examination will be allowed at such a hearing only in exceptional circumstances.

Leave hearing decision — s 90

Background

1. These proceedings relate to the children …
2. … was born on … and is now aged approximately … years
3. … was born … and is now aged approximately … years
4. The mother is …
5. The father is …
6. … was removed when the child was … years of age.
7. … was removed when the child was … months of age.
8. The children are under the parental responsibility of the Minister.
9. The children are in their second placement. They have been with their current carers for just over … years.

10. The proceedings are brought by the … for the rescission/variation of care under s 90(1AA) and (2) of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) being a person from whom parental responsibility has been removed.
11. Pursuant to s 90(7) … seeks that previous orders be rescinded.
12. The application is dated …
13. Final orders were made on …
14. This is the parent's second s 90 application. The previous application dated … was withdrawn on …
15. The grounds for leave include the significant changes …
16. The reasons for removal of the children in the original care proceedings in … articulated the following risks: …

Onus of proof

17. The burden is on the applicant.

Standard of proof

18. Standard of proof is on the balance of probabilities: s 93(4) of the Care Act.
19. The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved.

Witnesses

20. The evidence on file, for the most part, is as set out in the list of documents filed by the solicitor for the Secretary on the …
21. The hearing was conducted on the basis of the filed material and oral and/or written submissions.

Issues in dispute

22. The issues in dispute are whether there has been a significant change in any relevant circumstances since the care order was made or last varied, and if so, whether the court should exercise its discretion in granting leave.

Father's submissions

23. Father's submissions …

Mother's submissions

24. The mother supports …

The Secretary's submissions

25. The Secretary opposes leave. …

The ILR's submissions

26. The ILR opposes the granting of leave.

The law applicable

27. Section 90 of the Care Act empowers the Children's Court to rescind or vary previous care orders.

28. An application under s 90, however, may only be made pursuant to a grant of leave: s 90(1).

29. The Children's Court may grant leave if it appears that there has been a significant change in any relevant circumstances since the care order was made or last varied: s 90(2).

30. Whether there has been a significant change in any relevant circumstances is the threshold question. If there has been then the next task is whether the court should exercise its discretion in granting leave.

31. In the matter of *J, K and C* [2002] CLN 1, Crawford CM held:

> The granting of leave should not be assumed as a mere formality. It is a distinct proceeding with distinct issues to be determined.

32. In *In the matter of Jasper* [2006] CLN 2, Mitchell SCM said: "The point of this section … is to protect a child from contested care proceedings by ensuring that proceedings come to an end unless there is really a good cause to reopen them".

33. In *S v Department of Community Services (DoCS)* [2002] NSWCA 151, the Court of Appeal held at [27] that s 90(2) requires a comparison between the situation at the time when the application was heard and the facts underlying the decision when the order was made or last varied.

34. In making that comparison the court is not restricted to the time of the order being made but may look at a range leading up to that order being made in consideration of whether a significant change in relevant circumstances can be established.

35. In *Re M (No 6)* [2016] NSWSC 170, Robb J at [43]:

> An applicant must identify and establish one or more relevant circumstances that have changed, and then show that the change is, or changes are, significant.

36. In his reasons, Marien J in *Kestle v Department of Family and Community Services* [2012] NSWChC 2 sets out a helpful summary of the principles to be applied in a s 90(2) application that guide the decision-making process:

    (i) In determining whether to grant leave the court must first be satisfied under s 90(2) that there has been a significant change in a relevant circumstance since the care order was made or last varied.

    (ii) The range of relevant circumstances (a relevant circumstances is a circumstance that underpins the original order) will depend upon the issues presented for the court's decision. They may not necessarily be limited to just a "snapshot" of events occurring between the time of the original order and the date the leave application is heard. Such measurement requires a comparison between the situation at the time the application is heard and the facts underlying the decision last made or varied. In *Re Felicity (No 3)* [2014] NSWCA 226, Basten JA (with whom Ward and Emmett JJA agreed) rejected the argument that the relevant circumstances were restricted to the circumstances which formed the basis for making the care order in the first place. Justice Basten held that the phrase "any relevant circumstances" in s 90(2) of the Care Act refers to "any circumstances relevant to the safety, welfare and well-being of the child"

which his Honour believed conformed to the primary object of the Care Act in s 8(a): see [25]–[26]. *Re Felicity* was approved by Beazley P in *Potkonyak v Legal Services Commissioner (No 2)* [2018] NSWCA 173 at [118].

(iii) The change that must appear should be of sufficient significance to justify the court's consideration of an application for rescission or variation of the existing care order. That is adopted from *S v Department of Community Services* [2002] NSWCA 151.

(iv) The establishment of a significant change in a relevant circumstance is a necessary but not a sufficient condition for leave to be granted.

37. Before granting leave to make an application to vary or rescind the care order, the Children's Court must consider the matters set out in s 90(2B) and (2C).

38. The primary considerations outlined in s 90(2B) are as follows:

(a) the views of the child or young person and the weight to be given to those views, having regard to the maturity of the child or young person and his or her capacity to express his or her views,

(b) the length of time for which the child or young person has been in the care of the present carer and the stability of present care arrangements,

(c) if the Children's Court considers that the present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child or young person and whether that course would be in the best interests of the child or young person.

Additional considerations are as follows:

- the age of the child or young person
- the nature of the application
- the plans for the child or young person
- whether the applicant has an arguable case. An arguable case means a case "which has some prospect of success" or "has some chance of success".

39. In *Re Nerida* [2002] CLN 7 Dive SCM states:

> An "arguable case" is clearly a far lesser test than a prima facie case test or a "more probable than not" test. In my view an "arguable case" test indicates a requirement for the applicant to put material before the court which shows that there is a plausible case which requires or deserves further consideration in a substantive hearing.

40. In *S v Department of Community Services (DoCS)* [2002] NSWCA 151 Davies AJA states:

> I should observe that a person seeking leave to apply for the rescission or variation of a care order is not required to prove on such an application that, if leave be granted, the person would be entitled to the order sought.

41. In determining whether an applicant has an arguable case and whether to grant leave, the court may need to have regard to the mandatory considerations in s 90(6):

(a) the age of the child or young person,

(b) the views of the child or young person and the weight to be given to those views,

(c) the length of time the child or young person has been in the care of the present caregivers and the stability of present care arrangements,

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

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

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

(g) matters concerning the care and protection of the child or young person that are identified in

(i) a report under s 82, or

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

42. The objects of the Act are set out in s 8. The Act also sets out a number of principles according to which it is required to be administered, both administratively and judicially.

43. The overriding principle is that the safety, welfare, and well-being of children are paramount, even to the exclusion of the interests of any parent: s 9(1).

44. It is now well settled law that the proper test to be applied in ALL care proceedings in is that of "unacceptable risk to the child": *M v M* (1988) 166 CLR 69 at [25].

45. Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

Decision option

For the reasons given, I am not satisfied that the case for a grant of leave to apply under s 90(2) of the Care Act for the rescission or variation of the existing care orders has been made out, and leave should therefore be refused.

Further, even if the court was required to exercised its discretion, considering that the children have been in their placement since …, the stability and security of that placement, the attachment to current carers, the principle of least intrusive intervention, the age and views of the children, the nature of the application in seeking restoration, the scantness and inadequacy of the parents plans, the capacity of the parents, the risk to the children of psychological harm if present care arrangements are rescinded the parent would not have an arguable case.

Decision option

The court finds that there has been a significant change in relevant circumstances since the order was made or was last varied. Further, the court's view is that it is an appropriate exercise of the court's discretion to grant leave and leave is granted.

Directions

Secretary to file and serve care plan and permanency plan, a draft minute of order and a copy of the birth certificate for each child within 28 days of the receipt of a clinic assessment report or establishment.

Mother/Father/Other to file and serve evidence in reply to care plan and permanency plan within 14 days.

Adjournment for consideration of the care plan and a completed application for hearing date form, if required.

Note: Section 90(2D): the Children's Court may dismiss an application for leave under this section if it is satisfied that the application is frivolous, vexatious or an abuse of process.
Section 90(2E): without limiting s 90(2D), the Children's Court may dismiss an application for leave under this section if it is satisfied that—

(a) the application has no reasonable prospect of success, and

(b) the applicant has previously made a series of applications for leave under this section that the court has dismissed.

Note: The court can consider a costs order but nothing else to deter the applicant from taking out a further application.

Final order s 90 — Long decision after leave is granted

Proceedings

1. These proceedings concern the child …
2. The child is … of age.
3. The child's mother is …
4. The child's father is …
5. The child is currently resides …
6. The authorised carer …
7. The child's sibling is …
8. By s 90 of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) the Secretary for the Department of Communities and Justice (the Secretary) applies for the rescission of the orders made by … on … Further, the Secretary seeks the making of a final order vesting all aspects of parental responsibility for the child to the Minister until 18 years of age.

Background

9. The Secretary commenced care proceedings by way of an application initiating care proceedings filed on …
10. The court made interim orders on … vesting parental responsibility in the Minister.
11. A summary of proposed plan was filed on …
12. In that plan, the Secretary identified the following as matters the parents had to do for the Secretary to consider the viability of restoration
13. On … the Children's Court found the child was a child in need of care and protection.
14. On … the Secretary filed a care plan setting out the Secretary's assessment that there was/was not a realistic possibility of restoration to either parent.
15. On … the Children's Court made a final order allocating parental responsibility to the Minister until 18.

16. On … the child was placed in the care of their current authorised carer.
17. An assessment report dated … was provided to the court prepared by an independent clinician appointed by the clinic, Dr …
18. Separately, there had been a parenting capacity assessment of the …
19. On … the Secretary filed a care plan. The Secretary assessed that there was not a realistic possibility of restoration of … to either parent.
20. … appeared for the Secretary.
21. The father appeared in person as a self-represented litigant.
22. The mother was represented by …
23. … was appointed by the court as the ILR.

Onus of proof and standard of proof

24. The burden of proving the case falls upon the Secretary.
25. The standard of proof is on the balance of probabilities: s 93(4) of the Care Act.

Witnesses/evidence

26. The court has had the benefit of reflecting on all of the evidence and the written and oral submissions.
27. There was a significant amount of documentary evidence that was filed prior to the hearing or tendered during the hearing.
28. A number of witnesses were called to provide additional oral evidence; and were cross-examined.
29. These witnesses included … Caseworker … gives evidence that …

Issues not in dispute

30. It is not in dispute that there is no realistic possibility of restoration to the …

Issues in dispute

31. The issue for the court is …

Submissions

The Secretary

32. The Secretary submits that

Father

33. The father …

Mother

34. The mother …

ILR

35. The ILR submits …
36. State findings of fact relevant to issues in dispute

37. Child is … years of age.

38. Given child's tender age and immaturity, only limited weight should be placed on his/her views.

39. The child has resided in … since …

40. The child identifies … as the primary caregiver.

41. There are risk factors pertaining to the parent … regarding mental health, use of drugs and parenting capacity. The magnitude of those risks are great. They are of a long-standing nature. The consequences to the child's safety, welfare and well-being in the context of their circumstances would be significant.

42. The likelihood of those risk occurring is high because there has been a significant period of time where the parent has not addressed those concerns.

43. It is difficult to see how those risks might be satisfactorily managed, albeit it is acknowledged that the parent has recently begun addressing the risk factors.

44. There are benefits to the child in having a family placement but those benefits can be achieved with an appropriate contact regime without risking the impact of psychological harm that would follow if there is a disruption to the current care arrangement. A failed restoration would be devastating.

The applicable legal context for the determination of the matter

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

46. The objects of the Care Act are set out in s 8. The objects of this Act are to provide:

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

    (a1) recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles.

47. The Care Act sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear elsewhere.

48. First and foremost is the principle per s 9(1) requiring that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

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

50. The point is that the primary issue for the court is not about the parent or whether the carer would be significantly impacted by restoration to birth family or not — it is about the safety, welfare and well-being of a child — it is that that is paramount.

51. Secondary to the paramount concern, the Care Act sets out other particular principles to be applied in the administration of the Act. These are set out in ss 9(2) and 10 and include the following:

    - wherever a child is able to form their own view, they are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child's developmental capacity, and the circumstances: s 9(2)(a). See also s 10.

52. How much weight a child's views are given depends on a number of things. The age and level of maturity of the child, how strongly they hold their views and how long they have held them for; whether they were pressured to form the views and the circumstances in which the views were expressed will all be taken into consideration.

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

53. Any action to be taken to protect the children from harm must be the least intrusive intervention in the life of the children and their family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c).

54. Though, relevant in s 90 applications that specific provision has been interpreted as being limited in its application to decisions made at the time the children are removed and taken into care, and not to the time when later decisions are to be made following the removal of the children. In that latter circumstance, the issue is whether or not the existing care arrangements should be displaced: *Re Tracey* [2011] NSWCA 43 at [79].

55. It is noted that (s 90(2B)(c)) requires the court to consider, on the issue of leave:

> if the Children's Court considers that the present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child or young person and whether that course would be in the best interests of the child or young person.

56. The "placement hierarchy" prescribed: s 10A(3) of the Care Act establishes, if it is practicable and in the best interests of the child, the first preference for permanent placement is for the child to be restored to the parent(s). In *Director of Family and Community Services v Jack* [2012] NSWChC 7 that:

> There is nothing in the Act which specifically indicates that a child should remain with a parent unless the court is positively satisfied that such a placement would be contrary to the child's best interests. The statutory provisions outlined above, however, suggest to me that an order giving responsibility of a child to the Minister should only be made as an order of last resort. The majority of children are raised by their parents, the relationship between parent and child is one of the closest, if not the closest, of all relationships and the mere fact of the relationship will invariably receive substantial weight in any given case. This view receives support from decisions of the High Court and courts in the Australian Capital Territory and in New South Wales.

57. As was said by the High Court in *M v M* (1998) 166 CLR 69 at [20] in the context of proceedings in the Family Court for custody or access:

> in determining what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in the child's interest to maintain the filial relationship with both parents

58. The second preference for permanent placement is guardianship of a relative, kin or other suitable person. The paternal grandmother is such a relative.

59. The next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted.

60. The last preference is for the child to be placed under the parental responsibility of the Minister. The Secretary must assess whether there is a realistic possibility of restoration of the child to the parent(s) within a reasonable period.

61. Section 83(8A) states "reasonable period" for the purposes of this section must not exceed 24 months.

62. The principles relating to the phrase "a realistic possibility of restoration" may be summarised by reference to *Re Campbell* [2011] NSWSC 761 and *Re Tanya* [2016] NSWSC 794:

    - a possibility is something less than a probability; that is, something that is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible
    - the concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve
    - the possibility must be "realistic", that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". It needs to be "sensible" and "commonsensical"
    - a realistic possibility may be evidenced at the time of hearing by a coherent program already commenced and with some significant "runs on the board", or by the development of and commitment to a cohesive and viable plan that is sensible, practicable and viable within a reasonable time.

63. There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, that the parent(s) are likely to be able to satisfactorily address the identified risk issues.

64. The court may take into account the progress of parents in relation to their rehabilitation, their progress in respect of gaining insight into their parenting deficiencies, and their ability to satisfactorily address the issues that have led to the removal of the child.

65. The court may also have regard to any plan that prepares, educates or assists parents in moving towards a restoration, which involves for example, supports, scaffolding, treatment, training and education, provided it is viable and practicable.

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

67. It is now well settled law that the proper test to be applied in care proceedings in respect of final orders is that of "unacceptable risk to the child": *M v M* (1998) 166 CLR 69 at [25]:

68. The principles set out apply equally to all forms of harm, such as physical and emotional harm.

69. Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] Fam CA 1235. This is an exercise in foresight.

70. The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated.

71. Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

72. These proceedings are governed by s 90 of the Care Act. This statutory power enables a review of orders without the need for an appeal, where there has been a "significant change in any relevant circumstances" since the original order.

> Section 90(6) Before making an order to rescind or vary a care order that places a child or young person under the parental responsibility of the Minister, or that allocates specific aspects of parental responsibility from the Minister to another person, the Children's Court must take the following matters into consideration—
>
> (a) the age of the child or young person
>
> (b) the views of the child or young person and the weight to be given to those views
>
> (c) the length of time the child or young person has been in the care of the present caregivers and the stability of present care arrangements
>
> (d) the strength of the child's or young person's attachments to the birth parents and the present caregivers
>
> (e) the capacity of the birth parents to provide an adequate standard of care for the child or young person,
>
> (f) the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded.
>
> Section 90(7) If the Children's Court is satisfied, on an application made to it with respect to a child or young person, that it is appropriate to do so—
>
> (a) it may, by order, vary or rescind an order for the care and protection of the child or young person, and
>
> (b) if it rescinds such an order — it may, in accordance with this Chapter, make any one of the orders that it could have made in relation to the child or young person had an application been made to it with respect to the child or young person. Integrating the facts and law

73. The objective evidence is that …

Decision option

I have serious concerns about disrupting that environment by interfering with the current arrangement for the care of the child, and even deeper concerns as to the capacity of the parent to bring to that task the necessary level of skill and understanding, either on his own or jointly with the …

I also have serious concerns about disrupting that environment having regard to the risk factors set out regarding the … and their ability to manage the stressors of own mental health if parental responsibility is allocated to …

Decision option

Restoration of the child to the would involve an unacceptable risk of harm which is not capable of mitigation to a level that safeguards her safety, welfare and well-being.

I am satisfied, therefore, having regard to the circumstances of the child and a consideration of the evidence that there is no realistic possibility of restoration of the child being restored in a reasonable time.

The Children's Court therefore accepts the assessment of the Secretary that there is no realistic possibility of restoration of the child being restored to the parent within a reasonable time: s 83(5) of the Care Act.

Leave under s 90(2) of the Care Act having been granted, the issue for the court now is therefore, whether the previous care orders should be varied or rescinded: s 90(6). Before making an order to rescind or vary a care order that places a child or young person under the parental responsibility of the Minister, or that allocates specific aspects of parental responsibility from the Minister to another person, the Children's Court must take the following matters into consideration:

- the age of the child or young person
- the views of the child or young person and the weight to be given to those views
- the length of time the child or young person has been in the care of the present caregivers and the stability of present care arrangements
- the strength of the child's or young person's attachments to the birth parents and the present caregivers
- the capacity of the birth parents to provide an adequate standard of care for the child or young person,
- the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded.

Under s 90(7), if the Children's Court is satisfied, on an application made to it with respect to a child or young person, that it is appropriate to do so:

(a) it may, by order, vary or rescind an order for the care and protection of the child or young person, and

(b) if it rescinds such an order — it may, in accordance with this Chapter, make any one of the orders that it could have made in relation to the child or young person had an application been made to it with respect to the child or young person.

I have given consideration to each:

- the age of each child: this is often a relevant and persuasive factor, particularly with older children or young persons, but I do not consider it significant in the circumstances of the present case
- the wishes of the child and the weight to be given to those wishes: I have dealt with this issue above

- the length of time the children have been in the care of the present caregivers: this is a factor of some weight in this case
- the strength of the child's attachments to the birth parents and the present caregivers: the question of attachment weighs against a restoration, in favour of maintaining the current placement, in accordance with the clinician's view
- the capacity of the birth parents to provide an adequate standard of care for the children: I have dealt with this issue above,
- the risk to the children of psychological harm if the present care arrangements are varied or rescinded: I am satisfied that for the reasons given that more probably than not, restoration poses an unacceptable risk of psychological harm to these children.

For all the reasons articulated, I am satisfied that the previous care orders should not be rescinded: s 90(6).

Decision option

The Children's Court does not accept the assessment of the Secretary that there is no realistic possibility of restoration of the child being restored to the parent within a reasonable time: s 83(5) of the Care Act.

Leave under s 90(2) of the Care Act having been granted, the issue for the court now is therefore, whether the previous care orders should be varied or rescinded: s 90(6). In making this determination the court is required have regard to the matters set out in s 90(6). I have given consideration to each:

- the age of each child: this is often a relevant and persuasive factor, particularly with older children or young persons, but I do not consider it significant in the circumstances of the present case
- the wishes of the child and the weight to be given to those wishes: I have dealt with this issue above
- the length of time the children have been in the care of the present caregivers: this is a factor of some weight in this case
- the strength of the child's attachments to the birth parents and the present caregivers: the question of attachment weighs against a restoration, in favour of maintaining the current placement, in accordance with the clinician's view
- the capacity of the birth parents to provide an adequate standard of care for the children: I have dealt with this issue above,
- the risk to the children of psychological harm if the present care arrangements are varied or rescinded: I am satisfied that for the reasons given that more probably than not, restoration poses an unacceptable risk of psychological harm to these children.

For all the reasons articulated, I am satisfied that the previous care orders should not be rescinded: s 90(6).

Decision option

The Children's Court does not accept the assessment of the Secretary that there is no realistic possibility of restoration of the child being restored to the parent within a reasonable time: s 83(5) of the Care Act.

Leave under s 90(2) of the Care Act having been granted, the issue for the court now is therefore, whether the previous care orders should be varied or rescinded: s 90(6). In making this determination the court is required have regard to the matters set out in s 90(6). I have given consideration to each:

- the age of each child: this is often a relevant and persuasive factor, particularly with older children or young persons, but I do not consider it significant in the circumstances of the present case
- the wishes of the child and the weight to be given to those wishes. I have dealt with this issue above
- the length of time the children have been in the care of the present caregivers. This is a factor of some weight in this case
- the strength of the child's attachments to the birth parents and the present caregivers: the question of attachment weighs in favour of restoration
- the capacity of the birth parents to provide an adequate standard of care for the children: I have dealt with this issue above,
- the risk to the children of psychological harm if the present care arrangements are varied or rescinded: I am satisfied that for the reasons given that more probably than not, restoration does not pose an unacceptable risk of psychological harm to these children.

Note: Interim order regarding a variation or rescission application

Where an application to vary or rescind an order is made but not determined, the court may make an interim order. An interim order may have the effect of varying the original order but not rescinding it. For a discussion of the nature of a leave application: see *Re Edward* [2001] NSWSC 284 and P Mulroney, "Preparing and running a section 90 case: a perspective from the Bench" [2008] 7 CLN.

Revisiting the issue of establishment or finding of no realistic possibility of restoration (NRPOR)

In *Re Alistair* [2006] NSWSC 411, Kirby J considered a finding made in the Children's Court in relation to a finding pursuant to s 71(1) and held that, in the course of a hearing, where a ruling or determination is made, it is open to the court, before final orders, to revisit the issue if it is appropriate to do so.

The reasoning applies equally to a finding that there is no realistic possibility of restoration to a parent.

The discretion to set aside a properly made finding during the care proceedings is subject to a number of relevant considerations as identified by Kirby J, referring to Hale J's (as she then was) decision *In re B (Minors) (Care Proceedings: Issue Estoppel)* [1997] 3 WLR 1 as follows:

> (1) The court will wish to balance the underlying considerations of public policy, (a) that there is a public interest in an end to litigation — the resources of the courts and everyone involved in these proceedings are already severely stretched and should not be employed in deciding the same matter twice unless there is a good reason to do so; (b) that any delay in determining the outcome of the case is likely to be prejudicial to the welfare of the individual child; but (c) that the welfare of any child is unlikely to be served by relying upon determinations of

the fact which turn out to have been erroneous; and (d) the court's discretion, like the rules of the issue estoppel, as pointed out by Lord Upjohn in *Carl Zeiss Stifung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 947, "must be applied so as to work Justice and not injustice".

(2) The court may well wish to consider the importance of the previous findings in the context of the current proceedings. If they are so important that they are bound to affect the outcome one way or another, the court may be more willing to consider a rehearing than if they are of lesser or peripheral significance.

(3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial. By this I mean something more than the mere fact that different judges might on occasions reached different conclusion upon the same evidence. No doubt we would all be reluctant to allow a matter to be re-litigated on that basis alone. The court will want to know (a) whether the previous findings were the result of a full hearing in which the person concerned took part in the evidence was tested in the usual way; (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time; and (c) whether there is any new evidence or information casting doubt upon the accuracy of the original findings.

Delay

In *Bell-Collins children v Sec FACS* [2015] NSWSC 701, Slattery J stressed the significance of delay noting "anything which is likely to unduly delay proceedings is an important relevant consideration".

The paramount concern to protect children from harm and promote their development will usually involve giving priority to bringing proceedings to finality as quickly as possible. Anything which is likely to unduly delay these proceedings is an important relevance:

- delays have an impact on well-being of child due to future placement remaining uncertain
- in reality, litigation, properly conducted, takes time and appropriate preparation
- the granting of leave necessarily means there will be a further element of delay. However, the issues at stake and the importance of the need for scrutiny decisively outweighs the articulated concerns about further procedural delay.

The applicants' likely prospects of success and matters of public policy

Justice Slattery agreed with the then President of the Children's Court, Marien P, that the interpretation of "arguable case", as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is "reasonably capable of being argued" and has "some prospect of success" or "some chance of success". For example:

- DCJ not considering applicant as a placement option possible Secretary may withdraw from their position
- possible Secretary may withdraw from their position
- the applicant did not appreciate the nature of the concession
- the concession was not free and voluntary
- there was mistake or other circumstances affecting the integrity of the concession
- the concession was induced by threats or other impropriety.

[2-2420] Guardian ad litem: s 100 — child or young person

Last reviewed: November 2024

The primary right of appearance to parties in Children's Court proceedings is granted under s 98.

(2) However, if the Children's Court is of the opinion that a party to the proceedings who seeks to appear in person is not capable of adequately representing himself or herself, it may require the party to be legally represented.

(2A) If the Children's Court is of the opinion that a party to the proceedings is incapable of giving proper instructions to a legal representative, the Children's Court is to appoint a guardian ad litem for the person under s 100.

Under s 100(1) the Children's Court may appoint a guardian ad litem for a child or young person if it is of the opinion that—

(1) …

(a) there are special circumstances that warrant the appointment, and

(b) the child or young person will benefit from the appointment.

…

(3) The functions of a guardian ad litem of a child or young person are—

(a) to safeguard and represent the interests of the child or young person, and

(b) to instruct the legal representative of the child or young person.

(4) A legal representative of a child or young person for whom a guardian ad litem has been appointed is to act on the instructions of the guardian ad litem.

Decision

The court is of the opinion that:

- there are special circumstances that warrant the appointment, and
- the child or young person will benefit from the appointment.

The special circumstances include:

- that the child or young person has special needs because of age, disability or
- illness or
- that the child or young person is not capable of giving proper instructions to a legal representative.

The court orders the appointment of a guardian ad litem.

The legal practitioner must bring the circumstance or circumstances to the attention of the court as soon as is reasonably possible following the legal practitioner becoming aware of the circumstance or circumstances: PN 5.

Guardian ad litem and amicus curiae-parents — s 101

The primary right of appearance to parties in Children's Court proceedings is granted under s 98:

(2) However, if the Children's Court is of the opinion that a party to the proceedings who seeks to appear in person is not capable of adequately representing himself or herself, it may require the party to be legally represented.

(2A) If the Children's Court is of the opinion that a party to the proceedings is incapable of giving proper instructions to a legal representative, the Children's Court is to appoint a guardian ad litem for the person under s 101.

Under s 101 the Children's Court may—

(a) appoint a guardian ad litem for either or both of the parents of a child or young person if it is of the opinion that the parent is, or the parents are, incapable of giving proper instructions to his or her, or their, legal representative.

Circumstances that warrant the appointment of a guardian ad litem may include that the parent of a child or young person has an intellectual disability or is mentally ill.

The functions of a guardian ad litem of a parent of a child or young person are—

- to safeguard and represent the interests of the parent, and
- to instruct the legal representative of the parent.

A legal representative of a parent for whom a guardian ad litem has been appointed is to act on the instructions of the guardian ad litem.

The court is of the opinion that:

- the parent is incapable of giving proper instructions to their, legal representative, in that the parent has an intellectual disability or is mentally ill, and
- the appointment will safeguard and represent the interests of the parent.

The court orders the appointment of a guardian ad litem (GAL).

Note: when the GAL has been identified by the GAL Panel Co-ordinator the court needs to appoint the GAL.

[2-2440] Expedition and adjournments — s 94

Last reviewed: November 2024

Section 94 Expedition and adjournments

(4) The Children's Court should avoid the granting of adjournments to the maximum extent possible and must not grant an adjournment unless it is of the opinion that:

(a) it is in the best interests of the child or young person to do so, or

(b) there is some other cogent or substantial reason to do so.

[2-2460] Re-listing for non-compliance with directions

Last reviewed: November 2024

If any direction of the court is not complied with, the case may be relisted before the court by any party on 48 hours' notice for further directions. The court may re-list a matter for further directions on its own motion if any direction is not complied with.

If it appears to a party that a hearing date is in jeopardy as a result of non-compliance with orders or directions of the court or because of intervening events, the party must immediately approach the court for the urgent re-listing of the matter before a judicial officer.

Failure to comply with directions of the court or PN 5 may result in an order for costs being made against the non-complying party in accordance with s 88 of the Care Act.

[2-2480] Vacate a hearing date — Form 14

Last reviewed: November 2024

Any application to vacate a hearing date must be in writing on the prescribed Form 14 Application to vacate a hearing date and must state the reasons for the application. The party bringing the application to vacate a hearing must give reasonable notice to all other parties that an application to vacate is being made. When a hearing date has been allocated, it will not be vacated unless the party seeking to vacate the hearing provides cogent and compelling reasons.

Note: Form 14 Application to vacate hearing, together with all relevant information, should be submitted in writing not less than 21 days before the hearing date or, in the case of urgent circumstances arising after that time, as soon as practicable before the date of hearing.

[2-2500] Emergency care and protection orders — s 46

Last reviewed: November 2024

46 Emergency care and protection orders

(1) The Children's Court may make an order for the emergency care and protection of a child or young person if it is satisfied that the child or young person is at risk of serious harm.

(2) The order, while in force, places the child or young person in the care responsibility of the Secretary or the person specified in the order.

(3) The order has effect for a maximum period of 14 days, unless the order is extended in accordance with subsection (4).

(4) An order under this section may, while the order remains in force, be extended once only for a further maximum period of 14 days.

(5) If an application is made for the extension of an order under this section before the order expires, the order remains in force until the Children's Court makes a final determination on the application, even if that occurs after the original expiry date.

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

Removal of a child into state care may be sought by seeking orders from the court (s 34(2)(d)), by the obtaining of a warrant (s 233), or, where appropriate, by effecting an emergency removal (s 34(2)(c)). See also ss 43 and 44.

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

Subpoena — PN 5

Parties must issue subpoenas as soon as is practicable after the proceedings are commenced so that documents can be produced and inspected in a timely manner and are available for the proper preparation of the case, including submission to experts.

The issuing party must endorse on the subpoena the proposed access orders sought by the party.

Where the subpoena has not been served or where no documents have been produced, the issuing party may seek a further return date from the court on the return of subpoena, or the Registrar of the court following the mention of the return of subpoena.

Where an application is to be made to set aside the subpoena by the producer or any other party or person with sufficient interest, written notice of the application stating the grounds for the application in broad terms only is to be provided to the court and the issuing party prior to the return date.

Where an application to set aside the subpoena is to be made the applicant and the issuing party are to attend the court on the return date. Where the producer or any other party objects to the access orders proposed by the issuing party written notice of the objection is to be provided to the court and the issuing party prior to the return date.

Where an objection to the proposed access orders is made and agreement is not reached between the parties prior to the return date the issuing party and the objecting party are to attend the court on the return date.

Where the documents have been produced and no objection to the proposed access orders has been raised the court may make orders in accordance with the proposed access orders in the absence of the parties subject to any application to set aside the subpoena. Before making an order for access in the absence of the parties under PN 5 [15.7] or [15.8], the court must be satisfied that r 30A(8) of the Children's Court Rule 2000 has been complied with.

30A Form of subpoena

(1) A subpoena must not be addressed to more than one person.

(2) Unless the court orders otherwise, a subpoena must identify the addressee by name or by description of office or position.

(3) A subpoena for production must—

(a) identify the document or thing to be produced, and

(b) specify the date, time and place for production.

(4) A subpoena to attend to give evidence must specify the date, time and place for attendance.

(5) The date specified in a subpoena must be the date of the hearing to which it relates or any other date as permitted by the court.

(6) The place specified for production may be the court or the address of any person authorised to take evidence in the proceeding as permitted by the court.

(7) A subpoena must specify the last date for service of the subpoena, being a date not earlier than—

(a) 5 days, or

(b) any shorter or longer period as ordered by the court and specified in the subpoena,

before the date specified in the subpoena for compliance with it.

(8) The party on whose application a subpoena for production is issued must cause copies of the subpoena to be served not only on the person addressed in the subpoena but also on all of the other parties to the proceedings.

Where a party is not represented by a legal practitioner access is to take place in the presence of a member of the registry staff. Photocopy access may only be provided to an unrepresented party with leave of the court.

If photocopy access is granted to any document produced on subpoena, it shall be a condition of photocopy access that the copy shall not be used for any purpose other than the proceedings for which the document has been produced, unless the court otherwise directs.

A subpoena for production cannot be issued after the matter has been listed for a contested final hearing, except with the leave of the court.

The producer may produce a copy of any document instead of the original document unless the issuing party has clearly indicated in the schedule of documents that the original document is required to be produced.

Subpoena — general order

Where proposed access orders have not been endorsed on the subpoena and no objection to access has been raised, the court may make the following standard access orders in the absence of the parties subject to any application to set aside the subpoena:

The issuing party is to have first access within 3 working days and thereafter access to all parties. Leave is granted to a legal practitioner of a party to uplift documents for 3 working days and photocopy documents that the party proposes to rely on at the hearing or to be forwarded to the Children's Court Clinic or other expert.

The rule in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 precludes a party from making collateral use of documents obtained through the court's compulsory processes such as subpoenas.

The rule states: "where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence": *Hearne v Street* (2008) 235 CLR 125.

Note: The subpoena needs to also be served on all parties: Children's Court Rule 2000, r 30A(8).

Subpoena with proposed orders

Where proposed access orders have been endorsed on the subpoena and no objection to access has been raised the court may make the following access orders:

Access is granted in accordance with the proposed access order.

The rule in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 precludes a party from making collateral use of documents obtained through the court's compulsory processes such as subpoenas, see above at **Subpoena — general order**.

Subpoena — access is granted to legal practitioners only

The issuing party is to have first access within 3 working days and thereafter access to all parties. Leave is granted to a legal practitioner of a party to uplift documents for 3 working days and photocopy documents that the party proposes to rely on at the hearing or to be forwarded to the Children's Court Clinic or other expert.

The rule in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 precludes a party from making collateral use of documents obtained through the court's compulsory processes such as subpoenas, see above at **Subpoena — general order**.

Subpoena — access is granted to redacted documents

The issuing party is to have first access to the redacted documents within 3 working days and thereafter access to all parties. Leave is granted to a legal practitioner of a party to uplift documents for 3 working days and photocopy documents that the party proposes to rely on at the hearing or to be forwarded to the Children's Court Clinic or other expert.

The rule in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 precludes a party from making collateral use of documents obtained through the court's compulsory processes such as subpoenas, see above at **Subpoena — general order**.

Possible objection to subpoena

Access is granted to the legal practitioner of … in the first instance for 7 working days and if no objection is taken, thereafter leave is granted to a legal practitioner of a party to uplift documents for 3 working days and photocopy documents that the party proposes to rely on at the hearing or to be forwarded to the Children's Court Clinic or other expert. If an objection is taken by the … then liberty to restore on 48 hours notice so that the matter may be determined by the court.

The rule in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 precludes a party from making collateral use of documents obtained through the court's compulsory processes such as subpoenas, see above at **Subpoena — general order**.

Short service subpoena

Practice Note 5 Case management in care proceedings states at [15.1]:

> Parties must issue subpoenas as soon as is practicable after the proceedings are commenced so that documents can be produced and inspected in a timely manner and are available for the proper preparation of the case, including submission to experts.

PN 5 at [15.12] states: "A subpoena for production cannot be issued after the matter has been listed for a contested final hearing, except with the leave of the Court."

An application has been made this morning on behalf of … that a subpoena to produce documents addressed to … be served on short notice and made returnable in a truncated period of time.

The effect of the grant of an order for short service is to truncate the time for production of documents to the Court from the usual period which the Court ordinarily determines as a reasonable one. There is little purpose to be served in truncating the time for production of documents to the Court if the burden cast upon the recipient of the subpoena is such that it is unlikely to be able to achieve production in that shortened time.

The proposed subpoena contains a Schedule that suggests to me that the searches required to be made by … to satisfy the subpoena, will take a/not insignificant period of time.

The relevance of the documents sought to be produced to the court relate to …

1. Ordinarily, short service of a subpoena is granted by reason of one or more particular events occurring during the conduct of a trial. For example when there is a witness who is in the process of giving evidence or who is shortly to give evidence and it is discovered that there are documents which are necessary and ought to be produced to enable the conduct of the examination of that witness in an appropriate way and without disruption to the hearing.
2. As well, ordinarily, the Court would expect that where a subpoena is to be served on short notice, some contact is made with the intended recipient to see if they are likely to be in a position to be able to produce the documents within the shortened time. This was/was not done here.
3. The burden of searching for and producing the documents the subject of this subpoena is significant and, in my view, is likely/unlikely to be able to be achieved in any shortened time.
4. Having regard to the stage of this hearing, I see prejudice/no prejudice to a party to issue this subpoena and have it made returnable in the ordinary course.

I am satisfied/not satisfied that justice requires that the leave be granted and for the documents to be produced within the shortened time.

Accordingly, I order that the plaintiff have leave to file and serve on … by … time … on date … a subpoena for production of documents in the form provided to the Court today which I will now mark MFI 1, such subpoena to be returnable at time … date …

[2-2520] Children's Court may dispense with service — s 256A

Last reviewed: November 2024

256AChildren's Court may dispense with service

(1) If the Children's Court is satisfied that an unacceptable threat to the safety, welfare or well-being of a child or young person or a party to any proceedings would arise if any notice or other instrument required or authorised by this Act was given to, or any document served on, a particular person, the Children's Court may make an order dispensing with the giving of notice or instrument to, or service on, the person concerned.

(2) An order under this section excuses every other person from the requirement to comply with any provision of this Act that requires notification to, or service on, that person.

Hear from the parties on this application.

Dispensing with service was commented on by the Supreme Court in *Re Andrew* [2004] NSWSC 842, Wood CJ said at [56]:

> I am, however, satisfied that it is only in exceptional circumstances that the power to dispense with service could be exercised, that is, where service upon, or participation of, the parent in the proceedings, would unacceptably threaten the safety, welfare and well-being of the child. The power must be read in a way that reflects the need, in this context, to balance the interests of natural justice and those of the child. Moreover before it is exercised it would seem to be appropriate, if not essential, for a Separate Representative for the child to be appointed, who might place before the court any matter in opposition to the effective exclusion of the father from the proceedings.

Generally, evidence will be required that demonstrates the existence of an unacceptable risk before any order is made. It might be that careful redaction of documents so as to remove personal identifying information such as the location of the children or the mother will suffice to safeguard the safety of the children and might allow the father to participate in the proceedings. However, it's a matter of fact and degree and redaction will not be appropriate where the very fact of the proceedings coming to the attention of the person against whom the order is sought will induce the unacceptable risk to the children. It is suggested that dispensing with service in those rare cases where the risk of harm to the children is unacceptable, will be the only appropriate course.

The Care Act also has provision for orders that would exclude certain persons from participating in the proceedings even where they have been served: see s 104A. This was discussed by Blewitt CM in *DFaCs and the Marks Children* [2016] NSWChC 2:

> it would be an extraordinary step for this Court to rule that the father is not a "parent" and on that basis should be excluded from participating in the proceedings.

He rejected the argument that because the mother had sole parental responsibility arising from Family Law orders, the father did not fall within the definition of parent in s 3 of the Care Act. However, applying *Re Andrew*, above, in this instance, extraordinary circumstances did exist such as to exclude the father from the proceedings under s 104A.

In *Re Jaden and Kalen (No 2)* (unrep, NSWDC 16/4/18), Olsson SC heard an appeal brought by the ILR against an order of the Children's Court refusing to dispense with service under s 256A upon the mother and two extremely violent partners. In setting aside the orders in respect of the mother (AA) and one of the fathers (CC), with whom the mother was still in a relationship (thereby representing an unacceptably high risk that documents would be disclosed to that father), her Honour took into account:

- the likelihood of a heightened level of violence if CC learned of the complaints against him made by the mother and one of the children
- any harm that befell the mother would have "an enormous impact on their lives and would make their precarious emotional repair and development even more compromised"
- the violence upon the mother was of a very real and serious nature causing a neural impairment, physical bruising and other injuries
- "The terror that has been instilled in at least one of the children suggests that it is more likely than not that the department would succeed in the application to have the children taken under the parental responsibility of the Minister".

Additionally:

- an order was made against father (with whom neither the mother nor CC had any relationship) prohibiting him from sharing information in the documents with the mother or CC.
- it was ordered that the Secretary provide the mother and CC with a list of the child protection concerns so that they could respond in general terms
- that the solicitors for the mother and CC remained bound by undertakings given by them in the Children's Court not to disclose information contained in the documents

[2-2540] Exclusion of particular persons from proceedings — s 104A

Last reviewed: November 2024

(1) At any time while the Children's Court is hearing proceedings with respect to a child or young person, the Children's Court may direct any person (other than the child or young person) to leave the place where the proceedings are being heard.

(2) If any non-court proceedings are to be held with respect to a child or young person, the Children's Court may direct any person (other than the child or young person) not to be present at the place where the proceedings are to be held at any time during the proceedings concerned.

(3) The Children's Court may give a direction under this section only if it is of the opinion that it is in the interests of the child or young person that such a direction should be given.

(4) The powers exercisable by the Children's Court under this section may be exercised even if the person to whom a direction is given is directly interested in the proceedings concerned.

[2-2560] Aboriginal or Torres Strait Islanders

Last reviewed: November 2024

If the child is an Aboriginal or Torres Straits Islander there are particular additional requirements to be addressed.

83A Additional requirements for permanency plans for Aboriginal and Torres Strait Islander children and young persons

(1) This section sets out requirements for the preparation of a permanency plan for an Aboriginal or Torres Strait Islander child or young person that are in addition to the requirements set out in section 83.

(2) If the Secretary assesses, under section 83(3), that there is not a realistic possibility of restoring a child or young person to the child's or young person's parents within a reasonable period, the Secretary must—

(a) include in the permanency plan evidence of the active efforts made, in accordance with the principle of active efforts, to determine whether the child or young person can be placed with any of the following, in accordance with the principle for the general order for placement of Aboriginal and Torres Strait Islander children and young persons under section 13(1)—

(i) a relative,

(ii) a member of kin or community,

(iii) another suitable person, and

(b) include in the permanency plan—

(i) a recommendation that the child or young person be placed with a relative, member of kin or community or other suitable person identified under paragraph (a), or

(ii) a recommendation that the child or young person not be placed with a relative, member of kin or community or other suitable person and the reasons for the recommendation.

(3) After considering a permanency plan for an Aboriginal or Torres Strait Islander child or young person, the Children's Court must not make a final care order unless it expressly finds —

(a) the plan complies with the following—

(i) the permanent placement principles,

(ii) the Aboriginal and Torres Strait Islander Children and Young Persons Principle,

(iii) the placement principles for Aboriginal and Torres Strait Islander children and young persons set out in section 13, and

(b) the plan includes a cultural plan that sets out how the following will be maintained and developed—

(i) the child's or young person's connection with the child's or young person's Aboriginal or Torres Strait Islander family and the Aboriginal or Torres Strait Islander community of the child or young person,

(ii) the child's or young person's Aboriginal or Torres Strait Islander identity, and

(c) the plan has been developed, to the greatest extent practicable, in consultation with—

(i) the child or young person, and

(ii) the parents, family and kin of the child or young person, and

(iii) relevant Aboriginal or Torres Strait Islander organisations or entities for the child or young person.

The permanency planning must address how the plan has complied with s 13 of the Care Act: s 78(2A) which provides:

(2A) If the care plan is for an Aboriginal or Torres Strait Islander child or young person, the plan must also—

(a) include a cultural plan that sets out how the following will be maintained and developed—

(i) the child's or young person's connection with their Aboriginal or Torres Strait Islander family and community,

(ii) the child's or young person's Aboriginal or Torres Strait Islander identity, and

(b) be developed, to the greatest extent practicable, in consultation with—

(i) the child or young person, and

(ii) the parents, family and kin of the child or young person, and

(iii) relevant Aboriginal or Torres Strait Islander organisations or entities for the child or young person, and

(c) address how the plan has complied with the following—

(i) the permanent placement principles,

(ii) the Aboriginal and Torres Strait Islander Children and Young Persons Principle,

(iii) the placement principles for Aboriginal and Torres Strait Islander children and young persons set out in section 13.

It should also address the principle set out in s 9(2)(d) which requires that the child's identity, language and cultural ties be, as far as possible, preserved. Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child or young person is "intrinsic" to any assessment of what is in the child's best interests: *DOHS and K Siblings* [2013] VChC 1 per Wallington M at p 4.

It follows that the need to consider Aboriginality and ensure the participation of families and communities must be applied across all aspects of child protection decision making.

If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility: s 79(1).

Aboriginal and Torres Strait Islander principles — ss 11, 12, 12A, 13, 14

The Aboriginal and Torres Strait Islander principles are enshrined in Ch 2, Pt 2 Care Act.

Section 11(1) provides that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children with as much self-determination as is possible.

Proper implementation of the Aboriginal and Torres Strait Islander principles requires an acknowledgement that the cultural identity of an Aboriginal child is "intrinsic" to any assessment of what is in the child's best interests: *Secretary of the Department of Communities and Justice and Fiona Farmer* [2019] NSWChC 5 at [116]–[117].

The principles are not simply a hierarchy of options for the physical placement of an Aboriginal child in out-of-home-care (OOHC) but are made up of five elements:

- prevention
- partnership
- placement
- participation,
- connection.

These are aimed at enhancing and preserving Aboriginal children's sense of identity, as well as their connection to their culture, heritage, family and community: *Family is Culture Review Report* 2019, p 250.

Particular principles regarding Aboriginal and Torres Strait Islander children and their special heritage are enunciated by s 13 and are reflected particularly in ss 78(2A) and 83A. Broadly speaking, these principles under s 13(1) provide that if Aboriginal and Torres Strait Islander children are to be removed from their parents, they should be placed with:

- extended family members or, at least
- members of their community or, if that is not practical

- other Aboriginal and Torres Strait Islander persons residing nearby or, as a last resort
- a suitable person(s) approved by DCJ after consultation with members of the extended family and appropriate Aboriginal and Torres Strait Islander organisations.

Identification

Section 5 provides the relevant definitions in relation to the identification of Aboriginal and Torres Strait Islander children. The decision of *Hackett (a pseudonym) v Secretary, DCJ* [2020] NSWCA 83, although relating to the *Adoption Act 2000*, provides guidance in respect of the application of s 5. "There is no requirement in order … to be an Aboriginal child for the child to have a specified proportion of genetic inheritance" and "descent is different from race": *Hackett* per Leeming JA at [53]; [86]; *Adoption Act*, s 4(1), (2).

The late identification, or the de-identification, of children by DCJ can have consequences for planning and placement so, in cases where identification is an issue, the court will be assisted by timely evidence from the parties.

If a child has one Aboriginal and Torres Strait Islander parent and one non-Aboriginal and Torres Strait Islander parent, the child may be placed with the person with whom the best interests of the child will be served having regard to the principles of the Act: s 13(4). Arrangements must be made to ensure the child has the opportunity for continuing contact with the other parents' family, community and culture: s 13(5).

In determining placement, account is to be taken of the child's expressed wishes and whether they identify as an Aboriginal and Torres Strait Islander person: s 13(2).

In relation to placement with non-Aboriginal and Torres Strait Islander persons, no final order allocating sole parental responsibility for an Aboriginal and Torres Strait Islander child to a non-Aboriginal and Torres Strait Islander person may be made except after extensive consultation and with the express approval of the Minister for Aboriginal Affairs and the Minister for Community Services: s 78A(4).

Further, if an Aboriginal and Torres Strait Islander child is placed with a non-Aboriginal and Torres Strait Islander carer, the following principles are to determine the choice of a carer (s 13(6)):

(a) Subject to the child's best interests, a fundamental objective is to be the reunion of the child with his/her family or Aboriginal and Torres Strait Islander community

(b) Continuing contact must be ensured between the child and his/her Aboriginal and Torres Strait Islander family, community and culture.

The Aboriginal and Torres Strait Islander placement principles under s 13 are an aspect of the important principle in s 9(2)(d) that a child's cultural ties should be preserved when they are removed from their family. However, s 13(1) must not be blindly implemented without regard to the principle of paramountcy and the other objects and principles set out in ss 8 and 9: *Re Victoria and Marcus* [2010] CLN 2. In the exceptional case of *Re Victoria and Marcus*, the children were placed with carers who were not Aboriginal rather than their Aboriginal grandparents as the court found there was a real risk the grandparents would actively discourage the children from identifying with their Aboriginal cultural links, "contrary to the whole purpose and spirit of the Aboriginal Placement Principles set out in s 13(1)": at [52].

The principles in s 13(1) do not apply to emergency placements to protect a child from serious risk of immediate harm, or to a placement of less than two weeks duration: s 13(7).

[2-2580] Parent capacity order — s 91B(b)

Last reviewed: November 2024

"Parent capacity order" means an order requiring a parent or primary care-giver of a child or young person to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills: PN 10.

Procedure for listing applications for a parent capacity order

In the usual course an application for a parent capacity order is to be listed within 2–3 weeks of filing the application. Unless the parties are seeking consent orders on the first return date the application is to be referred for a dispute resolution conference (DRC).

Practice Note 10 states hearing dates will ordinarily only be allocated after the DRC has failed to settle the matter: [7.1] Listing an application for hearing.

If unrepresented, the following text may be helpful:

> Parent capacity orders are used to help parents keep their children safe. The Children's Court can issue a stand-alone parent capacity order. This order requires a parent to participate in a program, service, course, therapy or treatment to improve their parenting skills so they can provide a safe, nurturing home for their child.
>
> Parent capacity orders aim to reduce the need for Communities and Justice (DCJ) to intervene, such as removal of a child from the family home or a decision not to return a child to their parent's care.
>
> The Children's Court can make a parent capacity if the following have identified:
>
> - an issue with the parent's or primary caregiver's care for a child or young person
> - the potential risk of significant harm to the child or young person
> - it is reasonable and practical to make a parent or primary caregiver participate in a service, course or treatment program
> - there is an appropriate and available service, course or treatment program
> - it is unlikely the parent or primary caregiver would participate unless an order is made.
>
> The duration of a parent capacity order depends on the service, program or treatment required. It is specified in the order. The Children's Court can vary the time frame or terminate the order early.

[2-2600] Overseas travel

Last reviewed: November 2024

> The child … born … is permitted to have an Australian travel document.

[2-2620] Costs in care proceedings

Last reviewed: November 2024

Section 88 does not provide the court with power to award costs against a non-party such as a legal representative: *Director General, DFaCS v Robinson-Peters* [2012] NSWChC 3 at [54].

Costs in care proceedings are not at large. The Care Act limits the power to make an order for an award of costs.

The standard of proof is on the balance of probabilities: s 93(4) Care Act.

The present costs application is brought pursuant to s 88.

Legal framework

Common law

Under the common law a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [134].

Section 88 of the Act

Section 88 of the Act places a limit on the common law.

The Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify it doing so: see s 88 of the Act.

"Exceptional circumstances" is not defined in the Act.

The court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning will correspond with the grammatical meaning of the provision: see *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78].

Grammatical meaning of "exceptional"

The *Macquarie Dictionary* defines "exceptional" as an exception or unusual instance; unusual; extraordinary.

Exceptional:

- may be quantitative or qualitative: see *R v Buckland* [2000] 1 All ER 907 at 912–913
- can include a single exceptional matter, or a combination of exceptional factors, or a combination of ordinary factors when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388.

Grammatical meaning of "circumstances"

The *Macquarie Dictionary* defines "circumstances" as a condition, with respect to time, place, manner … which accompanies, determines, or modifies a fact or event.

Circumstances:

- depend upon the facts of each individual case: see *R v Okinikan* [1993] 1 WLR 173
- includes the evidence adduced, the conduct of the parties and the ultimate result: see *Knight v Clifton* [1971] Ch 700
- are sufficiently wide to include background material that has a close temporal connection with the case: see *R v Lowery* [1993] Crim LR 225.

Meaning of exceptional circumstances

The phrase "exceptional circumstances" means what it says as a matter of ordinary English: see *Dong v Hughes* [2005] NSWSC 84 Levine J at [48].

However, the context of the words, the consequences of a literal grammatical construction, the purpose of the statute or the canons of construction may require the words of a statute to be read in a way that does not correspond with the literal or grammatical meaning: see *Project Blue Sky* at [78].

Context

The phrase "exceptional circumstances" used in s 88 is context dependent: see *SP v Department of Community Services* [2006] NSWDC 168.

Context includes:

- s 9 (Principles for administration of Act): The safety, welfare and well-being of the child/YP are paramount
- s 93 (General nature of proceedings): Proceedings are not to be conducted in an adversarial manner
- s 94 (Expedition and adjournments): All matters are to proceed as expeditiously as possible in order to minimise the effect of the proceedings on the child and family.

Purpose of the statute

In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: see *R v Buckland* [2000] 1 All ER 907 at 912–913.

Therefore, in determining whether exceptional circumstances exist or not within the meaning of s 88 of the Act consideration is given to the statutory scheme for child protection.

First, proceedings that relate to the welfare of a child are not to be regarded as normal adversary litigation: *S v Minister for Youth & Community Services* (1986) 10 Fam LR 849 per Powell J.

Secondly, as a matter of broad public policy, the litigation of childcare issues should not ordinarily be the subject of costs orders that could potentially inhibit public interest litigation concerning the welfare and well-being of children: see *Y v Secretary, Department of Communities and Justice (No 7)* [2021] NSWDC 477 per Levy J SC at [9].

Thirdly, at a micro level: "the policy basis behind the restriction on the power to award costs is based in the notion that parties should have as full an opportunity to be heard as is reasonably possible, and not be deterred from participating by adverse pecuniary consequences — the safety, welfare and well-being of the child being the paramount concern": see *Secretary, Department of Family and Community Services (NSW) and the Knoll Children (Costs)* [2015] NSWChC 2, Johnstone J, the President of the Children's Court at [24].

Fourthly, there is not a prohibition on costs. Arguably, there is recognition that adverse costs orders play an important role in litigation in that the very possibility of an adverse costs order ought to focus the mind …: see *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [68] per McHugh J.

Finally, s 88 retains some protection of a successful party's common law rights.

Case law relevant to exceptional circumstances

In *SP v Department of Community Services* [2006] NSWDC 168, Rein DCJ observed there is a theme or flavour about categories identified as falling within the ambit of s 88.

Categories include:

- deliberately misleading courts or parties
- other misconduct or wrongful conduct
- contumelious disregard of Court orders or the principles set out in s 93 of the Care Act
- the raising of baseless allegations or false issues
- the maintenance of proceedings solely for an ulterior motive
- the undue prolongation or blatant abuse of process that are mischievous and/or misconceived.

The use of epithets such as contumelious (scornful and insulting, insolent, gross, blatant); suggest conduct far worse than ordinary. The epithets take the meaning beyond the grammatical interpretation of "exceptional circumstances".

However, disregard of Court orders but not contumelious, or negligence but not gross, or an abuse of process but not blatant — may still amount to exceptional circumstances if there are, for example, a combination of factors or the context or purpose of the Act allows.

It is the consequence not the epithet that is more significant.

In any event, those categories are not exhaustive, see: *Joy Alleyne as independent legal representative for LC v Director General Department of Community Services (No 2)* [2009] NSWDC 171 at [11].

In *Department of Community Services v SM and MM* [2008] NSWDC 68 at [10], Garling J found that the parents who had to pay for legal representation for the Department's appeal was relevant to the consideration of exceptional circumstances.

In *XX v Nationwide News Pty Ltd* [2010] NSWDC 147, Gibson J identified factors, one of which concerned the identification or likely identification of a child which in his view was capable of amounting to exceptional circumstances. His Honour observed that this was an application that the plaintiffs "had to bring" for the protection of the child.

In *Department of Family and Community Services (DFaCS) and the Mason Children (Costs)* [2018] NSWChC 4 at [72], Sheedy CM found: "*A proper assessment of the evidence* ought to have demonstrated the unreliability of the conclusions reached by the Secretary and it is this that demonstrates the existence of exceptional circumstances that supports the need for compensatory costs". See also *Re A Foster Carer v Department of Family & Community Services (No 2)* [2018] NSWDC 71.

Secretary, DFaCS and the Knoll Children (Costs) [2015] NSWChC 2, Johnstone J was critical of the handling of the proposed relocation of the carers and children and the Department's disconnect in communication. The impropriety was low but the consequence high. Firstly, the carers' required separate representation, elongating the matter. Secondly, the

application would likely never have been brought but for the Department's poor handling. The context offended s 94 of the Act. The significant impropriety was of the grandmother in that case. However, Johnstone J looked to the purpose of the Act and said at [39]:

> I should be careful not to make an order that might be seen as inappropriately discouraging litigants in the position of this paternal grandmother from prosecuting proceedings that they perceive to be in the best interests of the children involved.

The Department was held to a different standard. The Secretary has a distinct role in the context of the Care Act and, as a model litigant, would not be discouraged from carrying out such duties because of the prospects of an adverse cost order.

Discretion

The general rule that costs follow the event reflects the notion that justice to a successful party is not achieved if it comes at the price of being out-of-pocket.

This rule may be departed from if there is a special situation or if the successful party has acted in such a way as to disentitle itself to costs (or partial costs): see *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 (Devlin J).

Costs should be fair and reasonable and made on proper grounds. The purpose is to compensate the person in whose favour it is made and not to punish the person against whom the order is made: *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34].

In *Rodden v R* (2023) 112 NSWLR 162 at [134] the Court acknowledged there is a salutary effect of an adverse costs order.

Decision option — order for applicant to pay costs

As against the … first, the proceedings were improperly commenced by …, because they were predicated on erroneous assumptions of fact, baseless allegations, and false issues, or were brought solely for the ulterior motive of frustrating or delaying the proposed adoption of the children by the …; and secondly, the conduct of the proceedings on behalf of the … was grossly negligent, leading to extensive waste of the court's time, and the unnecessary prolongation of the hearing by reason of groundless contentions, a lack of candour and mischievous and misconceived assertions. Order that the applicant pay the … costs of the proceedings in this court in the sum of …

Decision option — order for applicant to pay costs

Some of the costs incurred by the applicant were in fact incurred in unexceptional circumstances, discounting allowances must therefore be made. Order that the applicant pay the … costs of the proceedings in this court in the sum of …

Decision option — costs order refused, proceedings not improperly commenced

I am unable to conclude that the commencement and maintenance of the proceedings was characterised as an abuse of process, attended by hopelessness, or otherwise fraudulent. I do not consider a costs order is justified on the basis that the proceedings by the applicant were improperly commenced.

Decision option — costs order refused, proceedings not inappropriately prolonged

I turn to the contention that the proceedings were inappropriately prolonged, by erroneous assumptions of fact, baseless and false allegations, and or misconceived assertions, such as would justify the making of a costs order.

I was critical of some aspects of the presentation of the case on behalf of the … Some of these were evident in the course of the hearing, and others are apparent with the benefit of hindsight. I do not think this was a case, objectively viewed, that should have proceeded over … hearing days. Many of the contentious issues, however, arose as a result of the historical conduct of … or conduct other than in connection with the hearing, for example, … These were all factual issues that needed to be aired and fully examined. Other contentious issues were not solely attributable to the conduct of the …, such as the … Many of these issues were inextricably woven into the wider factual matrix, and it would be an invidious task to seek to separate out issues with a view to justifying a costs order. Ultimately, I have formed the view that I am unable to comfortably point to any particular unnecessary leading of evidence or cross-examination that could be characterised as so egregious as to constitute exceptional circumstance justifying an order, either as to the whole of the Carers' costs or some part thereof. On balance, it seems to me, I should be careful not to make an order that might be seen as inappropriately discouraging litigants in the position of … from prosecuting proceedings that they perceive to be in the best interests of the children involved.

The application for costs is, therefore, refused.

Decision option — costs order refused, "exceptional circumstances" not demonstrated

In my view, the … have/have not demonstrated any "exceptional circumstances" that justify an order for costs in their favour against the … and the application is refused.

Decision option — costs order refused, "exceptional circumstances" not demonstrated

It is true that her credit was impugned, and that there were aspects of her evidence demonstrated a lack of sincerity and candour. But these are considerations that attend all proceedings in which there are contentious circumstances and factual disputes and do not amount to "exceptional circumstances" that justify an order for costs and the application is refused.

[2-2640] Transferring a child protection order

Last reviewed: November 2024

231G When Children's Court may make order under this Division

The Children's Court may make an order under this Division transferring a child protection order to a participating State if—

(a) an application for the making of the order is made by the Secretary, and

(b) the child protection order is not subject to an appeal to the District Court, and

(c) the relevant interstate officer has consented in writing to the transfer and to the provisions of the proposed interstate order.

231J Children's Court to have regard to certain matters

(1) The Children's Court must not make an order under this Division unless it has received and considered—

(a) an updated care plan, if a care plan under s 78 was prepared in relation to the original care order, or

(b) in any other case, a report by the Secretary that contains the matters required by the regulations to be included in the report.

(2) In determining what order to make on an application under this Division, the Children's Court must have regard to—

(a) the principles in s 9, and

(b) whether the Secretary or an interstate officer is in the better position to exercise powers and responsibilities under a child protection order relating to the child or young person, and

(c) the fact that it is preferable that a child or young person is subject to a child protection order made under the child welfare law of the State where the child or young person resides, and

(d) any information given to the Children's Court by the Secretary or otherwise concerning any sentencing order under any Act, other than a fine, in force in respect of the child or young person or any criminal proceedings pending against the child or young person in any court.

(3) The Secretary must provide to the Children's Court an updated care plan or report referred to in subsection (1), in accordance with the rules of the Children's Court.

(4) Other requirements concerning the hearing and the making of an application, and the form of a care plan, under this Division may be prescribed by the regulations.

Transferring a pending child protection order

231L When Children's Court may make order under this Part

(1) The Children's Court may make an order under this Part transferring a child protection proceeding pending in the Children's Court to the Children's Court in a participating State if—

(a) an application for the making of the order is made by the Secretary, and

(b) the relevant interstate officer has consented in writing to the transfer.

(2) The proceeding is discontinued in the Children's Court on the registration in the Children's Court in the participating State, in accordance with the interstate law, of an order referred to in subsection (1).

231M Children's Court to have regard to certain matters

In determining whether to make an order transferring a proceeding under this Part, the Children's Court must have regard to—

(a) the principles in s 9, and

(b) whether any other proceedings relating to the child or young person are pending, or have previously been heard and determined, under the child welfare law in the participating State, and

(c) the place where any of the matters giving rise to the proceeding in the Children's Court arose, and

(d) the place of residence, or likely place of residence, of the child or young person, his or her parents and any other people who are significant to the child or young person (as referred to in s 9(2)(f)), and

(e) whether the Secretary or an interstate officer is in the better position to exercise powers and responsibilities under a child protection order relating to the child or young person, and

(f) the fact that it is preferable that a child or young person is subject to a child protection order made under the child welfare law of the State where the child or young person resides, and

(g) any information given to the Children's Court by the Secretary or otherwise concerning any pending criminal proceedings or sentencing order that is currently in force (other than a fine) in respect of the child or young person.

[2-2660] Order for supervision — s 76

Last reviewed: November 2024

In making an order under this section, the court notes the history and previously identified risks and the order is made to ensure the safety, welfare and well-being of the child. The order is made for … months.

Note: See s 76(3A) which provides:

(3A) The Children's Court may specify a maximum period of supervision that is longer than 12 months (but that does not exceed 24 months) if the Children's Court is satisfied that there are special circumstances that warrant the making of an order of that length and that it is appropriate to do so.

Note: Also, s 76(4):

(4) The Children's Court may require the presentation of the following reports—

(a) a report before the end of the period of supervision stating the following—

(i) the outcomes of the supervision,

(ii) whether the purposes of the supervision have been achieved,

(iii) whether there is a need for further supervision to protect the child or young person,

(iv) whether other orders should be made to protect the child or young person,

(b) one or more reports during the period of supervision describing the progress of the supervision.

[2-2680] Prohibition orders — s 90A

Last reviewed: November 2024

90A Prohibition orders

(1) The Children's Court may, at any stage in care proceedings, make an order (a prohibition order) prohibiting any person, including a parent of a child or young person or any person who is not a party to the care proceedings, in accordance with such terms as are specified in the order, from doing anything that could be done by the parent in carrying out his or her parental responsibility.

(2) A party to care proceedings during which a prohibition order is made may notify the Children's Court of an alleged breach of the prohibition order.

(3) The Children's Court, on being notified of an alleged breach of a prohibition order —

(a) must give notice of its intention to consider the alleged breach to the person alleged to have breached the prohibition order, and

(b) must give that person an opportunity to be heard concerning the allegation before it determines whether or not the order has been breached, and

(c) is to determine whether or not the order has been breached, and

(d) if it determines that the order has been breached—may make such orders (including a parent capacity order) as it considers appropriate in all the circumstances.

(4) The person who is alleged to have breached the prohibition order is entitled to be heard, and may be legally represented, at the hearing of the matter.

[2-2700] Order for undertakings — s 73

Last reviewed: November 2024

The court, noting the history and identified risks, makes an order accepting the undertakings provided in writing, signed by the person giving it, and remaining in force before the day on which the child attains the age of 18 years to ensure the safety, welfare and well-being of the child.

Examples of such undertakings:

- the parents keep DCJ officers informed of their place of residence and that of the child, and not change such address without first notifying such officers
- the child be presented by the parents for all medical appointments
- to comply with the terms of any contact order made by the court with respect to the child
- not to consume alcohol 24 hours before contact with the child, and/or not to be under the influence of alcohol or any other substance during contact.

Applications on breach of undertakings under s 73(5)

On being notified of an alleged breach of undertaking the court:

(a) must give the parties an opportunity to be heard concerning the allegation, and

(b) is to determine whether the undertaking has been breached, and

(c) if it finds that the undertaking has been breached, make such orders as it considers appropriate in all the circumstances.

Applications on breach of supervision under s 77(3)

On being notified of an alleged breach of a supervision order the court must:

(a) must give the parties an opportunity to be heard concerning the allegation, and

(b) is to determine whether the order has been breached, and

(c) if it finds that the order has been breached, may make such orders as it considers appropriate in all the circumstances.

[2-2720] Withdrawal of care application — s 66

Last reviewed: November 2024

66 Leave to withdraw care application

(1) A care application may be withdrawn by the person who made the application with the leave of the Children's Court.

(2) An application for leave to withdraw the care application must be accompanied by—

(a) a statement that indicates how the issues that caused the application to be brought have been resolved, or

(b) a care plan that specifies how those issues are proposed to be addressed.

[2-2740] Apprehended violence order (AVO) — s 40A

Last reviewed: November 2024

Section 40A of the *Crimes (Domestic and Personal Violence) Act 2007* (CDPVA) provides:

40A Apprehended violence order may be made in care proceedings

(1) The Children's Court may, during care proceedings, make an apprehended violence order for the protection of—

(a) the child to whom the care proceedings relate, or

(b) any person who is a relative of, or who resides on the same property as, the child, or may vary or revoke any existing order that protects any of those persons.

(2) The Children's Court may make, vary or revoke an order on the application of a party to the care proceedings or on its own motion if the court considers that the circumstances justify making, varying or revoking the order.

(3) The Children's Court is not to make or vary an order under this section that protects a person if the court is aware that the defendant is subject to criminal proceedings before another court and those criminal proceedings arose out of some or all of the circumstances that justify the making of the order.

(4) Before making, varying or revoking an order under this section, the Children's Court is to notify the Commissioner of Police and the Secretary of the Department of Family and Community Services and give the Commissioner and Secretary standing to appear in the proceedings.

(5) Before varying or revoking a police-initiated order under this section the Children's Court is to notify the Commissioner of Police and give the Commissioner standing to appear in the proceedings.

(6) Sections 48(3) and 72B do not apply to an application made under subsection (2).

(7) The parties to the care proceedings and the defendant against whom the apprehended violence order is proposed to be made all have standing to appear in respect of the making of the apprehended violence order.

Refer to s 40A(8) and (9) also.

The court may make an order on its own motion during care proceedings. There may be a general reluctance in becoming an applicant, possibly a witness, the judge of fact and ultimately the maker of an order whilst dealing with the substantive care application. The police are resourced to take out AVO's and they run the risk of a possible costs order.

"Care proceedings" are defined in s 60 of the Care Act — means proceedings under Ch 5.

The AVO is not under Ch 5. The rules of evidence apply and the usual process for AVOs should apply. Costs may be awarded under s 99 of the CDPVA.

[2-2760] Applications for contact orders under s 86

Last reviewed: November 2024

See Contact guidelines for judges at **[6-2000]**.

How will the child benefit? Some benefit may be over the long term, ie, providing the foundation for a relationship which will develop later.

Check if leave is required

The Wood Special Commission of Inquiry into the Child Protection Services in NSW reviewed the current system of making contact orders and concluded:

> The Inquiry is of the view that, on balance, the Children's Court should retain its power to make contact orders with respect to those children and young persons about whom the court has accepted the assessment of the Director-General that there is a realistic possibility of restoration. For all other children and young persons, that is those where the court has accepted that there is no such possibility, the court should have no power with respect to making orders as to contact.

Currently the Children's Court has the power to make contact orders in accordance with s 86 Care Act.

Be cautious in making contact orders in matters where there is no realistic possibility of restoration to the parents. If parental responsibility is not with the Minister then the Department should assist in implementing any contact arrangements if needed.

Contact orders

86 Contact orders

(1) An order may be made by the Children's Court doing any one or more of the following—

(a) stipulating minimum requirements concerning the frequency and duration of contact between a child or young person and his or her parents, relatives or other persons of significance to the child or young person,

(b) requiring contact with a specified person to be supervised,

(c) denying contact with a specified person if contact with that person is not in the best interests of the child or young person.

(1A) A contact order may be made by the Children's Court—

(a) on application made by any party to proceedings before the Children's Court with respect to a child or young person, or

(b) with leave of the Children's Court—

on application made by any of the following persons who were parties to care proceedings with respect to a child or young person—

(i) the Secretary,

(ii) the child or young person,

(iii) a person having parental responsibility for the child or young person,

(iv) a person from whom parental responsibility for the child or young person has been removed,

(v) any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person, or

(c) with leave of the Children's Court — on application made by any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person.

(1B) The Children's Court may grant leave under subsection (1A)(b) or (c) if it appears to the court that there has been a significant change in any relevant circumstances since a final order was made in the proceedings.

(1C) The Children's Court is not required to hear or determine an application made to it with respect to a child or young person by a person referred to in subsection (1A)(c) unless it considers the person to have a sufficient interest in the welfare of the child or young person.

(1D) Before granting leave under subsection (1A)(b) or (c), the Children's Court—

(a) must take into consideration whether the applicant for the contact order and persons to whom the contact order applies have attempted, or been ordered by the Children's Court to try, to reach an agreement about contact arrangements by participating in alternative dispute resolution, and

(b) may order the applicant and those persons to attend a dispute resolution conference conducted by a Children's Registrar under s 65 or alternative dispute resolution process under s 65A.

(1E) Subject to any order the Children's Court may make, an applicant for a contact order under subsection (1A)(b) who was a party to care proceedings must notify other persons who were parties to the proceedings of the making of the application.

Note: Section 256A sets out the circumstances in which the Children's Court may dispense with the requirement to give notice.

(1F) A contact order made under subsection (1A)(b) on application of a person who was a party to proceedings in which an earlier contact order was made that has expired may be made in the same or different terms to the expired order.

(2) The Children's Court may make an order that contact be supervised by the Secretary or a person employed in that part of the Department comprising those members of staff who are principally involved in the administration of this Act only with the Secretary's or person's consent and must not be made in relation to contact with a child or young person who is the subject of a guardianship order.

(3) An order of the kind referred to in subsection (1)(a) does not prevent more frequent contact with a child or young person with the consent of a person having parental responsibility for the child or young person.

(4) An order of the kind referred to in subsection (1)(b) may be made only with the consent of the person specified in the order and the person who is required to supervise the contact.

(5) A contact order made under this section has effect for the period specified in the order, unless the order is varied or rescinded under ss 86A or 90.

(6) Despite subsection (5), if the Children's Court decides (whether by acceptance of the Secretary's assessment under s 83 or otherwise) that there is no realistic possibility of restoration of a child or young person to his or her parent, the maximum period that may be specified in a contact order made under subsection (1A) concerning the child or young person is 12 months.

(7) Subsection (6) does not apply to a contact order made on the application of a former party to proceedings in which an earlier contact order was made that has expired.

(8) Subsection (6) does not apply to a contact order concerning a child or young person who is the subject of a guardianship order if the Children's Court is satisfied that a contact order of more than 12 months duration (for example, a contact order for the duration of the guardianship order) is in the best interests of the child or young person.

Contact considerations

Identify the risk of harm	**Assess the seriousness of the risk — in the context of the severity of possible consequences**	**The likelihood of the risk occurring**	**Whether that risk might be satisfactorily managed or otherwise ameliorated and the likelihood of compliance**	**Balanced against the possibility of benefit to the child**	**Test**
	Scale: • insignificant • minor • moderate • major • catastrophic	Scale: • rare • unlikely • possible • likely • very likely • inevitable	Examples: • in custody • restricted by DCJ • supports • scaffolding • treatment • training and education • AVO under s 40A under the CDPVA	The majority of children are raised by their parents, the relationship between parent and child is one of the closest, if not the closest, of all relationships and the mere fact of the relationship will invariably receive substantial weight in any given case.	To protect the child's paramount interests the proper test to be applied is that of "unacceptable risk" to the child to be assessed from the accumulation of factors proved.
In addition some studies have found that contact with birth families may lead to: • multiple attachments create confusion for children or conflict of loyalties • the threat of harm to the child or to the new parents may undermine the placement • birth parents need to be helped towards closure as the best way of dealing with feelings of loss and guilt • demands placed on new parents				• Contact encourages reunification with the birth family • Contact maintains/ encourages attachment to the birth family • Contact prevents idealisation of the birth family • Contact maintains links and cultural identity • Contact enhances the psychological well-being of the children in care • Contact is a means by which the quality of the relationship between the	

Identify the risk of harm	Assess the seriousness of the risk — in the context of the severity of possible consequences	The likelihood of the risk occurring	Whether that risk might be satisfactorily managed or otherwise ameliorated and the likelihood of compliance	Balanced against the possibility of benefit to the child	Test
adversely affect the recruitment of new adopters • it is too risky to make such complex placements without adequate professional skills and resources which need to extend far beyond adoption • the push for contact arises less from the evidence on benefits than from professional desires to undo the pain of separation or because they themselves feel they have failed the birth family • continuation of unhealthy relationships, eg inappropriate dominant or bullying relationships, or controlling relationships • undermining the child's sense of stability and continuity by deliberately or inadvertently setting different moral standards or standards of behaviour. • experiences lacking in endorsement of the child as a valued individual eg, where little or no interest is shown in the child himself, or				birth family and the child can be assessed	

Identify the risk of harm	Assess the seriousness of the risk — in the context of the severity of possible consequences	The likelihood of the risk occurring	Whether that risk might be satisfactorily managed or otherwise ameliorated and the likelihood of compliance	Balanced against the possibility of benefit to the child	Test
contact where the parent is unable to consistently sustain the prioritisation of the child's needs • unreliable contact in which the child is frequently let down or feels rejected, unwanted and of little importance to the failing parent • where a child is continuing to attend contact, even though expressing a view that he/she doesn't want the contact, can make the child feel undermined					
• undermine the placement with another carer			contact is closely supervised	contact will need to be sufficiently frequent to maintain or develop the relationship between the parent and child.	
• distance and cost of contact			Parents can travel	the child understands who they are in the context of their birth family and cultural background.	
• the concern that this model addresses is that potential adoptive parents will be deterred from adopting by the prospect of having to accommodate				help ensure that they have a realistic understanding of who the parent is and do not idealise an unsuitable parent and develop unrealistic hopes of being reunited with them	

Identify the risk of harm	Assess the seriousness of the risk — in the context of the severity of possible consequences	The likelihood of the risk occurring	Whether that risk might be satisfactorily managed or otherwise ameliorated and the likelihood of compliance	Balanced against the possibility of benefit to the child	Test
continuing contact with the natural family					
• children and carer families will have their own commitments and patterns			Visitation can be a positive intervention for the entire family and can promote successful reunification. Visits reassure children that their families are alive and well and still care about them. Frequent contact with parents can reduce children's anxiety associated with separation. Other types of contact, including exchange of phone calls, cards, and letters, will also serve this purpose. Frequent visitation reassures parents that the agency is committed to maintaining and strengthening family relationships. Visits present the caseworker with a valuable opportunity to help family members identify their needs and strengths. By observing family members together, the worker can elicit important information about the quality of the parent-child relationship, as well as gain insight into the parents' developmental needs, motivation, and capacity to resume care of their children.		

Identify the risk of harm	Assess the seriousness of the risk — in the context of the severity of possible consequences	The likelihood of the risk occurring	Whether that risk might be satisfactorily managed or otherwise ameliorated and the likelihood of compliance	Balanced against the possibility of benefit to the child	Test
			Family visits can be used as interventions to achieve specific objectives. For example, foster or relative caregivers may use visits to model parenting skills and to share child management strategies. During visits, parents can practice newly acquired parenting strategies and can receive immediate, constructive feedback and coaching from the caseworker or caregiver. Visits may help parents understand the importance of permanency for their child. The visits can help them make a final decision regarding whether they want to diligently pursue reunification or relinquish their parental rights, thereby allowing their child to achieve permanency through another plan, such as adoption or guardianship. Sibling visitation allows these important relationships to be maintained, even when siblings must be placed in separate homes. Visitation with extended family is encouraged whenever possible. Extended family		

Identify the risk of harm	Assess the seriousness of the risk — in the context of the severity of possible consequences	The likelihood of the risk occurring	Whether that risk might be satisfactorily managed or otherwise ameliorated and the likelihood of compliance	Balanced against the possibility of benefit to the child	Test
			connections are important to the child's development and often serve as alternative permanency plans if reunification does not take place.		
• it is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than carer family events.					
• it is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing					
• general risk, child not safe, D&A					

[2-2770] Apprehended bias

Last reviewed: November 2024

In *BW v Secretary, Department of Communities and Justice* [2024] NSWSC 1354, Faulkner J sets out the criterion by which asserted apprehension of bias is to be determined and the process by which that criterion is to be assessed.

Faulkner J, with reference to *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 at [37] by Kiefel CJ and Gageler J referred as follows:

> The criterion is whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". The "double might" serves to emphasise that the criterion is concerned with "possibility (real and not remote), not probability".

Faulkner J observed at [139] that the application of the criterion was identified in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, and has been reiterated, logically to entail:

1. identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits
2. articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits
3. assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer

To the passages from the authorities extracted and emphasised by the trial judge may be added the following propositions per Bell P in *Polsen v Harrison* [2021] NSWCA 23 at [46]:

(i) the application of the apprehended bias rule depends on the circumstances of each case;

(ii) the fair-minded lay observer is an hypothetical figure, founded in the need for public confidence in the judiciary;

(iii) there is an unavoidable level of imprecision in the standard of what a fair-minded lay observer "might" apprehend, such that a fanciful or speculative possibility must be clearly distinguished from the requisite "firmly-established" apprehension of bias;

(iv) a finding of apprehended bias is not to be reached lightly;

(v) this is because the training, tradition and oath or affirmation of a professional judge require him or her to discard the irrelevant, the immaterial and the prejudicial;

(vi) the duty of a judge to disqualify for proper reasons is matched by an equally significant duty to hear any case in which there is no proper reason to disqualify;

(vii) the fair-minded lay observer is presumed to approach the matter on the basis that ordinarily the judge will act so as to ensure both the appearance and the substance of impartiality, such that

(viii) the rebuttal of this presumption requires a "realistic possibility" of the apprehension of bias which is not "fanciful or extravagant" but is based on "the established facts" of the matter;

(ix) "neither complacent nor unduly sensitive or suspicious", the fair-minded lay observer may have a level of scepticism as to professional pretensions, but will be cognisant of and vigilant against his or her own prejudices;

(x) the inquiry as to whether a judge might reasonably be apprehended to deviate from bringing an impartial mind to the resolution of a particular issue "requires no prediction about how the judge … will in fact approach the matter" and "admits of the possibility of human frailty";

(xi) the fair-minded lay observer is not presumed to reject the possibility of pre-judgment of a matter, otherwise an apprehension of bias would never arise in the case of a professional judge; however;

(xii) interventionist comments or conduct by a judge will not unilaterally create an apprehension of bias in the mind of the reasonable lay observer, who is taken to understand that such interventions are often motivated by the judge's desire to understand the evidence and to advance the trial process;

(xiii) it is "difficult, and probably impossible, to state in the abstract, in a manner suitable for application to cases generally, the degree of knowledge to be attributed to a fair-minded observer";

(xiv) there is to be attributed to the fair-minded observer a broad knowledge of the material objective facts as ascertained by the appellate court and the "actual circumstances of the case" as though the observer was sitting in the court;

(xv) the fair-minded lay observer is taken to know the nature of the decision, the circumstances which led to the decision and the context in which it was made;

(xvi) the context which must be considered includes the legal, statutory and factual context in which the decision is made, and "the totality of the circumstances", although the fair minded lay observer will not be taken to have a detailed knowledge of the law or legal principles;

(xvii) the knowledge that the fair minded observer is taken to have is not limited to those facts and matters that were known at the time of an application for recusal and includes published statements made by the judge (whether prior, contemporaneous, or subsequent to the recusal application);

(xviii) the fair-minded lay observer will not act on "insufficient knowledge", but will "inform himself [or herself]" of the relevant circumstances, without making "snap judgments";

(xix) the judge's own view about his or her ability to decide the case independently and impartially, as recorded in any reasons for dismissing a recusal application, carries little weight in the fair mind of the hypothetical lay observer, although

(xx) statements in a recusal judgment regarding factual matters, including the particular context of the comments or conduct in question, may be relevant;

(xxi) the fair-minded lay observer would not reasonably apprehend bias on the part of a judge from a short and emotional exchange taken out of context and weighed in isolation;

(xxii) the fair-minded lay observer will have regard to the cumulative effect of comments made by a judge and not to particular individual statements removed from their context; and

(xxiii) subsequent statements made by a judge, following the comments or conduct said to give rise to a reasonable apprehension of bias, may indicate that an earlier expressed statement or impression was not final or that the judge had not committed to a particular point of view.

Whether a fair-minded lay observer might reasonably apprehend bias can be informed by the cumulative effect of several incidents during the hearing: *Antoun v The Queen* [2006] HCA 2 at [2] (Gleeson CJ) and [57] (Hayne J).

Another matter which a fair-minded lay observer will take into account is the fact that an open judicial mind does not mean a blank mind. In *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [71]–[72] (footnotes omitted), Gleeson CJ and Gummow J said:

> … Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias.
>
> The test which was applied both by French J and by the Full Court was orthodox. It accords with the decisions of this Court in *Laws v Australian Broadcasting Tribunal* and *Johnson v Johnson*. The state of mind described as bias in the form of prejudgment is one so committed to a conclusion

> already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion. This preliminary argument should be rejected.

Central to an assessment of apprehended bias is the "fair-minded lay observer" who is a hypothetical figure founded in the need for public confidence in the judiciary. In *Polsen v Harrison*, above at [46], Bell P gathered together and set out a number of attributes of the fair-minded lay observer as established by the authorities, see list above.

Care matters

One matter which a fair-minded lay observer will take into account is the special features of the processes of the Children's Court on account of that court being partially inquisitorial and subject to the paramount obligation set out in s 9(1). The fair-minded lay observer is taken to have knowledge of the legal, statutory and factual context in which the decision is to be made: *Isbester v Knox City Council* (2015) 255 CLR 135 at [23] (Kiefel, Bell, Keane and Nettle JJ).

The fact that the Children's Court is required, to some extent, to inquire, means that it may be more difficult to establish a reasonable apprehension of bias: *SZBLY v Minister for Immigration and Citizenship* [2007] FCA 765 at [25] (Cowdroy J). See also *NADH v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328 (Allsop J).

An apprehension of bias may nonetheless arise in inquisitorial proceedings, including from the way the judge questions a witness: *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [29]–[31] (Gleeson CJ, Gaudron and Gummow JJ).

A finding that there is a reasonable apprehension of bias is not to be arrived at lightly: *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [56] (Nettle and Gordon JJ). This is because the training, tradition and oath or affirmation of a professional judge require him or her to discard the irrelevant, the immaterial and the prejudicial: *Vakauta v Kelly* (1989) 167 CLR 568 at [10] (Toohey J).

As for the treatment of the parties' legal representatives, in *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [91], Robertson J, with whom Allsop CJ agreed, said:

> Dealing with these contentions in turn, no doubt it is correct to say that occasional displays of impatience and irritation or occasional sarcasm or rudeness on the part of the Tribunal, while unfortunate and falling short of the desirable standards of good administration, do not of themselves establish disqualifying bias. But such matters are not irrelevant. Indeed I agree, with respect, with Lockhart J in *Sarbjit Singh v Minister for Immigration and Ethnic Affairs* [1996] FCA 902 where his Honour said at 10–11, in relation to a claim of actual bias:
>
> > It is obviously undesirable for decision-makers in the course of the hearing before them to be sarcastic or to make fun or mockery of witnesses or to show high personal indignation. In some cases this may be sufficient to establish actual bias; but generally it would be simply part of the factual matrix that must be taken into account …
>
> The entirety of the circumstances must be considered.

In *Heywood v Local Court of NSW* [2024] NSWSC 1047 at [101], Lonergan J said:

> Those principles are no doubt correct, but "robust debate" is not what was occurring here. There was by this stage not "testing of counsel's arguments", but admonishments, insults and threats directed to Mr Pappas.

By reference to the Second Reading Speech for the Children and Young Persons (Care and Protection) Bill 1998, the Attorney-General emphasises that the legislation contemplates that it is proper that the Children's Court should inform itself on any matter in whatever way it considers appropriate to ensure that it has before it all the relevant information on which to base its decision. The judge's power in s 107 to question a witness extends to calling the witness to be questioned: *D v C; Re B (No 2)* [2018] NSWCA 310 at [42] (Basten JA, with whom McColl JA and Emmett AJA agreed).

The Children's Court, however, is still a court with powers to make orders which affect people's rights. In *Director General, NSW Department of Community Services v Children's Court of NSW* (2002) 56 NSWLR 555 at [57], O'Keefe J said:

> Although less adversarial, technical and formal than the procedure in many other courts, the procedure before the Children's Court is nonetheless recognisable to those who are conversant with the operations of courts in our system of justice. The fact that it is a court with a recognised procedure and which is empowered to make binding orders which affect the rights of individuals carries with it a requirement that it observe the appropriate rules of natural justice. One of these is that the right of a party to be heard is respected and that those who appear before the court should know why it is that the court has determined a particular matter in a particular way and why it is that the court has acted in a particular way. The basis for decisions which affect or may affect the rights of individuals should be made known. Reasons perform this function.

The Children's Court must have regard to the interests of the parties in determining how a hearing is to be conducted. In *D v C; Re B (No 2)* at [83] Basten JA said:

> Although the present proceedings should not turn on this specific issue, it may be doubted that the powers of the court extended to the conduct of a hearing in a form which was not sought by any party. The consequence of that course was to impose burdens on independent State authorities, including the Legal Aid Commission and the Department of Family and Community Services. No doubt such consequences can flow from directions given to ensure the proper conduct of judicial proceedings. However, there can be few circumstances in which the Court can in effect undertake an inquiry of its own without regard to the common views of all the parties …

There is nothing in the Act which relieves the Children's Court of the obligation to afford the parties procedural fairness. However, the content of that obligation will be informed by the provisions of the Act: *D v C; Re B (No 2)* at [37] and [42] (Basten JA, with whom McColl JA and Emmett AJA agreed). In care proceedings, a denial of procedural fairness may arise from denying the parties the right to question a witness. It may also arise from disregarding the parties' views and evidence about where the best interests of the child lie: *D v C; Re B (No 2)* at [82] (Basten JA, with whom McColl JA and Emmett AJA agreed).

Like all other provisions of the Act, the powers of the Children's Court in s 107 are to be exercised having regard to s 9 and the paramount consideration of the safety, wellbeing and welfare of the child.

In *BW v Secretary, Department of Communities and Justice* [2024] NSWSC 1354, Faulkner J continued, the question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a question of fact, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made: *Isbester v Knox City Council*, above, at [20] (Kiefel, Bell, Keane and Nettle JJ).

Ultimately, the application requires the Court to consider all the evidence and carefully make a finding of fact about the perception of a fair-minded lay observer.

Disqualification for apprehended bias gives effect to the requirement that justice should both be done and be seen to be done: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6].

Principles for administration under the Care Act	**Section 9 Principles for administration of Act** (1) This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.
Interpretation	The Care jurisdiction is an exemplar of protective proceedings and may be described as beneficial legislation. The High Court in *The Queen v Kearney; Ex parte Jurlama* (1984) 158 CLR 427 at [7], per Gibbs CJ observed that beneficial legislation is to be interpreted in such a way as to give effect to its purpose: > If the section is ambiguous it should in my opinion be given a broad construction, so as to effectuate the beneficial purpose which it is intended to serve.
The Court must remain outside the arena	Even in non-adversarial proceedings, there is an arena in the sense that the Court is a forum in which the parties may make contentions and advocate for a certain position on certain issues. That much is true for the Children's Court, in which certain persons are entitled to appear (eg s 98(1) and (3)), they may be legally represented (eg ss 98(1), (3) and 99(1)), they may place views (eg s 99D(a)(i)) and may test evidence (eg ss 98(3) and 99D(a)(iii)). The arena is the exclusive domain of the parties. The Court must not itself enter the arena, or be seen to enter it: *BW v Secretary, Department of Communities and Justice* [2024] NSWSC 1354 at [300].

Nature of proceedings

- not inter partes
- not adversarial, nor ought the Court or parties act in an adversarial manner
- Court may call a witness and cross examine a witness
- The Court may be involved in the adducing of evidence to determine facts

Proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression: *Reynolds v Reynolds* (1973) 47 ALJR 499; *McKee v McKee* [1951] AC 352.

In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child: *M v M* (1988) 166 CLR 69 at [20].

Proceedings relating to the welfare of children, or any other person in need of protection, are not adversarial in the sense encountered in ordinary civil litigation but, rather, are attended by a strong, special public interest element: *Re Paul (No 2)* [2024] NSWSC 106 at [13].

Section 93 General nature of proceedings

(1) Proceedings before the Children's Court are not to be conducted in an adversarial manner.

Section 93(1) is not merely a descriptive provision, but one which imposes obligations. It may be directed to the presiding judicial officer, or to the parties, or to both: *D v C; Re B (No 2)* [2018] NSWCA 310 at [40].

> … the purpose of providing that the proceedings are not to be conducted in an adversarial manner is to give effect to the principle that it is the child's safety, welfare and wellbeing which are of paramount importance, as provided in s 9(1).
>
> … adversarial proceedings are commonly contrasted with inquisitorial proceedings. As commonly understood, the point of contrast is that an adversarial proceeding is controlled by the parties, with limited input from the court, whilst an inquisitorial proceeding reverses the element of primary control. Whether or not that meaning is to be found in s 93(1), it is reflected in s 107(1). The purpose of permitting a judicial officer to "examine and cross-examine a witness" is to allow the officer to be more involved in the adducing of evidence than is the case in an adversary trial. In the absence of argument to the contrary as to the scope of s 107(1), it may be assumed that this power extends to the judicial officer calling the witness in order to allow questioning. That, in effect, occurred in the present case, but was not for that reason beyond power: *D v C; Re B (No 2)* at [41–[42].
>
> Under s 107(1), a children's judge may question a witness but only for the purpose specified in the provision. The questioning must be "for the purpose of eliciting information relevant to the exercise of the Children's Court's powers": *BW v Secretary, Department of Communities and Justice* at [251].
>
> … the requirement that proceedings not be conducted "in an adversarial manner" is uncommon: *D v C; Re B (No 2)* at [39].

	The nature of the proceedings and the need for relevant facts are informed by the Court's obligation to: • have regard to s 9 and the paramount consideration of the safety, well-being, and welfare of the child: see *BW v Secretary, Department of Communities and Justice* at [42] • appoint an ILR and/or DLR: refer s 99 • not make a care order in relation to a child or young person unless the Court itself is satisfied that the child or young person is in need of care and protection: refer s 71(1) • inform itself on any matter in whatever way it considers appropriate to ensure that it has before it all the relevant information on which to base its decision: see *BW v Secretary, Department of Communities and Justice* at [38] • decide whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period: refer s 83(5) • not make a final care order unless it expressly finds that permanency planning for the child or young person has been appropriately and adequately addressed: refer s 83(7) • make a care order different from, in addition to, or in substitution for, the order for which the application was made, provided all prerequisites to the making of the order are satisfied: refer s 67 • sometimes without the benefit of a contradictor • for those who appear before the court they should know why it is that the court has determined a particular matter in a particular way and why it is that the court has acted in a particular way: *Director General, NSW Department of Community Services v Children's Court of NSW* (2002) 56 NSWLR 555 at 567 at [57].

The Court's responsibilities to the parties and witnesses. See *BW v Secretary, Department of Communities and Justice*	The Court must: • observe the appropriate rules of natural justice • afford the parties procedural fairness • respect the right of a party to be heard • not conduct the proceedings in an adversarial manner or behave in an adversarial manner • allow the parties to question a witness and not disregard the parties' views and evidence about where the best interests of the child lie • where the proceedings depart from the narrow basis on which a matter is to be heard and no opportunity is given to seek updated evidence in response grant an adjournment: *D v C; Re B (No 2)* at [90]–[92] • not conduct the hearing in a highly interventionist manner • not interfere in the cross-examination • not ask unfair questions • not cut off an answer to a question • not make comments which may have had the effect of confusing or upsetting witnesses • not enquire with respect to irrelevant considerations • not advocating a case judge having already formed a view • not adhere to information before the evidence is complete and submissions have been made • not making references during the hearing to a party in a pre-determined way creating reasonable apprehension that the Court might have already formed a view even though the evidence has not concluded and the submissions have not yet been made • not conduct the hearing in a way which cause delay • not bully the legal representatives • not impair the conduct of the case by levelling dismissive and critical comments • not enter into the arena and became an active participant in the conduct of the case • not question a witness in the nature of a cross-examination in which the Court is leading the witness in a desired direction • not use a tone of voice that is directive whilst displaying dissatisfaction.

[2-2780] Resources

Last reviewed: November 2024

- Judicial Commission of NSW, *Local Court Bench Book*, 2010–, Sydney, at **Children's Court – care and protection jurisdiction [40-000]**ff
- Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Sydney, at **Ch 2 First Nations people**
- *Family is Culture Review Report*, Sydney, 2019.

Cross-over kids

Cross-over kids: introduction ..... [2-3000]

Further reading

Cross-over kids: the drift of children from the child protection system into the criminal justice system

Introduction

Part 1: Identification of the extent of the cross-over

Part 2: Discussion of the causes of the cross-over

Part 3: Examination of options to address cross-over

Conclusion

[2-3000] Cross-over kids: introduction

Last reviewed: November 2024

It is well recognised that juvenile detention is a "key driver of adult incarceration" for Aboriginal people and that many children are placed in OOHC due to parental incarceration.

The Australian Institute of Criminology Report, "Care experienced children and the criminal justice system" highlighted judicial awareness of care criminalisation.[1] The magistrates interviewed all acknowledged the challenges facing care-experienced children, including:

- The welfare of care-experienced children and how factors such as mental health, a history of trauma, placement instability and lack of education contribute to criminalisation, in particular the damaging impact of placement instability.
- The setting of bail appropriate conditions for children from care, including a lack of suitable accommodation.
- A limited awareness among OOHC service providers of the needs of Indigenous children in care, and the need for increased levels of cultural competence in all sectors coming into contact with the care system.
- Police commonly called as a strategy to manage problematic behaviour of children in care.

The *Bail Act 2013* expressly requires the bail authority to have regard to any special vulnerability or needs the applicant has "because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment": s 18(1)(k). Prior to the introduction of the 2013 Act, the NSWCCA had accepted that, in an application for bail by an Aboriginal person, particularly where the applicant was also a young person, "alternative culturally appropriate supervision, where available, (with an emphasis on cultural

1 A McGrath, A Gerard, E Colvin, "Care-experienced children and the criminal justice system" (2020) 600 *Trends & Issues in crime and criminal justice*, Australian Institute of Criminology.

awareness and overcoming the renowned anti-social effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to remand in gaol": *R v Brown* [2013] NSWCCA 178 at [35].[2]

Note also that s 28 of the *Bail Act*, which permits a court to order bail on the condition that the child obtains suitable accommodation, means that a child "may be detained in circumstances where a homeless adult, charged with a like offence would not".[3]

Judicial awareness of the existence of "**cross-over kids**" may assist in tailoring sentences or bail conditions to accommodate the unique circumstances of children in OOHC. Awareness of care criminalisation and of the matters that should be considered when sentencing or otherwise dealing with children in OOHC should be acknowledged.

Further reading

- S Baidawi and R Ball, "Child protection and youth offending: differences in youth criminal court-involved children by dual system involvement" (2023) 144 *Children and Youth Services Review*
- S Baidawi and R Sheehan "'Crossover kids': Offending by child protection-involved youth", published in (2019) 582 *Trends & issues in crime and criminal justice* 1 by the Australian Institute of Criminology.
- P Johnstone, "Cross-over kids: the drift of children from the child protection system into the criminal justice system", below.
- A McGrath, A Gerard and E Colvin, "Care-experienced children and the criminal justice system", Australian Institute of Criminology, *Trends & Issues in crime and criminal justice*, No 600, September 2020
- K Nunn, "Preliminary concerns around the decision-making of out-of-home-care children who offend", a briefing note for the Officers of the Court for the Children's Court Section 16 Meeting, 1 November 2013
- K Richards and L Renshaw, "Bail and remand for young people in Australia: a national research project", Research and Public Policy Series No 125, Australian Institute of Criminology, 2013
- C Ringland, D Weatherburn & S Poynton, "Can child protection data improve the prediction of re-offending in young persons?" (2015) 188 *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research.

2 Note: In other decisions, the Supreme Court has emphasised the appropriateness of determining bail applications brought by First Nations people in the broader context of their overrepresentation in the prison population: see further L McCallum and E Timmins, "Black letter law" (2021) 33(4) *JOB* 37.

3 Dr Kath McFarlane, Scholar at Charles Sturt University, in a submission to the *Family is Culture review report*, addressed the issue of the interaction between the OOHC system and the criminal justice system in detail; M Davis, *Family is culture review report: independent review of Aboriginal children in OOHC*, 2019, p 238.

Cross-over kids: the drift of children from the child protection system into the criminal justice system

P Johnstone*

Introduction

This paper has been prepared for the 2016 Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law — Changing Practice, and is to be presented to attendees on Friday, 5 August 2016. The topic I will be addressing today is "Cross-over kids: the drift of children from the child protection system into the criminal justice system".[4]

First, I wish to acknowledge the traditional custodians of the land upon which we meet today, the Pambalong Clan of the Awabakal People, and pay my respects to their Elders past and present.

Throughout my time as President of the Children's Court, I have observed that there is an unequivocal correlation between a history of care and protection interventions and future criminal offending. This nexus between care and crime has been persuasively articulated by a number of respected commentators, including Dr Judith Cashmore,[5] and former President of the Children's Court, Judge Mark Marien, whose seminal paper on "Cross-over kids" examined the drift from children and young people in care into criminal offending.[6]

Notwithstanding that I have been President for four years, I continue to be astounded by the complexity of the issues that arise in this court.

The social disadvantage facing the children and young people appearing before this jurisdiction is a profound reminder of the need to work together to critically analyse the issues, build capacity and develop realistic and achievable options for improvement. We must never allow ourselves to sit idly by while children and young people are denied the human rights and opportunities they are entitled to as citizens of the world.

We were acutely reminded of the need to take action in the face of human rights abuses perpetrated against children and young people after the Four Corner's investigation into the systemic abuse and mistreatment of children and young people at the Don Dale Youth Detention Centre in Darwin.[7] Of relevance to these reports, and to the broader discussion today, is that over 90% of children and young people held in juvenile detention centers in the Northern Territory are Aboriginal or Torres Strait Islander.

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* President of the Children's Court of NSW; the paper was first presented for the 2016 Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law — Changing Practice on 5 August 2016.

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

5 J Cashmore, "The link between child maltreatment and adolescent offending: systems of abuse and neglect of adolescents" (2011) *Family Matters* 89, at 31–41.

6 Judge M Marien, "'Cross-over kids' – childhood and adolescent abuse and neglect and childhood offending", paper originally presented at the South Pacific Conference of Youth and Children's Courts Annual Meeting, 25–27 July 2011, Vanuatu (and updated for the Third National Juvenile Justice Summit 2012, 27 March 2012, Melbourne).

7 C Meldrum-Hanna et al, "Australia's Shame", originally aired on ABC Four Corners on Monday, 25 July 2016. Transcript accessible on www.abc.net.au/4corners/stories/2016/07/25/4504895.htm.

Without detailing the specific abuses, it is sufficient to state that they are abhorrent breaches of human rights that raise important questions, such as (to name a few): how could such egregious mistreatment occur in Australia today? Given that the events occurred in 2014, and despite two previous inquiries into the incident, why did it take two years for the government to establish a Royal Commission? How far have we really come in the 25 years since the Royal Commission into Aboriginal Deaths in Custody? What can we do in future to challenge the complex constellation of factors that continue to affect the treatment of Aboriginal and Torres Strait Islander peoples.

As a response to these events, on Thursday, 28 July 2016, the Australian Government announced its establishment of a Royal Commission to examine the child protection and juvenile detention systems of the Northern Territory.[8] Specifically, the terms of reference state that the Royal Commission will examine:

- failings in the child protection and youth detention systems of the Government of the Northern Territory since 2006
- the effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate
- cultural and management issues that may exist within the Northern Territory youth detention system
- whether the treatment of detainees breached laws or the detainee's human rights, and
- whether more should have been done by the Northern Territory Government to take appropriate measures to prevent the reoccurrence of inappropriate treatment.[9]

Despite the delay in conducting a Royal Commission into the child protection and juvenile justice systems in the Northern Territory, the establishment of a Royal Commission represents an important step in tackling the silence and shame surrounding the treatment of Aboriginal and Torres Strait Islander peoples in Australia.

The baleful effects of silence, and the oppression so commonly associated with it, have remained recurring themes throughout history, influencing some of the most significant events affecting the lives of Aboriginal people. Silence can result in constructive agreement to individual misconduct, it can normalise abuse of process and departure from the precepts of natural justice, and it can entrench the systemic disintegration of the social contract. One of the most concerning implications of the oppression of silence is its ability to manipulate facts and frustrate or prevent progress.

As John Stuart Mill famously pronounced:[10]

> Bad men need nothing more to compass their ends, than that good men should look on and do nothing.

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8 Joint Media Release of Prime Minister the Hon. M Turnbull MP and Attorney-General, Senator the Honourable G Brandis QC, "Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory", Thursday, 28 July 2016, accessible at www.attorneygeneral.gov.au.

9 ibid.

10 J Mill, *The Inaugural Address, delivered to the University of St Andrews*, Longmans, 1867, p 74.

Silence has been an important factor in perpetuating Aboriginal disadvantage. In fact, silence was used to attempt to remove Aboriginal people from recorded history. Reynolds describes this phenomenon, stating:[11]

> The Great Australian Silence was a 20th century phenomenon. Most books written about the colonies in the 19th century devoted a chapter or two to the Aborigines and to their relations with Europeans, while the few major historical works produced before 1900 gave considerable attention to the great tragedy of destruction and dispossession. But during the first half of the 20th century the Aborigines were dispersed from the pages of Australian history as effectively as the frontier squatters had dispersed them from the inland plains a century before.

In addition to historical disempowerment through the denial of a legitimate voice, Aboriginal peoples' experiences of gratuitous concurrence in the face of authority have acted as a fetter on their ability to access justice and achieve equality before the law. This repudiation of meaningful participation is even more striking for children and young people, who face additional barriers by virtue of their age and lack of autonomy.

The importance of giving a child or young person the opportunity to have their voice heard and to participate in the decisions that affect them is recognised both nationally and internationally.[12] However, it cannot be ignored that complex social disadvantage and vulnerability impedes the ability of a significant majority of the young people accessing the Children's Court to meaningfully participate and engage in decisions that will have a long lasting impact on their life course.

Aboriginal and Torres Strait Islander children and young people are among the most vulnerable children that appear before both jurisdictions of the Children's Court. Cultural competence, and the failure to embed it across all levels of decision making, can function to deny these young people strong connections to their identity, connections that have been described as "intrinsic" to any assessment of what is in a child or young person's best interests.[13]

With all of this in mind, it is critical that we can get together at symposiums such as these to engage in productive discussions. These forums encourage discourse, advocacy and participation by professionals committed to constant improvement. Any discourse that facilitates collaboration, capacity building and information exchange is a discourse that is worth preserving and promoting.

Further, the outcomes we reach from these discussions can drive paradigm shifts regarding the preservation of the best interests of Aboriginal children and young people and, as a corollary, assure that the interests of Aboriginal children are placed at the forefront of community consciousness.

A group that does a fantastic job in countering the deleterious effects of silence are the Grandmothers Against Removals. I commend all grandparents who take responsibility for raising their grandchildren. I also acknowledge that informal kinship carers play a significant role in taking such responsibility and that this is not always recognised with the appropriate financial and social supports.

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11 H Reynolds, *The breaking of the great Australian silence: Aborigines in Australian historiography 1955–1983*, University of London, Institute of Commonwealth Studies, Australian Studies Centre, 1984, p 1.

12 Article 12 of the United Nations Convention on the Rights of the Child (to which Australia became a signatory in 1989); *Children and Young Persons (Care and Protection) Act 1998*, ss 9 and 10.

13 *Department of Human Services and K siblings* [2013] VChC 1 per Magistrate B Wallington, at 5.

I thank you for your passionate presentation this morning and applaud you for the work you do in engaging with communities and ensuring that important voices are no longer silenced, abandoned or ignored.

I also wish to praise the hard work of the practitioners and other professionals working within this jurisdiction and acknowledge their commitment and advocacy toward safeguarding the best interests of Aboriginal children and young people.

Turning now to the specific challenges confronting Aboriginal children and young people in their experience of the drift from care to crime. After much consideration as to how I might do this topic justice, I have decided to distill the core elements of this subject, as I see them, into the following structure:

- Part 1: Identification of the extent of the cross-over
- Part 2: Discussion of the causes of the cross-over
- Part 3: Examination of options to address cross-over.

Whilst some of the material that I will discuss in this paper has been widely documented by respected academics and seasoned practitioners, I hope that my insights will add to this body of work and that this paper can be used as a valuable reference resource, with a focus on practical and positive directions for the future.

Part 1: Identification of the extent of the cross-over

In order to embark upon an exploration of the extent of cross-over, the first step is to develop a familiarity with the jurisdiction of the Children's Court of NSW. After developing this familiarity, it is necessary to define what the term "cross-over kids" denotes. It is only after this, that we can look at the scope of the problem and develop a true appreciation of the seriousness of this issue, its causes and what steps can be taken to ameliorate its effects.

The Children's Court of NSW is empowered with the jurisdiction to make decisions in care and protection matters as well as criminal matters relating to all children and young people under the age of 18.[14] While most people are aware of criminal proceedings and juvenile justice, the care and protection jurisdiction is often misperceived, and therefore confounds many members of the community.

In care and protection matters, the NSW child protection agency, the Department of Family and Community Services (DFaCS), brings proceedings with respect to children and young people alleged to be at risk of significant harm. These are distinct from criminal proceedings. Care and protection matters are an inquisitorial process whereby a judicial officer, after hearing all of the evidence, makes a determination as to whether entrusting parental responsibility to the child or young person's current parents/care givers represents an unacceptable risk of harm. If this is the case, the judicial officer will make an order for parental responsibility to the Minister until the young person attains the age of 18. The overarching, or paramount consideration, in all care and protection decision making is the safety, welfare and well-being of the child or young person.[15]

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14 Note also the operation of the doctrine of doli incapax for children and young people between the ages of 10–14 years.

15 *Children and Young Persons (Care and Protection) Act 1998*; the United Nations Convention on the Rights of the Child.

The bifurcated nature of the care and protection and criminal jurisdictions has its origins in a number of reviews to child welfare laws in the 1980s. These reforms culminated in a package of legislation that clearly demarcated the child protection jurisdiction from the juvenile crime jurisdiction. Whilst this was a positive step at the time (given the need to reform the punitive criminalisation of child protection issues under the *Child Welfare Act 1939*) it has created structural and legal barriers that fail to acknowledge and address the practicality of these young people's lives. This practicality is that criminal offending and care and protection are not mutually exclusive.

It is to this reality that we refer when we talk about the "cross-over between care and crime" or "cross-over kids". As I mentioned above, the black letter law recognises care and protection and juvenile crime as two separate jurisdictions. However, when viewed through a criminological and socio-legal lens, the practicality and reality of these young people's lives highlights that there is a distinct correlation between a history of care and protection interventions and criminal offending.

Judge Mark Marien enunciated the complexity of this cross-over, wrestling with the issue of how to respond when social issues manifest in interactions with the legal system:[16]

> A 13 year old who has left the family home and is living on the streets because of ongoing domestic violence and/or drug and alcohol abuse by their parents is very likely to become involved in offending behaviour because they are associating with a peer group which engages in offending behaviour. But does this "offending behaviour" by the 13 year old require a response within the criminal justice system (with the consequent stigmatising of the young person and the possible prejudicing of their future employment prospects) or should the child be dealt with within the child welfare system? Is there a risk in "criminalising" the behaviour of a young person with serious welfare needs? Alternatively, is there a risk that we may be "welfarising" our response to the criminal behaviour of young people ...

Sadly, this "cross-over" conundrum is something that I witness numerous times a day when conducting my judicial functions. I see it when I preside over the criminal list, defended hearings, parole list, education list, care and protection list and care and protection hearings. Many defeatists have stated that the effects of such troubling work would make anyone resistant, dispirited and resigned to maintaining the status quo. However, I am no defeatist and every day that I experience this cross-over, I am emboldened with the drive and determination to achieve a generation of children and young people whose lives have not been characterised by cross-over.

As President, I engage in continuous research in order to supplement my experiential data with statistical and critical commentary. Numbers have a way of slapping you across the face in a way that words cannot, and when accompanied by explanation and peer-reviewed research, the reader is afforded with a detailed and unequivocal picture of the issues.

Therefore, in describing the extent of the cross-over between young Aboriginal people drifting from the care and protection system into the criminal justice system, I propose to look at the following groups of statistics: data outlining the representation of *non-Aboriginal* children in care; the representation of *Aboriginal* children and young people in care; the representation of *non-Aboriginal* young people in detention; the representation of *Aboriginal* young people in detention and finally a comparison of the over-representation of Aboriginal young people who have been removed and later appear before the criminal jurisdiction of the court.

16 Judge M Marien, "'Cross-over kids' — childhood and adolescent abuse and neglect and childhood offending", n 3.

As at 30 June 2014, across Australia, the rate of children in out-of-home care per 1000 children in the population aged 0–17 years by Indigenous status was the highest in the Northern Territory (14.3%) and NSW (10.8%) and lowest in Victoria (6.1%) and Western Australia (6.4%).[17]

Between 2004–05 and 2013–14, the rate of Aboriginal and Torres Strait Islander children in out-of-home care per 1000 children in the Aboriginal and Torres Strait Islander population Australia-wide aged 0–17 years has more than doubled from 21.5% to 51.4% compared to 4.0% to 5.6% for non-Indigenous children.[18]

Troublingly, across jurisdictions in 2013–14, the *rate* of Aboriginal and Torres Strait Islander children in out-of-home care per 1000 children is highest in NSW (71.3%), the ACT (67.3%) and Victoria (62.7%).[19] Whereas, the *proportion* of children and young people in out-of-home care by Indigenous status and jurisdiction is highest in the Northern Territory (85%), Western Australia (51%) and Queensland (40%).[20]

In relation to young people in detention, the rate of young people aged 10–17 in detention on any average night in the June quarter of 2015 was 3.2 per 10,000 (or about 1 in every 3,150 young people). This represented a decrease from the rate in the June quarter 4 years earlier (3.6 per 10,000).[21] Over the period from the June quarter 2014 to the June quarter 2015, the rate of young people aged 10-17 in detention was between 2.9 and 3.3 per 10,000 each quarter.[22]

In the June quarter of 2015, just over half (480 young people or 54%) of all those in detention on an average night were Aboriginal. Aboriginal young people outnumbered non-Aboriginal young people in detention in every quarter from March 2013 onwards.[23]

The Australian Institute of Health and Welfare states that Indigenous over-representation can be explained by comparing the rate of Indigenous young people to that of the non-Indigenous young people in detention:[24]

> The rate ratio shows that Indigenous young people aged 10–17 were 26 times as likely as non-Indigenous young people to be in detention on an average night in the June quarter 2015. This was an increase from 19 times as likely in the June quarter 2011.

Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, powerfully distills these statistics, stating:[25]

> By the time they reached the age of 23, more than three quarters (75.6 per cent) of the New South Wales Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a New South Wales criminal court. The corresponding figure for the non-Indigenous population of New South Wales was just 16.9 per cent. By the same age, 24.5 per cent of the Indigenous population, but just 1.3 per cent of the non-Indigenous population, had been refused bail or given a custodial sentence (control order or sentence of imprisonment).

17 Productivity Commission, *Report on Government Services 2015*, Community services, Child protection, Vol F, Ch 15, Table 15A.18.
18 ibid.
19 ibid.
20 ibid.
21 Australian Institute of Health and Welfare (AIHW), *Youth detention population in Australia 2015*, AIHW Bulletin no 131, cat no Aus 196, 2015, p 6.
22 ibid.
23 ibid, p 9.
24 ibid, p 11.
25 D Weatherburn, *Arresting incarceration: pathways out of Indigenous imprisonment*, Aboriginal Studies Press, 2014, p 5.

These statistics present a concerning picture, bolstered further by a considerable amount of research that has been conducted to show that children that have been in care are over-represented in the juvenile justice system. In 2011, the results of the 2009 NSW young people in custody health survey report were released. This report was prepared by NSW Justice Health in conjunction with NSW Juvenile Justice and surveyed the views of 361 young people from all Juvenile Detention Centres in NSW.[26]

The report arrived at a number of significant conclusions, one of which was a confirmation that children with a history in care are over-represented in the juvenile justice system in NSW. It also made a number of revealing findings with respect to the cross-over of young Aboriginal people from the care and protection system into the criminal justice system. Specifically, the report found (with respect to young people in detention):

- 27% had a history of being placed in care — 38% of those young people were Aboriginal and 17% were non-Aboriginal
- 45% had a parent who had been incarcerated — 61% Aboriginal and 30% non-Aboriginal.

In addition to providing a statistical outline of the extent of cross-over between a history of care and protection and entry into juvenile detention, the findings of the survey above elucidate the number of contributory risk factors specific to Aboriginal and Torres Strait Islander children and young people. I will discuss these risk factors in greater detail in the following section.

Part 2: Discussion of the causes of the cross-over

My discussion of these causes will not focus upon the impacts of the colonisation of Aboriginal people. Nor will it examine the dispossession and disempowerment that resulted from the numerous abuses perpetrated on Aboriginal people over time. This paper accepts that the reticulated and entrenched social, economic and cultural disadvantages experienced by Aboriginal people are root causes of Aboriginal young people "drifting" from the care and protection system to the criminal justice system.[27]

For the purposes of today's discussion, I will settle on five well-recognised areas of disadvantage, specific to the complex manifestation of cross-over: child neglect and abuse, poor school performance/early disengagement from education, unemployment, drug and alcohol abuse and disconnection from cultural identity.[28] These areas of disadvantage should be posited within the root causes of disadvantage and the broader, underlying impacts of Aboriginal cultural history.

All of these areas and their correlation with the drift from care to crime are also present in the non-Indigenous population, as identified in the 2010 Strategic Review of the NSW Juvenile Justice System.[29] This review highlighted the following risk factors for juvenile offending:

- disengagement with the education system
- criminal lifestyles and associations

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26 D Indig et al, *2009 NSW young people in custody health survey: full report*, Justice Health and Juvenile Justice, 2011.

27 Royal Commission into Aboriginal deaths in custody, *National report*, 1991, Vol 1.

28 D Weatherburn, *Arresting incarceration*, n 22, p 77; Senate Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, incarceration and the criminal justice system*, Discussion Paper, 2010, pp 24–5.

29 Noetic Solutions Pty Ltd, *A strategic review of the New South Wales juvenile justice system: report for the Minister of Juvenile Justice*, 2010.

- alcohol and other drug misuse
- accommodation problems, relationship problems including family dysfunction, mental health
- intellectual disabilities, and
- lack of structured leisure and recreational pursuits.[30]

Further, as the 2009 Young People in Custody Health Survey confirmed, children with a history of being placed in out-of-home care are grossly over-represented in the juvenile justice system and have been found to experience poorer mental and physical health, particularly difficulties in accessing education, employment and housing and have higher rates of early parenthood.[31]

This disadvantage is augmented by a lack of availability of emotional, financial and social supports to young people as they transition to adulthood. Consequently, long-term social and economic costs to the young person and the wider community are high. These risk factors are intensified for Aboriginal young people and are often perpetuating and mutually dependent, creating an impenetrable cycle of disadvantage.

A wealth of research exists to establish the adverse effects of child abuse and maltreatment on life-course outcomes for young people. Stewart et al summarise this research most eloquently when they state:[32]

> Recently, the field of developmental criminology has focused attention on the impacts of exposure to risk and protective or resilience factors at different points in a child's development. Of particular interest are the factors that lead to the onset and end of criminal behaviour. While a number of risk factors have been identified as increasing the likelihood of offending, none are as consistent as the detrimental effect of child abuse and neglect.

As I have discussed above, Aboriginal children and young people are significantly over-represented in out-of-home care and, from this over-representation, we can infer that these children are much more likely to experience abuse and neglect than non-Aboriginal children.

The propensity for increased abuse and neglect can also be related to the crime rates in Indigenous communities and the likelihood of a child being exposed to family violence and other forms of antisocial behaviour from a young age.

This is reflected in the substantiated notification rates (rate by 1,000 of population) of child neglect and abuse by Indigenous status. In NSW, between 2009–2010, this rate was 55.3 in the Aboriginal community, compared to 6.3 of the non-Indigenous community, representing an Indigenous to non-Indigenous ratio of 8.8.[33]

With respect to poor school performance and disengagement from education, it is well established that Indigenous children are less likely to attend school regularly. It is also well established that a young person's attendance at school is closely correlated to their performance. This non-attendance can arise due to a number of pressures in the young person's home life and

30 ibid.

31 D Indig et al, *2009 NSW young people in custody health survey*, n 23, p 31.

32 A Stewart et al, "Pathways from child maltreatment to juvenile offending", *Trends and issues in crime and criminal justice*, No 241, Australian Institute of Criminology, 2002, p 1.

33 Commonwealth Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous disadvantage: key indicators 2011 report*, 2011, Table 4A.10.2.

may be connected to early parentifying behaviours and the need for older siblings to look after their younger siblings due to child abuse, neglect and/or parental abuse or misuse of alcohol and other drugs.

The statistics regarding school attendance and performance clearly show that Aboriginal students perform more poorly than non-Indigenous students on all measures of educational achievement, including the achievement of minimum literacy and numeracy requirements.[34] In NSW, 17.3% of Indigenous students completed year 12, compared to 52.3% of non-Indigenous students.[35] Indigenous students meet 77.7% of the minimum reading standards, as compared to 93.7% of non-Indigenous students[36] and 83.5% of Indigenous students meet minimum writing standards, as compared to 95.7% of non-Indigenous students.[37] Finally, 80.9% of Indigenous students meet minimum numeracy requirements as compared to 95.3% of non-Indigenous students.[38]

Lack of educational attainment is closely correlated with poor future prospects of employment, exacerbating disadvantage and heightening the likelihood of engagement in antisocial behaviour.

The gap in unemployment rates between Indigenous and non-Indigenous people aged between 15–64 years is striking. In NSW in 2010, 48.1% of Indigenous people aged 15–64 were employed, compared to 71.8% of non-Indigenous people.[39]

Interestingly, and highly material to the issue of cross-over Indigenous young people, unemployment rates are much higher among young Indigenous people in their "crime prone" years (15–24) than among non-Indigenous people during the same years. The data shows that 25% of Indigenous Australians aged 15–17 are unemployed, as compared with 13.5% non-Indigenous Australians.[40] In a 2001 Australian Bureau of Statistics study, Hunter found that the effect of being unemployed was substantially worse for those who were not in the labour force.[41]

Referring once more to the 2009 NSW young people in custody health survey, the report revealed that a large proportion of Indigenous young people were mis-using or abusing alcohol or other drugs prior to their placement in custody. These drug or alcohol issues are often compounded by the fact that a large proportion of these young people are negotiating fraught, chaotic and dysfunctional home lives, including parental drug misuse or abuse.

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34 ibid.
35 ibid, Table 4A.5.4 for 2008.
36 ibid, Table 4A.4.16 for NSW 2010.
37 ibid, Table 4A.4.17 for NSW 2010.
38 ibid, Table 4A.4.18 for NSW 2010.
39 Australian Bureau of Statistics (ABS), *Labour force characteristics of Aboriginal and Torres Strait Islander Australians, estimates from the labour force survey, 2011*, ABS cat no 6287.0, 2011, Table 1 for NSW, persons aged 15–64 years, 2011.
40 D Weatherburn, *Arresting incarceration*, n 22, p 84.
41 B Hunter, *Factors underlying Indigenous arrest rates*, NSW Bureau of Crime Statistics and Research, 2001.

Drug or alcohol abuse is particularly problematic for young people, and can have a significant effect on their mental health. Mental illness and developmental disabilities are widespread among the young people attending the Children's Court. This was further confirmed by the results of the 2009 NSW young people in custody health survey:[42]

- 46% had a possible disability or borderline intellectual disability
- 18% had mild to moderate hearing loss
- 66% reported being drunk at least weekly in the year prior to custody
- 65% had used an illicit drug at least weekly in the year prior to custody.

Professor McGorry et al confirm, stating:[43]

> … up to one in four young people in Australia are likely to be suffering from a mental health problem, most commonly substance misuse or dependency, depression or anxiety disorder or combinations of these. ... There is also some evidence that the prevalence may have risen in recent decades.

Statistics regarding alcohol-induced deaths for Indigenous people suggest that alcohol abuse among Indigenous people is widespread. Between 2005–2009, 27.7% of Indigenous people, as compared with 4.8% of non-Indigenous people in NSW had alcohol-induced deaths. In Western Australia, 48.8% of Indigenous people versus 4.4% non-Indigenous died from alcohol related causes and in the Northern Territory, 55.5% of Indigenous people, as compared with 4.6% of non-Indigenous people died from alcohol-induced deaths.[44]

In addition, data suggests that drug-related poisonings and drug-related mental/behavioural disorders are much more common among Indigenous Australians than non-Indigenous Australians — particularly with respect to the use of opioid and opioid derivatives.[45]

The final category is not as statistically marked as those identified above. However, in my view, it is one of the most significant causal factors for Aboriginal disadvantage generally, and the drift from care to crime more specifically. I will describe this factor as disconnection from cultural identity.

An abundance of research exists regarding the pivotal role of cultural identity in the socialisation of all children and young people. This is further supplemented by legislative recognition in the *Children and Young Persons (Care and Protection) Act 1998*.

Aronson-Fontes has conducted extensive research into culture and child protection and synthesises the role of culture as follows:[46]

> … culture defines what is natural and expected in a given group. We all participate in multiple cultures: ethnic, national and professional, among others. We carry our cultures with us at all times and they have an impact on how we view and relate to people from our own and other cultures.

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42 D Indig et al, *2009 NSW young people in custody health survey*, n 23.
43 P McGorry et al, "Investing in youth mental health is a best buy" (2007) 187(7) *Medical Journal of Australia* 5.
44 ABS, *Labour force characteristics of Aboriginal and Torres Strait Islander Australians*, n 36, Table 10A.3.17.
45 ibid, Table 10A.4.6.
46 L Aronson-Fontes, *Child abuse and culture: working with diverse families*, Guildford Press, 2005, p 4.

In relation to Aboriginal children and young people, a range of Aboriginal and Torres Strait Islander organisations have highlighted that connection to family, culture and community are central to the safety, welfare and well-being of Aboriginal young people.[47] As Libesman noted:[48]

> Cultural care is about being part of a family, community, extended network, knowing where you belong, and knowing what the difference is between two different nations.

The *Children and Young Persons (Care and Protection) Act 1998* also places culture as a critical consideration in decision-making for both non-Aboriginal and Aboriginal children and young people.[49] For Aboriginal children and young people, the Aboriginal and Torres Strait Islander child placement principles make clear that the identity and socialisation needs of Aboriginal and Torres Strait Islander children and young people will be met most successfully in placements that foster Aboriginal culture and identity.[50]

It is clear that a fundamental understanding and positive association with Aboriginal cultural identity manifests in positive life-course outcomes and that:[51]

> Aboriginal children do better if they remain connected to their culture …

A positive characterisation of Aboriginality can act as a protective factor in ensuring that culture is used constructively, rather than destructively. Cultural competence in this context is about challenging labels that associate Aboriginality with antisocial behaviour. Ms Eileen Cummings, Chair of the Northern Territory Stolen Generation Aboriginal Corporation, succinctly captures this challenge:[52]

> Children have always been loved and respected and nurtured and taught in the Aboriginal way. It is important that these values and systems are encouraged and that Aboriginal people are empowered to ensure the systems are once again taught to their children to bring back pride and dignity to the Aboriginal people and communities. Too often the focus is wholly on the negative, not the positive, of Aboriginal child rearing and the Aboriginal practices which give young people their identity, their values, their role and their purposes in life.

We know from the well-established criminological theory of labeling, that when social institutions and processes ascribe certain, negative labels to young people during the crucial years in which self-identity is formed, the young person may begin to form their identity around this label. Cunneen and White state that:[53]

> The process of labelling is tied up with the idea of the self-fulfilling prophecy. That is, if you tell someone sufficiently often that they are "bad" or "stupid", or "crazy", that person may start to believe the label and to act out the stereotypical behaviour associated with it.

The concept of labelling is often perpetuated by "moral panic", whereby public labeling and denouncement of certain groups as "bad", "criminal" or "deviant" is amplified by the media.[54]

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47 T Libesman, *Cultural care for Aboriginal and Torres Strait Islander children in out-of-home care*, Secretariat of National Aboriginal and Islander Child Care, 2011, pp 11–14.

48 ibid, p 11.

49 *Children and Young Persons (Care and Protection) Act 1998*, Ch 2, Pts 1 and 2.

50 ibid, s 13.

51 Commission for Children and Young People, *In the child's best interests: inquiry into compliance with the intent of the Aboriginal child placement principle in Victoria*, 2015, p 7.

52 E Cummings, Chair, Northern Territory Stolen Generations Aboriginal Corporation, Committee Hansard, Darwin, 2 April 2015, p 28.

53 C Cunneen and R White, "Theories of juvenile offending" in *Juvenile justice: youth and crime in Australia*, Oxford University Press, 2002, p 46.

54 S Cohen, *Folk devils and moral panics*, MacGibbon and Kee, 1972.

Young Aboriginal people in their formative years are saturated by portrayals in media, social media and within the community that define Aboriginal people as a homogenous criminogenic group of inherently antisocial people.

In addition, young people often respond as a collective, for example, they may form a gang in order to develop a sense of identity and community. This is likely to exacerbate the effects of peer pressure and in conjunction with the lack of a stable or secure home life, disengagement from education, unemployment and drug or alcohol misuse or abuse, it is easy to see how a young Aboriginal person might see that their only option is a life of crime and disadvantage.

The resulting stereotypical behaviour associated with the label of "antisocial Aboriginal youth" can also limit a young Aboriginal person's prospects of rehabilitation, further feeding and embedding the causative effects of cultural disconnection.

I appreciate that I have discussed a number of issues that present a rather bleak picture for Aboriginal children and young people drifting from the care and protection to the juvenile justice jurisdiction. However, in the next section, I propose to look at some ways of countering these risk factors through the application and development of promising initiatives that use protective factors to address the multifactorial reasons underpinning cross-over.

Part 3: Examination of options to address cross-over

This paper has illustrated that the needs of Aboriginal and Torres Strait Islander children and young people are irrefutable and complex. Justice Muirhead eloquently enunciated the need for erudite application of the law for Aboriginal and Torres Strait Islander children and young people in *Jabaltjari v Hammersley*, stating:[55]

> The young Aboriginal child is a child who requires tremendous care and attention, much thought, much consideration.

Whilst all children and young people in care require a range of supports to address trauma and abuse, there is an additional need for Aboriginal and Torres Strait Islander children to be provided with cultural support through tailored counseling and collaboration, to assist in maintaining links to their family and culture.

Ms Megan Mitchell, National Children's Commissioner stated that it is necessary to collaborate and engage with Aboriginal communities in order to improve outcomes for children and young people:[56]

> That includes things like improving the number of Aboriginal people that are in the child-protection and home-care workforce so that you can have effective engagement with families so that they become part of the solution and so that they are driving and owning the problem and solution. If we keep disempowering these communities and families, we will just create more of the same intergenerational disadvantage.

One way of doing this is by encouraging the use of therapeutic jurisprudence and problem-solving courts. Therapeutic jurisprudence is directed toward looking at the law as a therapeutic agent and, as a consequence, improving the operation of the law in order to address the impact of legal practice and procedure on well-being.[57]

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55 *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 98.

56 M Mitchell, National Children's Commissioner, Committee Hansard, Sydney, 18 February 2015, pp 5–6.

57 D Wexler, "An introduction to therapeutic jurisprudence" in D Wexler and B Winick, *Essays in therapeutic jurisprudence*, Carolina Academic Press, 1991, p 8.

Amongst other things, application of the precepts of therapeutic jurisprudence can improve policy and drafting, embed practice aimed at harm minimisation and the promotion of rehabilitation and encourage community trust and confidence in the administration of justice.[58]

Accordingly, using therapeutic approaches to address the drift of Aboriginal children and young people from the care and protection jurisdiction to the criminal justice system may provide a more holistic, and therefore more curative, approach to reducing cross-over. With respect to the effects of therapeutic jurisprudence in the criminal sphere, a report prepared for the National Judicial Institute in Canada recognised that:[59]

> Members of Aboriginal communities — overrepresented in our courts and in our jails — have advocated for a judicial system that both considers the complex social, economic and cultural factors that cause Aboriginal people to be in conflict with the law and that takes a healing approach to sentencing.

As President of the Children's Court, I have adopted a therapeutic jurisprudential approach to the over-representation of Aboriginal children and young people in the care and criminal jurisdictions of the court. Additionally, I have agitated for the application of innovative responses to address the distrust and disconnection from the justice system experienced by many Aboriginal young people.

One way the Children's Court is actively implementing the precepts of therapeutic jurisprudence in the court's criminal jurisdiction is through its establishment of a pilot Youth Koori Court (YKC), which has been in existence for over one-and-a-half years now. I acknowledge that the YKC is not a panacea, however, it does seek to provide the Aboriginal young people who appear before the court with an inclusive, empowering and culturally relevant legal process.

I strongly support the YKC and note that the pilot has been established within existing resources and without the need for legislative change. The establishment and development of the YKC has been undertaken in consultation with an extensive group of stakeholders.[60] These include the Aboriginal Legal Service, Children's Legal Services, Police Prosecutions, Daramu, Aboriginal Services Division of the Department of Justice, Juvenile Justice, Justice Health, the Children's Court Assistance Scheme, Marist Youth Care, The Men's Shed, The Lighthouse Project, DFaCS and the Children's Court Executive.

The legislative scheme applicable to the YKC is consistent with the general principles informing the work of the Children's Court. In particular, the provisions in s 6(a), (b) and (f) of the *Children (Criminal Proceedings) Act 1987* are included below [my emphasis]:

> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, *a right to be heard*, and *a right to participate*, in the processes that lead to decisions that affect them,

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58 M King, "Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice", (2008) 32 *Melbourne University Law Review* 1096 at p 1114.

59 S Goldberg, *Judging for the 21st century: a problem solving approach*, Ottawa National Judicial Institute, 2005, accessed at www.nji.ca.

60 Note: a significant amount of information relied upon in this section on the Youth Koori Court (YKC) is taken from a paper presented to the Aotearoa Conference on Therapeutic Jurisprudence on 3 and 4 September 2015 by the Presiding Magistrate of the YKC, Magistrate Susan Duncombe; see also S Duncombe, "NSW Youth Koori Court Pilot Program: opportunities and challenges", paper presented to the Australian Children's Commissioners and Guardians, 17 November 2016, Sydney.

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, *require guidance and assistance*, …

(f) that it is desirable that children who commit offences be *assisted with their reintegration into the community so as to sustain family and community ties*, …

In the Children's Court, the *Children (Criminal Proceedings) Act* provides the penalties applicable at s 33. Specifically, s 33(1)(c2) provides:

(c2) it may not make an order adjourning proceedings against the person to a specified date (not later than 12 months from the date of the finding of guilt) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act 2013*):

(i) for the purpose of assessing the person's capacity and prospects for rehabilitation,

(ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place,

(iii) for any other purpose the Children's Court considers appropriate in the circumstances, …

Simply put, the YKC uses a deferred sentencing model: s 33(1)(c2). In addition, it applies a culturally competent process through the participation of Elders.

The principles of mediation are used through a conference process, presided over by Specialist Magistrate Sue Duncombe. The young person is consulted and participates, as do the relevant stakeholders, and issues of concern are identified for the young person. Methods of addressing these issues are then incorporated in an Action and Support Plan for the young person. The young person must focus upon this plan over the 3–6 months prior to sentence.

The young person then has his/her actions taken into account on sentence and after hearing submissions from the prosecution and defence. Elders/respected persons are also provided with an opportunity to provide input. Juvenile Justice or the agency with the case coordination role will prepare a progress report. The judicial officer will consider this information and impose a sentence. Notably, the full suite of sentencing options are available to the judicial officer.

Referrals to the YKC can only be made on the application of the young person. It is a voluntary process and relies upon genuine commitment by the young person.

The culturally competent component of the YKC is demonstrated through the set-up of the court room itself. The YKC sits in a court room with artworks prepared by young people in custody at each of the juvenile justice centres in NSW.

The judicial officer sits with the Elders/respected persons around a table with the young person, his or her family or supporters, the prosecutor, the legal representative for the young person and representatives from agencies, including Juvenile Justice. The judicial officer is not robed until sentencing.

The YKC has been sitting for six months and 21 young people have been assessed as suitable and two of those have been sentenced in the YKC. Six young people are yet to attend a conference and develop their plans. Anecdotally, a profile of the young people involved demonstrates the enormity of the issues these young people face.

A formal process evaluation is being conducted by the University of Western Sydney. However, at this stage many young people have become genuinely engaged in the process and given the participatory nature of the process, many young people have developed a strong sense of accountability for their actions.

This development is indicative of an enlightened criminal justice system for young Aboriginal offenders. It is an exciting process to be involved in and has the real potential to significantly change outcomes for young Aboriginal people involved in the criminal justice system. The power of this change is articulated by a young person who stated (in an answer to a question from an Elder about how the person saw this court):[61]

> It is good. There is more support, heaps more. That support is more intensive. You can talk to the judge and the judge knows what's going on, not just reading the papers.

In its care and protection jurisdiction, I have used my influence to advocate for tailored cultural care planning for Aboriginal children and young people. As I stated above, culture is central to the identity formation and socialisation of children and young people.

It carries a young person through their formative years and provides a sense of belonging in the world. If a child is removed from its parents, culture remains important — whether the child is at an age in which they are cognisant of this process or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.

I appreciate that I have raised this issue at a variety of different forums, but it is important that I continue to do so until comprehensive cultural planning is embedded at all levels of the care and protection process. While I have witnessed some improvements during my tenure at the Children's Court, I am not yet satisfied that there has been a widespread application and appreciation of this need.

In order to achieve this aim, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focused cultural planning for Aboriginal children and young people.

The *Children and Young Persons (Care and Protection) Act 1998* is to be administered under the "paramountcy principle", that is, that the safety welfare and well-being of the child is paramount: s 9(1). In addition to this paramountcy principle, the *Children and Young Persons (Care and Protection) Act* sets out other particular principles to be applied in the administration of the Act: s 9(2).

One of these principles is that account must be taken of concepts such as culture, language, identity and community.

It is a principle to be applied in the administration of the *Children and Young Persons (Care and Protection) Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible: s 11.

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

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61 ibid. De-identified quote from young person cited in S Duncombe, "NSW Youth Koori Court Pilot Program: opportunities and challenges", p 14.

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

(a) a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or

(b) … a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or

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

(d) … a suitable person approved by the Secretary after consultation with:

  (i) members of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

  (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

Before it can make a final care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7)(a).

Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:

(a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement: s 9(2)(e),

(b) meet the needs of the child: s 78A(1)(b), and

(c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).

The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.

I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4:

> The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.

I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate

casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.

Conclusion

I hope that I have presented a comprehensive paper to address the complex factors associated with the drift of Aboriginal children from the care and protection system to the criminal justice system and I hope that this conversation will continue until we see a future where cross-over is no longer a problem to be addressed, but a chapter in past history that is not to be repeated.

Until that happens, I will continue to ensure that I use my role as President of this significant jurisdiction to achieve concrete, long-lasting and empowering results for Aboriginal children and young people.

Children's Court of NSW: 2019*

P Johnstone†

Care and protection and the Children's Court of NSW ..... [2-4000]
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[2-4000] Care and protection and the Children's Court of NSW

Proceedings relating to the care and protection of children and young persons in NSW, including first instance matters before the Children's Court, and appeals from its decisions, are public law proceedings, governed, both substantively and procedurally, by the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act).

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* This is the second part of the presentation.

† President of the Children's Court of NSW, NSW Bar Association CPD Conference, 30 March 2019, Sydney Hilton, Sydney.

Care proceedings[1] involve discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection. The rules of evidence do not apply, the proceedings are non-adversarial and they are required to be conducted with as little formality and legal technicality and form as the circumstances permit.

The guiding principles in the Care Act

Decisions in Care proceedings, at first instance and on appeal, are to be made consistently with the objects, provisions and principles provided for in the Care Act, and where appropriate, the United Nations' *Convention on the Rights of the Child* 1989.[2]

The Care Act contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department's powers and responsibilities begin and end as opposed to those of the court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the court.[3]

I will be concentrating, in this paper, on the judicial aspects of the legislation.

The objects of the Care Act located in s 8, are to provide:

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

(a1) recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and

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

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

The Care Act sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear in other parts of the Act.

First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that, in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

This principle, therefore, is the underpinning philosophy by which all relevant decisions are to be made.

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1 Defined in Care Act s 60.

2 *Re Tracey* (2011) 80 NSWLR 261; *Re Henry* [2015] NSWCA 89 at [208]ff.

3 *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008 (the "Wood Report") at 11.2 at https://apo.org.au/sites/default/files/resource-files/2008/11/apo-nid2851-1183596.pdf, accessed 26 June 2019.

This paramountcy principle operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

It is now well-settled law that the proper test to be applied is that of "unacceptable risk to the child": *M v M* (1988) 166 CLR 69 at [25]. That case dealt with past sexual abuse of a child but the principles there set out apply to other forms of harm, such as physical and emotional harm.[4] A positive finding of an allegation of harm having been caused to a child should only be made where the court is satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw*.[5] Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned.[6]

The Secretary, will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250 at [67]–[68], per Sackville AJA.

His Honour said in that decision:

> The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 140(2) of the *Evidence Act*. It was not appropriate to find that the [Secretary] had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was "*highly improbable*". To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father.
>
> As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at [171], statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] FamCA 1235. This is an exercise in foresight. The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated, for example, the nature and extent of parental contact, including any need for supervision.[7]

Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

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4 *A v A* (2000) 26 Fam LR 382.

5 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

6 *M v M* (1988) 166 CLR 69 at [26].

7 S Austin, "The enigma of unacceptable risk", paper delivered at the Hunter Valley Family Law Practitioners Association, 2015 Hunter Valley Family Law Conference, 31 July 2015, Hunter Valley.

Secondary to the paramount concern, the Care Act sets out other, particular principles to be applied in the administration of the Act. These are set out in ss 9(2), 10, 10A, 11, 12 and 13. There are also special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11, 12 and 13.

- Wherever a child is able to form their own view, they are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child's developmental capacity, and the circumstances: s 9(2)(a). See also s 10.
- Account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child or young person: s 9(2)(b).
- Any action to be taken to protect the children from harm must be the least intrusive intervention in the life of the children and their family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c).
- If children are temporarily or permanently deprived of their family environment, or cannot be allowed to remain in that environment in their own best interests, they are entitled to special protection and assistance from the State, and their name, identity, language, cultural and religious ties should, as far as possible, be preserved.
- Any out-of-home care arrangements are to be made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and, the younger the age of the child, the greater the need for early decisions to be made: s 9(2)(e).

  Unless contrary to the child's best interests, and taking into account the wishes of the child, this will include the retention of relationships with people significant to the children: s 9(2)(f).
- Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible: s 11(1).
- Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.
- Where possible, any out-of-home placement of an Aboriginal or Torres Strait Islander child is to be with a member of the extended family or kinship group.
- If that is not possible, the Act provides for a descending process of placement with an appropriate Aboriginal and Torres Straits Islander carer before, as a last resort, placement with a non-Aboriginal and Torres Straits Islander carer, after consultation: s 13(1).
- In determining where a child is to be placed, account is to be taken of whether the child identifies as an Aboriginal or Torres Strait Islander and the expressed wishes of the child: s 13(2).
- A permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13: s 78A(3).

The Care Act is not the most precise or orderly piece of legislation one could hope for. There are, however, a number of key concepts that principally occupy the exercise of the Care jurisdiction, about which I will say something. They include:

- removal of children and interim orders
- the need for care and protection — establishment
- permanent placement
- realistic possibility of restoration
- parental responsibility
- out-of-home care
- contact.

Removal of children from their parent(s) or carer(s)

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

Removal of a child into state care may be sought by seeking orders from the court (s 34(2)(d)), by the obtaining of a warrant (s 233), or, where appropriate, by effecting an emergency removal: s 34(2)(c); see also ss 43 and 44.

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

The court may then make interim Care orders: s 69. An "interim order" is an order of a temporary or provisional nature pending the final resolution of the proceedings in which an applicant "generally speaking, does not have to satisfy the court of the merits of its claim": *Re Jayden* [2007] NSWCA 35 at [77]. It may be made if it is not in the best interests of the safety, welfare and well-being of the child that he or she remain with the parent or parents, or that it is appropriate for the safety (s 69(2)), welfare and well-being of the child (s 70), or that an interim order is necessary, and is preferable to an order dismissing the proceedings: s 70A.[8]

The usual interim order is for the allocation of parental responsibility to the Minister until further order.[9] Such an order enables appropriate investigation and planning to be undertaken by Departmental caseworkers while the child is in a protected environment.

The making of an interim order in effect puts the position of the parties in a holding pattern, without prejudice, and without any admissions.

The Care Act, as recently amended, makes it clear that parties may apply to vary an interim order without the need to follow the formal process that applies to the rescission or variation of final Care orders.

This overcomes a problem thought to be posed by the Supreme Court decision in *Re Timothy* [2010] NSWSC 524, to the effect that an application to vary an interim order needed to be

8 *Re Jayden* [2007] NSWCA 35 per Ipp J at [70].
9 *Re Mary* [2014] NSWChC 7.

brought under s 90 of the Care Act, such that a formal application was required seeking leave to apply, and evidence adduced to satisfy the court that there had been a significant change in circumstances.[10] The Children's Court may now vary interim orders at any time if considered appropriate, including on oral application in matters currently before the court.[11]

The need for care and protection

After removal or assumption of a child into care, and the making of an interim order allocating parental responsibility to the Minister, the proceedings then focus on the past and current circumstances of the child. This first phase of care proceedings is generally referred to as the establishment phase. Thus, before the court moves to the second phase of the proceedings, in which the focus is on the child's future, the proceedings are required to be "established".[12]

The establishment precondition is satisfied if there has been a finding that there is an existing need of care and protection pursuant to s 71 of the Care Act: *VV v District Court of NSW* [2013] NSWCA 469 at [20]. It does not matter whether the conduct constituting a reason or part thereof for the purposes of s 71 occurred wholly or partly outside NSW: s 71A.

The rationale for the requirement that protective proceedings be established has been described as a safeguard against arbitrary intervention by the State into the lives of children and their families.[13]

The establishment issue is a threshold issue. It is a statutory precondition to the making of final Care orders in the second, welfare phase of protective proceedings. Establishment, or a finding, is not concerned with the issue of restoration, nor is it concerned with considerations of unacceptable risk of harm, nor with the amelioration of risk. These are matters for the second, welfare stage of protection proceedings.[14]

For care proceedings to be "established" a finding is required that the child is in need of care and protection for any reason or was in need of care and protection at the time the Application was made.

Section 71(1) of the Care Act relevantly provides:

> **Grounds for Care orders**:
>
> The Children's Court may make a Care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any reason including without limitation any of the following:
>
> (a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason
>
> (b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection
>
> (c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated
>
> (d) subject to s 71(2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers

10 *Re Timothy* at [59]–[60].
11 Care Act s 90AA.
12 *Re Alistair* [2006] NSWSC 411 at [69].
13 ibid at [64]–[65] per Kirby J.
14 *DFaCS and Nicole* [2018] NSWChC 3.

(e) the child or young person 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

(f) 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

(g) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with,

(h) s 171(1) applies in respect of the child or young person.[15]

Thus, the need for "care and protection" is not conclusively defined, and the concept is at large; a finding may be made for "any reason". The Care Act does, however, specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.

The court is not bound by the rules of evidence unless it so determines: s 93(3). Nevertheless the court must draw its conclusions from material that is satisfactory in a probative sense so as to avoid decision-making that might appear capricious, arbitrary or without foundational material.[16]

The significance of a finding that a child is in need of care and protection is that it forms the basis for the making of final Care orders under the Care Act.[17]

Once proceedings are established, they enter the so-called second phase, sometimes referred to as the "welfare phase" during which planning for the child is undertaken, and following which final Care orders may be made. Establishment is a statutory precondition to the making of final Care orders in the welfare phase.[18]

My preference is to describe this second phase as the "placement" phase given the important threshold construct that the Secretary must first address after establishment as to whether there is a realistic possibility of restoration. Only if there is no realistic possibility of restoration will alternative placements be required to be considered as part of the permanency planning, in the welfare or placement of proceedings, in a Care Plan that the Secretary is required to prepare pursuant to s 78 of the Care Act.

The placement phase of Care proceedings

Once a child has been found to be in need of care and protection the Secretary is required to undertake planning for the child's future. In most cases the Secretary will prepare a formal Care Plan that addresses the needs of the child.[19]

15 Section 171(1) deals with a child or young person residing in unauthorised statutory or supported out-of-home care.
16 *JL v Secretary DFaCS* [2015] NSWCA 88 at [148].
17 Care Act ss 71(1) and 72(1).
18 *Re Henry* [2015] NSWCA 89 at [36]–[37].
19 Care Act s 3(1).

The Secretary is required to consider what permanent placement is required to provide a safe, nurturing, stable and secure environment for the child.[20] Permanent placement is to be made in accordance with the permanent placement principles prescribed.[21] The "hierarchy" established might be summarised as follows:

- if it is practicable and in the best interests of the child, the first preference for permanent placement is for the child to be restored to the parent(s)
- the second preference for permanent placement is guardianship of a relative, kin or other suitable person
- the next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted
- the last preference is for the child to be placed under the parental responsibility of the Minister
- in the case of an Aboriginal or Torres Strait Islander child, if restoration, guardianship or the allocation of parental responsibility to the Minister is not practicable or in the child's best interests, the child is to be adopted.

Realistic possibility of restoration

Thus the Secretary must first assess whether there is a realistic possibility of restoration of the child to the parent(s) within a reasonable period, having regard firstly to the circumstances of the child; and secondly, to the evidence, if any, that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child.[22]

The court must then decide whether to accept the assessment of the Secretary: s 83(5). If the court does not accept the assessment of the Secretary, it may direct the Secretary to prepare a different permanency plan: s 83(6).

The phrase "realistic possibility of restoration", therefore, involves an important threshold construct, which informs the planning that is to be undertaken in respect of any child that has been removed from parents or assumed into care and found to be in need of care and protection.

There is no definition of the phrase "realistic possibility of restoration" in the Care Act.

However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the Supreme Court by Slattery J in 2011: *In the matter of Campbell* [2011] NSWSC 761. This decision was cited with approval by the Court of Appeal: *Re Henry* [2015] NSWCA 89 at [44].

Importantly, Slattery J held that it is at the time of the determination that the court must make the assessment. It must be a realistic possibility at that time, not merely a future possibility. This restriction has been removed by recent amendments to the Care Act.

The amendments inserted the additional words "within a reasonable time" into the relevant subsections of s 83. It is necessary, therefore, to look more closely at the significance of the addition of those words.

20 s 10A(1).
21 s 10A(3).
22 s 83(1).

In my view, the effect of those words has been to remove the restriction formulated by Slattery J in *In the matter of Campbell*, when he said:

> It is going too far to read into the expression a requirement that an applicant must always at the time of hearing … have demonstrated participation in a program with some significant "runs on the board".[23]

Instead, now, the court may take into account the formulation originally articulated by Senior Magistrate Mitchell in a submission to the *Report of the Special Commission of Inquiry into Child Protection Services in NSW*:[24]

> The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant "runs on the board". The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.[25]

The principles relating to the phrase "a realistic possibility of restoration" may now be summarised therefore, by reference to *In the matter of Campbell* and *Re Tanya*,[26] a decision by Rein J in the Supreme Court, and *The Department of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid and "Frank Reid"* [2010] CLN 1 at [61].

- A possibility is something less than a probability; that is, something that it is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible.
- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve.
- The possibility must be "realistic", that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". It needs to be "sensible" and "commonsensical".
- A realistic possibility may be evidenced at the time of hearing by a coherent program already commenced and with some significant "runs on the board". The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.
- There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.
- The determination must be undertaken in the context of the totality of the Care Act, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm.

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23 *In the matter of Campbell* [2011] NSWSC 761 at [56].
24 *Re Saunders and Morgan v Department of Community Services* [2008] CLN 10 Johnstone J at [11] and above n 4.
25 *In the matter of Campbell* [2011] NSWSC 761 at [55].
26 *Re Tanya* [2016] NSWSC 794 at [50]–[51].

Permanency planning

Where the Secretary assesses that there is a realistic possibility of restoration to a parent, and the court accepts that assessment, the Secretary is to prepare a permanency plan[27] that includes a description of the minimum outcomes that need to be achieved before the child is returned to the parent, services to be provided to facilitate restoration, and a statement of the length of time during which restoration should be actively pursued.[28]

If the Secretary assesses that there is no realistic possibility of restoration to a parent, the Secretary is to prepare a permanency plan for another suitable long-term placement in accordance with the permanent placement principles discussed above, as set out in s 10A of the Care Act.

Permanency planning means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs.[29] The court must not make a final Care order unless it expressly finds that permanency planning has been appropriately and adequately addressed.[30]

The permanency plan must have regard to the principle of the need for timely arrangements, the younger the child, the greater the need for early decisions, and must avoid the instability and uncertainty that can occur through a succession of different placements or temporary care arrangements. The planning must also make provision for the allocation of parental responsibility, the kind of placement proposed, the arrangements for contact, and the services that need to be provided.[31]

A permanency plan does not need to provide details as to the exact placement in the long term, but must be sufficiently clear and particularised so as to provide the court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future.[32]

If the child is an Aboriginal or Torres Straits Islander there are particular additional requirements to be addressed. The permanency planning must address how the plan has complied with the principles of participation and self-determination set out in s 13 of the Care Act.[33] It should also address the principle set out in s 9(2)(d) which requires that the child's identity, language and cultural ties be, as far as possible, preserved. Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child or young person is "intrinsic" to any assessment of what is in the child's best interests.[34] It follows that the need to consider Aboriginality and ensure the participation of families and communities must be applied across all aspects of child protection decision-making.

Parental responsibility

Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.[35] The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

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27 s 83(2).
28 s 84.
29 s 78A(1).
30 s 83(7).
31 s 78.
32 s 78A(2A).
33 s 78A(3).
34 *Department of Human Services and K Siblings* [2013] VChC 1 per Magistrate Wallington at 5.
35 s 3.

If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility.[36]

The specific aspects of parental responsibility that might be separately or jointly allocated are unlimited, but include residence, contact, education, religious upbringing and medical treatment.[37]

When allocating parental responsibility, the court is required to give particular consideration to the principle of the least intrusive intervention, and be satisfied that any other order would be insufficient to meet the needs of the child.[38]

Where a person is allocated all aspects of parental responsibility, the court may make a guardianship order: see ss 79A–79C.

The maximum period for which an order may be made allocating all aspects of parental responsibility to the Minister, following approval of a permanency plan involving restoration, guardianship or adoption, is 24 months,[39] unless there are special circumstances that warrant a longer period.[40]

This restriction marks an upper limit for the reasonable period within which there might be a realistic possibility of restoration.

It also places the onus on the Secretary to bring an application for rescission under s 90 of the Care Act if a staged restoration breaks down within that two year period.

Out-of-home care

Where the Secretary assesses that there is no realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the court: s 83(3). The Secretary may consider whether adoption is the preferred option: s 83(4).

A long-term placement following the removal of a child which provides a safe, nurturing and secure environment may be achieved by placement with a member or members of the same kinship group as the child or young person, or placement with an authorised carer: s 3.

Out-of-home care means residential care and control provided by a person other than a parent, at a place other than the usual home: s 135.

Decisions concerning out-of-home placement of children in need of care and protection are not decisions that the court undertakes lightly or easily. But at the end of the day, a risk assessment is required, in accordance with the principle that the safety, welfare, and well-being of the children are paramount.

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

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36 s 79(1).
37 s 79(2).
38 s 79(3).
39 s 79(9).
40 s 79(10).

The permanency plan will generally consist of a care plan: s 80, together with details of other matters about which the court is required to be satisfied. The care plan must make provision for certain specified matters: s 78. These are:

(a) the allocation of parental responsibility between the Minister and the parents of the child for the duration of any period of removal;

(b) the kind of placement proposed, including:

  (i) how it relates in general terms to permanency planning,

  (ii) any interim arrangements that are proposed pending permanent placement and the timetable proposed for achieving a permanent placement,

(c) the arrangements for contact between the child and his or her parents, relatives, friends and other persons connected with the child,

(d) the agency designated to supervise the placement in out-of-home care

(e) the services that need to be provided to the child or young person.

Contact

Importantly, where there is not to be a restoration, the permanency planning must also include provision for appropriate and adequate arrangements for contact.[41]

In addition, the court may, on application, make orders in relation to contact, including orders for contact between children and their parents, relatives or other persons of significance but only for a maximum period of up to 12 months. The court may make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised.[42]

The introduction of s 86 into the Care Act in 2000 permitted the Children's Court, for the first time, to make contact orders beyond the life of the particular proceedings. The section does not, however, create any right or other entitlement to contact in Care cases. Nor, in my view, does it create any presumption that contact should exist. Contact, although recognised in s 9(2)(f), remains subject always to the safety, welfare and well-being of the child. An order under s 86 mandating contact arrangements should, therefore, only be used sparingly, in cases of demonstrated need, such as intransigence, inflexibility, or a failure to have proper regard to the needs and best interests of the child.

The issue of appropriate contact for children who have been permanently removed from the care of their parents, particularly young children, remains vexed, and there continues to be a wide range of opinion as to the value of contact.

Perceived benefits to be derived by children from contact include developing and continuing meaningful relationships. On the other hand, contact can have an unsettling effect on a child, act as a distraction, impede attachment to new carers and disrupt the placement.

It is generally accepted that a child benefits from some contact with the family of origin (except in extreme cases). Much depends on the level of trust and co-operation that exists between the carers and the birth family. In some cases the birth family can play a positive and supportive role. In other cases, members of the birth family can put the stability of the placement

41 ss 9(2)(f), 78(2).
42 s 86.

at risk. There is a strong body of opinion that contact should not interfere with a child's growing attachment to the new family. The younger the child, and the less time the child has been with the birth parents, the less the need for other than minimal contact, for identification purposes.

There are some relevant judicial pronouncements that guide the resolution of contact issues, including the decisions in *Re Liam* [2005] NSWSC 75, *George v Children's Court of NSW* (2003) 59 NSWLR 232 and *Re Felicity (No 3)* [2014] NSWCA 226 at [42].

In 2011 the Children's Court issued Contact Guidelines designed to provide assistance to Judicial Officers, practitioners and parties, which were based upon available research and the court's "accumulated expertise and experience as a specialist court" in Care proceedings.

The issue of contact in Care cases requires the consideration of a range of factors, having regard to the exigencies and circumstances of the particular case, both advantageous and disadvantageous, and balancing the benefits against the risks, the primary focus being on the needs and best interests of the child, and any risk of unacceptable harm: *Re Helen* [2004] NSWLC 7.

The decision should be based on relevant, reliable and current information.

Factors include the level of attachment to the relevant member of the birth family, the degree of animosity displayed by the birth family against the carers, the level of demonstrated co-operation and engagement with the carers, and the commitment to supporting the placement, the degree of any abusive experience while in the care of the birth family and any ongoing emotional sequelae, the competing demands of the children's educational, cultural, social and sporting activities, the proposed location of the contact, the travel and other disruption involved, the quality of the contact, the safety of the children during contact, and any other risk factors associated with contact, including the potential for denigration of the carers or other undermining of the placement, and the potential for other negative persons or influences to be present at the visit.

Preferably, contact should be left to the discretion of the person having parental responsibility, taking into account the advice of any professionals retained to assist with the children and the views of all those affected, including the children themselves (having regard to their age, their level of emotional and psychosocial development, and other factors).

The regime for contact should be flexible, recognising that circumstances change as children grow older and their emotional, social and other needs develop.

Some relevant statements in the Children's Court Contact Guidelines are:[43]

> For some children the benefit of contact will be primarily that they understand who they are in the context of their birth family and cultural background. Contact might also help ensure that the child has a realistic understanding of who their parent is and that the child does not idealise an unsuitable parent and develop unrealistic hopes of being reunited with the parent.
>
> The focus must always be on the needs of the child and what is in the best interests of the child. How will the child benefit from contact with parents and siblings? Some benefit may be achieved over a long term, ie by providing the foundation for a relationship between the child and the parent which will develop later.
>
> …

43 The Children's Court of NSW, *Contact Guidelines*, pp 2–5 at www.childrenscourt.justice.nsw.gov.au/ Documents/ contact_guidelines.pdf, accessed 27 June 2019.

> Younger children will usually need more frequent contact for a shorter duration than older children to maintain a relationship. Younger children especially should not be subjected to long travel to attend contact.
>
> …
>
> Children and carer families will have their own commitments and patterns involving such things as sport, cultural activities, spending time with friends and church attendance. It is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than participating in carer family events. It is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing.
>
> It is very important to see children in the context of their extended family and not just their parents. Particular attention should be paid to supporting sibling relationships. Even if extended family members are unable to care for a child it is still likely that contact will be beneficial — providing information and family and cultural identity. Existing healthy relationships should be supported even if a child is to remain in out-of-home care.
>
> Balancing extended family contact and placement stability and normality requires careful consideration. For example, what would be usual contact with grandparents if the child were not in care?
>
> …
>
> Contact can occur in other ways than face-to-face. In some situations it will be necessary to limit or prohibit indirect contact or to ensure that it is supervised. It may also be necessary to prohibit a parent from making any reference to the child on a social networking website. Alternatively, especially if the parent is at some distance from the child, the use of electronic communication should be encouraged.
>
> …
>
> A long-term contact order may create problems as a child's circumstances change, particularly if the contact is to be relatively frequent. School, sport, cultural activities and friendship dynamics are just some of the factors which change over time. As a child gets older less frequent but longer contact may be appropriate.
>
> The need for contact to be supervised may also change as the child and the parents' circumstances change.

Particular aspects of the care jurisdiction

Practice and procedure

Care proceedings, including appeals, are to be conducted in closed court (s 104B), and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1).

This prohibition extends to the periods before, during and after the proceedings. The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

There are exceptions, such as where a young person (ie a person aged 16 or 17) consents, where the Children's Court consents, or where the Minister with parental responsibility consents: s 105(3).

The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the court has a discretion to exclude the media.

In my view, the discretion would only be exercised in exceptional circumstances, because the provisions of s 105 of the Care Act are usually sufficient protection: *R v LMW* [1999] NSWSC 1111.

Under the common law principles of open justice, the balance would lie in favour of the newspaper: *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476 at G. In *AM v DoCS; Ex p Nationwide News* [2008] NSWDC 16, I held that the common law principle of open justice is secondary to the principles in s 9 of the Care Act, in particular the paramountcy principle. In that case, I held that the newspaper, which had previously published material tending to identify the children, had not satisfied me that this sort of publication was not likely to re-occur.

I excluded the reporter from remaining in court. I went on to say at [15]:

> However, in the interests of a balancing exercise and applying the principle of open justice to the extent that it applies subject to s 9(a), I would be prepared to allow this newspaper to come back with some evidence which might convince me that it would be appropriate for me to be satisfied that, with acceptable undertakings, there could be a basis upon which I might allow its reporters to remain in court during the hearing.

Interestingly, the newspaper concerned did not take up that invitation.

Care and protection proceedings, including appeals, are not to be conducted in an adversarial manner: s 93(1).

The proceedings are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2).

In *Re Emily v Children's Court of NSW* [2006] NSWSC 1009 at [48] the Supreme Court set out the manner in which Care proceedings are to be dealt with by the court.

> The learned Magistrate was required by the explicit terms of the Care Act to deal with the matter before him in the manner for which express provision is made in, relevantly, sections 93, 94 and 97 of the Care Act. It is no doubt the case that those sections, broadly expressed though they are, do not empower a Children's Court Magistrate to take some sort of free-wheeling approach to an application, proceeding in virtually complete disregard of what ordinary common-sense fairness might be thought to require in the particular case. *The [court] is, however, both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured Court setting and statutory context.* [Emphasis added]

The court is not bound by the rules of evidence, unless it so determines: s 93(3). Nevertheless, the court must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision-making that might appear capricious, arbitrary or without foundational material: *JL v Secretary, DFaCS* [2015] NSWCA 88 at [148].

In *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 Meagher JA said at [79] in relation to a similar provision governing a tribunal:

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

> reason, has some probative value in that sense may be taken into account: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491–493; *The King v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott* [1933] HCA 30.

It is difficult to imagine circumstances in which a court might make such a determination that the rules of evidence should apply. The only situation that has so far occurred to me, apart from the rule as to relevance, relates to the provisions of the *Evidence Act 1995* concerning self-incrimination: s 128.

The standard of proof in Care proceedings is on the balance of probabilities: s 93(4) of the Care Act. The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

The provisions of the United Nations' *Convention on the Rights of the Child* 1989[44] (UNCROC) are capable of being relevant to the exercise of discretions under the Care Act: *Re Tracey* (2011) 80 NSWLR 261.

The circumstances in *Re Tracey* were unusual and unique. Nevertheless, it may be important to draw the parties out on the question of whether any aspect of UNCROC is specifically relied upon. If so, it will need to be addressed, to the extent that it raises some questions for additional consideration. Otherwise, it is prudent to advert to UNCROC, in any reasons, as not having any additional relevance. I usually add a paragraph along the following lines:

> Most, if not all, of the provisions in UNCROC have been incorporated into or are reflected in the Care Act. The parties in the present matter made no submissions based on the Convention.
>
> Nor did anything occur to me as to any provision in UNCROC such that there was some different requirement, some additional principle, or some gloss that required the court to have particular regard to, in determining this case or in considering the permanency planning proposed, such that I was required to go beyond the Care Act and the case law interpreting it.

The Court of Appeal approved a similar statement in *Re Kerry (No 2)* [2012] NSWCA 127.

More recently, in *Re Henry* [2015] NSWCA 89 at [208]–[220], McColl J discussed the application of the Convention, confirming that its provisions are capable of being relevant in Care proceedings but the circumstances in which that might occur were limited. Not all failures to refer to UNCROC in the context of the Care Act will attract relief on appeal: at [217].

Expeditious disposition of proceedings

Time is of the essence for the disposal of Care cases. The Care Act provides that all Care matters are to proceed as expeditiously as possible: s 94(1). The court is required to avoid adjournments, which should only be granted where it is in the best interests of the child or there is some other cogent or substantial reason: s 94(4). The Children's Court aims to complete 90% of Care cases within 9 months of commencement and 100% of cases within 12 months.

The timetable for each matter is to take account of the age and developmental needs of the child: s 94(2). Directions should be made with a view to ensuring that the timetable is kept: s 94(3). Practice Note 5 deals with case management in Care proceedings.[45] It deals with each

44 United Nations, *Convention on the Rights of the Child*, in force 2 September 1990, at www.ohchr.org/en/professionalinterest/pages/crc.aspx, accessed 27 June 2019.

45 Children's Court of NSW, Practice Note 5 Case management in care proceedings.

of the stages of a Care application and provides for a series of standard directions at [16.6] with prescribed times for the completion of various interlocutory processes, leading to the earliest resolution or allocation of a hearing date in contested matters.

Children's legal representatives

The Care Act provides for the participation of a child or young person in the proceedings through their representation by either an independent legal representative (ILR) or a direct legal representative (DLR): s 99A. An ILR will be appointed to act as the representative for a child under 12: s 99B. An ILR must consult with the child, but their duty is to act in accordance with the paramountcy principle. Whereas, a DLR may be appointed for any child at the age of 12 or over who is capable of giving proper instructions: s 99C. The DLR must then advocate as instructed by the child.

In addition to these provisions, the Law Society of NSW has prepared *Representation Principles for Children's Lawyers*.[46] These guidelines set out a number of important duties and obligations for practitioners representing children.

I will not discuss the document in full, however I will canvass some of the principles these guidelines detail. The guidelines set out the following: a definition of who is the client; the role of the practitioner; determining whether a child has the capacity to give instructions; taking instructions and appropriate communication; duties of representation; confidentiality; conflicts of interest; access to documents and reports; interaction with third parties and ending the relationship with the child.

Importantly, Principle D6 (dealing with communication) emphasises the importance of tailored communication to practitioners. The commentary to the principles state:

> It is important that practitioners are prepared and informed before any meeting with the child. The child must always be treated with respect — this involves listening and giving the child the opportunity to express him or herself without interrupting, addressing the child by his or her name, accepting that the child is entitled to his or her own view etc.[47]

Support persons

Under s 102, a participant in proceedings before the Children's Court may, with leave of the Children's Court, be accompanied by a support person. Leave must be granted unless the support person is a witness or the court, having regard to the wishes of the child or young person, is of the view that leave should not be granted or if there is some other reason to deny the application.

However, the Children's Court can withdraw leave at any time if a support person does not comply with any directions given by the court. A support person, however, cannot act on behalf of a party.

Examination and cross-examination

The Care Act provides that a Children's Magistrate may examine and cross-examine a witness in any proceedings to the extent that the Children's Magistrate considers appropriate in order to elicit information relevant to the exercise of the Children's Court's powers.[48]

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46 The Law Society of NSW, *Representation Principles for Children's Lawyers*, 4th edn, 2014, at www.lawsociety.com.au/sites/default/files/2018-03/Representing%20Children.pdf, accessed 26 June 2019.

47 ibid at p 22.

48 s 107(1).

The Care Act also provides guidance as to the nature of examination and cross-examination of witnesses.[49]

This guidance accords with the inquisitorial nature of Care proceedings insofar as proceedings are required to be conducted in a non-adversarial manner, with as little formality and legal technicality and form as the circumstances permit.

The Act prohibits the use of offensive or scandalous questions by excusing a witness from answering a question that the court regards to be offensive, scandalous, insulting, abusive or humiliating unless the court is satisfied that it is essential to the interests of justice that the question be asked or answered.[50]

Further, oppressive or repetitive examination of a witness is prohibited unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the question to be answered.[51]

Joinder

In proceedings under the Care Act, the parties will generally comprise the Secretary of the Department, the child or children, the parent(s), the step-parent(s), and the legal representative, being the Independent Legal Representative for children under 12, or the Direct Legal Representative for children 12 and over, up to the age of 18.

Other persons having a genuine concern for the safety, welfare and well-being of a child may be given leave to appear in the proceedings, or be legally represented, and examine and cross-examine witnesses.[52]

Others who might be significantly impacted by a decision of the Children's Court, not being parties to the proceedings, are to be given "an opportunity to be heard on the matter of significant impact".[53] Historically, such persons were generally not made parties, but could present an affidavit. They could not, however, cross-examine or call witnesses of their own.

There has been something of a change in approach in relation to the joinder of parties to Care proceedings in recent times, partly driven by the transfer of casework to the NGO sector, but also as a result of some recent pronouncements by superior courts. The court is now increasingly receptive to joinder applications and more likely to make orders than in the past. In *Re June (No 2)* [2013] NSWSC 1111, McDougall J clarified the distinction between ss 87 and 98(3) of the Care Act:

> The second point to note is that the opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)).
>
> Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses, at least generally. However, if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then in a particular case, the opportunity to be heard may extend to permitting cross-examination on that particular point.[54]

49 s 107.
50 s 107(2).
51 s 107(3).
52 s 98(3).
53 s 87(3).
54 *Re June (No 2)* [2013] NSWSC 1111 at [186]–[187].

The more recent decision in *Bell-Collins Children v Secretary, DFaCS* [2015] NSWSC 701, provides further clarification. During case management, the Children's Magistrate had refused the application of the grandparents to be joined as parties. At the hearing, which came before me at the Children's Court at Woy Woy,[55] I gave the grandparents an extensive opportunity to be heard, under s 87(1).

In the de novo appeal to the Supreme Court, the grandparents renewed their application for joinder and the matter was considered by Slattery J. The significant aspect of Slattery J's decision was his distillation of the distinction between the opportunity to be heard under s 87(1) and the granting of leave to appear under s 98(3):

> In section 87(1) the threshold is one to ensure that non-parties who may suffer adverse impacts from Care Act orders will receive procedural fairness before such orders are made. The focus is on "impact on a person".[56]
>
> But the threshold for s 98(3) is more child-centred. The s 98(3) right is only available to a person who in the court's opinion "has a genuine concern for the safety, welfare and well-being of the child". It is perhaps because the s 98(3) threshold is more altruistic than that under s 87 that the Care Act can afford a wider scope to participate to those who receive a grant of s 98(3) leave. Persons meeting s 98(3) leave will sometimes be, as the great grandparents are in this case, people who can by their participation fill an evidentiary gap in the proceedings that it may be in the best interests of that child to see filled in the proceedings. In my view that is the case here.[57]

Accordingly, Slattery J granted the grandparents leave on terms under s 98(3). The grandparents were only granted leave to cross-examine and adduce evidence about their own suitability as alternative carers for the children.

Finally, on the issue of joinder, I draw attention to a decision by Sackar J in which he further discusses the principles surrounding the joinder of persons having a genuine concern for the safety, welfare and well-being of a child, in the context of an application of a corporate FSP (NGO):

> It is clear that despite s 93(1) of the Act, including the requirement that proceedings are not to take place in an adversarial manner, that the Act explicitly contemplates examination and importantly cross-examination. This seems to me clearly to recognise that parties in such proceedings, like parties in other litigation, will be conducting their cases through advocates exclusively pursuing the interests of their respective clients. The mere tendering of affidavits to support the [NGO's] position overlooks the idiosyncratic nature of each piece of litigation and the realities, practical and ethical. Any cross examination to be effective should be directed to the pursuit of a particular party's interest. It could hardly be otherwise.[58]

Rescission and variation of Care orders: s 90

Peculiar to the Care jurisdiction is the power to rescind or vary final Care orders, at a later date.[59] This statutory power enables a review of orders without the need for an appeal, where there has been a "significant change in any relevant circumstances" since the original order.

Applications for rescission or variation of Care orders require the Applicant to obtain leave.

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55 *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.
56 *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701 at [33].
57 ibid at [34].
58 *EC v Secretary, NSW DFaCS* [2019] NSWSC 226 at [81].
59 s 90.

A refusal of leave is an "order" for the purposes of s 91(1) of the Care Act: *S v Department of Community Services* [2002] NSWCA 151 at [53]. Refusal to grant leave may, therefore, be the subject of an appeal de novo from the Children's Court.

The former President of the Children's Court expressed the view that if, on appeal, leave is granted, the hearing of the substantive application should then be remitted to the Children's Court for hearing.[60]

> With respect to appeals against a refusal by the Children's Court to grant leave under section 91(1), in my view if the District Court upholds the appeal and grants leave it should remit the proceedings to the Children's Court to determine the substantive section 90 application. Having granted leave the District Court would not have jurisdiction to hear the substantive application as the only "order" before the court (being the subject of an appeal under section 91(1)) is the order refusing leave. Further, if the District Court proceeded to hear the substantive section 90 application following it granting leave, the unsuccessful party on the substantive application in the District Court would be deprived of a statutory right of appeal.

The Care Act s 90(2C) sets out a number of additional matters that the court must take into account before granting leave:

(a) the age of the child or young person, and

(b) the nature of the application, and

(c) the plans for the child or young person, and

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

(e) whether the applicant has an arguable case, and

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

  (i) a report under section 82, or

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

Once leave is granted, the Care Act goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order that placed the child under the parental responsibility of the Minister, or that allocated specific aspects of parental responsibility from the Minister to another person: s 90(6).

The matters specified in s 90(6) are:

(a) the age of the child or young person,

(b) the wishes of the child or young person and the weight to be given to those wishes,

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

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

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

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

60 Per M Marien, "Care proceedings and appeals to the District Court" presented at Judicial Commission of NSW, Annual Conference of the District Court of New South Wales, 28 April 2011, at **[18-3000]** and https://jirs.judcom.nsw.gov.au/conferences/conference.php?id=1051, accessed 26 June 2019.

In the decision by Slattery J *In the matter of Campbell* [2011] NSWSC 761, his Honour discussed the concepts of "a relevant circumstance" and "significant" change in a relevant circumstance in the context of an application for leave.

As to what constitutes a "relevant circumstance", Slattery J said at [42]:

> The range of relevant circumstances will depend upon the issues presented for the court's decision. They may not necessarily be limited to a "snapshot" of events occurring between the time of the original order and the date the leave application is heard. This broader approach reflects the existing practice of the Children's Court on s 90 applications: see for example *In the matter of OM, ZM, BM and PM* [2002] CLN 4.

As to what constitutes a "significant" change in a relevant circumstance, he referred to *S v Department of Community Services (DoCS)* [2002] NSWCA 151 where the Court of Appeal held at [23] that the change must be "of sufficient significance to justify the consideration [by the court] of an application for rescission or variation of the order".

Justice Slattery said there are dangers in paraphrasing the s 90(2) statutory formula for the exercise of the discretion beyond this statement of the Court of Appeal: [43]. He also made it clear that the court's discretion to grant leave is not only limited by s 90(2), but also by the requirement to take into account the list of considerations in s 90(2A). Therefore, establishing a significant change in a relevant circumstance under s 90(2) is a necessary, but not a sufficient, condition for the granting of leave.

As to the requirement of an "arguable case", Slattery J held that this does not relate to the application for leave, but relates to the case for the rescission or variation sought, taking into account the matters in s 90(6). Therefore, the matters in s 90(6) must be taken into account in determining whether the applicant for leave has an arguable case. Justice Slattery agreed with Marien DCJ that the interpretation of "arguable case", as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is "reasonably capable of being argued" and has "some prospect of success" or "some chance of success": at [50].

These principles were considered and applied in *Kestle v DFaCS* [2012] NSWChC 2, in which a helpful summary of the principles to be applied in a s 90 application is set out at [22]:

(i) In determining whether to grant leave the court must first be satisfied under s 90(2) that there has been a significant change in a relevant circumstance since the Care order was made or last varied.

(ii) The range of relevant circumstances will depend upon the issues presented for the court's decision. They may not necessarily be limited to just a "snapshot" of events occurring between the time of the original order and the date the leave application is heard.

(iii) The change that must appear should be of sufficient significance to justify the court's consideration of an application for rescission or variation of the existing Care order: *S v Department of Community Services* [2002] NSWCA 151.

(iv) The establishment of a significant change in a relevant circumstance is a necessary but not a sufficient condition for leave to be granted. The court retains a general discretion whether or not to grant leave.

(v) Having been satisfied that a significant change in a relevant circumstance has been established by the applicant, the court must take into account the mandatory considerations set out in s 90(2A) in determining whether to grant leave.

(vi) The s 90(2A) mandatory considerations include that the applicant has an "arguable case" for the making of an order to rescind or vary the current orders.

(vii) An arguable case means a case "which has some prospect of success" or "has some chance of success".

(viii) In determining whether an applicant has an arguable case and whether to grant leave, the court may need to have regard to the mandatory considerations in s 90(6).

The judgment went on to specifically consider whether leave could be granted on a specific basis.

The mother had submitted that it was not open to the court to grant leave on a discrete issue such as contact.

She submitted that once leave is granted, all issues (including restoration and contact) may be re-visited by the court at the substantive hearing.

The court did not accept this argument and held that the court has a wide discretion under s 90(1) to grant leave, referring to the decision of Mitchell CM in *Re Tina* [2002] CLN 6, and said at [53]:

> In my view, the wide discretion available to the court in granting leave under s 90(1) allows the court to also exercise a wide discretion as to the terms and conditions upon which leave is granted. Accordingly, the court may restrict the grant of leave to a particular issue or issues. This would be appropriate, for example, where the court determines that an applicant parent does not have an arguable case for restoration of the child to their care, but does have an arguable case on the issue of increased parental contact.

In a careful judgment in *Re Bethany* [2012] NSWChC 4, Children's Magistrate Blewitt AM applied these principles at [49]–[50].

Costs in Care proceedings

Costs in Care proceedings are not at large. The Care Act limits the power to make an order for an award of costs. Section 88 provides:

> The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify it in doing so.

Under the common law a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [134]. Fairness dictates that the unsuccessful party typically bears the liability for costs: *Oshlack* at [67]. This means that the successful party in litigation is generally awarded costs, unless it appears to the court that some other order is appropriate, either as to the whole or some part of the costs: *Currabubula Holdings Pty Ltd v State Bank of NSW* [2000] NSWSC 232.

The common law position is, however, displaced by the Care Act, which provides for a comprehensive statutory scheme for care proceedings in which the power of the court to award costs is circumscribed by s 88, so that costs may only be awarded where exceptional circumstances exist.

The policy basis behind the restriction on the power to award costs is self-evidently based in the notion that parties involved in Care proceedings should have as full an opportunity

to be heard as is reasonably possible, and should not be deterred from participating in such proceedings by adverse pecuniary consequences, the safety, welfare and well-being of the child being the paramount concern.[61]

The meaning of "exceptional circumstances" in the context of s 88 of the Care Act, and when they might exist, has been considered and discussed in various decisions, most notably in the judgments in *SP v Department of Community Services* [2006] NSWDC 168; *Department of Community Services v SM and MM* [2008] NSWDC 68; *XX v Nationwide News Pty Ltd* [2010] NSWDC 147 and *Director-General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

I will not review those decisions here, but it may be said that the situations in which "exceptional circumstances" might be found are not exhaustively defined or limited by them.

Some general propositions are nevertheless apt. The discretion to award costs must be exercised judicially and "according to rules of reason and justice, not according to private opinion … or even benevolence … or sympathy" (*Williams v Lewer* [1974] 2 NSWLR 91 at 95), and is not to be exercised arbitrarily or capriciously, or on no grounds at all: *Oshlack*, above, at [22].

The underlying idea is of fairness, having regard to what the court considers to be the responsibility of each party for the costs incurred: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121].

The court may have regard to the particular circumstances of the case, including the evidence adduced, the conduct of the parties and the ultimate result: *Knight v Clifton* [1971] Ch 700.

The purpose of an order for costs is to compensate the person in whose favour it is made and not to punish the person against whom the order is made: *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34]; *Dr Douglass v Lawton Pty Ltd (No 2)* [2007] NSWCA 90 at [22].

Where an order for costs is made, I suggest that the order specify whether the costs are awarded on an indemnity basis, or that the costs should be quantified on the ordinary basis, as defined in s 3 of the *Civil Procedure Act 2005*.

I am also of the view that the Children's Court has the power to award a fixed sum of costs. The various provisions of the Care Act, including s 93(2), are sufficient to give the Children's Court the power to do so.[62]

Judicial Officers have traditionally been reluctant to order the payment of specified sums of costs. Nevertheless the cases suggest a number of circumstances in which it might be appropriate to make such an order, such as the avoidance of the expense, delay and aggravation involved in protracted litigation which might arise out of taxation (or assessment): *Sherborne Estate (No 2); Re Vanvalen v Neaves* (2005) 65 NSWLR 268 at [38]; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665 at [121]; *Keen v Telstra Corp (No 2)* [2006] FCA 930 at [4].

In my view, it will generally be appropriate to make orders for specified sums of costs in Care proceedings.

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61 *The Secretary, DFaCS (NSW) and the Knoll Children (Costs)* [2015] NSWChC 2.
62 ibid.

But, the power is to be exercised judicially: *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23 at [8]–[10]; and there must be proper factual foundation for the order: *Roberts v Rodier* [2006] NSWSC 1084 at [40]–[44]; *Ventouris Enterprises Pty Ltd v DIB Group Pty Ltd (No 4)* [2011] NSWSC 720.

The court arrives at an estimate of the proper costs by examining, on the basis of particulars provided, whether the quantification is logical, fair and reasonable: *Lo Surdo v Public Trustee* [2005] NSWSC 1290 at [7]; *Roberts v Rodier*, above, at [40]–[44].

The courts have, however, tended to apply a discount, having regard to the "broad-brush" approach involved: *Idoport*, above, at [13]; *Ginos Engineers Pty Ltd v Autodesk Australia Pty Ltd* (2008) 249 ALR 371 at [23].

The power to award costs in the Children's Court, however, does not extend to awards of costs against non-parties, or legal practitioners.[63]

There are, however, some exceptions to this principle, which arise under the general law.

The exceptions include persons who are not parties in the strict sense, but are closely connected with the proceedings, such as nominal parties: *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 217; or "relators": *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518; or "next friends": *Palmer v Walesby* (1868) LR 3 Ch App 732; and tutors: *Yakmor v Hamdoush (No 2)* (2009) 76 NSWLR 148.

Then there are persons who appear in the proceedings for some specific limited purpose, who are in effect a party, for that limited purpose, such as someone appearing to maintain a claim for privilege: *ACP Magazines Pty Ltd v Motion* [2000] NSWSC 1169; or to obtain a costs order: *Wentworth v Wentworth* (2001) 52 NSWLR 602.

It might also be arguable that such orders may also be made against persons who are bound by an order or judgment of the court and fail to comply, or who breach an undertaking given to the court, or persons in contempt or who commit an abuse of process.

These are issues for determination in the future.

Cultural planning

The Care Act is to be administered under the "paramountcy principle", that is, that the safety, welfare and well-being of the child is paramount.[64] In addition to this paramountcy principle, the Care Act sets out other particular principles to be applied in the administration of the Care Act.[65]

One of these principles is that account must be taken of concepts such as culture, language, identity and community.[66] Additionally, it is a principle to be applied in the administration of the Care Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible.[67]

Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the

63 *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3; *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11.
64 s 9(1).
65 s 9(2).
66 s 9(2)(d).
67 s 11.

Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under the Care Act that concern their children and young persons.[68]

Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is prescribed.[69] In summary, the order for placement is, with:

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

(b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,

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

(d) a suitable person approved by the Secretary after consultation with:

  (i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

  (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

Before it can make a final Care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed.[70]

Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security.[71] The plan must:

(a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement,[72] and

(b) meet the needs of the child,[73] and

(c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements.[74]

Culture is a critical element in the assessment of what is in a child's best interests and a critical consideration in assuring the safety, welfare and well-being of a child. It is vital that decision makers in child protection matters are provided with sufficient information to be able to appreciate the distinct role culture plays in the identity formation and socialisation of each child.

68 s 12.
69 s 13(1).
70 s 83(7).
71 s 78A.
72 s 9(2)(e).
73 s 78A(1)(b).
74 s 78A(1)(c).

The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles, and to adequately and appropriately address cultural planning, are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

There are various cases over recent years that address the Aboriginal and Torres Strait Islander Principles set out in the Care Act. These include: *Re Kerry (No 2)* [2012] NSWCA 127; *DFaCS (NSW) re Ingrid* [2012] NSWChC 19; *RL and DJ v DoCS* [2009] CLN 3; *In the matter of Victoria & Marcus* [2010] CLN 2 at [49]; *Re Simon* [2006] NSWSC 1410; *Re Earl and Tahneisha* [2008] CLN 7 and *Shaw v Wolf* (1998) 83 FCR 113.

I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]:

> The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters before the Children's Court.

I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

Care appeals

Procedure

A party dissatisfied with a decision of the Children's Court may appeal to the District Court: s 91(1). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly: s 91(6).

The appeal is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the order was made by the Children's Court, may be given on the appeal: s 91(2). The District Court may decide to admit the transcript or any exhibit from the Children's Court hearing: s 91(3).[75]

Judges of the District Court hearing such appeals have, in addition to any functions and discretions that the District Court has, all the functions and discretions that the Children's Court has under Ch 5 and 6 of the Care Act ie ss 43–109X: s 91(4).

The provisions of the Care Act (Ch 6) relating to procedure apply to the hearing of an appeal in the same way as they apply in the Children's Court: s 91(8).

It is important, therefore, for District Court Judges hearing such appeals to understand the Care Act, its guiding principles, and its procedural idiosyncrasies.

The Children's Court Clinic

The Children's Court Clinic (which I will refer to in short form as the Clinic) is established under the *Children's Court Act 1987*, and is given various functions designed to provide the Court with independent, expert, objective, and specialist advice and guidance.

75 Marien at n 61 discusses the nature of the appeal in his 2011 paper at [4.1].

The court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: s 53. The court may also make an order for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54.[76]

In addition, the court may make an order for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

The court is required to appoint the Clinic for the purpose of preparing assessment reports and information reports, unless it is more appropriate for some other person to be appointed. The reports are made to the court, and are not evidence tendered by a party.

It is absolutely critical, therefore, that the clinician be, and be seen to be, completely impartial and independent of the parties.

The Clinic has limited resources. Great care should be exercised in the making of assessment orders and, if made, the purpose should be clearly identified and spelled out for the clinician. It is important to remember that the court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course. In particular, the court must ensure that a child is not subjected to unnecessary assessment: s 56(2).

In considering whether to make an assessment order, the court should have regard to whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere.

Having said that, the court can derive considerable assistance from an Assessment Report. In addition to providing independent expert opinion, the clinician can provide a hybrid factual form of evidence not otherwise available. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, clinicians can provide the court with insights and nuances that might not otherwise come to its attention.

Thus, a clinician can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the "snapshot" nature of a court hearing, would not otherwise have the benefit of.

The Children's Court expects clinicians to be aware of, apply and adhere to the provisions of the *Expert Witness Code of Conduct* set out at Sch 7 of the *Uniform Civil Procedure Rules* 2005 (UCPR).

Alternative Dispute Resolution (ADR) in Care matters

Where intervention by Community Services is necessary, it is preferable that the intervention occurs early and at a time that allows for genuine engagement with the whole family, with a view to avoiding, wherever possible, escalation of problems into the court system. Once cases do need to come to court it remains important that the court also has processes available that will facilitate bringing the parties together with a view to them coming to a mutually acceptable resolution, that is in the best interest of the child, thereby avoiding lengthy, emotionally draining and often irrevocably divisive formal hearings.

76 For a more detailed discussion of Assessment Orders, see Marien ibid at [5].

Over the past few years, the Children's Court has initiated and entrenched alternative dispute resolution processes, which has involved an expansion and development of the involvement of Children's Registrars in Care matters. Prior to the introduction of these new initiatives the use of ADR in the Children's Court was restricted not only by the resources available, but also by an adversarial culture within the jurisdiction that favoured traditional court processes.

The ADR processes in the Children's Court are available in an appeal to the District Court.

The Dispute Resolution Conference (DRC) model has now become an integral aspect of Children's Court proceedings.

The conferences involve the use of a conciliation model. This means Children's Registrars have an advisory, as well as a facilitation role.

Conferences are now regularly conducted at the court by Children's Registrars who have legal qualifications and are also trained mediators (see s 65 of the Care Act), and are based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children's Courts, and Lismore and Albury Local Courts.

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

The DRC process has brought about a significant shift in culture that has impacted on cases in the Children's Court more generally. The Australian Institute of Criminology (AIC) has evaluated the use of ADR in the area of care and protection, and found high levels of participation and satisfaction. Family members involved found the process to be useful, and felt they were listened to and were treated fairly. The AIC evaluation found that approximately 80% of mediations conducted have resulted in the child protection issues in dispute being narrowed or resolved.[77]

The timing of a referral of disputed proceedings to a DRC can sometimes be important.

Like all referrals for mediation, it is a matter of judgment when to do so. Sometimes it is necessary for the issues to be sufficiently defined to make the mediation viable.

On other occasions, it is better to refer as soon as possible, even if all the relevant documentation and information is not necessarily available.

The importance of confidentiality in the DRC model was reaffirmed in *Re Anna* [2012] NSWChC 1.

In that case the father said something during the DRC that was described by the Secretary as an admission that may have been relevant to the father's capacity to be responsible for the safety, welfare and well-being of his daughter. The Secretary sought leave to file an affidavit by a caseworker who was present at the DRC in which he refers to the alleged admission made by the father.

In rejecting the application to file the affidavit, the court said at [12]–[13]:

> A pivotal feature of alternative dispute resolution (ADR) is that, except in defined circumstances, what is said and done in the course of ADR is confidential in the sense that it cannot be admitted into evidence in court proceedings. This important protection of confidentiality encourages frank and open discussions between the parties outside the formal court process.

77 A Morgan, H Boxall, K Terer, N Harris, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court*, Australian Institute of Criminology, Canberra, 2012, accessed 4 July 2019.

> …
>
> The encouragement of frank and open discussion between the parties is particularly important in ADR in child protection cases. ADR provides parents with the opportunity to freely discuss with the Department, in a safe and confidential setting, the parenting issues of concern to the Department and, most importantly, it provides the Department with the opportunity to discuss with the parents in that setting what needs to be done by the parents to address the Department's concerns.

The court went on to say, however, that the protection is not absolute. He referred to a clause in the *Children and Young Persons (Care and Protection) Regulation 2000* (now repealed). ADR is now provided by Ch 15A Care Act and the Children's Court Practice Note No 3.

Section 244A defines "alternative dispute resolution", which includes a DRC. It goes on to provide that evidence of anything said or of any admission made, during alternative dispute resolution is not admissible in any proceedings: s 244B.

Similarly, a document prepared for the purposes of, or in the course of, or as a result of, ADR is not admissible in evidence in any proceedings before any court, tribunal or body.

Section 244C(2) enables the disclosure of information obtained in connection with the alternative dispute resolution, but only in very limited circumstances, and only by the person conducting the ADR. The permissible circumstances include where the relevant persons consent, or in accordance with a requirement imposed by or under a law (other than a requirement imposed by a subpoena or other compulsory process).

In *Re Anna*, the court made various important observations at [17] and [18], including:

> However, [the clause] does not impose a general prohibition against disclosure of information obtained in connection with ADR. [The clause] does not, therefore, prohibit a person attending a DRC disclosing information obtained in connection with the DRC to a third party. For example, the clause does not prohibit a parent disclosing to their treating professional what was said at a DRC nor does it prohibit a lawyer who appears at a DRC as an agent disclosing to their principal what transpired at a DRC.
>
> Nor does [the clause] prohibit a party attending a DRC using information disclosed by another party at the DRC to make independent inquiries and tender in evidence in the proceedings the result of those independent inquiries. [See *Field v Commissioner for Railways for New South Wales* [1957] HCA 92.]

The exceptions enabling disclosure of information obtained in ADR appear in s 244C(2) which provides as follows:

> A person conducting alternative dispute resolution may disclose information obtained in connection with the alternative dispute resolution only in any one or more of the following circumstances:
>
> (a) with the consent of the person from whom the information was obtained,
>
> (b) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
>
> (c) if, as a result of obtaining the information, the person conducting alternative dispute resolution has reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of Part 2 of Chapter 3,

Note: See section 23.

(d) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

I do not propose here to consider in detail today the circumstances under which a disclosure made at a DRC might be admissible. That is a discussion for another day. For the moment, be aware that the power exists, but it is limited to disclosure by the person conducting the ADR, that is the Children's Registrar, and not the parties or others in attendance, or the caseworkers or legal practitioners involved.

Conclusion

I hope the contents of this paper have been helpful in guiding judges hearing Care appeals.

Additional resources may be found at the following sites:

(a) the website of the Children's Court contains numerous resources including the Practice Notes, the Contact Guidelines and various protocols. Most important, however, is the Children's Law News site (CLN), which contains various cases and articles collected over the last decade relating to Children's Law. It contains a helpful index

(b) there is a chapter in the *Civil Trials Bench Book* on **Child care appeals** at **[5-8000]**

(c) there is a chapter in the *Local Court Bench Book* on the **Children's Court — Care and Protection Jurisdiction** at **[40-000]**.

Finally, please feel free to ring me at any time to discuss issues of law or procedure in Care matters.

Children's Court update 2019 (care and protection jurisdiction)*

P Johnstone†

Introduction ..... [2-5000]

Updates in the care and protection jurisdiction

Department of Family and Community Services Report on the outcomes of consultations: shaping a better child protection system

Amendments to the Children and Young Persons (Care and Protection) Act 1998 and Adoption Act 2000

The Role of an Independent Legal Representative

Conclusion

[2-5000] Introduction

I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Biripi people, and pay my respects to their Elders past, present and emerging. I acknowledge and respect their continuing culture and the contribution they make to the life of this region.

The purpose of this paper is to alert Local Court Magistrates to recent developments affecting the exercise of Children's Court jurisdiction, and is designed to be a reference resource which may assist you in relation to children's matters in either care or crime.

I will firstly canvass some more general developments affecting the Children's Court over the past year or so, and then discuss some updates in the criminal and care jurisdictions, followed by a brief discussion of some recent case law.

Updates in the care and protection jurisdiction

There are several important updates and developments in the care and protection jurisdiction of the Children's Court, which I will canvass briefly here.

Department of Family and Community Services Report on the outcomes of consultations: shaping a better child protection system

Following consultations in 2017 and 2018, DFaCS published a report on the outcomes of these consultations in October 2018. The report, titled "Shaping a Better Child Protection System", outlines a summary of overall feedback from stakeholders, and communicates the NSW Government's position in relation to the child protection system.[1]

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* This is an extract of the presentation relevant to the care and protection jurisdiction. The remainder of the presentation is contained at **[8-1000]**.

† President of the Children's Court of NSW, Local Court Regional Conference, 27–29 March 2019, Port Macquarie.

1 Family and Community Services, "Shaping a better child protection system", at www.facs.nsw.gov.au/about/reforms/children-families/better-child-protection, accessed 4 July 2019.

Notably, the report recommended that the *Children and Young Persons (Care and Protection) Act 1998* (the "Care Act") be amended to provide that if a child or young person is assessed as at risk of significant harm, their family must be offered alternative dispute resolution before Care orders are sought from the Children's Court, except where it would not be appropriate due to exceptional circumstances.

The NSW Government also recommended an amendment to the Care Act to extend the obligation of government agencies and government funded NGO's to cooperate in the delivery of services to children and young persons, for the provision of prioritised access to services for children and young persons at risk of significant harm and their families.

This recommendation was made in light of the fact that the issues that families present to the health, education and justice systems are often associated with child protection risks.

The report recommended that the Children's Court be empowered to make a guardianship order by consent, where the suitability assessments around guardianship have been satisfied and all parties and children have received independent legal advice.

It was recommended that all parties to care proceedings may apply to vary an interim order without the requirement of a s 90 application to be filed. This would likely shorten care proceedings and provide further procedural fairness to participants.

The NSW government also recommended that where the Children's Court approves a permanency plan involving restoration, guardianship or adoption, that the maximum period for which an order may be made allocating all aspects of parental responsibility to the Minister is 24 months, unless the Children's Court is satisfied that there are special circumstances that warrant a longer period.

As such, it was recommended that s 83 be amended so that, "realistic possibility of restoration" means a realistic possibility of the child or young person being restored to his or her parents within a reasonable period, not exceeding two years.

The NSW Government recommended that an amendment to the Care Act be made to empower the Children's Court to make contact orders for more than 12 months duration for children and young persons who are the subject of a guardianship order, where it is in the best interests of the child or young person.

It was also recommended that s 90 be amended to introduce primary and additional considerations that the Children's Court must consider before granting leave to vary or rescind a Care order.

Finally, the Government recommended that the time limit in s 136(3) be amended from 6 months to 12 months to enable greater flexibility in the restoration process.

Amendments to the Children and Young Persons (Care and Protection) Act 1998 and Adoption Act 2000

The *Children and Young Persons (Care and Protection) Amendment Act 2018* commenced on 4 February 2019. The Act amends the Care Act and the *Adoption Act 2000* to support current child protection reforms.

The amendments aim to strengthen services to keep children safely at home with their families and restore children to their families when it is safe to do so. When this is not possible, a safe home will be secured for children through guardianship or open adoption.

The amendments aim to support further reductions in the number of children and young people in out-of-home care and improve the timeliness and quality of services for these children and their families.

The key amendments focus on:

- earlier family preservation and restoration
- permanency for children and young people, and
- streamlined court processes.

Earlier intervention with families is central to the legislative changes. Alternative Dispute Resolution, such as Family Group Conferencing, must be offered to a family before orders are sought from the Children's Court. This provides families an opportunity to work together to develop their own plan to keep their children safe.

The Department of Family and Community Services can ask an agency or funded service provider to give prioritised access to services for children at risk of significant harm and their family.

The Children's Court is able to assess the realistic possibility of restoration in a 24 month period, allowing the court to consider whether restoration will be possible into the future. Children and young people will be able to be restored to their parents up to 12 months before a court order involving restoration expires.

The amendments also focus on greater permanency for children and young people. Shorter term court orders will focus on casework planning to secure long-term permanency outcomes sooner, and reduce the time children spend in out-of-home care. For care plans involving restoration, guardianship or adoption, the maximum period of an order giving parental responsibility to the Minister will be 24 months, unless the Children's Court is satisfied that special circumstances exist.

The changes to legislation also aim to streamline court processes to focus on each child's experience and what is in their best interest. The changes are designed to minimise lengthy litigation processes and respond to a child's needs quickly.

The Children's Court is able to:

- make a guardianship order where both parents consent, without the need to make a finding that there is no realistic possibility of restoration of the child to their parents
- make contact orders for longer than 12 months where a guardianship order is made and it is in the child's best interest
- relist a matter and review progress in implementing the Care plan if the court is not satisfied that proper arrangements have been made for the child's care and protection
- prioritise the views of children in applications for leave to vary or rescind a Care order
- discuss an application for leave to vary or rescind a Care order if the court is satisfied that it is frivolous, vexatious, an abuse of process, or one of a serious of unsuccessful attempts by the applicant, and
- vary an interim order on an application by a party during proceedings if the court is satisfied that it is appropriate to do so.

There are a number of other ad hoc changes to care and protection proceedings. For example:

- when a guardian or carer with full parental responsibility dies, care responsibility will sit with the Secretary for 21 days. This will give the Secretary time to ensure appropriate care arrangements have been made
- the publication or broadcast of the names of children in a way that identifies them as being in out-of-home care will be prohibited in most situations,
- supported out-of-home care will only be provided for the placement of a child in care with a relative or kin where a relevant court order exists, consistent with existing practice.

The Department of Family and Community Services will monitor and report on the changes to ensure that they are supporting better outcomes for children, families and Aboriginal communities.

The Role of an Independent Legal Representative

The concept that "children should be seen and not heard" has become redundant as society has developed an appreciation of the value that children and young people can add when they are empowered to participate.

The qualification has been enshrined in Art 12 of the United Nations' *Convention on the Rights of the Child* 1989 (UNCROC). It states:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[2]

The participation principle in Art 12 is qualified by ss 8 and 9 of the Care Act. The Care Act clarifies that a young person's participation in decision-making is subject to ensuring their safety, welfare and well-being.[3]

The Independent Legal Representative (ILR) or "best interests" model is consistent with the need to consider the child's views whilst maintaining an overarching commitment to safeguarding the child's interests. The ILR will consult with the child, but their overriding duty is to the court, to act in accordance with the safety, welfare and well-being of the child.

The Direct Legal Representative (DLR) model requires that a DLR may be appointed for any child at the age of 12 or over who is capable of giving instructions. The DLR must then advocate as instructed by the child.

A practitioner who has been appointed as a DLR may make an application to the court for a declaration that a child aged 12 years or older is incapable to giving proper instructions and that the practitioner should act as an ILR instead of a DLR. Practitioners should make such an application where the practitioner forms the view that this is appropriate.

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2 United Nations, *Convention on the Rights of the Child*, in force 2 September 1990, at www.ohchr.org/en/professionalinterest/pages/crc.aspx, accessed 27 June 2019.

3 Care Act s 9.

Section 99D(b) of the Care Act provides that the role of an ILR includes the following:

(i) if a guardian ad litem has been appointed for the child or young person — acting on the instructions of the guardian ad litem;

(ii) interviewing a child or young person after becoming the independent legal representative

(iii) explaining to the child or young person the role of an independent legal representative

(iv) presenting direct evidence to the Children's Court about the child or young person and matters relevant to his or her safety, welfare and well-being

(v) presenting evidence of the child's or young person's wishes (and in doing so the independent legal representative is not bound by the child's or young person's instructions)

(vi) ensuring that all relevant evidence is adduced and, where necessary, tested

(vii) cross-examining the parties and their witnesses

(viii) making applications and submissions to the Children's Court for orders (whether final or interim) considered appropriate in the interest of the child or young person,

(ix) lodging an appeal against an order of the Children's Court if considered appropriate.

The role of the ILR is critical to ensuring that the participation principles of the Act are adhered to. ILRs can do this, while preserving the safety, welfare and well-being of the child, by using participatory advocacy. The future is bright and with scientific, psychiatric and sociological advancements, we will no doubt see further discussion of alternative schemes.

Conclusion

I hope this paper has been useful in outlining the changes in the Children's Court jurisdiction which have occurred over the past few years, and which will continue to unfold over the course of the year.

Important cases

Aboriginal and Torres Strait Islander placement principles ..... [3-1000]
Adoption of Jimmy (a pseudonym) [2025] NSWSC 408 ..... [3-1000]
Adoption of John (a pseudonym) and William (a pseudonym) [2025] NSWSC 109 218
Secretary, Department of Communities and Justice and Levi and Riley (No 2) [2025] NSWChC 5 219
Re Lucinda Porter (No 2) [2023] NSWChC 2 219
Re Malakhai [2022] NSWChC 6 219
Hackett (a pseudonym) v Secretary, Department of Communities and Justice [2020] NSWCA 83 219
Department of Communities and Justice and Masters [2020] NSWChC 7 220
Adoption of B [2019] NSWSC 908 220
Fischer v Thompson (Anonymised) [2019] NSWSC 773 220
Re Timothy [2010] NSWSC 524 220
Re Victoria and Marcus [2010] CLN 2 221

Adoption ..... [3-1020]
Adoption of Jimmy (a pseudonym) [2025] NSWSC 408 ..... [3-1020]
Adoption of John (a pseudonym) and William (a pseudonym) [2025] NSWSC 109 222
Hackett (a pseudonym) v Secretary, Department of Communities and Justice [2020] NSWCA 83 222
Department of Communities and Justice and Jake [2020] NSWChC 2 223
Adoption of B [2019] NSWSC 908 223
Fischer v Thompson (Anonymised) [2019] NSWSC 773 223
Department of Communities and Justice and the Stonsky Children [2019] NSWChC 8 223
Adoption of SRB, CJB and RDB [2014] NSWSC 138 224

Active efforts ..... [3-1010]
Department of Communities and Justice (DCJ) and Chase Croft [2024] NSWChC 15 ..... [3-1010]

Bias ..... [3-1040]
M v Secretary, Department of Communities and Justice [2024] NSWCA 283 ..... [3-1040]
BW v Secretary, Department of Communities and Justice [2024] NSWSC 1354 226
Polsen v Harrison [2021] NSWCA 23 226
JL v S, DFaCS [2015] NSWCA 88 226

Care and protection ..... [3-1060]
Secretary, Department of Communities and Justice v AM [2024] NSWDC 646 ..... [3-1060]
Department of Communities and Justice (DCJ) and Rosa Juma [2025] NSWChC 6 228
RC and PK v Secretary, Department of Communities and Justice [2024] NSWDC 196 228
Department of Communities and Justice (DCJ) and Skyla [2023] NSWChC 12 228
DCJ and Evie and Grace [2023] NSWChC 1 228
Y (a pseudonym) v Secretary, Communities and Justice (No 4) [2021] NSWDC 81 228
Department of Communities and Justice and Jacinta [2021] NSWChC 5 228
CXZ v Children's Guardian [2020] NSWCA 338 229
Secretary, Department of Communities and Justice v B [2020] NSWDC 736 229
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Adoption of John (a pseudonym) and William (a pseudonym) [2025] NSWSC 109

Secretary, Department of Communities and Justice and Levi and Riley (No 2) [2025] NSWChC 5

Re Lucinda Porter (No 2) [2023] NSWChC 2

Re Malakhai [2022] NSWChC 6

Hackett (a pseudonym) v Secretary, Department of Communities and Justice [2020] NSWCA 83

Department of Communities and Justice and Masters [2020] NSWChC 7

Adoption of B [2019] NSWSC 908

Fischer v Thompson (Anonymised) [2019] NSWSC 773

Re Timothy [2010] NSWSC 524

Re Victoria and Marcus [2010] CLN 2

[3-1000] Adoption of Jimmy (a pseudonym) [2025] NSWSC 408

Last reviewed: November 2025

Adoption — Aboriginal placement — where birth parents disclosed Aboriginal heritage — whether Secretary has made reasonable inquiries as to whether child is an Aboriginal child — whether child is Aboriginal.

Adoption — best interests — alternatives to adoption — where child has been cared for by adoptive parents for more than 12 years — where adoptive parents have been granted parental responsibility for child until he attains 18 years of age — where adoptive parents not seeking guardianship orders and seek to support child to lead independent life — adoption clearly preferable in best interests of child.

Adoption — consent — dispense order — child — where 17 year old child diagnosed with speech and language disorders — where child cannot participate in registered counselling to give consent to his own adoption — where child given opportunity to express views freely about the adoption.

Adoption of John (a pseudonym) and William (a pseudonym) [2025] NSWSC 109

Adoption — Aboriginal placement principles — reasonable inquiries — where children placed with non-Aboriginal carers at a time when not aware that children may be Aboriginal — where birth mother and children strongly identify as Aboriginal — where carers are raising children

as Aboriginal — where Secretary of view that children are not Aboriginal — whether Secretary has made reasonable inquiries as to whether the children are Aboriginal children — whether children are Aboriginal children.

Secretary, Department of Communities and Justice and Levi and Riley (No 2) [2025] NSWChC 5

Care proceedings — Aboriginality.

Re Lucinda Porter (No 2) [2023] NSWChC 2

Placement/kinship assessment — Aboriginal child with special needs — placed with non-Aboriginal foster carers — child is stable, secure and thriving in current placement — Family Group Conference indicated family's wish for child to remain in current placement — Care Plan proposed maternal great-uncle and aunt as long-term kinship carers — request for DCJ's permanency planning refused — long-term placement with maternal great-uncle and aunt cannot be recommended unless they are aware of child's special needs and assessment considers whether they have skills and commitment to provide a long-term home for child with special needs — safety, welfare and well-being of child are paramount, and kinship placement is not the only consideration in deciding placement — no evidence Secretary considered and weighed all relevant factors — maternal great-uncle and aunt withdrew application — no Aboriginal carers available and only available long-term placement was foster parents — Amended Care Plan and Cultural Plan permanency planning appropriately and adequately addressed — placement/kinship assessment must contain probing, challenges, appropriate corroboration, consideration of objective evidence, analysis and reasoning based on assessor's expertise: see [74] for assessment requirements — DCJ must balance Aboriginal and Torres Strait Islander placement principles with child's current circumstances and future needs and placement options and decide which placement will be in the child's best interest — parental responsibility to the Minister.

Re Malakhai [2022] NSWChC 6

Application by mother for restoration — Aboriginal mother and child — s 13 Aboriginal and Torres Strait Islander Child and Young Person Placement Principles apply — vulnerable child with ongoing medical and health needs — mother and child living in an FSP residential home with no support — referral to residential intensive parenting education program did not eventuate — Family is Culture Report recommendation 45: prenatal caseworkers should be allocated to ensure that expectant Aboriginal parents have access to early, targeted and coordinated intervention services and support — mother needs targeted and therapist-lead counselling to assist her learn parenting skills — no realistic possibility of restoration to mother — mother demonstrated no insight into impact of her cannabis use on her ability to parent safely — domestic violence — permanency planning has not been appropriately and adequately addressed — direction that a new Care Plan be prepared.

Hackett (a pseudonym) v Secretary, Department of Communities and Justice [2020] NSWCA 83

Adoption — biological father opposed adoption — biological mother identified as Aboriginal — child assumed into care at 7 months of age and placed with her proposed adoptive mother who is not Aboriginal — prior decision, *Fischer v Thompson (Anonymised)* [2019] NSWSC 773, stated that in order for a child to be an "Aboriginal child", it was necessary to identify an

ancestor of the child who was "a member of the Aboriginal race of Australia, and identified as an Aboriginal person, and was accepted by the Aboriginal community as an Aboriginal person" — at first instance it was held that the child was not Aboriginal and Aboriginal child placement principles did not apply — s 4(1) *Adoption Act 2000* provides that the definition of "Aboriginal child" refers to "descended from an Aboriginal" and s 4(2) refers to the child being "of Aboriginal descent"; "descended" and "descent" have nothing to do with identification or acceptance — unnecessary to identify ancestor who was a member of Aboriginal race, identified as Aboriginal and was recognised by Aboriginal community — sufficient to show child was descended from people who lived in Australia before British colonisation — *Fischer v Thompson (Anonymised)* [2019] NSWSC 773 disapproved — leave to appeal granted in part.

Department of Communities and Justice and Masters [2020] NSWChC 7

Application to rescind Care Orders giving Minister parental responsibility — applicant formerly held parental responsibility for child — Secretary opposed leave being granted due to an inability to approve applicant as an authorised carer because of a current bar to a Working With Children Check and also concerns as to capacity to provide adequate care — applicant and child are Aboriginal people — applicant shared parental responsibility with Minister for cultural up-bringing — sufficient interest in welfare of a child to enable applicant to have standing — significant change in relevant circumstances — applicable factors for s 90 leave following amendment of Care Act — child's attachment to applicant and risk of psychological harm — leave granted.

Adoption of B [2019] NSWSC 908

Adoption — child assumed into care at 6 months of age and placed with her proposed adoptive mother whom she has lived with for 12 years — birth father opposed adoption order — child consented to adoption — birth mother identified as Aboriginal person — evidence not conclusive whether child is of Aboriginal descent — adoption in child's best interests — order for adoption and order for change of surname approved.

Fischer v Thompson (Anonymised) [2019] NSWSC 773

Adoption — ss 4, 34 *Adoption Act 2000* definition of Aboriginal person — s 32 Care Act Aboriginal child placement principles — summons for orders for adoption and change of surname — 12 year old boy lives with proposed adoptive parents who have been caring for him since birth — birth parents oppose adoption — child consents to adoption — birth father discovered he was Aboriginal in 2017 — Aboriginality of child investigated by Secretary — Secretary opposed adoption as child benefiting from contact with birth family and connection with Aboriginal heritage — descent is sufficient for a child to be an Aboriginal child for purposes of s 4(1), (2) *Adoption Act* but child must still be descended from an Aborigine as defined in s 4 test — birth father is not an Aborigine for the purposes of the Act due to lack of evidence to meet components of s 4 test — order for adoption and order for change of surname approved.

Re Timothy [2010] NSWSC 524

Children — care and protection — administrative law — judicial review — grounds of review — jurisdictional error and procedural fairness — decisions of Children's Court Magistrates — who may make application for interim order regarding placement — Aboriginal Care Circle.

Re Victoria and Marcus [2010] CLN 2

Children — care and protection — leave to bring an application to rescind a care order — application of Aboriginal and Torres Strait Islander Placement Principles — importance of encouraging and preserving the children's Aboriginal cultural identity — children with special needs — autism.

Important cases — Adoption

Adoption of Jimmy (a pseudonym) [2025] NSWSC 408 ..... [3-1020]

Adoption of John (a pseudonym) and William (a pseudonym) [2025] NSWSC 109

Hackett (a pseudonym) v Secretary, Department of Communities and Justice [2020] NSWCA 83

Department of Communities and Justice and Jake [2020] NSWChC 2

Adoption of B [2019] NSWSC 908

Fischer v Thompson (Anonymised) [2019] NSWSC 773

Department of Communities and Justice and the Stonsky Children [2019] NSWChC 8

Adoption of SRB, CJB and RDB [2014] NSWSC 138

[3-1020] Adoption of Jimmy (a pseudonym) [2025] NSWSC 408

Last reviewed: June 2025

Adoption — Aboriginal placement — where birth parents disclosed Aboriginal heritage — whether Secretary has made reasonable inquiries as to whether child is an Aboriginal child — whether child is Aboriginal.

Adoption — best interests — alternatives to adoption — where child has been cared for by adoptive parents for more than 12 years — where adoptive parents have been granted parental responsibility for child until he attains 18 years of age — where adoptive parents not seeking guardianship orders and seek to support child to lead independent life — adoption clearly preferable in best interests of child.

Adoption — consent — dispense order — child — where 17 year old child diagnosed with speech and language disorders — where child cannot participate in registered counselling to give consent to his own adoption — where child given opportunity to express views freely about the adoption.

Adoption of John (a pseudonym) and William (a pseudonym) [2025] NSWSC 109

Adoption — Aboriginal placement principles — reasonable inquiries — where children placed with non-Aboriginal carers at a time when not aware that children may be Aboriginal — where birth mother and children strongly identify as Aboriginal — where carers are raising children as Aboriginal — where Secretary of view that children are not Aboriginal — whether Secretary has made reasonable inquiries as to whether the children are Aboriginal children — whether children are Aboriginal children.

Hackett (a pseudonym) v Secretary, Department of Communities and Justice [2020] NSWCA 83

Adoption — biological father opposed adoption — biological mother identified as Aboriginal — child assumed into care at 7 months of age and placed with her proposed adoptive mother

who is not Aboriginal — prior decision, *Fischer v Thompson (Anonymised)* [2019] NSWSC 773, stated that in order for a child to be an "Aboriginal child", it was necessary to identify an ancestor of the child who was "a member of the Aboriginal race of Australia, and identified as an Aboriginal person, and was accepted by the Aboriginal community as an Aboriginal person" — at first instance it was held that the child was not Aboriginal and Aboriginal child placement principles did not apply — s 4(1) *Adoption Act 2000* provides that the definition of "Aboriginal child" refers to "descended from an Aboriginal" and s 4(2) refers to the child being "of Aboriginal descent"; "descended" and "descent" have nothing to do with identification or acceptance — unnecessary to identify ancestor who was a member of Aboriginal race, identified as Aboriginal and was recognised by Aboriginal community — sufficient to show child was descended from people who lived in Australia before British colonisation — *Fischer v Thompson (Anonymised)* disapproved — leave to appeal granted in part.

Department of Communities and Justice and Jake [2020] NSWChC 2

Adoption — child placed in a kinship foster care placement with the proposed adoptive parents after birth — no realistic prospect of restoration to parents — interim order allocating all aspects of Parental Responsibility to the Minister — Secretary filed a Care Plan proposing adoption — IRL not satisfied with permanency planning — found that adoption is premature and court cannot be satisfied the Care Plan addresses all the needs of the child — Plan not approved and Secretary invited to prepare a further Care Plan.

Adoption of B [2019] NSWSC 908

Adoption — child assumed into care at 6 months of age and placed with her proposed adoptive mother whom she has lived with for 12 years — birth father opposed adoption order — child consented to adoption — birth mother identified as Aboriginal person — evidence not conclusive whether child is of Aboriginal descent — adoption in child's best interests — order for adoption and order for change of surname approved.

Fischer v Thompson (Anonymised) [2019] NSWSC 773

Adoption — ss 4, 34 *Adoption Act 2000* definition of Aboriginal person — s 32 Care Act Aboriginal child placement principles — summons for orders for adoption and change of surname — 12 year old boy lives with proposed adoptive parents who have been caring for him since birth — birth parents oppose adoption — child consents to adoption — birth father discovered he was Aboriginal in 2017 — Aboriginality of child investigated by Secretary — Secretary opposed adoption as child benefiting from contact with birth family and connection with Aboriginal heritage — descent is sufficient for a child to be an Aboriginal child for purposes of s 4(1), (2) *Adoption Act* but child must still be descended from an Aborigine as defined in s 4 test — birth father is not an Aborigine for the purposes of the Act due to lack of evidence to meet components of s 4 test — order for adoption and order for change of surname approved.

Department of Communities and Justice and the Stonsky Children [2019] NSWChC 8

Adoption — children placed with carers with a view to adoption — no realistic possibility of restoration to parents — Secretary proposed short-term care orders of parental responsibility to the Minister for two years with a view to adoption — parents opposed adoption — ILR

contends that permanency planning is not achieved — proposed adoptive parents are highly regarded foster carers with extensive experience in caring for children in short-term, respite and emergency capacities as well as caring for children with delays or disabilities — adoption plan is real and not simply aspirational, not a case of a mere intention to adopt — unlikely adoption process will finalise within two years — Care Plan should place an onus on the Secretary to bring an application for rescission under s 90 Care Act if adoption is delayed or does not proceed — the permanency planning has not been appropriately and adequately addressed unless Care Plan has a mechanism to ensure a s 90 application is made — Secretary directed to prepare a different permanency plan.

Adoption of SRB, CJB and RDB [2014] NSWSC 138

Family Law Act 1975 (Cth) s 64B(2)(b) — *Adoption Act 2000* ss 8, 59, 67(1)(d), 90, 91, 118 — children were removed from their birth parents' care pursuant to a child protection order, on the grounds, inter alia, that they were living in an unsafe environment due to issues of domestic violence and substance abuse (including alcohol, cannabis and heroin) on the part of their birth parents — whether making of adoption orders clearly preferable to any other legal action which can be taken in respect of the care of the children — focus of the adoption order must be on the best interests of the child, not the wishes and aspirations of the adoptive applicants or birth parents — factors to consider as to whether adoption order preferable to other long-term orders — finding that the making of the adoption orders were clearly preferable to any other action which can be taken with respect to the care of the children.

Important cases — Active efforts

Department of Communities and Justice (DCJ) and Chase Croft [2024] NSWChC 15 ..... [3-1010]

[3-1010] Department of Communities and Justice (DCJ) and Chase Croft [2024] NSWChC 15

Last reviewed: November 2025

Care proceedings — active efforts — Temporary Care Agreement.

Important cases — Bias

M v Secretary, Department of Communities and Justice [2024] NSWCA 283 .... [3-1040]

BW v Secretary, Department of Communities and Justice [2024] NSWSC 1354

Polsen v Harrison [2021] NSWCA 23

JL v S, DFaCS [2015] NSWCA 88

[3-1040] M v Secretary, Department of Communities and Justice [2024] NSWCA 283

Last reviewed: March 2025

Bias rule — actual or apprehended — apprehended bias — where bias alleged by reference to reasons for judgment — sole reliance on reasons inverts proper inquiry — transcript did not disclose bias.

BW v Secretary, Department of Communities and Justice [2024] NSWSC 1354

Judicial review – Children's Court Magistrate — bias — apprehended bias — application for disqualification of Magistrate — fair-minded lay observer — error of law on the face of the record — adequacy of reasons.

Polsen v Harrison [2021] NSWCA 23

Application for recusal declined — judge commented on role of plaintiff's expert at conclave — comments made during preliminary discussion as to amended pleading — test whether fair-minded lay observer might think judge might have pre-judged credibility of witness not satisfied.

JL v S, DFaCS [2015] NSWCA 88

Appeal unsuccessful application for leave to apply to rescind care orders — whether error of law on the face of the record or jurisdictional error established — whether District Court correctly applied provisions of the Care Act s 90 — whether judge biased in approach to assessing applicant's case — whether there was a denial of procedural fairness — what are the duties of a judicial officer to an unrepresented litigant — relevance of international treaty obligations (United Nations Convention on the Rights of the Child) to exercise of discretion — whether judge placed excessive or too little weight on applicant's evidence.

Important cases — Care and protection

Secretary, Department of Communities and Justice v AM [2024] NSWDC 646 .. [3-1060]

Department of Communities and Justice (DCJ) and Rosa Juma [2025] NSWChC 6

RC and PK v Secretary, Department of Communities and Justice [2024] NSWDC 196

Department of Communities and Justice (DCJ) and Skyla [2023] NSWChC 12

DCJ and Evie and Grace [2023] NSWChC 1

Y (a pseudonym) v Secretary, Communities and Justice (No 4) [2021] NSWDC 81

Department of Communities and Justice and Jacinta [2021] NSWChC 5

CXZ v Children's Guardian [2020] NSWCA 338

Secretary, Department of Communities and Justice v B [2020] NSWDC 736

A v Secretary, Department of Communities and Justice (No 4) [2019] NSWSC 1872

Re Benji and Perry [2018] NSWSC 1750

NU v NSW Secretary of Family and Community Services [2017] NSWCA 221

AA v DFaCS [2016] NSWCA 323

DFaCS re Eggleton [2016] NSWChC 4

Re June [2013] NSWSC 969

Re Sophie (No 2) [2009] NSWCA 89

Re Jayden [2007] NSWCA 35

SB v Parramatta Children's Court [2007] NSWSC 1297

Re Alistair [2006] NSWSC 411

[3-1060] Secretary, Department of Communities and Justice v AM [2024] NSWDC 646

Last reviewed: November 2025

Care appeal — child in need of care and protection — child approximately 6 years of age — no realistic possibility of restoration to either parent — child placed into foster care at a young age where he remained for almost 4 years — appeal by the Secretary and paternal grandmother

against the Children's Court decision to place the child's care with the foster carer, and in lieu to place child into the paternal grandmother's care — competing suitable persons — no credibility issue of witnesses — analysis of s 83(3) placing child with a "relative" — consideration of "permanency" planning pursuant to ss 10A and 78A — short term and long term considerations — best interest of the child.

Department of Communities and Justice (DCJ) and Rosa Juma [2025] NSWChC 6

Care proceedings — care order — interim care order — safety plans.

RC and PK v Secretary, Department of Communities and Justice [2024] NSWDC 196

Care and protection — care and protection orders — appeal from Children's Court to District Court — whether the need for care and protection of the child has been established — general principles applicable — alleged sexual assault of children by mother — alleged mental health issues — lack of insight.

Department of Communities and Justice (DCJ) and Skyla [2023] NSWChC 12

Care and protection — establishment — availability of parent — no parent available.

DCJ and Evie and Grace [2023] NSWChC 1

Twin infants had healing fractures at multiple sites — most probable cause was the application of excessive force by a parent — parents unable to explain injuries and children were assumed into care and placed with their maternal great aunt — non-exhaustive list of factors in assessing safety at [53] — parents are intelligent, educated and engaged with services as recommended by the Department — parents have made the children available for medical assessments and reviews and have personally undertaken medical tests in search of a medical explanation for the injuries — parents have both attended psychologists to address concerns about their capacity to support their children — exposure of the harm will cause both parents to reflect on the way they have handled the children and to closely observe the other when handling the children — children's maternal uncle and grandparents will remain connected to the children and are alert to any signs of physical distress — children attend childcare three days each week and are supported by a nanny — risk of harm has been sufficiently mitigated such that the children are likely to be safe in the care of their parents — realistic possibility of restoration of children to their parents.

Y (a pseudonym) v Secretary, Communities and Justice (No 4) [2021] NSWDC 81

Care and protection — application by the Secretary, Department of Communities and Justice to set aside appellant's subpoenas that seek production of documents — no legitimate forensic purpose identified — subpoenas oppressive and too wide — fishing — subpoenas set aside.

Department of Communities and Justice and Jacinta [2021] NSWChC 5

Section 71 Care Act — Secretary, the parents and the Direct Legal Representative (DLR) reached agreement to allow child to return home immediately — Magistrate refused to make findings and orders by consent — s 9(1) Care Act requires that in any decision the court makes,

the safety, welfare and well-being of the child are paramount — parental responsibility allocated to the Minister for Families, Communities and Disability Services until the child attains 18 years of age.

CXZ v Children's Guardian [2020] NSWCA 338

Care and protection — principles to be applied in determining whether person poses risk to safety of children under s 18 *Child Protection (Working with Children) Act 2012* (NSW) — primary judge erred by finding tribunal failed to discharge its function — *M v M* (1988) 166 CLR 69 does not require each allegation of risk to be assessed by a three-step process — tribunal properly assessed whether evidence disclosed applicant posed a risk — leave to appeal granted.

Secretary, Department of Communities and Justice v B [2020] NSWDC 736

Care and protection — care order — appeal from Children's Court to District Court by plaintiff Secretary — need for care and protection of child established — sexual assault of other child — perpetrator not clear — mother had drug and mental health issues — lack of insight into seriousness of the injuries — general principles applicable — appeal allowed.

A v Secretary, Department of Communities and Justice (No 4) [2019] NSWSC 1872

Care and protection — allegation father sexually abused daughter — both children removed from parents and placed in care of Minister — children at unacceptable risk of harm — the ground for care orders under s 71(1)(c) has been made out in relation to both children — orders made by the Children's Court confirmed.

Re Benji and Perry [2018] NSWSC 1750

Care and protection — Children's Court ordered children to be returned to their carers — "unacceptable risk of harm" test in *M v M* (1988) 166 CLR 69 — s 9(1) Care Act — necessary to balance possibility of harm if children are returned to their carers with probability of psychological harm if they are not returned — application dismissed.

NU v NSW Secretary of Family and Community Services [2017] NSWCA 221

Care and protection — allegation father sexually abused daughter — appropriate test to be applied in cases of custody/ access to child — inability to make positive finding of abuse not ultimate determinative of unacceptable risk of harm — *Browne v Dunn* rule did not apply — no error of law demonstrated — summons dismissed.

AA v DFaCS [2016] NSWCA 323

Care and protection — whether actions of DFaCS under Care Act valid — father charged interstate but not convicted of indecent and sexual assault involving a child under 12 years — risk of harm report about the father's alleged history of sexual assaults — risk of violence alerts — mother's three older children from a former marriage assumed into care and subject to an emergency care and protection order — high risk birth alert issued for impending birth of child and any future children — whether DFaCS's assumption of care order and the high risk birth alert valid — DFaCS case in totality conveyed a serious risk of harm — parents did not establish grounds for relief — allegations of misconduct against DFaCS officers not found — DFaCS not motivated by ill-will but acted in the children's best interests.

DFaCS re Eggleton [2016] NSWChC 4

Application under Care Act — application of the unacceptable risk of harm test — parental history of alcohol and drug abuse — accidental death of younger sibling — realistic possibility of restoration — strong and positive attachment between child and parents — magnitude of risk not sufficient to meet the threshold for unacceptable risk of harm.

Re June [2013] NSWSC 969

Application by foster carers challenging decision of Children's Court — whether magistrate erred in failing to admit relevant evidence — need to weigh advantages of admitting probative evidence against disadvantages of admitting improperly obtained evidence — whether magistrate failed to comply with s 9(2)(c) Care Act — whether magistrate failed to properly apply s 79(3) — whether foster carers were entitled to an opportunity to be heard on matters of significant impact — what constitutes an opportunity to be heard — s 87 — where an order may have a significant impact on a person who is not a party to proceedings, there is a need for that person to be given an opportunity to be heard on that issue — ex tempore judgment — whether foster carers have standing to seek relief under s 69 *Supreme Court Act 1970* — if not, whether manifest defects in hearing before and reasons of Children's Court constitute "exceptional circumstances" — whether Supreme Court may, in the exercise of parens patriae jurisdiction, grant relief under s 69 — order quashed and matter remitted to the Children's Court to be heard by a magistrate other than the magistrate who made the order that has been quashed.

Re Sophie (No 2) [2009] NSWCA 89

Care and protection — application for care order — child welfare — whether child in need of care and protection — child infected with a sexually transmitted disease — whether child was sexually abused by the father who had the same sexually transmitted disease — onus of proof — history of litigation chequered — appeal — father seeking an order in the nature of certiorari quashing orders upon the ground of an error of law on the face of the record — whether trial judge failed to place onus on the Director-General of proving sexual abuse on the balance of probabilities — summons dismissed.

Re Jayden [2007] NSWCA 35

Care and protection — review of interim care responsibility orders — interim order conferring parental responsibility of children on Minister for Community Services — serious issue to be tried as to whether final order should be made — Director-General of the Department of Community Services obtaining discharge of contact order to enable Minister to send children to New Zealand prior to final order — whether this amounts to an abuse of process — ss 69, 70, 70A and 72 Care Act considered — legal practitioners — parties to proceedings — whether legal practitioners appointed by the Children's Court pursuant to s 99 Care Act to represent children the subject of proceedings should be named as parties to proceedings in the Supreme Court.

SB v Parramatta Children's Court [2007] NSWSC 1297

Care Act ss 71, 106A — s 106A(1) obliges the court to admit any evidence adduced that a parent or care-giver of a child, the subject of a care application, has previously had a child removed from, and not restored to, their care and protection — presumption that the child, the subject of the application, is in need of care and protection — presumption under s 106A is

not itself a ground for making a care order — the court must be satisfied there are grounds identified in s 71(1) before a care order is made — matter remitted to be heard and determined according to law.

Re Alistair [2006] NSWSC 411

Care and protection — finding child in need of care and protection — challenge to Magistrate's decision to permit re-examination of evidence when considering placement — application res judicata/issue estoppel rejected — discretion to receive evidence miscarried — Magistrate when exercising discretion required to balance competing interests — *In re B (Minors) Care Proceedings: Issue Estoppel* [1997] 2 WLR 1 applied — pending criminal proceedings — appropriate remedy.

Important cases — Care plans

Department of Communities and Justice (DCJ) and Ivy [2025] NSWChC 1 ..... [3-1080]

DCJ and Evie and Grace [2023] NSWChC 1

JE v Secretary, DFaCS [2019] NSWCA 162

DFaCS and Nicole [2018] NSWChC 3

DFaCS and the Slade Children [2017] NSWChC 4

C v S, FaCS [2016] NSWDC 103

[3-1080] Department of Communities and Justice (DCJ) and Ivy [2025] NSWChC 1

Last reviewed: May 2026

Care proceedings — nature of the Court's jurisdiction — s 83(5) *Children and Young Persons (Care and Protection) Act 1998* does not restrict the Court in matters it may consider — not possible to determine a realistic possibility of restoration on the balance of probabilities — unacceptable risk caters for all considerations — the proper test to be applied is not that of "unacceptable risk to the child".

DCJ and Evie and Grace [2023] NSWChC 1

Twin infants had healing fractures at multiple sites — most probable cause was the application of excessive force by a parent — parents unable to explain injuries and children were assumed into care and placed with their maternal great aunt — non-exhaustive list of factors in assessing safety at [53] — parents are intelligent, educated and engaged with services as recommended by the Department — parents have made the children available for medical assessments and reviews and have personally undertaken medical tests in search of a medical explanation for the injuries — parents have both attended psychologists to address concerns about their capacity to support their children — exposure of the harm will cause both parents to reflect on the way they have handled the children and to closely observe the other when handling the children — children's maternal uncle and grandparents will remain connected to the children and are alert to any signs of physical distress — children attend childcare three days each week and are supported by a nanny — risk of harm has been sufficiently mitigated such that the children are likely to be safe in the care of their parents — realistic possibility of restoration of children to their parents.

JE v Secretary, DFaCS [2019] NSWCA 162

Appeal — s 91 Care Act — parental responsibility for eldest daughter allocated to her father, responsibility for younger daughter allocated to maternal grandparents — mother sought damages arising out of circumstances her children were removed from her care — DFaCS sought orders that proceedings be struck out in relation to younger daughter — at first instance damage proceedings dismissed and s 91 appeal dismissed for both children — application

for judicial review of decision in s 91 appeal and leave to appeal dismissal of damage proceedings — denial of procedural fairness due to jurisdictional error dismissing proceedings relating to eldest child — dismissal order varied and s 91 appeal remitted to District Court for determination as it relates to the care orders with respect to eldest child — damages proceedings by mother dismissed on grounds of unreasonable delay and statement of claim did not plead a reasonable cause of action — summary of argument did not identify any error — application for extension of time to seek leave to appeal refused — no principle or matter of public importance to warrant reconsideration on appeal — leave to appeal refused.

DFaCS and Nicole [2018] NSWChC 3

Care Act s 71 — whether there is a realistic possibility of restoration — child is in need of care and protection — Secretary to prepare, file and serve Care Plan — case relisted for response to Care Plan.

DFaCS and the Slade Children [2017] NSWChC 4

Application to transfer case management from NSW to Victoria — parental responsibility allocated to grandmother — grandmother and children moved to Victoria — children listed in AVO as persons in need of protection — orders sought by Secretary that care orders be rescinded, parental responsibility transferred to Minister and then to Victoria — court does not have jurisdiction to hear s 90 application where children not present in NSW or who are subject to a report — risk of harm reports not filed, so court unable to exercise function of the Care Act — appeal dismissed for want of jurisdiction.

C v S, FaCS [2016] NSWDC 103

Care and protection — child placed in out-of-home care — placement into maternal grandmother's care refused — refusal by Children's Court to place the child in grandmother's care because of the Office of the Children's Guardian refusal to issue grandmother with the relevant clearance to work with children — reports from FaCS supported restoration to the grandmother — renewal of AVOs against child's mother and abusive former spouse — orders of Children's Court set aside — interim order for parental responsibility for the child to be allocated to grandmother — final orders to be made after FaCS prepares permanency plan.

Important cases — Change in circumstances/rescission or variation of care plans

SNN v Department of Communities & Justice [2024] NSWDC 393 ..... [3-1100]

LZ v Secretary, Department of Family and Community Services [2019] NSWDC 156

DFaCS and Bridget [2019] NSWChC 4

Re Jeremy (a pseudonym); DM v Secretary, Department of Family and Community Services [2017] NSWCA 220

FaCS v Kestle [2012] NSWChC 2

Re Campbell [2011] NSWSC 761

Re Hamilton [2010] CLN 2

S v Department of Community Services [2002] NSWCA 151

[3-1100] SNN v Department of Communities & Justice [2024] NSWDC 393

Last reviewed: March 2025

Final care orders reposed all aspects of parental responsibility for child in the Minister for Families, Communities and Disability Services — Mother's unsuccessful application for leave to appeal Children's Court's decision — appeal to District Court — whether "significant change in circumstances" — evaluation of mandatory and additional considerations — whether arguable case

LZ v Secretary, Department of Family and Community Services [2019] NSWDC 156

Care Act s 90 application for leave to rescind orders — appeal from Children's Court to District Court — no significant change in any relevant circumstances under s 90(2) — child secure in foster placement — child expressed wish to remain with foster parents — 3-month transition period for restoration too short — mother fails to understand damage done to child by being away from her for lengthy periods — appeal dismissed.

DFaCS and Bridget [2019] NSWChC 4

Care Act s 90 application for leave to rescind or vary previous care orders — father had drug addiction issues and history of criminal offending — mother is drug-free, maintains a safe home and is committed to contact with child — mother has separated from father — leave granted.

Re Jeremy (a pseudonym); DM v Secretary, Department of Family and Community Services [2017] NSWCA 220

Application for leave to vary care orders — significant change in any relevant circumstances — appellant mother of four children in the care of Minister — appellant sought orders of allocation

of sole parental responsibility of two children — leave required for application s 90 Care Act — appellant entitled to have court properly investigate care situation — judge erred in law failing to apply provisions of Act — orders set aside, remitted to District Court for appeal.

FaCS v Kestle [2012] NSWChC 2

Application under Care Act for s 90 leave to vary or rescind care orders — relevance of arguable case for leave — consideration of Statement of Wishes by children — consideration of paramountcy principle in leave applications — discretion to restrict grant of leave to particular issue or issues — s 94(4) and granting of adjournments.

Re Campbell [2011] NSWSC 761

Application under Care Act for s 90 leave to vary or rescind care orders — significant change in relevant circumstances — "relevant circumstances" will depend upon the issues presented, but may not necessarily be limited to just a "snapshot" of events occurring between the time of the original order and the date the leave application is heard — realistic possibility of restoration — least intrusive form of intervention principle — *Re Tracey* (2011) 80 NSWLR 261 — proposal by carer for adoption.

Re Hamilton [2010] CLN 2

Application to rescind a care order and restore one child to the father — application for restoration abandoned — application for a contact order sought instead — whether contact with the father is in the best interests of the children — father has a serious criminal record for sexual offences against children and for indecent exposure — children exposed to domestic violence between the parents — possible sexual abuse and sexual grooming of the children by the father — meaning of "unacceptable risk of harm" — meaning of "permanency planning" — no realistic possibility of restoration — whether permanency planning has been appropriately and adequately addressed — importance of maintaining contact between siblings who are not placed together — children with special needs — autism and post traumatic stress disorder.

S v Department of Community Services [2002] NSWCA 151

Section 61 Care Act — application for rescission or variation of a care order — must establish a change of "sufficient significance" to justify the consideration of an application for rescission or variation of the care order — Children's Court approached the issue in a limited and unduly technical way, failed to take account of material considerations — leave to appeal granted.

Important cases — Child Representatives/Independent Legal Representative (ILRs)

Shapkin v Secretary, Department of Communities and Justice [2025] NSWCA 87 ..... [3-1120]

Shapkin v Secretary, Department of Communities and Justice [2025] NSWCA 71

GR v Secretary, Department of Communities and Justice [2021] NSWCA 301

GR v Department of Communities and Justice [2020] NSWSC 1622

DFaCS and the Prince Children [2019] NSWChC 2

DFaCS and Leo [2019] NSWChC 3

SL v S, DFaCS [2016] NSWCA 124

Re Jayden [2007] NSWCA 35

[3-1120] Shapkin v Secretary, Department of Communities and Justice [2025] NSWCA 87

Last reviewed: June 2025

Administrative law — error of law on the face of the record — *Children and Young Persons (Care and Protection) Act 1998* s 98(3) — application to appear in proceedings in Children's Court dismissed — appeal to District Court dismissed — whether error of law on the face of the record of the District Court — whether sufficient for applicant to be found to have a genuine concern for the safety, welfare and well-being of the child or whether application was subject to a further discretion — conflict in decisions of Supreme Court on approach to s 98(3) — whether relief should be withheld for discretionary reasons.

Shapkin v Secretary, Department of Communities and Justice [2025] NSWCA 71

Judicial review — *Children and Young Persons (Care and Protection) Act*, s 98(3) — other person with genuine concern for safety of child may appear — applicant sought to appear in care proceedings and submitted independent legal representative (ILR) lacked standing — leave granted to ILR to intervene — divergence in authorities concerning s 98 would benefit from ILR's participation.

GR v Secretary, Department of Communities and Justice [2021] NSWCA 301

Three notices of motion in interlocutory proceedings — in substantive judgment, order for appointment of a guardian ad litem set aside (see *GR v Secretary, Department of Communities and Justice* [2021] NSWCA 157 at **[3-1220]**) — young person under legal incapacity not represented by either a tutor, guardian ad litem or legal representative — mother (appellant in substantive proceedings) proposed tutor be appointed — father opposed appointment — tutor selected by mother rejected as it would escalate conflict between parties — Independent

Legal Representative (ILR) to be appointed — Crown Solicitor (i) to liaise with the Legal Aid Commission of NSW in order to effect ILR appointment; and (ii) to advise the parties of any proposal regarding appointment of a specific person as ILR — second and third notices of motion dismissed.

GR v Department of Communities and Justice [2020] NSWSC 1622

Care Act s 98(2A) — Mother sought to remove Independent Legal Representative (ILR) and proposed a Direct Legal Representative (DLR) for child — application opposed by ILR — whether a guardian ad litem ought to be appointed for child — whether ILR should be removed and whether she should continue as a party — child does not have requisite capacity to understand and give instructions in legal proceedings, and understand legal ramifications — guardian ad litem must be appointed — ILR to take instructions from guardian ad litem and can be removed as a party to these proceedings if such an order is sought.

DFaCS and the Prince Children [2019] NSWChC 2

Leave application by Independent Legal Representative (ILR) of one child to vary or rescind care orders in relation to all 5 children — Minister for Community Services in NSW exercises parental responsibility for older children — all children reside in Qld with their mother — children remain subject to final orders made by NSW court — ILR for one child has standing to bring an application pursuant to s 90 Care Act for all siblings — NSW Children's Court has jurisdiction to hear and determine an application pursuant to s 90 for variation or rescission of the orders.

DFaCS and Leo [2019] NSWChC 3

Application pursuant to s 90 by Independent Legal Representative (ILR) for leave to vary or rescind care order — Children's Court made a Final order of parental responsibility to the Minister and no restoration to mother — agency designated to provide permanent placement failed to do so and explored restoration contrary to court's decision — no alternative long-term care options identified by Community Services or agency — Leave is granted to ILR to bring an application pursuant to s 90.

SL v S, DFaCS [2016] NSWCA 124

Judicial review in the supervisory jurisdiction of the Supreme Court — challenge to Children's Court maternal grandparent parental order — whether District Court applied correct provisions of the Care Act subject to relevant amendments in 2014 — whether error of law on the face of the record or jurisdictional error — child suffered life-threatening head injuries when with mother — mother diagnosed with juvenile myoclonic epilepsy — whether injuries were non-accidental — whether child in need of care and protection — mechanism of injuries unexplained – no realistic possibility of restoration — whether there had been failure to make an appropriate contact order — whether reasons adequate for permanency planning — role of independent legal representative in care proceedings.

Re Jayden [2007] NSWCA 35

Care and protection — review of interim care responsibility orders — interim order conferring parental responsibility of children on Minister for Community Services — serious issue to be tried as to whether final order should be made — Director-General of the Department of

Community Services obtaining discharge of contact order to enable Minister to send children to New Zealand prior to final order — whether this amounts to an abuse of process — ss 69, 70, 70A and 72 Care Act considered — legal practitioners — parties to proceedings — whether legal practitioners appointed by the Children's Court pursuant to s 99 Care Act to represent children the subject of proceedings should be named as parties to proceedings in the Supreme Court.

Important cases — Contact orders

SH v Department of Communities and Justice (No 2) [2026] NSWSC 302 ..... [3-1140]

Department of Communities and Justice (DCJ) and Dimitri and Nicholas and Sofia and Julia [2024] NSWChC 11

SM v Director-General, Department of Human Services [2010] NSWDC 250

Re Hamilton [2010] CLN 2

Re Liam [2005] NSWSC 75

Re Helen [2004] NSWLC 7

[3-1140] SH v Department of Communities and Justice (No 2) [2026] NSWSC 302

Last reviewed: May 2026

Contact order — appeal — ambit of appeal limited by nature of order the subject of the appeal.

Department of Communities and Justice (DCJ) and Dimitri and Nicholas and Sofia and Julia [2024] NSWChC 11

Application for Contact orders — procedural fairness — views of children.

Note: Appeal to the Supreme Court is above.

SM v Director-General, Department of Human Services [2010] NSWDC 250

Contact orders — mother and her family have supervised contact for three hours each time on a total of five occasions per year in school holiday periods — supervision by the Director-General or her delegate — mother applied to increase frequency of contact with supervision by family members — if court decides that supervision is required, contact cannot be ordered without consent of supervisor — contact ought be supervised by Director-General or a person approved by her — appeal dismissed.

Re Hamilton [2010] CLN 2

Application to rescind a care order and restore one child to the father — application for restoration abandoned — application for a contact order sought instead — whether contact with the father is in the best interests of the children — father has a serious criminal record for sexual offences against children and for indecent exposure — children exposed to domestic violence between the parents — possible sexual abuse and sexual grooming of the children by the father — meaning of "unacceptable risk of harm" — meaning of "permanency planning" — no realistic possibility of restoration — whether permanency planning has been appropriately and adequately addressed — importance of maintaining contact between siblings who are not placed together — children with special needs — autism and post traumatic stress disorder.

Re Liam [2005] NSWSC 75

Contact orders — s 86 Care Act — interim contact order made by Children's Court — s 86 requires Children's Court to not only consider whether there should be any contact, but also whether such contact should be supervised — contact cannot be ordered without the consent of the supervisor — supervised contact with child permitted for 1½ hours, once per week, upon the basis of mother's undertaking given to the Children's Court.

Re Helen [2004] NSWLC 7

Contact orders — child's attachment to her mother is significant and is already formed and will not be broken by moving or by creating a contact regime in which its importance and significance is insufficiently recognised — balance the benefits and risks of contact with primary focus on child's best interests — orders for supervised contact and telephone contact.

Important cases — Convention on the Rights of the Child

Re Henry [2015] NSWCA 89 ..... [3-1160]

JL v S, DFaCS [2015] NSWCA 88

Re Tracey (2011) 80 NSWLR 261

[3-1160] Re Henry [2015] NSWCA 89

Last reviewed: June 2024

Judicial review — appeal from Children's Court to District Court — whether the District Court correctly construed and applied the provisions of s 106A Care Act — challenge to Children's Court order placing child under parental responsibility of Minister until aged 18 years of age — the court must assess, at the time the application is before it, whether there is a "realistic possibility of restoration", that is to say, whether the "possibility of restoration is real or practical [and not] … fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'": *In the matter of Campbell* [2011] NSWSC 761 (at [55]) — relevance of United Nations Convention on the Rights of the Child — what are the duties of a judicial officer to an unrepresented litigant.

JL v S, DFaCS [2015] NSWCA 88

Appeal unsuccessful application for leave to apply to rescind care orders — whether error of law on the face of the record or jurisdictional error established — whether District Court correctly applied provisions of the Care Act s 90 — whether judge biased in approach to assessing applicant's case — whether there was a denial of procedural fairness — what are the duties of a judicial officer to an unrepresented litigant — relevance of international treaty obligations (United Nations Convention on the Rights of the Child) to exercise of discretion — whether judge placed excessive or too little weight on applicant's evidence.

Re Tracey (2011) 80 NSWLR 261

Application by mother for parental responsibility — Care Act — Convention on the Rights of the Child (CROC) — treaty obligations under the CROC may be a relevant consideration to the exercise of discretion in determining care application — judge erred in failing to take into account CROC Articles in exercising her discretion.

Important cases — Costs

Department of Communities and Justice (DCJ) and Layla, Jasmine and Zara [2023] NSWChC 14 ..... [3-1180]

Department of Communities and Justice (DCJ) and Katie [2023] NSWChC 11

Y v Secretary, Department of Communities and Justice (No 7) [2021] NSWDC 477

Re: A Costs Appellant Carer (a pseudonym) v Secretary, Department of Communities and Justice [2021] NSWDC 197

Re A Foster Carer v DFaCS (No 2) [2018] NSWDC 71

S, DFaCS and the Knoll Children (Costs) [2015] NSWChC 2

[3-1180] Department of Communities and Justice (DCJ) and Layla, Jasmine and Zara [2023] NSWChC 14

Last reviewed: June 2024

Application for costs under s 88 Care Act — care proceedings — exceptional circumstances — application for costs dismissed.

Department of Communities and Justice (DCJ) and Katie [2023] NSWChC 11

Application for costs under s 88 Care Act — exceptional circumstances — costs to paternal grandmother.

Y v Secretary, Department of Communities and Justice (No 7) [2021] NSWDC 477

Child care appeal dismissed in *Y v The Secretary, Department of Communities and Justice (No 6)* [2021] NSWDC 392 (see **[3-1420]**) — s 88 Care Act and s 98 *Civil Procedure Act 2005* — application by the Secretary, Department of Communities and Justice for a compensatory specified gross sum costs order against the appellant — application based on the cost consequences of the inefficient, combative, non-compliant and time-wasting manner in which appeal was conducted by appellant father — exceptional circumstances under s 88 Care Act established — specified gross sum costs made in Secretary's favour.

Re: A Costs Appellant Carer (a pseudonym) v Secretary, Department of Communities and Justice [2021] NSWDC 197

Appeal from decision of Children's Court refusing appellant's application for costs — Secretary, Department of Communities and Justice failed to meet the establishment criteria in proceedings in the Children's Court — exceptional circumstances shown by the costs appellant within the meaning of s 88 Care Act.

Re A Foster Carer v DFaCS (No 2) [2018] NSWDC 71

Application for costs under s 88 Care Act — the appellant's appeal costs to be paid by DFaCS due to exceptional circumstances — exceptional circumstances arose because DFaCS's position was based on flawed care agency investigation report.

S, DFaCS and the Knoll Children (Costs) [2015] NSWChC 2

Application for costs under s 88 Care Act — application for costs to be paid to the carers by the paternal grandmother — whether there are exceptional circumstances to justify a costs order — application dismissed.

Important cases — Evidence

VC v Secretary of the Department of Communities and Justice [2024] NSWDC 166 ..... [3-1190]

[3-1190] VC v Secretary of the Department of Communities and Justice [2024] NSWDC 166

Last reviewed: November 2024

Evidence — child care proceeding — plaintiff records telephone conversation with third party — other parties object to transcript of sound recording — whether evidence relevant — whether evidence illegally obtained — whether desirability of admitting illegally obtained evidence outweighed by undesirability of admitting evidence illegally obtained.

Important cases — Experts' reports

J & T v DCJ [2023] NSWDC 78 ..... [3-1200]

Jones v Booth [2019] NSWSC 1066

Department of Family and Community Services and the Jacobs children [2019] NSWChC 11

DFaCS and Amber [2019] NSWChC 10

Secretary, Department of Family and Community Services v Hayward (a pseudonym) (2018) 98 NSWLR 599

Hayward v R (2018) 97 NSWLR 852

R v Hayward [2017] NSWSC 1170

[3-1200] J & T v DCJ [2023] NSWDC 78

Last reviewed: June 2024

Care Act s 91 appeal by parents seeking restoration — trauma-informed approach to child care appeal — mother's background included significant childhood trauma involving a history of incestuous rapes that occurred over a number of years, resulting in pregnancies and the birth of six children before she had reached the age of 16 years — two further children from her relationship with plaintiff father were also removed — departmental management of data on matters of child risk had a rigidity which could not be overridden by caseworkers and managers who came into possession of contrary information that ought to have served to dispel some crucial recorded departmental notions of risk — that rigidity perpetuated a risk assessment that was contrary to uncontroverted medical evidence and was not exposed at previous Children's Court hearing — plaintiff father's daughter made allegations of a sexual nature against her father — allegations incorrectly recorded as substantiated by the department — part of the Children's Court clinician's report lacks determinative weight due to reliance on these allegations — department erroneously reported that both parents had unmanaged mental health issues that needed a treatment plan — Children's Court clinician's assessment as to plaintiffs' insights into mental health and child protection, understanding and acceptance of medical advice, physical disability, past parental instances of discordance and reactivity to service providers, safe and secure housing and mother's Borderline Personality Diagnosis based on an outdated and incomplete assessment and do not form a reliable basis for refusing the parents' claim for restoration — court does not accept Secretary's submissions that the parents pose an unacceptable risk of harm to their children — realistic possibility of restoration and Secretary has not appropriately addressed permanency planning — department to prepare an Amended Care Plan.

Jones v Booth [2019] NSWSC 1066

Civil procedure — mental health — declaratory relief sought concerning qualifications of a psychologist to furnish a report in support of a s 32 *Mental Health (Forensic Provisions) Act*

1990 application — report rejected by magistrate as it was not a psychiatric report — report later accepted by different magistrate — application under s 32 later successful — type of report which may be appropriate will depend on particular case — court should consider the qualifications and expertise of author, together with report contents, to determine whether report should be admitted and what weight is given to it — conditions which fall within the definition of "cognitive impairment" are frequently reported on by psychologists — live controversy does not exist for grant of declaratory relief — declaration refused.

Department of Family and Community Services and the Jacobs children [2019] NSWChC 11

Care Act s 76(4) — supervision order made pursuant to s 76 — late filing of the supervision report — extension of time for filing of supervision report not permissible — finality of litigation and extinguishment of jurisdiction beyond date of the supervision order — parties to file draft Orders and matter relisted.

DFaCS and Amber [2019] NSWChC 10

Jurisdiction of Children's Court — extension of time sought to file a s 82 report — the extension of time was made outside the 12-month period mandated in s 82(2)(a) — court may extend the date for the provision of the report, so long as that extension does not go beyond the 12-month period from the date of the Final Orders — court has no authority when the statutory time period has expired — parties to file any draft Minute of Order they wish court to consider within 14 days and the matter will be relisted.

Secretary, Department of Family and Community Services v Hayward (a pseudonym) (2018) 98 NSWLR 599

Care Act ss 24, 29(1)(e), 29(1)(f)(ii) — s 29(1)(e) forbids use of compulsory process to produce or give evidence regarding contents of risk of significant harm report — no exception in criminal proceedings as s 29(1)(f)(ii) limits use to "proceedings relating to the report" — whether court in criminal case can compel disclosure of report makers' identities — no power to order the Secretary to identify the maker of a report, nor to produce the unredacted reports, nor to provide information from which the identity of that person could be deduced — notice of motion dismissed.

Hayward v R (2018) 97 NSWLR 852

Care Act s 29(1)(d)(iii) — whether reports made to DFaCS admissible in criminal proceedings in Supreme Court — the phrase "in relation to" limits the scope of s 29(1)(d)(iii) to proceedings which affect the legal rights and interests of a child or young person in proceedings which concern their welfare — subpoena material which the applicant sought to admit is not admissible in the present proceedings in the Supreme Court — appeal dismissed.

R v Hayward [2017] NSWSC 1170

Care and protection — offences relating to physical abuse of a child — accused seeks to rely on subpoenaed material from the Department about mother's history of inflicting injuries on the child/children — s 29 Care Act provides reports only admissible for limited proceedings in the Supreme Court — accused argued application to criminal proceedings in the Supreme Court — Second Reading Speech consulted and where reports are admissible intended to be "child

welfare proceedings" — criminal proceedings do not fall within s 29(1)(d) even if the victim was a child — held s 29(1) report is not admissible in criminal proceedings in the Supreme Court.

Important cases — Guardian ad litem

HP v The Secretary, Department of Communities & Justice [2024] NSWDC 474 ..... [3-1220]

CM v Secretary, Department of Communities and Justice [2022] NSWCA 120

GR v Secretary, Department of Communities and Justice [2021] NSWCA 267

GR v Secretary, Department of Communities and Justice [2021] NSWCA 157

CM v Secretary, Department of Communities and Justice [2021] NSWSC 1442

GR v Department of Communities and Justice [2020] NSWSC 1622

[3-1220] HP v The Secretary, Department of Communities & Justice [2024] NSWDC 474

Last reviewed: November 2025

Child welfare — appeals from decision of Children's Court — appointment of guardian ad litem for Mother during the hearing — subsequent adjournment of proceeding — Guardian subsequently applies for discontinuance of appeal proceeding — whether proceeding could be discontinued — whether discontinuance requires leave — if discontinuance requires the Court's leave — whether leave should be granted.

CM v Secretary, Department of Communities and Justice [2022] NSWCA 120

Appeal of *CM v Secretary, Department of Communities and Justice* [2021] NSWSC 1442 (at **[3-1220]**) — previously appointed GAL ceased her appointment — mother sought judicial review of appointment of GAL — unnecessary to make order that mother be legally represented before appointing GAL — ss 98, 101, 101AA Care Act and changes made by the *Stronger Communities Legislation Amendment (Children) Act 2021* considered — no reason why the legislation would be construed on the basis that it was first necessary to make an order for legal representation before appointing a guardian ad litem — application dismissed.

GR v Secretary, Department of Communities and Justice [2021] NSWCA 267

Notices of motion concerning pending application for leave to appeal *GR v Department of Communities and Justice* [2021] NSWSC 1081 (see **[3-1420]**) — order sought by mother for tutor to be appointed and child be allowed to participate in appeal hearing directly and via his tutor — tutor may be appointed to act on behalf of a person under a legal disability who is an initiator of legal proceedings, whereas a guardian ad litem is appropriate representation for a person who is a defendant or respondent to proceedings — evidence required that proposed tutor consents to being appointed and does not have any interest in the proceeding adverse to the interests of the person under legal incapacity (UCPR r 7.18) — applicant has not identified the person she proposes to be appointed as tutor and there is no evidence of consent, nor understanding of what is involved in undertaking the role of tutor — order for the appointment

of a tutor refused but the question of appointment of a legal representative or a guardian ad litem left open — see further *GR v Secretary, Department of Communities and Justice* [2021] NSWCA 301 at **[3-1120]**.

GR v Secretary, Department of Communities and Justice [2021] NSWCA 157

Appeal — care proceedings — ss 98(2A), 100 Care Act — guardian ad litem appointed for a child and young person in separate proceedings — where a party to proceedings is incapable of giving proper instructions to a legal representative, s 98(2A) directs court to consider the discretionary factors in ss 100 or 101 before appointing a guardian ad litem — primary judge erred in adopting a mandatory construction of s 98(2A) and not addressing the discretionary considerations in s 100(1) when appointing a guardian ad litem — appeal allowed and previous orders quashed — see further *GR v Secretary, Department of Communities and Justice* [2021] NSWCA 301 at **[3-1120]**.

CM v Secretary, Department of Communities and Justice [2021] NSWSC 1442

Order sought in court's parens patriae jurisdiction to set aside appointment of guardian ad litem ("GAL") — ss 98(2A) and 101 Care Act — in a separate hearing a GAL appointed for the mother under s 101 Care Act to assist the mother in conducting her appeal — mother is self-represented and does not wish to be legally represented — mother not capable of adequately representing herself within s 98(2A) Care Act — incapable of giving proper instructions to legal representative within s 101 Care Act, then an appointment of a GAL can be made — two step process: court must first go through the gateway of s 98 and make a judgment about whether the person is "capable of adequately representing…herself"; then court must make a separate judgment about whether the person is "incapable of giving proper instructions" to his or her legal representative — application dismissed.

GR v Department of Communities and Justice [2020] NSWSC 1622

Care Act s 98(2A) — Mother sought to remove Independent Legal Representative (ILR) and proposed a Direct Legal Representative (DLR) for child — application opposed by ILR — whether a guardian ad litem ought to be appointed for child — whether ILR should be removed and whether she should continue as a party — child does not have requisite capacity to understand and give instructions in legal proceedings, and understand legal ramifications — guardian ad litem must be appointed — ILR to take instructions from guardian ad litem and can be removed as a party to these proceedings if such an order is sought.

Important cases — Identification of children in the media

Burton v DPP [2022] NSWCA 242 ..... [3-1240]

Burton v DPP (NSW) [2021] NSWSC 1230

Burton v DPP (2019) 100 NSWLR 734

AB (a pseudonym) v R (No 3) (2019) 97 NSWLR 1046

Secretary, DFaCS v Smith (2017) 95 NSWLR 597

[3-1240] Burton v DPP [2022] NSWCA 242

Last reviewed: June 2024

Care Act s 105 — appellants argue s 105 invalid for burdening the implied constitutional freedom of communication on political and government matters — prohibition in s 105 only applies when there is some connection in the publication or broadcast between identification of the child/young person and pending, contemplated or completed proceedings, non-court proceedings or a relevant report — implicit that the ability of a relevant child or young person to consent to publication or broadcast does not cease upon them turning 18 — constitutional freedom is burdened insofar as people are prohibited from publicly protesting or discussing the removal of particular children by governmental action — s 105 is not invalid for breach of implied freedom — appeal dismissed.

Burton v DPP (NSW) [2021] NSWSC 1230

Application for a declaration that magistrate erred in determining s 105 Care Act was not constitutionally invalid — law prohibits publication of names of children and young persons connected with care proceedings — applicants allege s 105 breaches implied freedom of political communication — *Comcare v Banerji* (2019) 267 CLR 373 applied — slight burden on political communication made out — legitimate protective function of s 105 made out as there is high likelihood of irreparable damage due to inherently sensitive subject matter — burden consequently found to be justified — section is reasonably appropriate and adapted to advance its legitimate protective purpose — section is suitable, necessary, and adequate in its balance — held to be constitutionally valid — summons dismissed — appeal *Burton v DPP* [2022] NSWCA 242 dismissed.

Burton v DPP (2019) 100 NSWLR 734

Appeal of dismissal of proceedings — non-publication order — ss 7, 11, 12 *Court Suppression and Non-Publication Orders Act 1998* — the order of the Children's Court was not an interim order and therefore did require the place or period of its operation to be specified — leave to appeal granted.

AB (a pseudonym) v R (No 3) (2019) 97 NSWLR 1046

Respondent pleaded guilty to historic sex offences committed when he was a child — primary judge ordered non-publication and suppression of respondent's name under s 8 *Court*

Suppression and Non-publication Orders Act 2010 — suppression and non-publication orders revoked on appeal — appeal against decision not to make non-publication order — court materially misconstrued s 8(1)(c) *Court Suppression and Non-Publication Orders Act* by adopting probable harm test — calculus of risk approach adopted — evidence of risk of physical harm to applicant — evidence of significant psychological harm to applicant and applicant's family — circumstances of misreporting by media and threats to applicant — appeal allowed, non-publication order made under s 8(1)(c).

Secretary, DFaCS v Smith (2017) 95 NSWLR 597

Child under parental responsibility of the Minister and in foster care — court engaged a "balancing exercise" of child's interest — paramount interest of child cannot be raised on appeal — construction of strict liability offence for publication of child's name contrary to s 105 Care Act — primary judge's construction not arguably wrong — exercise of discretion in refusing to grant injunction arguably miscarried — leave to appeal refused.

Important cases — Joinder

In re a Child [2022] NSWSC 671 ..... [3-1260]

AB and JB v Secretary [2021] NSWDC 626

EC v Secretary, NSW Department of Family and Community Services [2019] NSWSC 226

Secretary, DFaCS and Krystal [2019] NSWChC 6

GO v Secretary, Department of Communities and Justice [2017] NSWDC 198

Department of Communities and Justice and Lara [2017] NSWChC 6

[3-1260] In re a Child [2022] NSWSC 671

Last reviewed: June 2024

Joinder application by paternal aunt for leave to appear in person in care proceedings — s 98(3) Care Act two-step process involving first a determination of whether the applicant has the genuine concern described, and second a decision whether or not to exercise the discretion to grant leave — aunt does not have genuine concern — aunt's position is her desire to assist her brother in dispute with mother — joinder would add an additional layer of complexity to proceeding — potential to increase stress on child — leave refused.

AB and JB v Secretary [2021] NSWDC 626

Appeal from order refusing joinder of maternal grandparents in child care proceedings — maternal grandparents have reasonable prospects of success and should be heard — refusal order set aside — leave granted for joinder.

EC v Secretary, NSW Department of Family and Community Services [2019] NSWSC 226

Care Act ss 91, 98(3) — appeal from the Presidential Children's Court to Supreme Court of NSW — application by Barnardos to be joined to proceedings — meaning of "person" in s 98(3) — Barnardos has "genuine concern for the safety, welfare and well-being" of children — discretion exercised for Barnardos to be joined as a party as in best interests of children — s 98(3) not limited to "natural person" — appeal dismissed.

Secretary, DFaCS and Krystal [2019] NSWChC 6

Care Act s 3 definition of "parent" — biological father did not hold parental responsibility — Family Court Order placed parental responsibility with step-father after death of mother — child accused step-father of sexual abuse — Care Act does not provide a right of appearance to a parent unless parent holds parental responsibility — distinction between biological parents not holding parental responsibility and persons who hold parental responsibility in respect of a child, the latter has statutory definition of "parent" and former is excluded — biological father

not entitled to appear as of right in proceedings — court satisfied on the balance of probabilities that biological father has a genuine concern for the safety, welfare and well-being of the child — biological father's application for joinder granted.

GO v Secretary, Department of Communities and Justice [2017] NSWDC 198

Joinder of person with genuine concern for the welfare of a child to care proceedings — appellant great-grandmother of child subject to care proceedings and carer of mother — leave to appeal decision of Children's Court for joinder — magistrate erred in finding that appellant and mother held same position in care proceedings — leave granted to appellant to cross-examine and adduce evidence as to suitability as an alternative carer of child.

Department of Communities and Justice and Lara [2017] NSWChC 6

Application for joinder by carers under s 98(3) Care Act — genuine interest in child's safety, welfare and well-being — unable to cope with behavioural difficulties — applicant's Working with Children Check bar from historical allegation of sexual assault of a child — applicants do not have sufficient prospects of success — application for party status refused — application for joinder refused.

Important cases — Jurisdiction

L v Minister for Families, Communities and Disability Services [2024] NSWCA 199 ..... [3-1280]

DN v Secretary, DCJ [2023] NSWSC 595

Department of Communities and Justice (DCJ) and May, June and Roy [2023] NSWChC 15

Secretary, Department of Communities and Justice v KH [2022] NSWCA 221

Harris (pseudonym) v Secretary, Department of Communities and Justice [2021] NSWCA 261

JH v Secretary, Department of Communities and Justice [2021] NSWSC 1539

A v Department of Communities and Justice [2021] NSWSC 937

Department of Communities and Justice and Jacinta [2021] NSWChC 5

Department of Communities and Justice (DCJ) and Cara (a pseudonym) [2021] NSWChC 3

A v Secretary, Family and Community Services (No 2) [2019] NSWSC 43

Department of Family and Community Services and the Jacobs children [2019] NSWChC 11

DFaCS and Amber [2019] NSWChC 10

D v C; Re B (No 2) [2018] NSWCA 310

Bondelmonte v Bondelmonte (2017) 259 CLR 662

DFaCS and the Slade Children [2017] NSWChC 4

DFaCS and the Eastway Children [2017] NSWChC 3

Re Madison (No 2) [2015] NSWSC 27

AQY and AQZ v Administrative Decisions Tribunal of NSW [2013] NSWSC 1028

[3-1280] L v Minister for Families, Communities and Disability Services [2024] NSWCA 199

Last reviewed: March 2025

Jurisdictional error — Care Act — where care orders made by the Children's Court removed parental responsibilities from mother — where care orders confirmed on appeal by the District Court — where no appeal lies to the Court of Appeal — where part of applicant's evidence not considered by judge — no cross-examination or argument addressed to judge on evidence not considered — whether judge displayed apparent bias — whether applicant denied procedural

fairness — whether decision was legally unreasonable — nothing in transcript of hearing under review demonstrates reasonable apprehension of bias or procedural fairness — findings of judge were not unreasonable in any sense of the word — summons dismissed.

DN v Secretary, DCJ [2023] NSWSC 595

Plaintiff (mother) seeks to quash orders for want of jurisdiction under Care Act — parental responsibility under s 90 Care Act granted to carers — Aboriginal children — carers non-Aboriginal — plaintiff (mother) applied for contact orders — carers' visas expired and they returned to UK with children and remained there due to COVID — laws conferring jurisdiction are to be construed broadly particularly for the Care Act which requires a maximal, beneficial and practical approach — once final care order has been made, the Children's Court has jurisdiction — s 90 does not indicate that a jurisdictional fact, other than the existence of the final order, must be found — if the existence of a final care order is insufficient of itself to establish jurisdiction under s 90, the same result pertains due to proper construction of s 4(c) — a person who resides outside of Australia can be a suitable person under s 79(1) Care Act — s 9(1) paramountcy principle governs application of all other principles, including the Aboriginal and Torres Strait Islander principles in s 13.

Department of Communities and Justice (DCJ) and May, June and Roy [2023] NSWChC 15

Section 90 — interim order – Court has power to make an interim order prior to leave being granted — jurisdiction — cannot rescind or vary an order that is not in existence — unacceptable risk is not determinative of best interests — determination of "best interests" — Consideration of "least intrusiveness" and "placement principles" — guardianship order made.

Secretary, Department of Communities and Justice v KH [2022] NSWCA 221

Summons for judicial review seeking to quash the orders made in *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498 — reasons of the primary judge do not form part of the record as they do not constitute an "ultimate determination" — District Court decision (realistic possibility of restoration of child to mother) not the "ultimate determination" — no more than a step towards an ultimate determination, and issues of parental responsibility, contact orders, and permanent care plans remain to be determined — no error of law disclosed — summons for judicial review dismissed.

Harris (pseudonym) v Secretary, Department of Communities and Justice [2021] NSWCA 261

Applicant sought declaration by Supreme Court that removal of children was unlawful due to defective warrant — care proceedings on foot in the Children's Court — Children's Court unable to grant declaration but able to determine same question as part of ascertaining its own jurisdiction — granting declaration would merely be an advisory opinion — leave to appeal refused.

JH v Secretary, Department of Communities and Justice [2021] NSWSC 1539

Supervisory jurisdiction — application for summary dismissal of application for review — challenge to interlocutory establishment decision of Children's Court Magistrate — grounds for review are untenable and summons for judicial review reveal no reasonable cause of action — proceedings for judicial review summarily dismissed.

A v Department of Communities and Justice [2021] NSWSC 937

Amended summons sought 13 separate declarations with respect to four aspects of proceedings — summons did not concern real issues in dispute between the parties — attempt to re-litigate proceedings not in accordance with rules and procedures — abuse of process — no identifiable common questions of law or fact — proceedings dismissed.

Department of Communities and Justice and Jacinta [2021] NSWChC 5

Section 71 Care Act — Secretary, the parents and the Direct Legal Representative (DLR) reached agreement to allow child to return home immediately — Magistrate refused to make findings and orders by consent — s 9(1) Care Act requires that in any decision the court makes, the safety, welfare and well-being of the child are paramount — parental responsibility allocated to the Minister for Families, Communities and Disability Services until the child attains 18 years of age.

Department of Communities and Justice (DCJ) and Cara (a pseudonym) [2021] NSWChC 3

Application by ILR for a prohibition order under s 90A Care Act against placing an infant child with the mother in a residential rehabilitation facility — Secretary proposes to move the child to join the mother to evaluate prospects of restoration while the mother is in a supportive environment — mother argues prohibition orders cannot be made against her as she no longer has parental responsibility as required under s 3 Care Act definition of "parent" — consideration of *Re Josie* [2004] NSWSC 642 — *Re Josie* applies to prohibition orders under s 90A equally as it did to s 47 orders — court has jurisdiction to make a prohibition order against the mother, under s 90A, in her capacity as a parent notwithstanding the definition of "parent" in s 3 which says that a parent is "a person with parental responsibility" — s 90A applies to a broad category of persons, including a person from whom parental responsibility has been removed — court does have jurisdiction to make a prohibition order against the mother — practical effect of such a prohibition order will derogate from the Minister's exercise of parental responsibility in respect of residence and have the effect of removing from the Secretary a placement option — application dismissed.

A v Secretary, Family and Community Services (No 2) [2019] NSWSC 43

Judicial review — error on the face of the record — jurisdictional error — denial of procedural fairness — orders sought in relation to proceedings in Children's Court for care and protection — orders of prohibition and declaratory relief sought in relation to proceedings still being heard in the Children's Court — Supreme Court cannot resolve any factual issues unresolved in Children's Court — basis for orders sought not established — no error in conduct of Children's Court proceedings established — no jurisdictional error regarding provision of care plans — denial of procedural fairness in relation to the care plan not established — Supreme Court does not have power to direct removal of documents from Children's Court file — orders refused — summons dismissed.

Department of Family and Community Services and the Jacobs children [2019] NSWChC 11

Care Act s 76(4) — supervision order made pursuant to s 76 — late filing of the supervision report — extension of time for filing of supervision report not permissible — finality of litigation and extinguishment of jurisdiction beyond date of the supervision order — parties to file draft Orders and matter relisted.

DFaCS and Amber [2019] NSWChC 10

Jurisdiction of Children's Court — extension of time sought to file a s 82 report — the extension of time was made outside the 12-month period mandated in s 82(2)(a) — court may extend the date for the provision of the report, so long as that extension does not go beyond the 12-month period from the date of the Final Orders — court has no authority when the statutory time period has expired — parties to file any draft Minute of Order they wish court to consider within 14 days and the matter will be relisted.

D v C; Re B (No 2) [2018] NSWCA 310

Care Act ss 80, 83(7), 93, 107 — obligation on court not to conduct proceedings in adversarial manner — procedural fairness required adjournment where trial judge departed from case put by appellant — respondent sought to adduce further evidence— denial of procedural fairness — application refused — matter relisted for hearing in the District Court.

Bondelmonte v Bondelmonte (2017) 259 CLR 662

Children taken overseas by father in breach of parenting order — primary judge made interim order for children's return pending further relocation orders — father's appeal to the Full Court of the Family Court dismissed — father's appeal to the High Court that the primary judge failed to take into consideration the views of the children in relation to the interim parenting orders — court not required to seek the views of the child but is required to consider any expressed view under s 60CC(3)(a) *Family Law Act 1975* (Cth) — court not obliged to take into consideration the children's views in the case of interim, temporary arrangements — parenting order may be made in favour of a parent of the child or some other person making interim orders in circumstances of urgency under s 64C *Family Law Act* — appeal dismissed.

DFaCS and the Slade Children [2017] NSWChC 4

Application to transfer case management from NSW to Victoria — parental responsibility allocated to grandmother — grandmother and children moved to Victoria — children listed in AVO as persons in need of protection — orders sought by Secretary that care orders be rescinded, parental responsibility transferred to Minister and then to Victoria — court does not have jurisdiction to hear s 90 application where children not present in NSW or who are subject to a report — risk of harm reports not filed, so court unable to exercise function of the Care Act — appeal dismissed for want of jurisdiction.

DFaCS and the Eastway Children [2017] NSWChC 3

Mother sought rescission of final Care orders — Secretary of Department consented to exercise of jurisdiction by Family Law Court (FLC) — mother sought FLC parenting orders for shared parental responsibility and for children to reside with her — father applied to Children's Court for varying contact arrangements but not to vary parental responsibility allocation — mother withdrew Children's Court application — mother and Secretary sought dismissal of father's application — matter is a private dispute not requiring involvement of the Care Act, the Children's Court or the Department — FLC is the preferable forum — case dismissed.

Re Madison (No 2) [2015] NSWSC 27

Application to vary orders for parental responsibility — orders sought for specific financial assistance — orders sought to transfer proceedings from Children's Court to NSW Supreme

Court — Minister in better position than father to discharge parental responsibilities — father's financial request beyond Ministerial responsibilities — Supreme Court should not intervene, unless in exceptional circumstances, in proceedings that are ongoing in a specialist Tribunal which has been established to hear them.

AQY and AQZ v Administrative Decisions Tribunal of NSW [2013] NSWSC 1028

Jurisdictional error — whether Administrative Decisions Tribunal of NSW has jurisdiction to review the decision of the Director-General of the Family and Community Services to not grant certain persons the responsibility for the daily care and control of the child — whether decision is one in relation to the preparation of a permanency plan or the enforcement of a permanency plan that has been embodied in, or approved by, an order or orders of the Children's Court — need for court to make a finding that permanency planning has been adequately addressed and approved of before final orders made — ex tempore judgment — urgent matter — finding that the Tribunal had jurisdiction to entertain the application.

Important cases — Language and culture

Other cases ..... [3-1300]

Secretary, Department of Communities and Justice and Fiona Farmer [2019] NSWChC 5

[3-1300] Other cases

Last reviewed: June 2024

See also **Aboriginal and Torres Strait Islander placement principles** at **[3-1000]**ff

Secretary, Department of Communities and Justice and Fiona Farmer [2019] NSWChC 5

Application by father for restoration under s 83(4) Care Act — mother has mental health issues which affect her ability to parent — father demonstrated lack of understanding of mother's health incapacity and failed to protect child — father has separated from mother — risk is minimal and is capable of being addressed — realistic possibility of restoration to father within a reasonable period — Secretary to prepare a different permanency plan involving restoration.

Important cases — Non-accidental injury

DCJ and Evie and Grace [2023] NSWChC 1 ..... [3-1320]

SL v S, DFaCS [2016] NSWCA 124

[3-1320] DCJ and Evie and Grace [2023] NSWChC 1

Last reviewed: June 2024

Twin infants had healing fractures at multiple sites — most probable cause was the application of excessive force by a parent — parents unable to explain injuries and children were assumed into care and placed with their maternal great aunt — non-exhaustive list of factors in assessing safety at [53] — parents are intelligent, educated and engaged with services as recommended by the Department — parents have made the children available for medical assessments and reviews and have personally undertaken medical tests in search of a medical explanation for the injuries — parents have both attended psychologists to address concerns about their capacity to support their children — exposure of the harm will cause both parents to reflect on the way they have handled the children and to closely observe the other when handling the children — children's maternal uncle and grandparents will remain connected to the children and are alert to any signs of physical distress — children attend childcare three days each week and are supported by a nanny — risk of harm has been sufficiently mitigated such that the children are likely to be safe in the care of their parents — realistic possibility of restoration of children to their parents.

SL v S, DFaCS [2016] NSWCA 124

Judicial review in the supervisory jurisdiction of the Supreme Court — challenge to Children's Court maternal grandparent parental order — whether District Court applied correct provisions of the Care Act subject to relevant amendments in 2014 — whether error of law on the face of the record or jurisdictional error — child suffered life-threatening head injuries when with mother — mother diagnosed with juvenile myoclonic epilepsy — whether injuries were non-accidental — whether child in need of care and protection — mechanism of injuries unexplained – no realistic possibility of restoration — whether there had been failure to make an appropriate contact order — whether reasons adequate for permanency planning — role of independent legal representative in care proceedings.

Important cases — Parens patriae

WS v Department of Communities and Justice [2026] NSWSC 337 ..... [3-1340]

Re AC [2026] NSWSC 236

CH v Secretary, Department of Communities and Justice [2025] NSWSC 1617

Re Miki (No 2) [2025] NSWSC 369

Re Dakota [2024] NSWSC 1333

DB v Secretary, Department of Communities and Justice [2024] NSWSC 470

Re Leonardo [2022] NSWSC 1265

GR v Secretary, DFaCSJ [2019] NSWCA 177

S, DFaCS re "Lee" [2015] NSWSC 1276

Re Tilly v Minister, FaCS [2015] NSWSC 1208

TF v DFaCS [2015] NSWSC 694

[3-1340] WS v Department of Communities and Justice [2026] NSWSC 337

Last reviewed: May 2026

Parens patriae — plaintiff is the paternal grandfather of a child assumed into care shortly after her birth and who was placed with a long-term carer under the parental responsibility of the Minister — after contested proceedings the Children's Court grants parental responsibility for the child to the Minister — plaintiff commences appeal proceedings in the District Court — plaintiff brings a summons in this Court's parens patriae jurisdiction against the Secretary of the Department, seeking similar orders to those sought in the District Court appeal proceedings — the defendant brings a motion into strike out the plaintiff's summons as frivolous and vexatious and an abuse of process — the plaintiff discontinues the District Court appeal proceedings — the defendant presses forward with the motion — whether there are exceptional circumstances sufficient to enliven this Court's parens patriae jurisdiction — whether these proceedings are frivolous and vexatious or abuse of process — summons struck out.

Re AC [2026] NSWSC 236

Parens patriae — a Health Authority, the plaintiff, seeks orders authorising the administration of blood and blood products to a minor aged 17 who is undergoing surgery under general anaesthetic — minor refuses to consent to the administration of blood and blood products during the surgery — whether the Court should authorise the administration of blood and blood products — administration of blood products to AC during the forthcoming medical procedure authorised on terms.

CH v Secretary, Department of Communities and Justice [2025] NSWSC 1617

Parens patriae — the plaintiff, the paternal grandmother of a child under the care of the Minister seeks urgent relief for the removal of the child from the Minister's care and the placement of

the child with the plaintiff and her husband — the child is due to be placed with a non-kin carer within days with a view to long-term placement with that carer following a hearing in the Children's Court exercising jurisdiction under the *Children and Young Persons (Care and Protection) Act 1998* — the defendant, the Secretary of the Department of Communities and Justice (DCJ) opposes the relief sought — whether the application raises exceptional circumstances warranting the exercise of the Court's parens patriae jurisdiction — discussion of delay in obtaining a response from DCJ — comments made about the need for more accessible points of contact at DCJ and communication for the Court and parens patriae plaintiffs — summons dismissed.

Re Miki (No 2) [2025] NSWSC 369

Parens patriae — application for secure accommodation orders — secure accommodation orders made in November 2022 for neurologically affected child exhibiting self-harming behaviours and at significant risk of sexual abuse — progression of child through a protective care and transformative program designed to restore the child to life in the community having had the benefit of appropriate health and educative supports — transition leave sought and ordered.

Parens patriae — secure accommodation orders — protective care and transformative program explained — care supports and their aims described.

Parens patriae — secure accommodation orders — transition considerations explained — leave to transition necessarily to be assessed by reference to viable placement alternatives — proposed placement remote from child's former carers — no closer acceptable alternative placement readily available — balancing of risks associated with move to proposed distant placement against risks associated with delaying transition — diminishing returns to be gained by keeping child within the existing program and facility — further confinement with potentially unduly prolonged delay might be counter-productive — on balance, transition is appropriate — nature of the protective jurisdiction enables the Court to stand ready to meet exigencies of setbacks if risks materialise.

Re Dakota [2024] NSWSC 1333

Parens patriae jurisdiction — where mother of child in foster care seeking injunction against Minister removing the child from the State of New South Wales — where mother's application in the Children's Court for recovery of the child is pending — whether in the best interests of the child.

DB v Secretary, Department of Communities and Justice [2024] NSWSC 470

Parens patriae jurisdiction of the Supreme Court — Grandfather of child in care simultaneously lodges an appeal to the District Court of NSW from orders of the Children's Court of NSW and applies to the Supreme Court for parens patriae orders — Supreme Court proceedings summarily dismissed as vexatious and an abuse of process — best interests of child favour expedited determination of District Court appeal

Re Leonardo [2022] NSWSC 1265

Infant in care of plaintiffs — Minister and Secretary pursuing transition plan for permanent placement with paternal uncle — application to restrain Minister from removing child —

exceptional exercise of parens patriae jurisdiction of Supreme Court — child has been physically in the care of the plaintiffs for 15 months and appropriately cared for by them — maintain status quo in order for plaintiffs to be given written notification of the reasons for Minister's decision should they seek to review decision — Minister restrained from removing child from his current placement with plaintiffs until further order.

GR v Secretary, DFaCSJ [2019] NSWCA 177

Care Act s 44 — parens patriae jurisdiction — 15-year-old boy with autism spectrum disorder and avoidant food intake disorders — medical intervention in hospital due to weight loss — DFaCSJ allocated parental responsibility for medical issues by Supreme Court and an interim care order until the boy turned 18 granted by the Children's Court — parents applied to vary care order but application dismissed — court should exercise caution in summarily dismissing proceedings where parents self-represented and had an incomplete understanding of procedure — court has a responsibility to ensure some degree of instruction as to the process which was being put in place — when dismissing proceedings, judge did not consider whether orders made in Children's Court were not in best interests of the boy and whether court was not dealing expeditiously with issue of continuing care when determining the best interests of the boy — leave to appeal granted.

S, DFaCS re "Lee" [2015] NSWSC 1276

Exercise of parens patriae jurisdiction — where orders in place for parental responsibility and secure accommodation — continued availability of jurisdiction where child soon to attain 18 years of age but is not capable of managing her affairs — importance of ability to detain and restrain child to ensure proper care — where guardianship order does not include powers to detain and restrain — where guardianship order does not provide adequate safety net as alternative to parental responsibility and secured accommodation orders — unwillingness to discharge court orders upon child's attaining 18 years of age until satisfied appropriate replacement orders in place.

Re Tilly v Minister, FaCS [2015] NSWSC 1208

Parens patriae jurisdiction — application to prevent removal of child from temporary carer — carer accused of assaults against other children in her care — the presence of risk, as determined by the Children's Guardian, an automatic bar to a person being engaged in child-related work — statutory obligation on FaCS to remove child — parens patriae power not capable of dispensing with statutory obligations — residual parens patriae power to remove child from Minister's care in aid of statutory care responsibilities — court has power to make child ward of the court — best interest of the child in out-of-home care — where removal would undermine the child's bonds with the temporary carer — where need to protect child from risk of harm — where exercising jurisdiction would circumvent statutory child protection regime — court (not without regret) did not exercise parens patriae jurisdiction.

TF v DFaCS [2015] NSWSC 694

Invocation of parens patriae jurisdiction of the Supreme Court — whether the Children's Court had jurisdiction to make orders under s 4(a) and (c) Care Act — jurisdictional error — Children's Court order quashed.

Important cases — "Parent" definition

Department of Communities and Justice (DCJ) and Cara (a pseudonym) [2021] NSWChC 3 ..... [3-1360]

Secretary, DFaCS and Krystal [2019] NSWChC 6

S, DFaCS and the Marks Children [2016] NSWChC 2

[3-1360] Department of Communities and Justice (DCJ) and Cara (a pseudonym) [2021] NSWChC 3

Last reviewed: June 2024

Application by ILR for a prohibition order under s 90A Care Act against placing an infant child with the mother in a residential rehabilitation facility — Secretary proposes to move the child to join the mother to evaluate prospects of restoration while the mother is in a supportive environment — mother argues prohibition orders cannot be made against her as she no longer has parental responsibility as required under s 3 Care Act definition of "parent" — consideration of *Re Josie* [2004] NSWSC 642 — *Re Josie* applies to prohibition orders under s 90A equally as it did to s 47 orders — court has jurisdiction to make a prohibition order against the mother, under s 90A, in her capacity as a parent notwithstanding the definition of "parent" in s 3 which says that a parent is "a person with parental responsibility" — s 90A applies to a broad category of persons, including a person from whom parental responsibility has been removed — court does have jurisdiction to make a prohibition order against the mother — practical effect of such a prohibition order will derogate from the Minister's exercise of parental responsibility in respect of residence and have the effect of removing from the Secretary a placement option — application dismissed.

Secretary, DFaCS and Krystal [2019] NSWChC 6

Care Act s 3 definition of "parent" — biological father did not hold parental responsibility — Family Court Order placed parental responsibility with step-father after death of mother — child accused step-father of sexual abuse — Care Act does not provide a right of appearance to a parent unless parent holds parental responsibility — distinction between biological parents not holding parental responsibility and persons who hold parental responsibility in respect of a child, the latter has statutory definition of "parent" and former is excluded — biological father not entitled to appear as of right in proceedings — court satisfied on the balance of probabilities that biological father has a genuine concern for the safety, welfare and well-being of the child — biological father's application for joinder granted.

S, DFaCS and the Marks Children [2016] NSWChC 2

Application that father is not the children's "parent" — alternative application to exclude father from the proceedings — exceptional circumstances — allegations of domestic violence, sexual interference, abduction and threats to kill the children — father in immigration detention — father and legal representative not to be served with materials — father prohibited from having

contact with the children — father found to be a “parent” for the purposes of these proceedings — compelling reasons that it is in the children’s best interests that the father be excluded from proceedings — father poses unacceptable risk to the children.

Important cases — Parentage orders

Secretary, Department of Communities and Justice v TL [2025] NSWSC 301 .... [3-1370]

[3-1370] Secretary, Department of Communities and Justice v TL [2025] NSWSC 301

Last reviewed: November 2025

Parentage — declaration of parentage — where child's father not recorded at birth — where mother subsequently applied to vary birth certificate to record first defendant as father — where mother made various representations as to child's paternity — where on the evidence there is no doubt that second defendant is child's father — declaration of non-parentage made — declaration of parentage made.

Important cases — Permanency planning

PS v DCJ [2026] NSWSC 350 ..... [3-1380]

Department of Communities and Justice (DCJ) and Lila Fleming [2025] NSWChC 8

Department of Communities and Justice (DCJ) and Ivy [2025] NSWChC 1

Department of Communities and Justice (DCJ) and Margaret and Richard [2024] NSWChC 7

Department of Communities and Justice (DCJ) and Phoebe and Katelyn Wilson [2024] NSWChC 9

DCJ and Evie and Grace [2023] NSWChC 1

Department of Communities and Justice and Murphy [2020] NSWChC 12

Department of Communities and Justice and Jack and Jill [2020] NSWChC 3

Department of Communities and Justice and Jake [2020] NSWChC 2

Department of Communities and Justice and Teddy [2020] NSWChC 1

BA v Secretary, Department of Communities and Justice [2019] NSWCA 206

Department of Communities and Justice and the Stonsky Children [2019] NSWChC 8

[3-1380] PS v DCJ [2026] NSWSC 350

Last reviewed: May 2026

Care and protection — allocation of parental responsibility — permanency planning — *Children and Young Persons (Care and Protection) Act 1998* (Care Act) — appeal from a decision of a Presidential Children's Court — four children of a separated couple are assumed into care in June 2022 — care orders made in August 2022 that the children were in need of care and protection under Care Act s 71(1)(a),(b) and (c) on the grounds that both parents were involved in physical abuse or ill-treatment of the children, threatened serious psychological harm to them and were not meeting their psychological needs — orders made by a Presidential Children's Court in October 2023 allocating parental responsibility between the mother and the Minister for the two older children and in May 2024 orders were made allocating parental responsibility for the two younger children to the mother to the exclusion of the father — father appeals against all findings and conclusions of the Children's Court — by the time of the appeal hearing the eldest child is 18 and outside the jurisdiction of the Children's Court under the Care Act — whether the three children are in need of care and protection within Care Act s 72 — whether there is a realistic possibility of the three children being restored to the father within

a reasonable period within Care Act s 83 — what orders should be made or continued under Care Act s 79 in relation to the parental responsibility of the children — whether prohibition orders made under Care Act s 90 in relation to the father should be varied — appeal dismissed.

Department of Communities and Justice (DCJ) and Lila Fleming [2025] NSWChC 8

Care proceedings — placement — best interests of the child — permanency planning — two viable placements.

Department of Communities and Justice (DCJ) and Ivy [2025] NSWChC 1

Care proceedings — nature of the Court's jurisdiction — s 83(5) *Children and Young Persons (Care and Protection) Act 1998* does not restrict the Court in matters it may consider — not possible to determine a realistic possibility of restoration on the balance of probabilities — unacceptable risk caters for all considerations — the proper test to be applied is not that of "unacceptable risk to the child".

Department of Communities and Justice (DCJ) and Margaret and Richard [2024] NSWChC 7

Care and protection — allocation of parental responsibility — permanency planning — s 90A Care Act — special circumstances.

Department of Communities and Justice (DCJ) and Phoebe and Katelyn Wilson [2024] NSWChC 9

Care and protection — permanency planning and case management — permanency planning appropriately and adequately addressed — order of parental responsibility to the Minister.

DCJ and Evie and Grace [2023] NSWChC 1

Twin infants had healing fractures at multiple sites — most probable cause was the application of excessive force by a parent — parents unable to explain injuries and children were assumed into care and placed with their maternal great aunt — non-exhaustive list of factors in assessing safety at [53] — parents are intelligent, educated and engaged with services as recommended by the Department — parents have made the children available for medical assessments and reviews and have personally undertaken medical tests in search of a medical explanation for the injuries — parents have both attended psychologists to address concerns about their capacity to support their children — exposure of the harm will cause both parents to reflect on the way they have handled the children and to closely observe the other when handling the children — children's maternal uncle and grandparents will remain connected to the children and are alert to any signs of physical distress — children attend childcare three days each week and are supported by a nanny — risk of harm has been sufficiently mitigated such that the children are likely to be safe in the care of their parents — realistic possibility of restoration of children to their parents.

Department of Communities and Justice and Murphy [2020] NSWChC 12

Child assumed into care as newborn — parent has drug and mental health issues — unacceptable risk of significant harm — no realistic possibility of restoration — permanency planning — a plan must be realistic, reasonable and achievable and not underdeveloped, vague or aspirational

to satisfy ss 78A(1)(b), (2A) and 83(7A) — child is of Ethiopian and West African heritage — permanency plan must sufficiently identify or address cultural needs — permanency planning not appropriately and adequately addressed.

Department of Communities and Justice and Jack and Jill [2020] NSWChC 3

Guardianship — two children being cared for by maternal cousin who did not want an order of guardianship — mother died, father relinquished care of younger child — no realistic possibility of restoration — care plans suggest Department would like to progress towards guardianship in the future — ILR for the younger child opposes care plan because permanency planning has not been addressed — *Department of Communities and Justice and Teddy* [2020] NSWChC 1 applies — meaning of the expression "a permanency plan involving guardianship" is one that has guardianship as a necessary or integral part or result, there must be a reasonable degree of inevitability about a guardianship order being made at an appropriate time in the foreseeable future — the plans proposed are not plans involving guardianship as permanency planning must be addressed — Department directed to file new permanency plans.

Department of Communities and Justice and Jake [2020] NSWChC 2

Adoption — child placed in a kinship foster care placement with the proposed adoptive parents after birth — no realistic prospect of restoration to parents — interim order allocating all aspects of Parental Responsibility to the Minister — Secretary filed a Care Plan proposing adoption — IRL not satisfied with permanency planning — found that adoption is premature and court cannot be satisfied the Care Plan addresses all the needs of the child — Plan not approved and Secretary invited to prepare a further Care Plan.

Department of Communities and Justice and Teddy [2020] NSWChC 1

Care Plan to place child permanently with paternal aunt and uncle who have cared for child on an interim basis since birth — no realistic possibility of restoration to either of the parents — parents and ILR oppose making a short-term order which is proposed in Care Plan — permanency plan does not include guardianship, it merely proposes to consider guardianship in six months' time — two conditions precedent to the making of a guardianship order: the consent of the proposed guardians, and a positive guardianship assessment — held that permanency planning has not been appropriately and adequately addressed and Secretary invited to prepare and file a further Care Plan.

BA v Secretary, Department of Communities and Justice [2019] NSWCA 206

Care Act s 91 — three children removed from parents and parental responsibility allocated to Minister — parents unsuccessfully appealed to District Court — no realistic possibility of restoration of children to either parent and permanent placement was determined to be in best interests of children — NSWCA has power of review in its supervisory jurisdiction pursuant to s 69 *Supreme Court Act 1970* — no jurisdictional error nor any error of law on the face of the record in District Court — summons for judicial review dismissed.

Department of Communities and Justice and the Stonsky Children [2019] NSWChC 8

Adoption — children placed with carers with a view to adoption — no realistic possibility of restoration to parents — Secretary proposed short-term care orders of parental responsibility

to the Minister for two years with a view to adoption — parents opposed adoption — ILR contends that permanency planning is not achieved — proposed adoptive parents are highly regarded foster carers with extensive experience in caring for children in short-term, respite and emergency capacities as well as caring for children with delays or disabilities — adoption plan is real and not simply aspirational, not a case of a mere intention to adopt — unlikely adoption process will finalise within two years — Care Plan should place an onus on the Secretary to bring an application for rescission under s 90 Care Act if adoption is delayed or does not proceed — the permanency planning has not been appropriately and adequately addressed unless Care Plan has a mechanism to ensure a s 90 application is made — Secretary directed to prepare a different permanency plan.

Important cases — Proof

Isles and Nelissen [2022] FedCFamC1A 97 ..... [3-1400]

DCJ and Janet and Xing-fu [2022] NSWChC 7

NU v NSW Secretary of Family and Community Services [2017] NSWCA 221

Re Sophie (No 2) [2009] NSWCA 89

M v M FC 88/063 (1988) 166 CLR 69

[3-1400] Isles and Nelissen [2022] FedCFamC1A 97

Last reviewed: June 2024

Standard of proof for unacceptable risk of harm — child alleged sexual abuse by father — father charged but later withdrawn due to lack of specific evidence — primary judge found that he could not make a finding that father sexually assaulted child, but held an unacceptable risk exists which could only be mitigated through supervised time (*Isles and Nelissen* [2021] FedCFamC1F 295) — test for making findings of sexual abuse distinguished from findings of unacceptable risk of harm — standard of proof as to whether abuse has occurred in the past is determined on the balance of probabilities — s 140 *Evidence Act 1995* (Cth) — an unacceptable risk of harm does not require civil standard of proof on the balance of probabilities — unacceptable risk of harm requires a predictive or prospective exercise not limited to findings of past fact, but also possibilities — M v M FC 88/063 (1988) 166 CLR 69 followed — three relevant factors to consider when assessing unacceptable risk of harm: whether there are facts that indicate risk, either present or future; magnitude of risk; and tools or circumstances that can adequately mitigate that risk — appeal dismissed.

DCJ and Janet and Xing-fu [2022] NSWChC 7

Standard of proof for unacceptable risk of harm — child alleged sexual abuse by stepfather — later retracted her complaint — whether stepfather presents an unacceptable risk — if an allegation of sexual abuse is made out/not made out on the balance of probabilities, court then assesses risk, without conflation — *Isles and Nelissen* [2021] FedCFamC1F 295 followed — standard of proof in assessing risk is not on the balance of probabilities, the court looks to possibilities —*Isles and Nelissen* [2022] FedCFamC1A 97 followed — court satisfied that there was no evidence of sexual abuse — no unacceptable risk — court finds there is a realistic possibility of restoration within a reasonable period of Xing-fu to his father — court made finding prior to hearing that realistic possibility of restoration of Janet and Xing-fu to their mother.

NU v NSW Secretary of Family and Community Services [2017] NSWCA 221

Care and protection — allegation father sexually abused daughter — appropriate test to be applied in cases of custody/ access to child — inability to make positive finding of abuse not ultimate determinative of unacceptable risk of harm — *Browne v Dunn* rule did not apply — no error of law demonstrated — summons dismissed.

Re Sophie (No 2) [2009] NSWCA 89

Care and protection — application for care order — child welfare — whether child in need of care and protection — child infected with a sexually transmitted disease — whether child was sexually abused by the father who had the same sexually transmitted disease — onus of proof — history of litigation chequered — appeal — father seeking an order in the nature of certiorari quashing orders upon the ground of an error of law on the face of the record — whether trial judge failed to place onus on the Director-General of proving sexual abuse on the balance of probabilities — summons dismissed.

M v M FC 88/063 (1988) 166 CLR 69

Standard of proof for sexual abuse matters — wife's allegation that the father sexually abused daughter — trial judge not satisfied that father had sexually abused the child but considered that there was a possibility that the child had been sexually abused by the husband — in the interests of the child the risk of abuse would be eliminated by denying access to the husband, including supervised access — appeal to the Full Court of the Family Court dismissed — appeal to the High Court for an order that the father be granted access to the child — paramountcy of the welfare of the child — whether the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child — High Court dismissed appeal — to achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

Important cases — Realistic possibility of restoration

VC v Secretary, Department of Communities and Justice (No 2) [2024] NSWDC 192 ..... [3-1420]

Department of Communities and Justice (DCJ) and the Dalton Tomkins Children [2023] NSWChC 10

DCJ and Evie and Grace [2023] NSWChC 1

Secretary, Department of Communities and Justice v KH [2022] NSWCA 221

GR v Secretary, Department of Communities and Justice [2022] NSWCA 153

Re Malakhai [2022] NSWChC 6

Finn, Lincoln, Marina and Blake Hughes [2022] NSWChC 4

Department of Communities and Justice and Jamzie [2022] NSWChC 1

Secretary, Department of Communities and Justice v KH [2021] NSWCA 308

GR v Secretary, Department of Communities and Justice [2021] NSWCA 267

GR v Department of Communities and Justice [2021] NSWSC 1081

Y v Secretary, Department of Communities and Justice (No 6) [2021] NSWDC 392

Department of Communities and Justice and Bloom [2021] NSWChC 2

Secretary, Department of Communities and Justice and Fiona Farmer [2019] NSWChC 5

DFaCS and the Steward Children [2019] NSWChC 1

Re Tanya [2016] NSWSC 794

Re M (No 8) [2016] NSWSC 641

Re M (No 6) [2016] NSWSC 170

S, DFaCS and the Harper Children [2016] NSWChC 3

Re Henry [2015] NSWCA 89

Re Tracey (2011) 80 NSWLR 261

[3-1420] VC v Secretary, Department of Communities and Justice (No 2) [2024] NSWDC 192

Last reviewed: November 2024

Whether realistic possibility of restoration of care of child to mother or father — whether all aspects of parental responsibility should be allocated to mother or father — appropriateness of permanency planning — assessment of care plan.

Department of Communities and Justice (DCJ) and the Dalton Tomkins Children [2023] NSWChC 10

Secretary made assessment that there is a realistic possibility of restoration — unsatisfactory case management — funded service providers — Children's Court Clinic recommendations — unacceptable risk of harm — no realistic possibility of restoration of children to mother or father.

DCJ and Evie and Grace [2023] NSWChC 1

Twin infants had healing fractures at multiple sites — most probable cause was the application of excessive force by a parent — parents unable to explain injuries and children were assumed into care and placed with their maternal great aunt — non-exhaustive list of factors in assessing safety at [53] — parents are intelligent, educated and engaged with services as recommended by the Department — parents have made the children available for medical assessments and reviews and have personally undertaken medical tests in search of a medical explanation for the injuries — parents have both attended psychologists to address concerns about their capacity to support their children — exposure of the harm will cause both parents to reflect on the way they have handled the children and to closely observe the other when handling the children — children's maternal uncle and grandparents will remain connected to the children and are alert to any signs of physical distress — children attend childcare three days each week and are supported by a nanny — risk of harm has been sufficiently mitigated such that the children are likely to be safe in the care of their parents — realistic possibility of restoration of children to their parents.

Secretary, Department of Communities and Justice v KH [2022] NSWCA 221

Summons for judicial review seeking to quash the orders made in *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498 — reasons of the primary judge do not form part of the record as they do not constitute an "ultimate determination" — District Court decision (realistic possibility of restoration of child to mother) not the "ultimate determination" — no more than a step towards an ultimate determination, and issues of parental responsibility, contact orders, and permanent care plans remain to be determined — no error of law disclosed — summons for judicial review dismissed.

GR v Secretary, Department of Communities and Justice [2022] NSWCA 153

Parental responsibilities allocated to Minister, Department of Communities and Justice until 18 years old — mother seeking to restore care — young person almost 18 years — insufficient prospects that alternative order would be made to justify granting leave to appeal — summons seeking leave to appeal dismissed.

Re Malakhai [2022] NSWChC 6

Application by mother for restoration — Aboriginal mother and child — s 13 Aboriginal and Torres Strait Islander Child and Young Person Placement Principles apply — vulnerable child with ongoing medical and health needs — mother and child living in an FSP residential home with no support — referral to residential intensive parenting education program did not eventuate — Family is Culture Report recommendation 45: prenatal caseworkers should be allocated to ensure that expectant Aboriginal parents have access to early, targeted and coordinated intervention services and support — mother needs targeted and therapist-lead

counselling to assist her learn parenting skills — no realistic possibility of restoration to mother — mother demonstrated no insight into impact of her cannabis use on her ability to parent safely — domestic violence — permanency planning has not been appropriately and adequately addressed — direction that a new Care Plan be prepared.

Finn, Lincoln, Marina and Blake Hughes [2022] NSWChC 4

Application for supplementary Children's Court Clinic Report — children separated from one another and have suffered ongoing abuse and neglect in care — no long-term foster carers available for any or all of the children — mother has started to take steps towards addressing issues that led to removal of children — need for courts to conduct holistic balancing exercise to assess realistic options for child — DCJ and clinician assessed no realistic possibility of restoration to mother — assessments undertaken before mother's reported gains and when there was expectation of suitable long-term placement — mother being reconsidered for restoration — a further expert assessment is required — application granted.

Department of Communities and Justice and Jamzie [2022] NSWChC 1

Secretary commenced proceedings pursuant to s 61 of the Care Act — mother sought restoration of child — test in *DFACS and the Steward Children* [2019] NSWChC 1 (at **[3-1420]**) is too onerous and should not be applied — test in *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2 followed — a realistic possibility may be evidenced at the time of hearing by a coherent program already commenced and with some significant "runs on the board", or by the development of and commitment to a cohesive and viable plan that is sensible, practicable and viable within a reasonable time — realistic possibility of restoration within 18 months.

Secretary, Department of Communities and Justice v KH [2021] NSWCA 308

Secretary sought stay pending completion of judicial review — *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498 found realistic possibility of restoration of child to mother — amended care plan ordered — Secretary seeking judicial review in Court of Appeal — motion by Secretary to stay District Court orders pending determination of judicial review application — stay granted.

GR v Secretary, Department of Communities and Justice [2021] NSWCA 267

Appeal *GR v Department of Communities and Justice* [2021] NSWSC 1081 (see **[3-1420]**) (see **[3-1220]** for application for a tutor) — three notices of motion concerning a pending application for leave to appeal — application to set aside subpoenas — orders made as production of material unduly burdensome and would not facilitate appeal — orders sought to allow child to live with mother or allow daily contact — despite acceptance into the National Disability Insurance Scheme, no basis to override the care orders in place — notices of motion dismissed.

GR v Department of Communities and Justice [2021] NSWSC 1081

Appeal from care order of Children's Court — Application to set side Final Care Orders and restore child to mother's care — 17-year-old child has Autism Spectrum Disorder, Selective Mutism and Avoidant Restrictive Food Intake Disorder — child hospitalised due to severe

weight loss — no realistic possibility of restoration — the mother is incapable of cooperating with DCJ or carers and has not accepted nor addressed the issues that gave rise to her child's initial assumption to care — ongoing unacceptable risk of harm — nothing in evidence to warrant departure from orders of the Children's Court — appeal dismissed.

Y v Secretary, Department of Communities and Justice (No 6) [2021] NSWDC 392

Appellant father sought restoration of child following removal on account of his violence — disrespectful behaviour of appellant in court — referral to the Attorney-General for consideration of appellant's disrespectful behaviour (s 200A *District Court Act 1973*) — parental unfitness found — appeal dismissed.

Department of Communities and Justice and Bloom [2021] NSWChC 2

Application by father for restoration — 7-year-old child is in Aboriginal kinship care — mother has mental health issues and alcohol abuse and concedes child should not be restored to her, and supports the proposed permanent placement with current carers — the phrase "a realistic possibility of restoration" is summarised at [173]:

- a possibility is something less than a probability; that is, something that is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible
- the concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve
- the possibility must be "realistic", that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". It needs to be "sensible" and "commonsensical"
- a realistic possibility may be evidenced at the time of hearing by a coherent program already commenced and with some significant "runs on the board", or by the development of and commitment to a cohesive and viable plan that is sensible, practicable and viable within a reasonable time
- there are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child
- the determination must be undertaken in the context of the totality of the Care Act, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm

— no realistic possibility of restoration of the child to either parent — Permanency Planning for the child is appropriate and adequate — father's application under s 90 Care Act dismissed — Final Care orders allocating parental responsibility for the child to the Minister.

Secretary, Department of Communities and Justice and Fiona Farmer [2019] NSWChC 5

Application by father for restoration under s 83(4) Care Act — mother has mental health issues which affect her ability to parent — father demonstrated lack of understanding of mother's

health incapacity and failed to protect child — father has separated from mother — risk is minimal and is capable of being addressed — realistic possibility of restoration to father within a reasonable period — Secretary to prepare a different permanency plan involving restoration.

DFaCS and the Steward Children [2019] NSWChC 1

Application by father for restoration within a reasonable period under s 83 Care Act — "within a reasonable period" clarified — parent must have commenced a process of improving his or her parenting and that there has already been some significant success on the part of the parent which enables a confident assessment that continuing success might be predicted — AVO restricting father from having any contact with his children or the mother — no realistic possibility of restoration of children to mother or father.

Re Tanya [2016] NSWSC 794

Care and protection — child with Down's syndrome and intellectual disability — whether child in need of care and protection — restoration to mother not realistic possibility given relationship with a known paedophile — restoration to father realistic possibility.

Re M (No 8) [2016] NSWSC 641

Appeal by mother for leave for rescission or variation of orders under s 90 Care Act — mother did not demonstrate that her conduct was likely to change in a way that would justify the court exploring the questions raised — application dismissed.

Re M (No 6) [2016] NSWSC 170

Appeal of care orders made by a Presidential Children's Court — Five children from three fathers removed from mother's care — Children's Court orders granted parental responsibility of the three youngest children to children's fathers — whether realistic possibility of restoration to mother — mother pursued a peripatetic lifestyle, alienation from the fathers and her family, physical neglect, poor relationship with her children and a poor attitude to the DFaCS — mother not demonstrated that she had full insight into her situation — order for a rescission or variation of the care orders refused.

S, DFaCS and the Harper Children [2016] NSWChC 3

Mother applied for restoration under Care Act — Secretary, DFaCS proposed care plan restoring children to their father — unacceptable risk of harm test — allegations mother deliberately injected fecal matter into eldest child via an intravenous line — mother poses an unacceptable risk of harm to children — no realistic possibility of restoration of the children to their mother — realistic possibility of restoration to their father.

Re Henry [2015] NSWCA 89

Judicial review — appeal from Children's Court to District Court — whether the District Court correctly construed and applied the provisions of s 106A Care Act — challenge to Children's Court order placing child under parental responsibility of Minister until aged 18 years of age — the court must assess, at the time the application is before it, whether there is a "realistic possibility of restoration", that is to say, whether the "possibility of restoration is real or practical [and not] … fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'": *In the matter of Campbell* [2011] NSWSC 761 (at [55]) — relevance of United Nations Convention on the Rights of the Child — what are the duties of a judicial officer to an unrepresented litigant.

Re Tracey (2011) 80 NSWLR 261

Application by mother for parental responsibility — Care Act — Convention on the Rights of the Child (CROC) — treaty obligations under the CROC may be a relevant consideration to the exercise of discretion in determining care application — judge erred in failing to take into account CROC Articles in exercising her discretion.

Important cases — Short-term orders

Department of Communities and Justice and Teddy [2020] NSWChC 1 ..... [3-1440]

Department of Communities and Justice and Jack and Jill [2020] NSWChC 3

Department of Communities and Justice and Jake [2020] NSWChC 2

Department of Communities and Justice and the Stonsky Children [2019] NSWChC 8

Bondelmonte v Bondelmonte (2017) 259 CLR 662

Re Jayden [2007] NSWCA 35

[3-1440] Department of Communities and Justice and Teddy [2020] NSWChC 1

Last reviewed: June 2024

Care Plan to place child permanently with paternal aunt and uncle who have cared for child on an interim basis since birth — no realistic possibility of restoration to either of the parents — parents and ILR oppose making a short-term order which is proposed in Care Plan — permanency plan does not include guardianship, it merely proposes to consider guardianship in six months' time — two conditions precedent to the making of a guardianship order: the consent of the proposed guardians, and a positive guardianship assessment — held that permanency planning has not been appropriately and adequately addressed and Secretary invited to prepare and file a further Care Plan.

Department of Communities and Justice and Jack and Jill [2020] NSWChC 3

Guardianship — two children being cared for by maternal cousin who did not want an order of guardianship — mother died, father relinquished care of younger child — no realistic possibility of restoration — care plans suggest Department would like to progress towards guardianship in the future — ILR for the younger child opposes care plan because permanency planning has not been addressed — *Department of Communities and Justice and Teddy* [2020] NSWChC 1 applies — meaning of the expression "a permanency plan involving guardianship" is one that has guardianship as a necessary or integral part or result, there must be a reasonable degree of inevitability about a guardianship order being made at an appropriate time in the foreseeable future — the plans proposed are not plans involving guardianship as permanency planning must be addressed — Department directed to file new permanency plans.

Department of Communities and Justice and Jake [2020] NSWChC 2

Adoption — child placed in a kinship foster care placement with the proposed adoptive parents after birth — no realistic prospect of restoration to parents — interim order allocating all aspects of Parental Responsibility to the Minister — Secretary filed a Care Plan proposing adoption

— IRL not satisfied with permanency planning — found that adoption is premature and court cannot be satisfied the Care Plan addresses all the needs of the child — Plan not approved and Secretary invited to prepare a further Care Plan.

Department of Communities and Justice and the Stonsky Children [2019] NSWChC 8

Adoption — children placed with carers with a view to adoption — no realistic possibility of restoration to parents — Secretary proposed short-term care orders of parental responsibility to the Minister for two years with a view to adoption — parents opposed adoption — ILR contends that permanency planning is not achieved — proposed adoptive parents are highly regarded foster carers with extensive experience in caring for children in short-term, respite and emergency capacities as well as caring for children with delays or disabilities — adoption plan is real and not simply aspirational, not a case of a mere intention to adopt — unlikely adoption process will finalise within two years — Care Plan should place an onus on the Secretary to bring an application for rescission under s 90 Care Act if adoption is delayed or does not proceed — the permanency planning has not been appropriately and adequately addressed unless Care Plan has a mechanism to ensure a s 90 application is made — Secretary directed to prepare a different permanency plan.

Bondelmonte v Bondelmonte (2017) 259 CLR 662

Children taken overseas by father in breach of parenting order — primary judge made interim order for children's return pending further relocation orders — father's appeal to the Full Court of the Family Court dismissed — father's appeal to the High Court that the primary judge failed to take into consideration the views of the children in relation to the interim parenting orders — court not required to seek the views of the child but is required to consider any expressed view under s 60CC(3)(a) *Family Law Act 1975* (Cth) — court not obliged to take into consideration the children's views in the case of interim, temporary arrangements — parenting order may be made in favour of a parent of the child or some other person making interim orders in circumstances of urgency under s 64C *Family Law Act* — appeal dismissed.

Re Jayden [2007] NSWCA 35

Care and protection — review of interim care responsibility orders — interim order conferring parental responsibility of children on Minister for Community Services — serious issue to be tried as to whether final order should be made — Director-General of the Department of Community Services obtaining discharge of contact order to enable Minister to send children to New Zealand prior to final order — whether this amounts to an abuse of process — ss 69, 70, 70A and 72 Care Act considered — legal practitioners — parties to proceedings — whether legal practitioners appointed by the Children's Court pursuant to s 99 Care Act to represent children the subject of proceedings should be named as parties to proceedings in the Supreme Court.

Important cases — Unacceptable risk

Department of Communities and Justice (DCJ) and Alice [2024] NSWChC 12 ..... [3-1460]

Department of Communities and Justice (DCJ) and the Dixon Children [2024] NSWChC 8

DCJ and Evie and Grace [2023] NSWChC 1

Isles and Nelissen [2022] FedCFamC1A 97

DCJ and Janet and Xing-fu [2022] NSWChC 7

A v Secretary, Department of Communities and Justice (No 4) [2019] NSWSC 1872

Re Benji and Perry [2018] NSWSC 1750

AA v DFaCS [2016] NSWCA 323

DFaCS re Eggleton [2016] NSWChC 4

S, DFaCS and the Marks Children [2016] NSWChC 2

Re June [2013] NSWSC 969

[3-1460] Department of Communities and Justice (DCJ) and Alice [2024] NSWChC 12

Last reviewed: March 2025

Care and protection — best interests — safety, welfare and wellbeing — paramountcy principle — permanent placement principles — unacceptable risk.

Department of Communities and Justice (DCJ) and the Dixon Children [2024] NSWChC 8

Care and protection — unacceptable risk of harm test — unexplained injuries — court satisfied that an order that allows the four children to reside with the parental grandparents would not expose the children to an unacceptable risk of harm.

DCJ and Evie and Grace [2023] NSWChC 1

Twin infants had healing fractures at multiple sites — most probable cause was the application of excessive force by a parent — parents unable to explain injuries and children were assumed into care and placed with their maternal great aunt — non-exhaustive list of factors in assessing safety at [53] — parents are intelligent, educated and engaged with services as recommended by the Department — parents have made the children available for medical assessments and reviews and have personally undertaken medical tests in search of a medical explanation for the injuries — parents have both attended psychologists to address concerns about their capacity to support their children — exposure of the harm will cause both parents to reflect on the way

they have handled the children and to closely observe the other when handling the children — children's maternal uncle and grandparents will remain connected to the children and are alert to any signs of physical distress — children attend childcare three days each week and are supported by a nanny — risk of harm has been sufficiently mitigated such that the children are likely to be safe in the care of their parents — realistic possibility of restoration of children to their parents.

Isles and Nelissen [2022] FedCFamC1A 97

Standard of proof for unacceptable risk of harm — child alleged sexual abuse by father — father charged but later withdrawn due to lack of specific evidence — primary judge found that he could not make a finding that father sexually assaulted child, but held an unacceptable risk exists which could only be mitigated through supervised time (*Isles and Nelissen* [2021] FedCFamC1F 295) — test for making findings of sexual abuse distinguished from findings of unacceptable risk of harm — standard of proof as to whether abuse has occurred in the past is determined on the balance of probabilities — s 140 *Evidence Act 1995* (Cth) — an unacceptable risk of harm does not require civil standard of proof on the balance of probabilities — unacceptable risk of harm requires a predictive or prospective exercise not limited to findings of past fact, but also possibilities — M v M FC 88/063 (1988) 166 CLR 69 followed — three relevant factors to consider when assessing unacceptable risk of harm: whether there are facts that indicate risk, either present or future; magnitude of risk; and tools or circumstances that can adequately mitigate that risk — appeal dismissed.

DCJ and Janet and Xing-fu [2022] NSWChC 7

Standard of proof for unacceptable risk of harm — child alleged sexual abuse by stepfather — later retracted her complaint — whether stepfather presents an unacceptable risk — if an allegation of sexual abuse is made out/not made out on the balance of probabilities, court then assesses risk, without conflation — *Isles and Nelissen* [2021] FedCFamC1F 295 followed — standard of proof in assessing risk is not on the balance of probabilities, the court looks to possibilities —*Isles and Nelissen* [2022] FedCFamC1A 97 followed — court satisfied that there was no evidence of sexual abuse — no unacceptable risk — court finds there is a realistic possibility of restoration within a reasonable period of Xing-fu to his father — court made finding prior to hearing that realistic possibility of restoration of Janet and Xing-fu to their mother.

A v Secretary, Department of Communities and Justice (No 4) [2019] NSWSC 1872

Care and protection — allegation father sexually abused daughter — both children removed from parents and placed in care of Minister — children at unacceptable risk of harm — the ground for care orders under s 71(1)(c) has been made out in relation to both children — orders made by the Children's Court confirmed.

Re Benji and Perry [2018] NSWSC 1750

Care and protection — Children's Court ordered children to be returned to their carers — "unacceptable risk of harm" test in *M v M* (1988) 166 CLR 69 — s 9(1) Care Act — necessary to balance possibility of harm if children are returned to their carers with probability of psychological harm if they are not returned — application dismissed.

AA v DFaCS [2016] NSWCA 323

Care and protection — whether actions of DFaCS under Care Act valid — father charged interstate but not convicted of indecent and sexual assault involving a child under 12 years — risk of harm report about the father's alleged history of sexual assaults — risk of violence alerts — mother's three older children from a former marriage assumed into care and subject to an emergency care and protection order — high risk birth alert issued for impending birth of child and any future children — whether DFaCS's assumption of care order and the high risk birth alert valid — DFaCS case in totality conveyed a serious risk of harm — parents did not establish grounds for relief — allegations of misconduct against DFaCS officers not found — DFaCS not motivated by ill-will but acted in the children's best interests.

DFaCS re Eggleton [2016] NSWChC 4

Application under Care Act — application of the unacceptable risk of harm test — parental history of alcohol and drug abuse — accidental death of younger sibling — realistic possibility of restoration — strong and positive attachment between child and parents — magnitude of risk not sufficient to meet the threshold for unacceptable risk of harm.

S, DFaCS and the Marks Children [2016] NSWChC 2

Application that father is not the children's "parent" — alternative application to exclude father from the proceedings — exceptional circumstances — allegations of domestic violence, sexual interference, abduction and threats to kill the children — father in immigration detention — father and legal representative not to be served with materials — father prohibited from having contact with the children — father found to be a "parent" for the purposes of these proceedings — compelling reasons that it is in the children's best interests that the father be excluded from proceedings — father poses unacceptable risk to the children.

Re June [2013] NSWSC 969

Application by foster carers challenging decision of Children's Court — whether magistrate erred in failing to admit relevant evidence — need to weigh advantages of admitting probative evidence against disadvantages of admitting improperly obtained evidence — whether magistrate failed to comply with s 9(2)(c) Care Act — whether magistrate failed to properly apply s 79(3) — whether foster carers were entitled to an opportunity to be heard on matters of significant impact — what constitutes an opportunity to be heard — s 87 — where an order may have a significant impact on a person who is not a party to proceedings, there is a need for that person to be given an opportunity to be heard on that issue — ex tempore judgment — whether foster carers have standing to seek relief under s 69 *Supreme Court Act 1970* — if not, whether manifest defects in hearing before and reasons of Children's Court constitute "exceptional circumstances" — whether Supreme Court may, in the exercise of parens patriae jurisdiction, grant relief under s 69 — order quashed and matter remitted to the Children's Court to be heard by a magistrate other than the magistrate who made the order that has been quashed.

Important cases — Unexplained injury

DCJ and Harry [2023] NSWChC 5 ..... [3-1480]

DCJ and Evie and Grace [2023] NSWChC 1

[3-1480] DCJ and Harry [2023] NSWChC 5

Last reviewed: June 2024

Interim contact order to facilitate overnight supervised contact between parents and child — 1-year-old infant sustained bilateral multi-layer retinal haemorrhages and a subdural haematoma consistent with injuries sustained by infants who have been shaken — removed and placed with paternal grandmother and paternal aunt — realistic possibility of restoration to parents — criteria outlined in *DCJ and Evie and Grace* [2023] NSWChC 1 followed — benefit in increasing contact with parents to transition them to become primary attachment figures — benefit outweighs any potential harm.

DCJ and Evie and Grace [2023] NSWChC 1

Twin infants had healing fractures at multiple sites — most probable cause was the application of excessive force by a parent — parents unable to explain injuries and children were assumed into care and placed with their maternal great aunt — non-exhaustive list of factors in assessing safety at [53] — parents are intelligent, educated and engaged with services as recommended by the Department — parents have made the children available for medical assessments and reviews and have personally undertaken medical tests in search of a medical explanation for the injuries — parents have both attended psychologists to address concerns about their capacity to support their children — exposure of the harm will cause both parents to reflect on the way they have handled the children and to closely observe the other when handling the children — children's maternal uncle and grandparents will remain connected to the children and are alert to any signs of physical distress — children attend childcare three days each week and are supported by a nanny — risk of harm has been sufficiently mitigated such that the children are likely to be safe in the care of their parents — realistic possibility of restoration of children to their parents.

Legislation

Children and Young Persons (Care and Protection) Act 1998 ..... [4-1000]

Children and Young Persons (Care and Protection) Regulation 2022

Children (Protection and Parental Responsibility) Act 1997

Children's Court Act 1987

Children's Court Regulation 2024

Children's Court Rule 2000

Community Welfare Act 1987

[4-1000] Children and Young Persons (Care and Protection) Act 1998

Last reviewed: November 2024

Children and young persons — care and protection — necessary for their safety, welfare and well-being — provision of environment free of violence and exploitation — provision of services that foster children's health, developmental needs, spirituality, self-respect and dignity — assistance to parents to promote a safe and nurturing environment — principle of participation — Aboriginal and Torres Strait Islander principles — roles of the Minister and Director-General — requests for assistance and reports — investigations and assessment — principles of intervention — use of alternative dispute resolution — care plans and parent responsibility contracts — registration of plans and contracts — Children's Court hearings — emergency protection and assessment — care applications — Children's Court procedure — support for children and young persons in crisis — authorised carers — out-of-home care — medical examination and treatment — Children's Guardian — children's employment — offences involving children and young persons — transfer of child protection orders and proceedings — removal of persons and entry of premises and places — administrative review — exchange of information and co-ordination of services — Code of conduct.

Children and Young Persons (Care and Protection) Regulation 2022

Children and young persons — care and protection — rescission and variation of care orders — access to records relating to Aboriginal persons and Torres Strait Islanders — access to certain information and records kept under the *Children and Young Persons (Care and Protection) Act 1998* — records, reporting and information — protection of communications made from disclosure except in certain circumstances — forms and contents of care plans and alternative parenting plans — matters relating to the Children's Guardian — matters relating to out-of-home care — Code of Conduct for Authorised Carers — conditions of accreditation of designated agency — registered agencies — condition of registration — medical examination and treatment — carrying out certain medical treatments on children.

Children (Protection and Parental Responsibility) Act 1997

Children and young persons — care and protection — parental responsibility — guiding principles for courts — welfare of children in public places — local crime prevention — safer

environment — fostering community involvement in the development of local crime prevention plans — attendance of parents and other persons at proceedings — preparation of local crime prevention plans — approval of local crime prevention plans — administration, duration and revocation of approval — proceedings for offences.

Children's Court Act 1987

Children — Children's Court of NSW — constitution — jurisdiction — Children's Court Advisory Committee — Children's Court Clinic — functions of the president — reports — venue — contempt — judicial notice of signatures — appeals — rules — practice notes — directions may be given in circumstances not covered by the rules or the practice notes — provisions relating to Children's judges.

Children's Court Regulation 2024

Children — Children's Court of NSW — appeals in relation to decisions of Presidential Children's Court — appeals etc under *Children and Young Persons (Care and Protection) Act 1998* — appeals under *Crimes (Appeal and Review) Act 2001* — appeals relating to apprehended violence orders — appeals relating to forfeiture orders under Sch 2 to the *Bail Act 2013* — appeals under *Crimes (Domestic and Personal Violence) Act 2007* — definitions — savings.

Children's Court Rule 2000

Children — Children's Court of NSW — general practice and procedure — application of the Rule — administration of the court, including seal, venue, sittings and delegation of functions — filing, lodgment and service of documents — care proceedings — functions of Children's Registrars — applications — children and young persons as witnesses — evidence of school attendance — application for appointment of a person to act as guardian ad litem — record of proceedings — subpoenas — criminal proceedings — Children's Court Clinic — Children's Court Advisory Committee — forms.

Community Welfare Act 1987

Promote, protect, develop, maintain and improve the welfare of the family — provision of services to persons disadvantaged by, inter alia, lack of adequate family support, family problems, breakdown of the family as a social unit, age — promotion of the welfare of Aborigines — community welfare and social development — functions of the Minister and Director-General — Council and committees — constitution and procedure — general welfare assistance — disaster welfare assistance.

Children's Court Clinic

Children's Court Clinic ..... [5-1000]

Further references

[5-1000] Children's Court Clinic

Last reviewed: May 2023

The Children's Court Clinic was created to provide the Children's Court and higher courts with independent, expert clinical reports, known as clinic assessments, in care and protection matters. The clinical assessments are of:

- children and young persons, and/ or
- the capacity of parents and others to carry out parental responsibility.

More information about the Children's Court Clinic can be found at the following websites:

- Children's Court of NSW — Children's Court Clinic
- The Sydney Children's Hospitals Network — Children's Court Clinic.

Further references

Additional information can be obtained from the following further references:

- assessments of parenting competence —
  - K Budd, "Assessing parenting competence in child protection cases: a clinical practice model" (2001) 4(1) *Clinical Child and Family Psychology Review* 1
  - K Budd, "Assessing parenting capacity in a child welfare context" at **[18-8000]**
  - NSW Department of Community Services, *Effective parenting capacity assessment: key issues*, 2006
  - NSW Department of Community Services, "Assessment of parenting capacity: literature review", *Research report*, 2005
  - NSW Department of Community Services, *Parenting capacity assessment: Improving decision-making*, 2006
  - T Donald and J Jureidini, "Parenting capacity" at **[18-7000]**
- assessments of First Nations parents —
  - S Ralph, "Assessment of capacity in Aboriginal and Torres Strait Islander parents" (2015) 37(4) *InPsych*
  - R Penman, "The 'growing up' of Aboriginal and Torres Strait Islander children: a literature review", Occasional Paper no 15, Commonwealth of Australia, 2006

  - P Choate and A McKenzie, "Psychometrics in parenting capacity assessments: A problem for Aboriginal parents" (2015) 10 *First Peoples Child and Family Review*
  - SNAICC — National Voice for our Children, the Family Matters campaign and the University of Melbourne, *The family matters report*, 2020
- assessments of parents with an intellectual disability —
  - Research Centre for Children and Families, *Towards Access and Equity: a guide to assessing parenting capacity with parents with intellectual disability*, 2022
- Refugees —
  - Australian Institute of Family Studies, *Intimate partner violence in Australian refugee communities*, 2018
  - Australian Institute of Family Studies, *Understanding the mental health and help-seeking behaviours of refugees*, 2022
- Domestic violence —
  - ANROWS, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report*, Horizons Research Report, issue 4, June 2017
  - H Boxall and S Lawler, "How does domestic violence escalate over time?", *Trends & issues in crime and criminal justice*, no 626, Australian Institute of Criminology, Canberra, 2021
  - C Dowling and A Morgan, "Is methamphetamine use associated with domestic violence?", *Trends & issues in crime and criminal justice*, no 563, Australian Institute of Criminology, Canberra, 2018.

Practice notes, guidelines and protocols

Practice Notes ..... [6-1000]
Practice Note 2: Initiating report and service of the relevant portion of the community services file in care proceedings ..... [6-1000]
Practice Note 3: Alternative dispute resolution procedures in the Children's Court ... [6-1020]
Practice Note 5: Case management in care proceedings ..... [6-1040]
Practice Note 6: Children's Court Clinic assessment applications and attendance of authorised clinicians at hearings, dispute resolution conferences and external mediation conferences ..... [6-1060]
Practice Note 9: Joint conference of expert witnesses in care proceedings ..... [6-1080]
Practice Note 10: Parent capacity orders ..... [6-1100]
Practice Note 13: Section 38 care plans ..... [6-1120]
Practice Note 14: Standardised care orders ..... [6-1140]
Practice Note 15: Requests for the provision of services to facilitate restoration in care proceedings ..... [6-1160]
Practice Note 17: Designated agencies in Children's Court care proceedings ..... [6-1180]
Practice Note 18: Winha-nga-nha List ..... [6-1190]
Practice Note 19: Support Plan Conference Pilot 291

Guidelines ..... [6-2000]
Contact guidelines ..... [6-2000]
NSW care circles procedure guide ..... [6-2020]
Guidelines for conducting a dispute resolution conference ..... [6-2040]
Standardised care orders ..... [6-2060]

Protocols ..... [6-3000]
Protocol for Children's Registrars conducing Care Call Overs ..... [6-3000]
Protocol for return of subpoenas for production at Parramatta Children's Court ..... [6-3020]
Protocol for return of subpoenas for production at Wagga Wagga Children's Court ... [6-3040]

Practice Notes

Practice Note 2: Initiating report and service of the relevant portion of the community services file in care proceedings ..... [6-1000]

Practice Note 3: Alternative dispute resolution procedures in the Children's Court ..... [6-1020]

Practice Note 5: Case management in care proceedings ..... [6-1040]

Practice Note 6: Children's Court Clinic assessment applications and attendance of authorised clinicians at hearings, dispute resolution conferences and external mediation conferences ..... [6-1060]

Practice Note 9: Joint conference of expert witnesses in care proceedings ..... [6-1080]

Practice Note 10: Parent capacity orders ..... [6-1100]

Practice Note 13: Section 38 care plans ..... [6-1120]

Practice Note 14: Standardised care orders ..... [6-1140]

Practice Note 15: Requests for the provision of services to facilitate restoration in care proceedings ..... [6-1160]

Practice Note 17: Designated agencies in Children's Court care proceedings ..... [6-1180]

Practice Note 18: Winha-nga-nha List ..... [6-1190]

Practice Note 19: Support Plan Conference Pilot

[6-1000] Practice Note 2: Initiating report and service of the relevant portion of the community services file in care proceedings

Last reviewed: October 2023

Practice Note 2 was issued 23 July 2010 and last amended 1 July 2016.

[6-1020] Practice Note 3: Alternative dispute resolution procedures in the Children's Court

Last reviewed: October 2023

Practice Note 3 commenced 7 February 2011 and last amended 11 November 2015.

[6-1040] Practice Note 5: Case management in care proceedings

Last reviewed: October 2023

Practice Note 5 first issued 2 September 2011 and last amended 30 June 2017 (commenced 3 July 2017).

[6-1060] Practice Note 6: Children's Court Clinic assessment applications and attendance of authorised clinicians at hearings, dispute resolution conferences and external mediation conferences

Last reviewed: October 2023

Practice Note 6 first issued 2 September 2011 and last amended 30 June 2017 (commenced 3 July 2017).

[6-1080] Practice Note 9: Joint conference of expert witnesses in care proceedings

Last reviewed: October 2023

Practice Note 9 commenced 28 May 2012.

[6-1100] Practice Note 10: Parent capacity orders

Last reviewed: October 2023

Practice Note 10 commenced 29 October 2014.

[6-1120] Practice Note 13: Section 38 care plans

Last reviewed: October 2023

Practice Note 13 commenced on 16 December 2019.

[6-1140] Practice Note 14: Standardised care orders

Last reviewed: October 2023

Practice Note 14 commenced on 3 May 2021.

[6-1160] Practice Note 15: Requests for the provision of services to facilitate restoration in care proceedings

Last reviewed: October 2023

Practice Note 15 commenced on 2 May 2022.

[6-1180] Practice Note 17: Designated agencies in Children's Court care proceedings

Last reviewed: October 2023

Practice Note 17 commenced on 9 January 2023 and last amended 17 March 2023 (commenced 20 March 2023).

[6-1190] Practice Note 18: Winha-nga-nha List

Last reviewed: October 2023

Practice Note 18 commenced on 4 September 2023.

Practice Note 19: Support Plan Conference Pilot

Last reviewed: May 2026

Practice Note 19 commenced on 2 May 2024.

Guidelines

Contact guidelines ..... [6-2000]

What is the purpose of contact

The child's best interests — contact must be looked at from the child's perspective

Restoration contact

How old and at what developmental stage is the child?

What are the child's wishes regarding contact

How healthy is the attachment or relationship between children and their birth parents?

What are the practical considerations?

What are the arrangements for contact with siblings, extended family and other significant people?

What indirect contact arrangements are appropriate?

Are there special events that should be provided for — birthdays, religious events, special cultural events?

What length of order is realistic?

What does the Care Plan contain regarding contact?

Aboriginal and Torres Strait Islander families

What is appropriate for an interim contact order?

Are there real risks to the safety, welfare and wellbeing of the child?

Should contact be prohibited or restricted?

As a last resort

NSW care circles procedure guide ..... [6-2020]

Guidelines for conducting a dispute resolution conference ..... [6-2040]

The following model is based on the LEADR Model of Mediation

Purpose of a dispute resolution conference

The role of the Children's Registrar in the Dispute Resolution Conference

Pre-conference preparation

Conference structure

Standardised care orders ..... [6-2060]

[6-2000] Contact guidelines

Last reviewed: May 2023

These guidelines are intended to assist magistrates to identify issues to be considered in making a decision regarding contact in care and protection proceedings. They assume the law as it stood on [date] at which time the court had power to make contact orders regarding all care matters, both those involving restoration and those where there will be no restoration.

What is the purpose of contact

- *Restoration to the care of a parent or other carer*

  If an order that will result in restoring the child to a care of a parent is made, contact will need to be sufficiently frequent to maintain or develop the relationship between the parent and child.

- *Maintenance of a relationship which has some positive features*

  Some parents will be unable to care for their child but will nevertheless be able to love and affirm the child and not undermine the placement with another carer. It is necessary to ask whether the frequency of visits enhance or destabilise the current placement.

- *Maintaining a sense of identity regarding kinship and culture*

  For some children the benefit of contact will be primarily that they understand who they are in the context of their birth family and cultural background. Contact might also help ensure that they have a realistic understanding of who the parent is and do not idealise an unsuitable parent and develop unrealistic hopes of being reunited with them.

The child's best interests — contact must be looked at from the child's perspective

The focus must always be on the needs of the child and what is in the best interests of the child. How will the child benefit from contact with parents and siblings? Some benefit may be achieved over a long term, i.e. by providing the foundation for a relationship between the child and the parent which will develop later.

Restoration contact

If contact is part of a restoration plan it must be sufficiently frequent to allow a positive healthy relationship between parent and child to be maintained or to develop. It will ideally be in a situation that is as natural and relaxed as possible. It may need to increase as restoration nears.

How old and at what developmental stage is the child?

Younger children will usually need more frequent contact for a shorter duration than older children to maintain a relationship. Older children may benefit more from less frequent contact of greater duration (and thus less intrusive in carer family, sporting, cultural or friendship activities).

What are the child's wishes regarding contact

- *How do they react to contact that is occurring?*

  Often a child's wishes can be deduced from their behaviour at contact. Older children should be able to express their views and care should be taken to ensure that this expression is not influenced. The child's legal representative will have an important role to play in this regard.

  Negative reactions immediately before or following a contact visit may not necessarily indicate that the child is not enjoying and benefiting from contact with their birth family. Contact visits tend to bring out strong emotions in both the child and the parents and negative behaviours exhibited by the child before, during or after contact may simply be an indication of their heightened emotional state. For recently removed children there may be some separation anxiety which will need to be considered.

- *Should the child be able to refuse to attend contact at a particular age?*

As a child matures their views about contact should have increased weight. Great care should be taken about agreeing with a young child who refuses contact when there is not an apparently sound reason. It may be difficult to get an older child to contact that they don't wish to attend without causing greater harm than the benefit to be derived from the contact. The burden placed on carers to get an unwilling child to contact should be considered.

- Older children asked to reflect on contact arrangements often wish that they had more contact than occurred.

How healthy is the attachment or relationship between children and their birth parents?

- *How long was the child in the care of the parent before removal from their care?*

  In most cases there will be a strong attachment between a child and a parent who has been their carer for a long time. It is likely that the child will be adversely affected if contact becomes minimal in the absence of reasons to believe that the child will be harmed by contact. An infant or very young child will not have this strength of relationship.

- *How does the parent behave at contact?*

  Some behaviour by parents at contact, if persisted with, should result in limited contact; eg attending contact substance affected, denigrating others (including carers and the Department/caseworkers), not actively interacting with their child or favouring one child over another.

- *Has the parent failed to attend contact without good reason?*

  Persistent non-attendance will be harmful to a child whose expectations will be disappointed. This will often have impacts on their behaviour and possibly affect their placement.

- *Is there a strong relationship that is dysfunctional?*

  For some children there will be a strong relationship with a parent that will be dysfunctional. The parent may encourage poor behaviour ie violence, challenging appropriate limits on behaviour, diet etc. It is better to look at the health of the relationship.

What are the practical considerations?

- *Is there a substantial distance to be travelled?*

  Younger children especially should not be subjected to long travel to attend contact.

- *Are there limitations on people travelling to contact eg cost, disability?*

  Sometimes a carer will live some distance from the parent either because the care could not be found in the local community or because a parent has changed address. Ordinarily the onus should be on the parent to travel to the contact rather than having the child travel, especially younger children. If a parent is to be travelling, cost issues might need to be addressed. Enquiries should be made as to whether the Department can assist the parent with the cost of travelling to contact.

- *Will there be disruption cause to the child or the household in which the child is living?*

  Children and carer families will have their own commitments and patterns involving such things as piano lessons, basketball games, church attendance. It is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than carer family events. It is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing.

What are the arrangements for contact with siblings, extended family and other significant people?

It is very important to see children in the context of their extended family and not just their parents. Particular attention should be paid to supporting sibling relationships. Even if extended family members are unable to care for a child it is still likely that contact will be beneficial — providing information and family and cultural identity. Existing healthy relationships should be supported even if a child is to remain in and out of home care.

Balancing extended family contact and placement stability and normality requires careful consideration. For example what would be usual contact with grandparents if the child was not in care?

In some situations provision for contact with a carer will be very important even though a child is being restored to the care of a parent or moving to another carer.

What indirect contact arrangements are appropriate?

- *Do arrangements need to be made regarding phone calls, cards and letters, email and social networking (eg Facebook/MySpace/Twitter/Skype)*

  Contact can occur in other ways than face-to-face. In some situations it will be necessary to limit or prohibit indirect contact or to ensure that it is supervised. For example, it may be necessary to prohibit a parent from making any reference to the child on a social networking website. Alternatively, especially if the parent is at some distance from the child the use of electronic communication should be encouraged.

Are there special events that should be provided for — birthdays, religious events, special cultural events?

Events such as these are important ways of maintaining identity and heritage. It should also be recognised that carer families will wish to celebrate some of these events as well. Often an order that contact near a particular date will be the best outcome.

What length of order is realistic?

- *How will the needs and circumstances of the child change over time?*

  A long term order for contact may create problems as a child's circumstances change, particularly if the contact is to be relatively frequent. School, sport, cultural activities and friendship dynamics are just some of the factors which change over time. As a child gets older less frequent but longer contact may be appropriate.

  The need for contact to be supervised may also change as the child and parent's circumstances change.

- *How will the needs and circumstances of the carers/parents/others change over time?*

  Carers are often unknown at this stage of the proceedings. In cases where carers are known their attitudes to contact should be considered, as some of the literature suggests that their attitudes can have a powerful influence on the quality and frequency of contact.

What does the Care Plan contain regarding contact?

- *Is there a need for a specific order or is the Care Plan sufficient?*
- *Does the Care Plan include provision for determining location?*

- *Will a written contact plan be provided to parent/child/carer/others? Will this include contact rules?*

  For many parents and children it is difficult to predict future circumstances, particularly if a specific long-term carer has not been identified. Care should be exercised in ensuring that an unduly limiting contact order is not made. It may be preferable to ensure that plans for contact are clearly set out in the care plan without contact orders being made. Even if an order is made it is likely to be for a short duration rather than until the child turns 18 so the Care Plan should contemplate as much of the longer term future as possible.

Aboriginal and Torres Strait Islander families

Contact, whether with parents or with extended family, is likely to assist in maintaining cultural identity when a child is placed outside of kinship or community. If family contact is limited there will need to be an appropriate cultural plan in the Care Plan.

What is appropriate for an interim contact order?

In making an interim order the court must to some extent predict the likely outcome of the proceedings and make orders that are in keeping with this. Nevertheless interim orders can also assist transition. For example it may be appropriate to provide for more frequent contact in an interim order than will be contemplated long-term. It may also be appropriate to provide for declining or increasing amounts of contact that are in keeping with a move to the likely outcome.

In a case where at the early stages of the proceedings it is difficult to predict the outcome, careful consideration should be given as to whether an interim contact order should be made at that early stage or whether the Department should make contact arrangements in conformity with its assessment of risks to the child.

Are there real risks to the safety, welfare and wellbeing of the child?

- *Should contact be supervised?*

  Where a child has been removed from his or her family as a result of physical or sexual abuse, contact visits will most likely need to be supervised in order to ensure the safety of the child. If there has been trauma caused by a parent a child may not feel safe unless contact is closely supervised.

  In cases involving allegations of physical or sexual abuse of a child by a parent, very careful consideration should be given to the risk that **any** contact with the parent (even supervised contact) may bepsychologically damaging to the child: see **Should contact be prohibited or restricted?** below.

  If there is a real risk that a parent is likely to be substance affected, affected by uncontrolled mental illness or is likely to behave in a way at contact which will be detrimental to the child or the placement, general supervision will be needed.

  In some situations where restoration is planned contact can be used to help a parent improve their parenting skills. It would need to be specifically planned that this would be the case.

- *Who should supervise contact?*

  (i) **Other family or friends.** There is often no reason that contact needs to be supervised by a Caseworker or contact worker organised by the Department. Grandparents, other family friends may be suitable ***if there is evidence that they are going to be sufficiently***

protective and reliable. It is more likely that timing and location of contact will be flexible and more suited to a child's needs than if organised by the Department. It may also mean that the contact can take place in the first language of the child and the parent if it is not English. In cases where contact is to be supervised by a person other than the Director General or delegate, both the person having contact and the person to supervise the contact must consent before an order can be made: section 86(4) of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act).

(ii) **The Director General or delegate.** In some situations the risk to the child will require that professional contact supervisors are involved. However, before an order can be made for contact to be supervised by the Director General or delegate, the Director General or delegate must consent: section 86(2) of the Care Act.

- *Are written guidelines necessary eg re non-denigration of others, not being substance affected, communication in language other than English?*

  For some parents it will be necessary to provide rules governing such matters as advance confirmation of attendance, the importance of not denigrating other people, that the contract may be cancelled if they attend substance affected, that they are not to communicate with the child in a language not spoken by the contact supervisor, etc. This will make it clearer that there may be consequences if the rules are broken.

- *Should contact with parents and others occur separately from each other?*

  If there is a real risk of conflict between adults present at contact separate contact should be ordered, or contact rules provide for the cessation of contact if conflict arises.

Should contact be prohibited or restricted?

In some circumstances a child will experience trauma at contact because of

- trauma that they have suffered at the hands of or with the acquiescence of a parent, or
- distressing behaviour by a parent at contact – eg intoxication, verbal abuse, favouritism towards one child, denigration of carers or the Department/caseworkers.

As a last resort

In rare cases contact may need to be prohibited for a period of time or subject to considerable restriction. This should only be done after careful assessment of the possibility of distress or harm to the child.

[6-2020] NSW care circles procedure guide

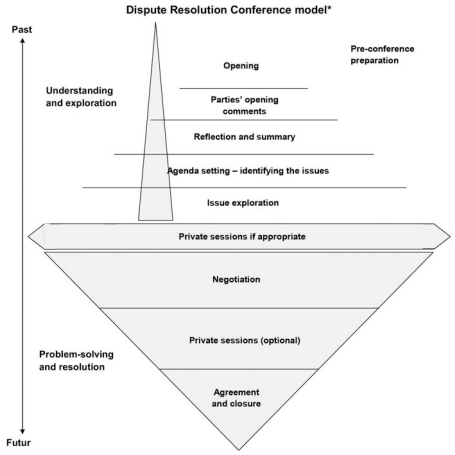
Last reviewed: May 2023

NSW care circles procedure guide was issued August 2011 and last amended June 2012.

[6-2040] Guidelines for conducting a dispute resolution conference

Last reviewed: May 2023

The following model is based on the LEADR Model of Mediation



Purpose of a dispute resolution conference

The purpose of a Dispute Resolution Conference (DRC) is to provide a safe environment that promotes frank and open discussion between the parties in a structured forum to encourage the parties to agree on action that should be taken in relation to the child or young person concerned.

A DRC should aim to:

- Identify the risks and safety concerns that have led to the intervention or involvement of Community Services
- Identify and clarify the strengths within the family, including any progress made by family members in addressing those concerns
- Hear and consider the views of the child(ren) either directly or indirectly through the child's legal representative
- Focus the parties attention on the child's (or children's) best interests
- Identify and clarify disputed issues
- Identify and clarify areas of agreement
- Develop options and consider alternatives
- Enhance communication between the parties
- Reach agreement on issues of dispute between parties to avoid, or limit the scope, of any hearing
- Formulate final or interim orders that may be made by consent.

The role of the Children's Registrar in the Dispute Resolution Conference

The Children's Registrar is an independent convenor acting with the authority of the Court.

In that capacity, the Children's Registrar shall generally follow this model but can apply discretion in particular cases where the Children's Registrar believes that certain features of the model will not promote the purpose of the particular DRC or are inconsistent with their role as an officer of the Court.

The Children's Registrar is responsible for controlling the proceedings and ensuring that each participant has the opportunity to participate fully in a safe environment.

When conducting a DRC, the Children's Registrars should adopt an independent and objective approach, free of bias. They should encourage the participation of the parties in shaping decisions that are fair, practical and achievable and that are made in the child's best interests.

The Children's Registrar should also be familiar with the facts and issues involved in the application that is the subject of the conference, prior to the commencement of the conference.

In conducting a DRC, the Children's Registrar should:

- Create an environment where everyone feels able to discuss and negotiate the issues in dispute and encourage parties, particularly families, to directly participate and contribute to the process
- Clearly explain how the conference will be conducted and its purpose
- Explain that the conference is confidential and explain the limits to the confidentiality of the process
- Address any power imbalances that arise in the conference through appropriate strategies which allow all parties to express their views freely and without fear of intimidation
- Intervene appropriately if a participant becomes antagonistic or aggressive
- Confirm that legal representatives have the most up-to-date instructions from their clients
- Clarify the risks and safety concerns that led to the intervention of Community Services
- Lead a discussion with the participants regarding the strengths within the family
- Assist the parties to identify/clarify the facts, views, interests and opinions of parties to the conference and to identify and clarify areas of agreement
- Provide a "court perspective" on cases of a similar nature (whilst not providing legal advice) to help parties "reality test" their positions and provide information to assist parties to identify those matters which may be of particular concern to the Children's Court, if it were considering the case
- Develop options for resolution and consider alternatives to negotiation and settlement. Assist the parties to clearly understand what is likely to happen if they cannot agree to an appropriate way forward
- Structure the process to ensure that each party understands the problems and options for settlement
- Outline, with the assistance of the parties and/or their legal advisers, how each party's views/options for settlement promote, or fail to promote, the best interests of the child
- Introduce options that could be considered by parties, after they have had an opportunity to generate those options themselves
- Endeavour to establish agreements or settlement in appropriate cases
- Ensure that the written agreement is accurate and is understood by the parties
- Ensure that all parties understand that in the event that agreement is reached as to any final orders the Court can only make those orders if it independently approves them and determines that they accord with the requirements of the *Children and Young Persons (Care and Protection) Act 1998* (the Act) and are in the best interests of the child.

Where a Children's Registrar has a conflict of interest or is unable to be independent and objective, they should disqualify themselves from participating in the DRC.

Pre-conference preparation

Prior to the DRC, the Children's Registrar will familiarise themselves with all material in the proceedings that has been filed to date in the Children's Court.

The Children's Registrar will speak with each of the parties (or their legal representative) approximately one week prior to attending the DRC to establish who will be in attendance, and of those, who is seeking to participate in the conference. The Children's Registrar will resolve any questions that may arise regarding the appropriateness of a person's participation in the DRC. In general, the participation of all who have an interest in the outcome of the proceedings should be encouraged.

The Children's Registrar will also consider any issues that may affect the manner in which the conference is conducted (ie the potential need for a shuttle conference to be conducted using separate rooms, or one party attending via AVL).

Conference structure

1. Opening — by Children's Registrar

At the commencement of a DRC, the Children's Registrar will:

- Explain the purpose of the DRC
- Emphasise that the central consideration will always be the safety, welfare and wellbeing of the child
- Explain the DRC process, including the availability of private sessions and time outs with legal representatives if required
- Outline to the parties that the purpose of a DRC is to attempt to reach agreement about the resolution of the application through the parties discussing and negotiating about their point of view. When it is not possible or appropriate to reach a final agreement about the resolution of the application, it remains the purpose of a DRC to identify what has been agreed and what are the points of disagreement
- Discuss the role of the Children's Registrar, and the role of the other parties and legal representatives and the role of any support persons
- Explain the potential for a second DRC in appropriate circumstances
- Explain the confidentiality provisions of cl 19 *Children and Young Persons (Care and Protection) Regulation 2012*, including limitations to confidentiality in a way that can be understood by the parties
- Explain the need for the parties to participate in good faith in a way that can be understood by the parties
- Explain how the DRC fits in within the Court hearing process and the differences between a DRC and a Court hearing
- Explain the role of the Court in independently approving any agreement reached by the parties during the DRC to ensure that any orders accord with the requirements of the Act and are consistent with the best interests of the child

- Explain that the conference has been scheduled for a minimum of 2 hours and obtain assurances from the parties as to their availability for that period
- Explain the contents of the report to the Children's Court following the conclusion of the DRC
- Ensure that the parties are aware of the location of rest rooms etc.

The Children's Registrar will explain the following guidelines:

- Everyone is expected to behave in a polite and considerate manner
- When a person is talking, they must be allowed to complete what they are saying
- If a person is talking "too much" and preventing or affecting the opportunity for others to have their say, the Children's Registrar may intervene.

The Children's Registrar will also explain that the conference can be terminated if in his/her opinion:

- One or more of the participants is behaving inappropriately
- There are particular problems affecting the operation of the conference
- There are concerns for the safety and well-being of participants.

2. Parties' opening comments

The Children's Registrar will:

- Summarise his/her understanding of:
  - the current application(s) before the court
  - the current situation regarding placement of child(ren)
  - any court orders currently in place
  - the orders sought by Community Services

  and seek confirmation from the participants.
- Give each of the parties an opportunity to state what they hope to achieve at the DRC.

Parties will be encouraged to express their views on the current situation, and their current goal. The Children's Registrar will encourage the parties to speak for themselves, but acknowledge that some parties may find this difficult and may prefer to have their legal representatives speak on their behalf.

Parties who present the second and subsequent opening comments will be encouraged to identify all the issues that are important to them and discouraged from limiting their comments to a response to the first party's comments.

3. Reflection and summary

After all of the parties have spoken, the Children's Registrar will summarise the main interests and concerns of the parties and request, if necessary, clarification of any issues.

4. Agenda setting – identifying the issues

The Children's Registrar should, in consultation with all of the parties, develop an agenda for the conference. This agenda should include all key issues that parties raised in their opening statements.

The agenda should be both neutral and mutual. The agenda should be written down. The agenda should reflect issues that are clear from the documents that have been filed as well as issues raised by the parties in their opening statements.

5. Issue exploration

The parties should work through each of the issues identified in the agenda. The Children's Registrar should encourage the parties to directly speak with each other as a means of clarifying their respective views.

The Children's Registrar should ask open questions that allow the parties to fully explore each issue.

The Children's Registrar can assist parties to identify and clarify interests that have caused the parties to feel as they do. Identifying motivating interests allows the parties to see that there may be more than one way to satisfy their interests.

The Children's Registrar should not narrow the exploration of the issues at this time to legal issues. However, the Children's Registrar should correct or confirm a party's understanding of the legal issues relevant to the case when appropriate.

6. Private sessions

After each of the issues identified have been fully explored, the Children's Registrar should conduct private sessions with each of the parties. The private session is considered to be a very valuable tool in which the Children's Registrar can reality test the positions of the parties. The Children's Registrar has the discretion not to conduct private sessions where they feel it is inappropriate in the particular circumstances. The following issues should be considered when deciding to hold a private session:

(a) Is one of the parties unrepresented?

If one of the parties is unrepresented the Children's Registrar should consider

(i) whether that party may feel unfairly pressured during a private session given the authority that the Children's Registrar holds as an officer of the court

(ii) whether there is a real risk that the party may misrepresent statements made by a Registrar during a private session

and whether these concerns can be remedied by

(i) conducting a limited private session utilising mediation techniques only rather than conciliation techniques or

(ii) holding a private session with another party (for example where another party's interest are similar to those of the unrepresented party or with the child's legal representative).

(b) Do you have personal safety concerns about conducting a private session with one of the parties?

If such concerns are held the Children's Registrar should consider whether holding the private session in conjunction with another party will alleviate the concerns. If the concerns cannot be alleviated the private session should not be held.

If the Children's Registrar decides not to hold a private session with one party, private sessions cannot be conducted with the other parties.

The Children's Registrar also has the discretion to invite more than one party to the private session.

In conducting the private session, the Children's Registrar should confirm the confidentiality of the session both at the beginning and at the end. This time should be used to discuss the needs of each party, and whether all issues have been adequately covered.

The Children's Registrar should discuss options that have been identified with the party, and reality test their propositions against the alternatives available if there is no settlement.

7. Negotiation

The Children's Registrar will facilitate direct negotiation between the parties, and assist the parties to explore options for settlement.

The Children's Registrar will discuss the options that have been considered thus far with the parties and what each party will need to do to make the option(s) work. The parties will be asked to identify how the option(s) is/are in the best interests of the child. The Children's Registrar will seek advice from parties about how realistic and achievable the option(s) is/are having regard to the legislative tests and caselaw.

Children's Registrars should provide a "reality check" for the parties, encouraging them to consider the practicality of the options; implications of the options; and whether the Court is likely to find that particular option(s) is/are within the child's best interests.

If the conference is not considering options that appropriately safeguard the best interests of the child, the Children's Registrar may provide further options for the parties to consider. It is preferable for any options introduced by the Children's Registrar to be so introduced during joint sessions between the parties.

8. Private sessions (optional)

The Children's Registrar may conduct additional private sessions if necessary. This phase is optional, and is to be conducted at the Children's Registrar's discretion, or at the request of one of the parties.

These sessions will be used to reflect on the options generated and any issues still outstanding, in private.

9. Agreement and closure

The Children's Registrar will seek to clarify the agreement(s) reached and strive to ensure that all parties feel and/or appreciate that the agreement is accurate, fair, realistic and appropriate to ensure the best interests of the child.

The Children's Registrar will confirm with the parties that the Children's Court is the final arbiter and that the Court will decide if the proposed agreement is in the best interests of the child.

If agreement has been reached with respect to any proposed order, one of the legal practitioners present at the DRC will be nominated to draft the Minute of Care order. This ideally will be done on the day of the DRC, and will be circulated to all parties present.

Where agreement has been reached, the Children's Registrar will announce the end of the DRC and the commencement of directions. The Children's Registrar must make it clear that the confidentiality provisions no longer apply. Where possible, an order from the Court should be sought on the same day.

Where no agreement has been reached, the Children's Registrar will identify with the parties the issues that there is agreement on, and those that are still in dispute. Directions may also be given for the future conduct of the matter.

The Children's Registrar will provide a report to the Children's Court as a record of the outcome of the conference, as detailed in the form "Outcome of Dispute Resolution Conference — Report to Court".

[6-2060] Standardised care orders

Last reviewed: May 2023

These orders relate to interim and final orders.

Protocols

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Protocol for return of subpoenas for production at Parramatta Children's Court ..... [6-3020]

Protocol for return of subpoenas for production at Wagga Wagga Children's Court ..... [6-3040]

[6-3000] Protocol for Children's Registrars conducing Care Call Overs

Last reviewed: May 2023

The Protocol for Children's Registrars conducing Care Call Overs was issued in 2014.

[6-3020] Protocol for return of subpoenas for production at Parramatta Children's Court

Last reviewed: May 2023

The Protocol for return of subpoenas – Parramatta Children's Court was issued in 2012.

[6-3040] Protocol for return of subpoenas for production at Wagga Wagga Children's Court

Last reviewed: May 2023

The Protocol for return of subpoenas – Wagga Wagga Children's Court was issued in 2019.

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Attachment goes to court: child protection and custody issues

P Granqvist et al*

Abstract ..... [7-1000]

[7-1000] Abstract

"Attachment theory and research are drawn upon in many applied settings, including family courts, but misunderstandings are widespread and sometimes result in misapplications. The aim of this consensus statement is, therefore, to enhance understanding, counter misinformation, and steer family-court utilisation of attachment theory in a supportive, evidence-based direction, especially with regard to child protection and child custody decision-making. The article is divided into two parts. In the first, we address problems related to the use of attachment theory and research in family courts, and discuss reasons for these problems. To this end, we examine family court applications of attachment theory in the current context of the best-interest-of-the-child standard, discuss misunderstandings regarding attachment theory, and identify factors that have hindered accurate implementation. In the second part, we provide recommendations for the application of attachment theory and research. To this end, we set out three attachment principles: the child's need for familiar, non-abusive caregivers; the value of continuity of good-enough care; and the benefits of networks of attachment relationships. We also discuss the suitability of assessments of attachment quality and caregiving behaviour to inform family court decision-making. We conclude that assessments of caregiver behaviour should take center stage. Although there is dissensus among us regarding the use of assessments of attachment quality to inform child custody and child-protection decisions, such assessments are currently most suitable for targeting and directing supportive interventions. Finally, we provide directions to guide future interdisciplinary research collaboration."

"Attachment goes to court: child protection and custody issues", published in (2022) 24(1) *Attachment and Human Development* 1.

* T Forslund, M van IJzendoorn, A Sagi-Schwartz, D Glaser, M Steele, M Hammarlund, C Schuengel, M Bakermans-Kranenburg, H Steele, P Shaver, U Lux, J Simmonds, D Jacobvitz, A Groh, K Bernard, C Cyr, N Hazen, S Foster, E Psouni, P Cowan, C Pape Cowan, A Rifkin-Graboi, D Wilkins, B Pierrehumbert, G Tarabulsy, R Carcamo, Z Wang, X Liang, M Kazmierczak, P Pawlicka, L Ayiro, T Chansa, F Sichimba, H Mooya,L McLean, M Verissimo, S Gojman-de-Millán,M Moretti, F Bacro, M Peltola,M Galbally, K Kondo-Ikemura, K Behrens, S Scott, A Fresno Rodriguez, R Spencer, G Posada, R Cassibba, N Barrantes-Vidal, J Palacios, L Barone, S Madigan, K Jones-Mason, S Reijman, F Juffer, R Pasco Fearon, A Bernier, D Cicchetti, G Roisman,J Cassidy, H Kindler, P Zimmermann, R Feldman, G Spangler, C Zeanah, M Dozier, J Belsky, M Lamb and R Duschinsky.

Forensic evidence in child protection proceedings*

P Johnstone†

Introduction ..... [7-2000]

Specialist nature of the Children's Court

Care and protection proceedings

Evidence in care and protection proceedings

Non-accidental head injury

Non-accidental head injury in care proceedings

Relevant case law

SS v Department of Human Services (NSW) [2010] NSWDC 279

Re Lincoln and Raymond [2009] CLN 5

Re Anthony [2008] NSWLC 21

Forensic evidence in child protection proceedings

Conclusion

[7-2000] Introduction

I would like to acknowledge the traditional custodians of the land upon which we meet today, the people of the Eora Nation, and pay my respects to their Elders, past, present and emerging.

I would also like to recognise the over-representation of Aboriginal and Torres Strait Islander children and families in the Children's Court jurisdiction and acknowledge that this over-representation is deeply intertwined with historical and ongoing experiences of intergenerational trauma, institutionalisation, and colonisation.

Cases involving instances of shaken baby syndrome are among the most emotive, controversial and challenging within the care and protection jurisdiction of the Children's Court of NSW.

Decision making in care and protection proceedings is complex, and necessitates that judicial officers engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being.[1] This process is especially complex in cases involving non-accidental head injury where there is

* The author acknowledges the considerable help and valuable assistance in the preparation of this paper by the Children's Court Research Associate, Darcy Jackman.

† Judge Peter Johnstone, President of the Children's Court of NSW, International symposium on shaken baby syndrome and abusive head trauma, 16 September 2019, Sydney.

1 K Kozlowska and S Foley, "Attachment and risk of future harm: a case of non-accidental brain injury" (2006) 27(2) *Australian and New Zealand Journal of Family Therapy* 75.

typically no direct evidence to the alleged abuse, and the explanations offered by carers are usually inconsistent with the physical findings.[2] (Throughout this paper, I will use the term "non-accidental head injury", as it encompasses all cases with evidence of head trauma as well as brain injuries.)

This paper aims to explore the role of forensic evidence in care and protection proceedings involving non-accidental head injury. It will look first at the role of the Children's Court in care and protection proceedings in NSW. Secondly, it will discuss current research in non-accidental head injury. Thirdly, it will provide an overview of three cases involving suspected non-accidental head injury in the Children's Court, and analyse decision-making processes employed by judicial officers in establishing whether there is an unacceptable risk of harm. Finally, the paper will discuss the role of forensic and other evidence in care and protection proceedings involving non-accidental head injury in the Children's Court.

Specialist nature of the Children's Court

The Children's Court of NSW is a specialist court which deals with both care and protection matters and offences committed by children and young people under 18.

The Children's Court of NSW consists of a President, 15 specialist Children's Magistrates and 14 Children's Registrars. It sits permanently in 7 locations, and conducts circuits on a regular basis at other country locations across NSW.

Care and protection proceedings

Care and protection proceedings are conducted in the Children's Court of NSW under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ('the Care Act').

The objects of the Care Act, as set out in s 8, are:

- that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and
- recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and
- that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and
- that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

The paramountcy principle under which the Care Act is to be administered provides that in any action or decision concerning a particular child, their safety, welfare and well-being is paramount.[3] This principle prevails over all other considerations, even where it conflicts with the rights or interests of the parents.

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2 *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.

3 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(1).

Care and protection proceedings in the Children's Court are conducted in two main stages: the establishment stage and the placement stage.

Establishment is a threshold issue that grounds the court's continuing jurisdiction in care and protection matters. A final Care order can only be made if the court is satisfied, on the balance of probabilities that the child is in need of care and protection.

It is now well settled law that critical decisions under the Care Act relating to such issues as restoration, contact, parental responsibility and placement, the proper test to be applied is that of "unacceptable risk of harm to the child", as established in the High Court decision in *M v M* (1988) 166 CLR 69. Whether there is an unacceptable risk of harm to the child is to be assessed from the accumulation of factors proved according to the relevant civil standard. The High Court held that in applying the unacceptable risk of harm test it is necessary to determine firstly whether a risk of harm exists and, secondly, the magnitude of that risk, as it may be determinative of the issues involved in the particular proceedings.

The unacceptable risk of harm test was applied in the matter of *DFaCS Re Eggleton* [2016] NSWChC 4 in which I noted at [18]:

> It seems to me … that the unacceptable risk of harm that is said to be presented to the child by his parents needs to be evaluated against the prospect of it actually occurring, and against the protective measures that might be put in place to ameliorate or minimise that risk ...

The onus of proof in care and protection matters is upon the Secretary. The standard of proof is on the balance of probabilities.[4] The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved. Further, the Secretary will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable.[5] This was determined by Sackville AJA in *Director-General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250 at [67]–[68], where he said:

> The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 140(2) of the *Evidence Act 1995* (NSW). It was not appropriate to find that the Director-General had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was "*highly improbable*". To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father.
>
> As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at [171], statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

4 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 93(4).
5 *MXS v Department of Family and Human Services (NSW)* [2012] NSWDC 63.

Once a child or young person has been found to be in need of care and protection, the Secretary of the Department of Family and Community Services must assess whether there is a realistic possibility of the child being restored to his or her parents within a reasonable period of time, not exceeding two years, having regard to the circumstances of the child and any evidence that the parents are likely to be able to satisfactorily address the issues that led to the removal of the child from their care.[6]

The assessment as to whether or not there is a realistic possibility of restoration to a parent involves an important threshold construct which informs the planning that is to be undertaken in respect of any child, and determines whether some other course of action is appropriate, such as placement with a family member or with someone else, in foster care.

The Care Act provides that it is for the Secretary to make the assessment in the first instance. It is then for the court to decide whether to accept that assessment.

In considering whether to accept the Secretary's assessment, the court must have regard to two matters:

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

There is no definition of the phrase "realistic possibility of restoration" in the Care Act. However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the NSW Supreme Court by Slattery, J *In the matter of Campbell* [2011] NSWSC 761.

This decision was cited with approval by the NSW Court of Appeal in *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89. The case law suggests that for a court to make a finding of realistic possibility of restoration the possibility must be "realistic", that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". It needs to be "sensible" and "commonsensical".

If the court does not accept the assessment of the Secretary as to restoration, it may direct the Secretary to prepare a different permanency plan.[7] The Secretary is then required to address the permanency planning for the child in accordance with the decision as to restoration or otherwise.[8]

Evidence in care and protection proceedings

The Care Act confers a unique jurisdiction on the Children's Court. As Wilson J observed in the High Court in *J v Lieschke* (1987) 162 CLR 447 at [3] in relation to the *Child Welfare Act 1939*, "[n]eglect proceedings are truly a creature of statue, neither civil or criminal in nature".

The Children's Court has a wide discretion to admit evidence in care and protection proceedings, such as hearsay evidence, that would not be admissible in other courts.

6 *DFaCS & the Steward Children* [2019] NSWChC 1.
7 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 83(6).
8 ibid s 78.

Nevertheless, it must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision making that might appear capricious, arbitrary or without foundational material.[9]

The court is required to examine the sources of evidence, particularly quasi-opinion and secondary evidence, to determine its strength and the weight to be given to it.[10]

The court must take into account all the evidence and consider each piece of evidence in the context of all the other evidence. In *Re T* [2004] EWCA Civ 558 at [33], Dame Elizabeth Butler-Sloss P observed:

> Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.

When considering cases of suspected non-accidental head injury the court will frequently be required to consider and evaluate evidence from experts, particularly medical witnesses. Their evidence is opinion evidence.

Despite the Children's Court's broad discretion to admit evidence, in matters concerning expert scientific evidence the court tends to apply the usual rules of evidence relating to expert testimony.[11]

The law sets out a number of specific requirements in respect of opinion evidence.

In *Makita (Australia) Pty Ltd v Sprowles* Heydon JA, then a justice of the NSWCA, summarised the applicable law in relation to the admissibility of expert evidence:[12]

1. there must be field of "specialised knowledge" in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
2. the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";
3. so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert;
4. so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;
5. it must be established that the facts on which the opinion is based form a proper foundation for it; and the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert, and on which the opinion is "wholly or substantially based" applies to the facts assumed or observed so as to produce the opinion propounded.

Thus, expert witnesses must exercise their independent professional judgement in relation to issues.

Doctors should not stray outside their area of expertise. For example, a general practitioner should not venture to express a view on a matter of psychiatry, or at least should make clear

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9 *JL v Secretary, Department of family and Community Services* [2015] NSWCA 88 at [148]; see also *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 at [79].

10 *LZ and QJ v FACS* [2017] NSWDC 414 at [150].

11 A Stephens, *Legal outcomes in non-accidental head injury ("shaken baby syndrome") cases: inevitable inconsistencies*, PhD Thesis, The University of Sydney, 2011.

12 (2001) 52 NSWLR 705 at [85].

that the view is based on a limited level of general medical knowledge derived from study or general practice. The expert should clearly set out any written material considered, and all the people consulted with, and specify which aspects of that material were regarded as persuasive in forming the opinion. Medical experts should identify any paper or study they have relied on, and should articulate the reasoning process they have used to come to any opinion or conclusion, and be in a position to defend it.

Expert witnesses in the Children's Court must comply with the Expert Witness Code of Conduct[13] as set out in the Uniform Civil Procedure Rules 2005.[14]

Non-accidental head injury

It is not possible to analyse the role of forensic evidence in care and protection proceedings involving suspected non-accidental head injury without an attempt to survey the present realities of abusive head trauma in infants.

The issue of non-accidental head injury has been the subject of profound and sometimes passionate disagreement.

Shaking as a mechanism for inflicting intracranial injury in infants was first described in an article in the British Medical Journal in 1971. The research relied upon was published a few years prior wherein rhesus monkeys were placed in fibreglass chairs on tracks and then, with their heads free to rotate, subjected to accelerations similar to those in rear end motor vehicle collisions. Some of the animals were found thereafter to have suffered intracranial injury and some were found to have a concomitant neck injury. The resulting proposition that rotational acceleration of sufficient magnitude could cause intracranial injury without impact, and therefore without external evidence of injury, appeared to be an explanation for hitherto unexplained injury in infants.

In 1987 however, a major study of 48 children aged one month to two years with suspected shake injury was published in the *Journal of Neurosurgery*. The experiment concluded that the accelerations established for shakes were smaller by a factor of 50 to one than those for impacts. The study ended:[15]

> It is our conclusion that the shaken baby syndrome, at least in its most severe acute form, is not usually caused by shaking alone. Although shaking may, in fact, be a part of the process, it is more likely that such infants suffer blunt impact. The most likely scenario may be a child who was shaken, then thrown into or against a crib, or other surface, striking the back of the head and thus undergoing a large, brief deceleration.

In 2005, the United Kingdom Court of Appeal heard appeals by four carers in whose care infants had died or suffered brain injury. The court heard ten expert medical witnesses called on the behalf of the appellants and 11 called on behalf of the Crown. The essential issues in the appeals was a challenge to the then accepted hypothesis concerning shaken baby syndrome and the proposition that the coincidence of the "triad" — encepathology, subdural haemorrhage and retinal haemorrhage — in a child, was the "hallmark" of non-accidental head injury.[16]

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13 Children's Court of New South Wales, *Joint Conference of Expert Witnesses in Care Proceedings*, Practice Note 9.

14 Uniform Civil Procedure Rules 2005, r 31.18.

15 A Duhaime, et al, "The shaken baby syndrome: a clinical, pathological, and biomechanical study" (1987) 66(3) *Journal of Neurosurgery* 409.

16 *R v Harris* [2005] EWCA Crim 1980 at [56].

A team of distinguished doctors, led by Dr Jennian Geddes, produced three papers which cumulatively challenged the supposed infallibility of the "triad".[17] In *R v Harris* [2005] EWCA Crim1980, the court disregarded Dr Geddes' research as a credible or alternative explanation of the triad injuries. It continued at [69]–[70]:

> There are many other medical issues involved in cases of non-accidental head injury. Further, there remains a body of medical opinion which does not accept that the triad is an infallible tool for diagnosis. This body of opinion, whilst recognising that the triad is consistent with non-accidental head injury, cautions against its use as a certain diagnosis in the absence of other evidence.
>
> Whilst a strong pointer to non-accidental head injury on its own we do not think it is possible to find that it [the triad] must automatically and necessarily lead to a diagnosis of non-accidental head injury. All the circumstances, including the clinical picture, must be taken into account.

In 2009, researchers confronted the circularity of reasoning issue which lies at the centre of the proposition that the triad are, without evidence of external injury, capable of establishing shaken infant syndrome.[18]

Further, a French report published the following year on the study of 112 cases over a 4-year period, in 29 of which the perpetrator had confessed to violence towards the child.[19] These were compared with 112 cases in which there was no confession. It was found that there was no statistically significant difference between the two groups for gender ratio, number of deaths, main symptoms, presence of fractures, retinal haemorrhages or subdural haemorrhages. Significantly, 11 of the 29 children of the confessed deliberate shaking group were listed to have had no skin lesions, fractures, other injuries or previous injuries.

Finally, in 2016 the Swedish Agency for Health Technology Assessment and Assessment of Social Services published a controversial report.[20] The report addressed the methodologies of the enormous number of pieces of research on the issue. Of 1065 pieces selected for initial survey, 1035 were excluded because they did not meet the inclusion criteria. Of the remaining 30 studies, only two were assessed to have moderate quality, and none of high quality.

I end this survey by acknowledging its limitations. As a judicial officer I am limited in my understanding of medical processes, and although I have engaged in research and reading on the topic of non-accidental head injury, I am by no means a specialist on the topic.

Non-accidental head injury in care proceedings

Care and protection proceedings involving suspected non-accidental head injury are among the most emotive, controversial and challenging matters judicial officers face. Decision making is complex, and necessitates that the court engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being.

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17 *Ministry of Social Development v Tilo* [2017] NZFC 2593 at [32].

18 M Vinchon, et al, "Confessed abuse versus witnessed accident in infants: comparison of clinical, radiological and ophthalmological data in corroborated cases" (2009) 26 *Child's Nervous System* 637.

19 C Adamsbaum, et al, "Abusive head trauma: judicial admissions highlight violent and repetitive shaking" (2010) 126 *Pediatrics* 546.

20 Swedish Agency for Health Technology Assessment and Assessment of Social Services, *Traumatic shaking — the role of the triad in medical investigations of suspected traumatic shaking*, SBU Report Number 255E, 2016 at www.sbu.se/en/publications/sbu-assesses/traumatic-shaking--the-role-of-the-triad-in-medical-investigations-of-suspected-traumatic-shaking/, accessed 26 September 2019.

In matters involving suspected non-accidental head injury, the Children's Court is tasked with deciding whether the child has suffered significant harm, or if there is a real possibility of significant harm in the future. Critical to this decision-making process is establishing whether there is an unacceptable risk of harm to the child.

Proving on the balance of probabilities that injuries occurred through abuse and non-accidental means can be challenging. Even in matters where the court is able to make a finding that the injuries were caused through abuse, ascertaining the identity of the offender is often difficult, if not impossible, as the circumstances of the alleged crimes are not precisely determined by the pathological findings and perpetrators' accounts of the events are rarely accurate and consistent.[21]

In order to illustrate the role of forensic evidence in care and protection proceedings involving suspected non-accidental head injury and the decision-making processes employed by courts, this paper will conduct a survey of four matters involving head trauma.

Relevant case law

SS v Department of Human Services (NSW) [2010] NSWDC 279

In the matter of *SS v Department of Human Services (NSW)* [2010] NSWDC 279 an 11-week-old baby, J, was admitted to Mount Druitt Hospital suffering from diarrhoea, fever, lethargy and a rash on his cheeks. Clinical examination revealed multiple problems including seizures, a bulging fontanelle, acute bilateral subdural haemorrhaging and bilateral retinal haemorrhaging. There was no evidence of trauma, either by way of skin damage, or by way of bone fractures.

J was later transferred to the Children's Hospital at Westmead where he was diagnosed as having sustained brain damage. Subsequently, a notification was made to the Joint Investigation Response Team (JIRT) for investigation and assessment of the cause of his brain damage. Following the investigation, J was assumed into the care of the Minister of the Department of Human Services. J remained at Westmead Hospital until he was transferred to a rehabilitation hospital.

The Department of Human Services filed a Care Plan in the Children's Court seeking final orders allocating parental responsibility for J to the Minister until he turned 18. The Children's Court found that it was more likely than not that J's injuries were caused by non-accidental shaking. The court determined that restoration of J to the parents care involved an unacceptable risk of harm inconsistent with his safety, welfare and well-being, and accordingly, there was a finding of no realistic possibility of restoration.

The parents appealed to the District Court from the orders made by the Children's Court by way of new hearing and evidence in addition to and in substitution for the evidence on which the orders were made by that court. They contended that the Director-General did not establish, to the relevant evidentiary standard, that care orders should be made. They submitted, therefore, that the appeal should be allowed and the orders of the Children's Court set aside, with the result that J should be returned to their care.

The outcome of the appeal and the orders were dependent upon the determination of the pivotal issue, that is, whether the brain damage sustained by J was the result of non-accidental shaking by one of the parents.

21 Stephens, above n 12.

The parents' explanation of events in support of their appeal was as follows. According to the mother's evidence, she found J lying on the lounge one afternoon. She noticed he was pale, lying there drifting off to sleep. The father told her J had not been eating a lot and was not as active as usual. She noticed J make a sudden and quick movement of his head. She picked him up and gave him some water to drink.

The mother noticed he was looking at her in a blank way, and when she clicked her fingers in front of his eyes he didn't blink. She became concerned and took J to Mount Druitt Hospital.

In support of their appeal, the parents relied upon two overseas medical witnesses, Dr Gabaeff and Dr Gardner.

Dr Gabaeff, a physician practicing in emergency medicine and clinic forensic medicine in the United States, argued that in his opinion, the brain damage suffered by J was the result of meningitis. He disagreed with the studies in the medical literature that identified the diagnostic value of subdural haematoma and retinal haemorrhages, and the absence of signs of impact, as good indicators of inflicted head injuries.

Dr Gardner, a retired ophthalmologist from the United States, further suggested that there were a number of possible alternative causes of the retinal haemorrhages suffered by J, including birth haemorrhages, infections, blood disorders and alterations in intrathoracic, intra-abdominal, intracranial and intravascular pressure.

The Director-General submitted that the parents presented an unacceptable risk of harm to J, and argued that parental responsibility should remain allocated in accordance with the orders of the Children's Court. The Director-General's case relied upon the hospital records and the evidence of Dr Stachurska, Dr Hing and Professor Isaacs.

Dr Anna Stachurska, a specialist paediatrician in the Child Protection Unit, and Mr Mark Palmer, the Senior Clinician in the Child Protection Unit at Westmead Hospital, provided the court with J's initial Assessment Report. The report found no medical condition that could explain J's presentation. Rather, it pointed towards a finding that J's injuries were non-accidental: "It is highly concerning that J has significant unexplained injuries, which are indicative of inflicted head injury on more than one occasion (most probably due to shaking)".[22]

In providing evidence to the court, Dr Stachurska, reiterated that she was of the view that J's injury was most likely caused by being shaken. She disagreed with the evidence of the two doctors called by the parents, Dr Gabaeff and Dr Gardner, that an available alternative cause was meningitis.

Dr Hing and Dr Isaacs supported the findings of the initial assessment. Dr Stephen Hing, a medical practitioner specialising in ophthalmology, was of the view that it was extremely likely that J's brain injury was caused by non-accidental means. He also disagreed with Dr Gabaeff and Dr Gardener that an available alternative cause of the injuries was meningitis. He noted that although retinal haemorrhages can occur from meningitis, they do not look like the severe retinal haemorrhages suffered by J. Further, Professor David Isaacs, a senior staff specialist in General Paediatrics and Paediatric Infectious Diseases at Westmead Children's Hospital, said that he was almost certain J was severely shaken on several occasions, causing bleeding in the brain and eyes. He also disputed meningitis as a cause.

The determination of the issue of whether the brain damage sustained by J was the result of non-accidental shaking involved a consideration of the competing bodies of medical opinion.

22 *SS v Department of Human Services (NSW)* [2010] NSWDC 279 at [37].

The court concluded, at [99], [105]–[106], that it preferred the body of medical evidence presented on behalf of the Director-General rather than the evidence of Dr Gabaeff and Dr Gardener:

> An overall assessment of the medical evidence revealed the Director General's evidence to be the more objective. Dr Gabaeff and Dr Gardener approached the task from a prejudiced and pre-judged perspective. Their evidence, which was wholly concerned to debunk the notion of shaken baby syndrome, is to be approached with considerable caution. The medical evidence led by the Director General, on the other hand, involved a logical evaluation of all available material, was concerned to consider other possibilities, and was carefully and logically reasoned. That evidence is consistent with mainstream paediatric medical opinion. By their own admission, Dr Gabaeff and Dr Gardener are outside that conventional paradigm.
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> …
>
> The plaintiffs' experts… were unashamedly partisan, and the totality of their evidence must be viewed with suspicion.
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> Their evidence was found wanting in a number of important respects. Dr Gardner's position, upon analysis, is to the effect that there were other possible explanations for J's presentation. But, because Dr Gardner does not accept shaken baby syndrome as a valid diagnosis, the explanation must be otherwise. To my mind that was circular reasoning. Dr Gabaeff's position was entirely premised on the diagnosis of meningitis. Flaws in his reasoning process were exposed in cross-examination, including for example his reliance on an incorrectly assumed fever, and a theory as to the possible mechanism of infection being the immunisation injections, which was discredited. I preferred the evidence of the Westmead experts and I find that J's brain damage was not caused by meningitis.

The court found that it was satisfied, on the balance of probabilities, that the proximate cause of the brain damage observed following the hospitalisation of J was non-accidental shaking in the previous 24 hours. The only persons who, on the balance of probabilities, were in the available pool of perpetrators, were the parents.

Re Lincoln and Raymond [2009] CLN 5

In the matter of *Re Lincoln and Raymond* [2009] CLN 5, Lincoln, was admitted to Royal Alexandra Hospital for Children at Westmead suffering seizures, a bulging fontanelle and low grade temperature, although there were no external signs of trauma. Further investigations showed Lincoln had bilateral acute haemorrhages, chronic subdural haemorrhages, retinal haemorrhages and extensive bilateral bleeding. There was a subsequent emergency care and protection order which allocated parental responsibility for the child to the Minister pending further order.

The Director-General sought an order that the Minister have parental responsibility of Lincoln until he attained the age of 18 years.

A number of expert witnesses were called on behalf of the Director-General. The overwhelming bulk of medical opinion among those who treated Lincoln or consulted regarding his care was that his injuries were non-accidental and caused by having been shaken without impact to his head.

The parents argued that there was a realistic possibility of restoration to their care. They denied having done anything which may have occasioned Lincoln's injuries. They suggested

that perhaps Lincoln had been suffering from a medical abnormality, such as meningitis, or that a vaccination may have been responsible for his injuries. The parents' views were supported by Dr Innes, a medical practitioner, who suggested, at [46] that:

> Lincoln suffered a subdural haemorrhage brought on by a coagulopathy — a tendency to bleed spontaneously. The cause of the coagulopathy was a deficiency of vitamin K which caused the condition known as the "late form of Haemorrhagic Disease of the New Born".

The court preferred the evidence presented by the Director-General over that presented by the parents. The Senior Children's Magistrate came to this conclusion after an analysis of all the presented evidence. He noted at [47]–[48]:

> In the first place, Dr Stachurska has treated Lincoln and was involved with him when he presented at hospital. In contrast to Dr Innes who has never met the child, conducted no tests, undertook no consultations and had access to very few of the records, Dr Stachurska treated Lincoln at RAHC Westmead and was responsible for his care. It was she who ordered a variety of tests and, armed with a wide range of written material including hospital and nursing notes and records and test results, she had the opportunity to consult with colleagues, experts in a variety of fields, and to explore Lincoln's symptoms and the origin of his injuries.
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> Secondly, as I think Dr Innes would recognise, Dr Stachurska, when she gave her evidence and expressed her clinical opinions … represented the majority of medical opinion in this country and around the world. Unlike Dr Innes, she has no axe to grind and no special theory to advance. She is not a crusader for or an apostle of any particular medical theory whereas Dr Innes is a man seized of a theory, convinced of its truth and eager to proselytise. Dr Stachurska presented her evidence calmly and respectfully. She did not accuse her medical colleagues of "talking nonsense" and treat their opinions with derision as Dr Innes did. It is difficult to see her speaking so blithely about the Baby P case or writing in protest about the jury verdict as Dr Innes did. It seemed to me that, in contrast to Dr Innes' evidence, Dr Stachurska's evidence was sober, well considered and internally consistent and that there was no suggestion that she was grasping at straws upon which she might build a hypothesis.

The court concluded that it was more likely than not that Lincoln's injuries were caused by shaking. Senior Children's Magistrate Mitchell concluded at [58], [59], on all the evidence, that there was an unacceptable risk of harm to Lincoln:

> The question for the Children's Court in the present case, then, is not whether the parents or, for that matter, any other person is responsible for Lincoln's injuries but whether the proposals put to the court for his care and for the care of his brother constitute an acceptable or unacceptable risk so far as the safety, welfare and well-being of each of the children is concerned. In assessing risk, the court should have particular regard to the following:
>
> - the egregious nature and extent of the injuries which have been inflicted on Lincoln
> - the fact that neither parent has offered an acceptable explanation of those injuries
> - the opportunity which each of Lincoln's parent has had to inflict injury
> - the relative lack of opportunity which any other person has had to mistreat Lincoln
> - the on-going extreme vulnerability of Lincoln in particular and his and Raymond's need of and entitlement to protection
> - the extent of Lincoln's continuing disabilities and the degree to which his on-going care will call for special skills and special qualities including patience and empathy
> - the reservations regarding the reliability and suitability of his parents which prudently are entertained in the circumstances of Lincoln's injuries while in the care of his parents

- the consequences of Lincoln's long term separation from his parents, particularly with regard to his attachments
- the attachments of each of the boys
- the suitability of the father as a carer for Raymond and the boy's progress while in his father's care
- the unavailability of any other family member to take care of the children
- the risks and unknowns necessarily involved in out-of-home care and separation from parents.

> Taking all those matters into account and having considered them in detail, my assessment is that the proposal of [the parents] that Lincoln be restored to their care involves an unacceptable risk to the child and is not consistent with his safety, welfare and well-being. Accordingly, there is no realistic possibility of a restoration in his case.

Re Anthony [2008] NSWLC 21

In the matter of *Re Anthony* [2008] NSWLC 21, Anthony, then aged 10 weeks, presented at Sydney Children's Hospital at Randwick. Following a number of investigations, Anthony was found to have both old and new subdural haemorrhages bilaterally, widespread haemorrhages in both his eyes, fractures of multiple ribs and facial bruising.

Anthony's parents professed themselves to be "bewildered." Each denied causing any harm to Anthony, and while acknowledging the logical inconsistency of the position, each doubted that the other could have done so.

Following Anthony's discharge from hospital, he resided, while in the parental responsibility of the Minister, with his maternal grandmother. An application was made by the Director-General to the Children's Court to place Anthony with his maternal grandmother for a period of five years, and continue to have contact with his parents.

A number of expert witnesses were called by the Director-General and the parents during proceedings before the Children's Court to determine whether, on the balance of probabilities, Anthony's parents presented an unacceptable risk of harm. In doing so, it was necessary for the court to ascertain whether on balance, Anthony's injuries were the result of abuse.

The Director-General relied upon two witnesses, Dr Moran and Dr Tait, from the Sydney Children's Hospital Network.

Dr Moran reported that "subdural haemorrhages and retinal haemorrhages most usually occur secondary to trauma … of the acceleration-deceleration type, typically caused by shaking with impact". Further, he suggested that Anthony's rib fractures were "caused by squeezing of the chest wall … and require a degree of force which is not associated with normal handling".[23]

Dr Tait, a Consultant Paediatrician, agreed with Dr Moran that, at 12 months of age, retinal haemorrhages, particularly those involving different layers of the retina as was the case with Anthony, "are rare, and in this age group almost exclusively are the consequence of forceful acceleration/deceleration of the head in association with angular rotation".[24]

The parents presented an affidavit of Dr Kalokerinos suggesting that some or perhaps all of Anthony's injuries may have been a consequence of vitamin C deficiency. The court noted that Dr Kalokerinos' thesis was not new, and had failed to attract support of the medical profession.

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23 *Re Anthony* [2008] NSWLC 21 at [6].
24 ibid at [10].

Similarly, the theory was not supported by consistent rigorous study and research. Senior Children's Magistrate Mitchell, while praising Kalokerinos as "a distinguished Australian humanitarian", held that "his honourable motives do not render his science reliable."[25] The court employed the concept of "general acceptance" and dismissed Dr Kalokerinos's theory by stating that it had "failed to attract support in the medical profession".[26]

The Children's Court also had the privilege of hearing from Dr Lennings, a clinical and forensic psychologist. Dr Lennings opined that the psycho-social factors often pointing to risk in cases of non-accidental injury to children were absent in the case of *Re Anthony*. Further, he did not believe that either parent was prone to impulsivity of behaviour, there was no suggestion of personality disorder in either parent and there was an absence of aggression and violence. While Dr Lennings acknowledged that the absence of psycho-social factors was peculiar, as he explained, "human behaviour is unpredictable".[27]

Further, the court reflected upon the findings of Kasia Kozlowska and Sue Foley in their paper titled "Attachment and risk of future harm: a case of non-accidental brain injury" published in the *Australian and New Zealand Journal of Family Therapy*. This paper noted that:[28]

> shaking may be the result of one of a number of scenarios: a lack of empathy for the child's needs or distress; parental difficulty in managing the child's negative emotions; parental difficulty in managing their own emotions; or parental anger at the impact of the child on their ability to meet their own physical or emotional needs.

Kozlowska and Foley argue that an exploration of "perpetrator intentionality" is an important tool for the assessment of future risk but acknowledge that in many cases "understanding the circumstances surrounding the shaking event in order to understand risk is not possible in day-to-day practice".[29] The court noted that such a practice is not possible where the identity of the perpetrator is unknown or where the perpetrator is unwilling to speak about the matter, and as such, was not possible in *Re Anthony*.

In such circumstances, the learned authors acknowledged that the "assumption remains however, that after an alleged incident, there is always ongoing potential for harm, even though the circumstances of the injury may remain unclear" and, for that reason, they argue that the "broader indicators of risk" including parental substance abuse, parental or older sibling mental health examination and history, history of poor impulse control, frustration tolerance, violence between family members, other instances of physical harm or neglect of children, safe physical handling of children, physical discipline practices, parental ability to empathise with children, and parental ability to recognise and meet their children's needs must be carefully considered.[30]

As Stephan Herridge states in "Non-accidental injury in care proceedings — a digest for practitioners" [2009] CLN 6 at 12:

> If the cause of the injuries was known and was acknowledged by the person responsible, one could assess the likelihood of that person acting again so as to cause the injuries. It would be possible to assess the risk involved to the plaintiff and to weigh that against the advantages of returning him to his parents. However, in the absence of any explanation, it is far more difficult to assess and weigh the relative advantages and disadvantages in this matter.

25 Stephens, above n 12.
26 *Re Anthony* at [14].
27 ibid at [29].
28 Kozlowska and Foley, above n 2, at 76.
29 ibid.
30 ibid.

The court in *Re Anthony* then turned to consider and balance the risks associated with restoration against those in alternate or out-of-home care, at [44]:

> It follows then that, in assessing whether the risk posed to a child by a parental proposal is acceptable or unacceptable, one of the factors which will be considered is the risk of disadvantage posed by alternate proposals for the care of the child advanced by the Director-General or any other party. There will be cases where the risks posed by parents are so egregious that they quite overwhelm the disadvantages posed by a proposal of long term out-of-home care but, in other cases, such as *Re Nellie* [2004] CLN 4, where there had been serious injury to the child caused by an unexplained shaking incident, the risks posed by a restoration to the parents and the disadvantages involved in the Director-General's proposals were much more evenly balanced.

The Children's Court held that to restore Anthony to his parents in the circumstances was an unacceptable risk to his safety, welfare and well-being. Accordingly, the court directed that Anthony should be placed in the parental responsibility of the grandparents.

Forensic evidence in child protection proceedings

Care and protection proceedings involving suspected non-accidental head injury often rest entirely upon forensic evidence.

A review of legal principles, as set out in *Re JS* [2012] EWHC 1370 (Fam), emphasises the centrality of expert evidence in care and protection proceedings involving matters of suspected non-accidental head injury.

Firstly, the burden of proof lies with the Department of Family and Community Services, now known as the Department of Communities and Justice. It is the Department that brings these proceedings and identifies the findings they invite the court to make. Therefore the burden of proving the allegations rests with them.

Second, the standard of proof is the balance of probabilities: *Briginshaw v Briginshaw* (1938) 60 CLR 336. If the Department of Family and Community Services proves on the balance of probabilities that a child has sustained non-accidental injuries inflicted by one of his parents, the Children's Court will treat that fact as established and all future decisions concerning his future will be based on that finding.

Third, findings of fact in suspected non-accidental injury must be based on evidence. As Munby LJ observed in *Re A (A Child)* [2011] EWCA Civ 12 at [26]:

> [It] is an elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation.

Fourth, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in *Re T* [2004] EWCA Civ 558 at [33]:

> evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.

Fifth, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists.

Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the

expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence. Thus there may be cases, if the medical opinion is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.

Sixth, in assessing the expert evidence it is to be borne in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others.

Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them.

Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear, distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything.

Ninth, as observed by Hedley J in *Re R* [2011] EWHC 1715 (Fam) at [10]:

> there has to be factored into every case which concerns a disputed aetiology giving rise to significant harm, a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities.

The court must resist the temptation to believe that it is always possible to identify the cause of injury to the child.

Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators, is whether there is a likelihood or a real possibility that he or she was the perpetrator, as established in *North Yorkshire County Council v SA sub nom A (a Child)* [2003] EWCA Civ 839. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injuries to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judicial officer should not strain to do so.

Expert witnesses are uniquely placed to assist the court in cases involving suspected child abuse, but are not an advocate for a party. They have a paramount duty, overriding any duty to the party or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness. Expert witnesses ultimately assist the court in determining matters to ensure the safety, welfare and well-being of a child or young person.

In the current climate of evidence-based medicine, the question of how medical knowledge is utilised in cases of physical child abuse is of paramount importance for the effectiveness of the legal process and the protection of victims.

Conclusion

Forensic evidence plays a central role in care and protection proceedings involving suspected non-accidental head injury. It is critical in establishing the required tests under the Care Act, namely, whether a child is in need of care and protection, and whether there is any realistic possibility of restoration.

Judicial officers rely on medical professionals to conduct timely and high-quality clinical investigations in suspected shaken baby cases to facilitate the decision-making process in court.

Decision making in care and protection proceedings is complex, and necessitates that courts engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being.[31] This process is especially complex in cases involving non-accidental head injury where there are typically no witnesses to the alleged abuse and explanations offered by carers are often inconsistent with the physical findings.

Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against all other available evidence. Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judicial officer, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.

I hope this paper has been illuminating for all here today, especially for those who may come into contact with the care and protection jurisdiction of the Children's Court of NSW.

31 Kozlowska and Foley, F, above n 2, at 75.

Expert clinical evidence in care proceedings*

P Johnstone†

Introduction ..... [7-3000]

Specialist nature of the Children's Court role and structure of the Children's Court

Origins of the Children's Court of NSW

The need for specialist courts and the structure of the Children's Court

The legislative environment of the Children's Court

Specialised principles and procedures of the Children's Court

The use of expert clinical evidence

The role of the clinician

Giving expert evidence

The emerging importance of advances in the understanding of brain development, particularly in the area of youth crime

Conclusion

[7-3000] Introduction

The relationship between psychiatry, psychology and the law is of significant relevance to the Children's Court, as we rely heavily on developments in these areas to inform our understanding of the children who come before the court, and assist us in shaping our decision-making to better address the issues of care and protection and youth crime.

The first part of my paper is about the specialist nature of the Children's Court jurisdiction. In the second part, I will explore the use of expert clinical evidence, particularly in Care cases. Finally, in the third part, I will canvass the emerging importance of advances in the understanding of brain development in dealing with issues in the Children's Court, particularly in the area of youth crime.

My hope is that my discussion may provide some relevant insight into the operation and work of the Children's Court, and help promote a better understanding between ANZAPPL and the Children's Court of the expert's role in court proceedings. As professionals working within

* I acknowledge the considerable help and valuable assistance in the preparation of this paper by the Children's Court Research Associate, Elizabeth King.

† His Honour Judge Peter Johnstone, President of the Children's Court of NSW; the paper was first presented for the Australian and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL), Annual General Meeting, 1 March 2017, Sydney.

these areas that are so interconnected, we are charged with the task, and indeed the privilege, of collaboration and consultation, in order to better understand those children and young people that we seek to support.

Specialist nature of the Children's Court role and structure of the Children's Court

Today, the Children's Court of NSW consists of a President, 15 specialist Children's Court magistrates and 10 Children's Registrars. It sits permanently in seven locations, and conducts circuits on a regular basis at country locations across NSW.

The Children's Court of NSW deals with both care and protection matters and offences committed by children under 18.

Although these are two separate jurisdictions, there is a distinct correlation between a history of care and protection interventions and future criminal offending. This nexus has been explored and articulated particularly well by former President of the Children's Court, Judge Marien, who describes the reality of "cross-over kids"[1] — young people who have been before the court in its care jurisdiction, and the frequency with which they come before the crime jurisdiction later in life. In Judge Marien's paper he cites the work of the eminent psychologist Dr Judith Cashmore AO, who argues that there is an established link between childhood maltreatment and subsequent offending in adolescence.[2]

The Children's Court does not charge children with crimes, but it does determine their guilt. If children plead guilty, or are found guilty after a trial, the Children's Court conducts a sentence hearing and determines the appropriate sentence to be imposed.

I believe that the ultimate aim of an enlightened system of juvenile justice should be to have no children in detention. Rather, we should be developing other social mechanisms to deal with problem children.

Origins of the Children's Court of NSW

The Children's Court of NSW is one of the oldest children's courts in the world. It has a specially created stand-alone jurisdiction which has origins tracing back to 1850.

Prior to 1850, the criminal law did not distinguish between children and adults, and children were subjected to the same laws and punishments as adults and were liable to be dealt with in adult courts.

There were a number of children under 18 transported as convicts in the First Fleet of 1788. The precise number of convicts transported is unclear, but among the 750–780 convicts, there were 34 children under 14 years of age and some 72 young persons aged 15–19.[3]

The first special provision recognising the need to treat children differently was the *Juvenile Offenders Act 1850*.[4]

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1 M Marien, "'Cross-over kids' — childhood and adolescent abuse and neglect and juvenile offending", paper presented to the National Juvenile Justice Summit, 26 and 27 March 2012, Melbourne. See "Cross-over kids: the drift of children from the child protection system into the criminal justice system" at **[2-3000]**.

2 J Cashmore, "The link between child maltreatment and adolescent offending" (2011) 89 *Family matters* 31 at https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending, accessed 28 March 2018.

3 State Library of NSW Research Guides, "First Fleet Convicts" at www.sl.nsw.gov.au, accessed 28 March 2018.

4 14 Vic No II, 1850.

This legislation was enacted to provide speedier trials and address the "evils of long imprisonment of children".

Then, in 1866, further reforms were introduced, including the *Reformatory Schools Act 1866*.[5]

This Act provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act 1866*,[6] under which public and private "industrial schools" were established, to which vagrant and destitute children could be sent.[7]

Since those early beginnings in 1850, there has been a steady progression of reform that has increasingly recognised and addressed the need for children to be treated differently and separately from adults in the criminal justice and child welfare systems.

The need for specialist courts and the structure of the Children's Court

The *Children's Court Act 1987* imposes upon the President both judicial and extra-judicial functions: s 16. My extra-judicial obligations include a requirement to confer regularly with community groups and social agencies on matters involving children and the court: s 16(1)(d). I am also required to chair an Advisory Committee that has a responsibility to provide advice to the Attorney General and the Minister for Family and Community Services on matters involving the court and its function within the juvenile justice system in NSW: s 15A.

Therefore, as President of the Children's Court, I have had the opportunity to preside over a wide range of cases, to observe many children involved in the youth justice system and the care and protection system, to visit the juvenile detention centres, to read widely, to attend conferences and seminars, and to speak to a lot of experts and others involved, or interested, in matters concerning children and young people.

I continue to be astounded by the complexity of the issues that arise in this area. The social disadvantage facing the children and young people and their families who have their lives characterised by decisions made by this court, is a profound reminder of the need for continuing education and resolute and meaningful collaboration. The evidence arising from the public hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse, and more recently, the Royal Commission into the protection and detention of children in the Northern Territory, exemplify the systemic failures that can arise when silos are maintained and networks are broken.

In particular, the need for ongoing collaboration between the scientific and legal community is absolutely crucial, as the ability of judicial officers to understand and make decisions in the best interests of children relies heavily on our ability to understand the social, emotional and psychological development of children, and to be able to identify areas for prevention, early intervention, diversion and rehabilitation.

Examining and challenging the social disadvantage and disempowerment that have defined the lives of generations of families who come before the Children's Court is critical to my role as President of the Children's Court, and the roles of my colleagues, the specialist Children's Court magistrates.

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5 30 Vic No IV, 1866.

6 30 Vic No II, 1866 (otherwise known as the *Industrial Schools Act 1866*).

7 R Blackmore, "History of children's legislation in New South Wales — the Children's Court", at www.childrenscourt.justice.nsw.gov.au, accessed 27 January 2016, extracted from R Blackmore, *The Children's Court and Community Welfare in NSW*, Longman Cheshire, Melbourne, 1989.

It is implicit in the role of judicial officers that we comply with our responsibility to perform our roles consistent with the administration of justice. However, this is a particularly special jurisdiction that is imbued with the practice of therapeutic jurisprudence and restorative justice.

Additionally, there is value in having a consistency of approach and of outcomes across the whole State, in the way evidence is presented, in the practices and procedures applied, and in the decisions made in cases that come before the court.

I am an advocate, therefore, for the expansion of the specialist nature of the jurisdiction across as much of the State as might be achieved over time.

Children's Court magistrates now hear something like 90% of care cases in the State.

The coverage for criminal matters remains, however, at about 60%. The balance of cases is heard by Local Court magistrates exercising Children's Court jurisdiction, predominantly in remote parts of NSW.

The legislative environment of the Children's Court

The Children's Court has jurisdiction over care and protection matters and matters involving juvenile crime. The court also has jurisdiction to hear children's parole matters, apprehended violence orders and compulsory schooling matters under s 22D of the *Education Act 1990* (NSW).

Proceedings in relation to the care and protection of children and young persons in NSW are public law proceedings, governed, both substantially and procedurally, by the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the Care Act).

Care proceedings involve discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection.[8]

In the criminal jurisdiction of the court, the applicable legislation includes the *Crimes Act 1900*, the *Bail Act 2013*, the *Children (Criminal Proceedings) Act 1987* (CCPA) and the *Young Offenders Act 1997* (YOA). Section 6 of the CCPA provides that children and young people are unique, reflecting an understanding of the cognitive and neurobiological differences between young people and adults.

Specifically, it states that the following principles are to be applied with regard to the administration of the Act:[9]

> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
>
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
>
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
>
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

8 *Children and Young Persons (Care and Protection) Act 1998*, s 60.
9 *Children (Criminal Proceedings) Act 1987*, s 6.

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

The YOA is a statutory embodiment of early intervention and diversion, providing the option of warnings, cautions and Youth Justice Conferences (YJCs). A YJC brings young offenders, their families and supporters face-to-face with victims, their supporters and police to discuss the crime and how people have been affected. Together, they agree on a suitable outcome that can include an apology, reasonable reparation to victims, and steps to reconnect the young person with their community to help them desist from further offending.

YJCs are beneficial for the young person's experience of the criminal justice system, as all involved in the conference are not placed in an adversarial situation. Further, YJCs facilitate co-operation between the young person and police and foster collaboration and input from the individual offender, victims, families and communities. I am particularly supportive of the use of YJCs. In my view, they produce fruitful results for both the individual offender and the community.

There are also safeguards within the Care Act and corresponding provisions in the CCPA and YOA that prevent the publication of any material that identifies or is likely to identify the young person.[10]

Specialised principles and procedures of the Children's Court

The Children's Court safeguards the needs of the vulnerable people who appear before it and has developed discrete, distinct and specialised procedures over time.

In criminal matters, courts are designed to be smaller, less intimidating environments and legal practitioners stay seated when addressing the court. Participants are encouraged to tailor their language to the age and stage of the young person's development. Additionally, police do not wear their uniforms or carry their appointments in court.

In care proceedings, the rules of evidence do not apply, the proceedings are non-adversarial, and are required to be conducted with as little formality and legal technicality and form as the circumstances permit.

The need to tailor the environment and communication to the child, young person or vulnerable witness is highlighted in the English case of *R v Lubemba*:[11]

> It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses.

10 *Children and Young Persons (Care and Protection) Act 1998*, ss 104 and 105; *Children (Criminal Proceedings) Act 1987*, s 15A and *Young Offenders Act 1997*, s 65.

11 [2014] EWCA Crim 2064 at [38]–[45].

> It is perfectly possible to ensure the jury are made aware of the defence case and all the significant inconsistencies without intimidating or distressing a witness.

In addition, the Children's Court has the benefit of assistance from the Children's Court Clinic.

The Children's Court Clinic (which I will refer to in short form as the "Clinic") is established under the *Children's Court Act 1987* and is given various functions designed to provide the court with independent, expert, objective and specialised advice and guidance.

Upon the making of an assessment order by the court, the Clinic may provide a psychological or psychiatric assessment of a child,[12] or an assessment of a person's capacity to carry out parental responsibility.[13]

I will canvas the use of expert evidence, including the giving of expert evidence by clinicians shortly.

As an advocate for the specialist nature of the Children's Court, I view forums such as these as an important means by which the Children's Court can further inform itself.

Organisations such as ANZAPPL have the benefit of many decades of wisdom and knowledge in the areas of psychology and psychiatry. Any discourse that facilitates collaboration, capacity building and information exchange is a discourse that is worth supporting. Accordingly, I see this as an opportunity to share our respective wisdom and expertise.

The use of expert clinical evidence

The court may receive the benefit of expert evidence from different classes of experts, including a clinician from the Children's Court Clinic. Clinicians are effectively single witness experts in the sense that they are appointed by the court, and are not qualified or retained by a party. However, it is also possible for a party to retain an external expert, such as a psychologist or a psychiatrist, a surgeon or speech therapist.

The Children's Court expects all experts, including clinicians, to be aware of, to apply and to adhere to the provisions of the Expert witness code of conduct (the Code) set out at Sch 7 of the Uniform Civil Procedure Rules 2005. Experts must not advocate for a party. It is the expert's paramount duty, overriding any other duty, or loyalty to the person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness.

External experts retained by a party such as the mother or father of a child, are bound by this duty of impartiality in the same way a clinician is, however the independence of an external expert is impacted by the terms of reference given to the expert by the contracting party.

Therefore, although the Code applies equally to clinicians and external experts, I will discuss the role of the clinician first, and then canvass some more general requirements of all expert witnesses.

The role of the clinician

It is important to distinguish the role of the clinician from the role of the court.

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12 *Children and Young Persons (Care and Protection) Act 1998*, s 53.

13 ibid s 54.

As I have set out above, the court only intervenes where there is a need for care and protection. This is a "critical first step" that reflects the UN Convention on the Rights of the Child (CROC) in acting as a safeguard, protecting families from unnecessary state intervention into their lives.[14]

> Once having intervened, the role of the Court then differs from other Courts. One would normally expect a court to have powers of compulsion, to require parties before it to do certain things so as to resolve the issue in dispute. In fact, the Children's Court has very few powers of compulsion. It can compel people to attend before it or produce documents to it. It can reallocate parental responsibility — notwithstanding the disagreement of everyone before the Court to the orders that the Court proposes to make. The Court can also compel attendance as part of a therapeutic program. But beyond those very limited powers all of the other powers of the Children's Court require the consent and co-operation of at least one of the child, the family, DoCS (now DFaCS) or other agencies.
>
> This can prove extraordinarily frustrating for judicial officers. It is however a natural element which reflects the peculiarities of making an order in one point of time which will potentially bind a child and family for years to come.

Thus, for example, the court cannot order restoration. It can only decide to accept or reject the assessment of the Secretary. The court cannot direct the permanent placement. It can only approve or not approve the Secretary's permanency plan.

The court is, however, required to make findings. The role of the clinician, in simple terms, is to assist the court in making those findings. It is absolutely critical, therefore, that the clinician be, and be seen to be, completely impartial and independent of the parties, whether it be the department, or family members, or any of the lawyers and caseworkers involved.

Perhaps one way of looking at it is to say, in accordance with the paramountcy principle; their role is to assist the court to make decisions that best promote the safety, welfare and well-being of the child.

The clinician's role, to impartially assist the court, has several practical consequences.

Assist means not attempting to guide or shape the outcome, or to pre-empt a finding, or to attempt to inappropriately influence the judicial officer. Clinicians must not try to be the lawyer and purport to interpret the Care Act or the CROC in forming their opinion. Their assessment should focus on clinical matters, consistent with their expertise, not the legal principles.

Clinicians must not say what they think the parties want to hear. They must be aware of the audience, but where necessary, be firm, and frank, about deficiencies in the parents or others. It is for the court to apply the law to the facts as it finds them, with the clinician's assistance as to what those facts are.

The first way in which clinicians assist the court is by the provision of an expert opinion.

That opinion must derive first from a body of specialised knowledge, obtained by clinicians by reason of their training, experience and study. Thus, clinicians should clearly identify and be able to demonstrate what that specialised knowledge is, and how they obtained it. Clinicians must not, therefore, stray outside their area of expertise.

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14 J Mason, "Courts, DoCS and Child Protection in NSW", Judicial Commission of NSW, District Court of NSW Seminar, 20 May 2009, at p 7.

For example, a general practitioner should not express a view on a matter of psychiatry, or at least should make clear that the view is based on a limited level of general medical knowledge derived from study or general practice.

Secondly, the opinion must derive from facts, that is, it must be based on matters that the clinician has observed, or assumed to be accepted facts, or which are assumed to be subsequently proved or disproved. The facts or assumed facts upon which a clinician or expert relies should be set out and differentiated, in the sense that they are matters which have been personally observed, read or been informed about, or which have been assumed or hypothesised (usually in cross-examination).

Thirdly, clinicians should articulate the reasoning process they have used to come to any opinion or conclusion, and be in a position to defend it.

In addition to providing the court the benefit of their expertise, clinicians in the Children's Court have another very important facet to the way they assist the court. They provide information, not necessarily in the form of an opinion, but a hybrid factual form of evidence, which can greatly assist the judicial officer. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, they can provide the court with insights and nuances that might not otherwise come to its attention. They can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the "snapshot" nature of a court hearing, the benefit of which it would not otherwise have.

Importantly, clinicians must not approach issues in the same way as a treating medical practitioner, who will accept and rely on a history of given symptoms described or signs recorded, generally at face value, to diagnose and treat a patient. In contrast, clinicians should question histories, particularly if at odds with other material they have read or heard, or observed. They should objectively assess and test the facts they rely on, consistent with their duty of impartiality and independence. Clinicians cannot take things at face value, as they otherwise risk misleading or confusing the court.

Clinicians should also be prepared to change their view, or have their view rejected by the court, where the facts upon which their opinion was based are found not to have been established, or where a different set of facts about which the expert was not aware emerges, or the significance of which was not fully appreciated by the expert. As Mark Allerton has said on a previous occasion:[15]

> it is important to show that you have canvassed a range of views and information, but have made your own assessment of their validity and accuracy, and assessed the extent to which they support or weaken your own findings.

I set out now something I wrote about a clinician, as it seems to encapsulate some of the points I have been making:

> I am persuasively guided by the opinion of the Clinician. He is, after all the court's witness (as counsel was at pains to remind me), and may therefore be presumed to be unbiased and objective.

15 M Allerton, "How to be a real expert, and not just an old drip under pressure", August 2008, p 4.

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

There is no substitute for common sense.

Giving expert evidence

Given the audience before me today, it would be beneficial for me to reinforce some of the requirements for expert evidence in the Children's Court, which applies to clinicians as well as all other appointed experts, as outlined in the Code and the relevant Practice Notes.[16]

An expert's assessment report should clearly set out the name and address of the expert, an acknowledgement by the expert that they have read the Code and agree to be bound by it, as well as their qualifications in preparing the report.[17] Additionally, the expert must clearly set out any written material which has been considered or relied upon, and also any examinations, tests or investigations which have been relied upon.

To the extent to which any opinion expressed by the expert involves the acceptance of another person's opinion, the identification of that person and the opinion expressed by that person, including any literature should be provided.[18]

By way of example, I recently presided over a matter where two psychologists broke almost every rule in relation to the giving of expert evidence.

They failed to describe their expertise, qualifications and experience in the report, and there was no formal scope for their retainer, or letter of instructions. They were unaware of the Code and the Children's Court Practice Note, and were therefore unable to comply with either. Most importantly, they also failed to list the documents they considered as part of their investigation. I was asked to reject their report in its entirety, and if I had been in any other jurisdiction than the Children's Court, I would have done so.

Expert evidence plays a crucial role in care proceedings at the Children's Court, whether it be provided by a clinician or an external expert retained by a party. It is absolutely crucial, therefore, that experts be aware of the Code and the Practice Note, and comply accordingly so

16 Practice Note No 6, "Children's Court Clinic assessment applications and attendance of authorised clinicians at hearings, dispute resolution conferences and external mediation conferences", 2011, Children's Court of NSW; Practice Note No 9, "Joint conference of expert witnesses in care proceedings", 2012, Children's Court of NSW.

17 Uniform Civil Procedure Rules 2005, Sch 7, cl 3(a), (b) and (c).

18 ibid, cl 3(e), (g) and (h).

as to present valuable evidence which will assist the court in determining the best interests of the child with regard to safety, welfare and wellbeing. To do so otherwise is to risk wasting the court's time and resources.

It is important to distinguish between criminal trials and civil trials, where the burden of proof is significantly lower. In criminal matters the Crown is generally required to prove a fact beyond reasonable doubt, hence it is common to see a defence run along the lines of causing confusion, or "muddying the waters", to create a reasonable doubt.

In care cases, however, the facts need only be established on the balance of probabilities: s 93(4) of the Care Act. In applying that standard, the court will have regard to the gravity and importance of the matters to be determined in accordance with the principles in *Briginshaw v Briginshaw*;[19] *Director General of Department of Community Services; Re "Sophie"*.[20] Thus, the court will not lightly make any findings in respect of the serious allegations: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.[21]

The point might be demonstrated by a case study, in a case involving the so-called shaken baby syndrome, decided in the District Court on appeal in 2010: *SS v Department of Human Services*.[22]

The Secretary's case was that the baby in question had suffered a non-accidental abusive head injury causing severe brain damage, and that the perpetrator(s), although not identified, were, on the balance of probabilities the mother and/or the father.

Reliance was placed principally on the hospital records and the evidence of the Staff Specialist Paediatrician of the Child Protection Unit at the Children's Hospital at Westmead, a specialist paediatric ophthalmologist who had worked in the area for 21 years, and Professor David Isaacs, a senior staff specialist in General Paediatrics and Paediatric Infectious Diseases at Westmead Children's Hospital.

The parents contended that, upon analysis, the medical conclusion of a "shaken baby" was based on less than unassailable foundations.

They submitted that the existence of alternative hypotheses, together with the "circular reasoning" of the "science" of shaken baby syndrome, led to the position where the court could not be comfortably satisfied that the Secretary had proved the case against the parents.

The so-called alternative hypotheses as to the possible cause of the baby's brain damage, including for example meningitis, or a congenital condition, were advanced by two doctors from the United States, qualified on behalf of the parents and brought to Australia to give evidence. The reality was that these two American doctors were professional expert witnesses who were nothing more than "hired guns", whose evidence was not directed at discovering the true cause, rather it was designed to create doubt as to the Secretary's hypothesis of shaken baby syndrome.

The court said of the American doctors:[23]

> Dr Gabaeff and Dr Gardner approached the task from a prejudiced and pre-judged perspective. Their evidence, which was wholly concerned to debunk the notion of shaken baby syndrome,

19 (1938) 60 CLR 336.
20 [2008] NSWCA 250.
21 (1992) 67 ALJR 170.
22 [2010] NSWDC 279.
23 *SS v Department of Human Services* [2010] NSWDC 279 at [99], [105].

> is to be approached with considerable caution. The medical evidence led by the [Secretary], on the other hand, involved a logical evaluation of all available material, was concerned to consider other possibilities, and was carefully and logically reasoned. That evidence is consistent with mainstream paediatric medical opinion. By their own admission, Dr Gabaeff and Dr Gardner are outside that conventional paradigm.
>
> …
>
> [They] were unashamedly partisan, and the totality of their evidence must be viewed with suspicion.

The point was that creating a doubt may have been enough for a criminal jury to have a reasonable doubt as to the guilt of the parents, but in a Care case, where the paramount concern is the safety, welfare and well-being of the children, the court looks at the probabilities. Hence, the judge concluded:[24]

> I am comfortably satisfied, on the balance of probabilities, that the proximate cause of the brain damage observed following [the baby's] hospitalisation on that day was non-accidental shaking in the previous 24 hours. The only persons who, on the balance of probabilities, were in the available pool of perpetrators, were the parents.

Where the court is asked to accept an opinion of an expert, it will look to the substance of the opinion expressed.

Accordingly, the cogency of the reasoning process plays an important role: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [92]. A reasoned explanation or conclusion must be presented.

This requires the expert to explain the methodology employed to reach the conclusion expressed, that is, to identify the chain of reasoning leading to the conclusion.

It is also important to be aware that the judicial officer is required to express a view about an expert's evidence, especially where it conflicts with someone else giving evidence about the same issue. This means experts should be measured in any criticism they make of other witnesses, objective but not pejorative. Conversely, experts should not take criticism of their views personally. It is in the nature of litigation that criticism will be made. If everything was straightforward and clear cut, there would be no need for court cases.

Finally, I want to make a few observations about future directions in expert evidence.

The Clinic has already made some forays into joint opinion writing. There are difficulties with that, as it gives rise to practical issues such as who expressed what opinion, who has what expertise, and who should be cross-examined about what.

On the other hand, there is great value in having the experts get together in advance of a hearing, or even during the hearing, to confer and identify what they agree about, and what they differ on and why. I, for my part, will be utilising these techniques in the Children's Court in the future.

In the recent case, referred to above involving the joint report, I put the two authors into the witness box together to be cross-examined together. I doubt a judge would get away with this "technique" in any other court.

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24 ibid at [108].

The emerging importance of advances in the understanding of brain development, particularly in the area of youth crime

Throughout my time at the Children's Court, I have undertaken some research into the issues and circumstances surrounding the reasons young people commit offences.

Given the expertise of the audience before me today, I will only briefly outline the research relating to adolescent brain development, and will discuss why it is so important why we must continue to grow our knowledge in this area, in order to better respond to youth offending.

A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.[25]

We know that rational choice theory argues that young people are able to undertake a logical risk assessment in their decision-making process. Neurobiological research, on the other hand, argues that adolescent decision-making is not linear, sophisticated and predictable.

A further complication is that brain development differs depending upon a number of variables and that "neuroscientific data are continuous and highly variable from person to person; the bounds of 'normal' development have not been well delineated."[26]

Despite this, the neurobiological research to date shows that whilst adolescents may appear to function in much the same way as adults, they are not capable of the executive function that mature adults possess.

Executive function of the prefrontal cortex is explained by Johnson, Blum and Giedd as:[27]

> a set of supervisory cognitive skills needed for goal-directed behavior, including planning, response inhibition, working memory, and attention … Poor executive functioning leads to difficulty with planning, attention, using feedback, and, mental inflexibility, all of which could undermine judgment and decision making.

If we liken executive function of the pre-frontal cortex to a type of control centre of the brain, we can recognise that during adolescence, this control centre is under construction. As such, a young person's ability to undertake clear, logical and planned decision-making prior to acting is also under construction.

Neurobiological development will continue beyond adolescence and into a person's twenties, and different people will reach neurobiological maturity at different ages.[28]

In simple terms, according to neurobiology, a young person is unable to make any rational choice, let alone a rational choice to commit a criminal act.

This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility.

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25 E McCuish et al, "Psychopathic traits and offending trajectories from early adolescence to adulthood" (2014) *Journal of Criminal Justice* 42 at 66–76; D Kenny, "The adolescent brain: implications for understanding young offenders" (2016) 28 *JOB* 23.

26 S Johnson, R Blum, J Giedd, "Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy" (2009) 45 *Journal of Adolescent Health* 216 at 218.

27 ibid at 217.

28 B Midson, "Risky business: developmental neuroscience and the culpability of young killers" (2012) 19(5) *Psychiatry, Psychology and Law* 692 at 700. See also, S Gruber, D Yurgelun-Todd, "Neurobiology and the law: a role in juvenile justice?" (2006) 3 *Ohio State Journal of Criminal Law* 321 at 332.

Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of a young offender.

Advances in neurobiology allow us to better understand the range of factors (biological, psychological and social) that make juvenile offenders different from adult offenders, and justify and improve the unique responses to juvenile crime.

The importance of understanding trauma, and the effect of trauma on brain development, is another critical issue. As a judicial officer, I see children and young people on a daily basis, and recognise the impact that trauma can have on a young person's ability to articulate themselves and their ability to regulate their behaviours.

Dr Cashmore's research[29] shows links between brain development, trauma and criminal offending, and therefore it comes as no surprise that communication with children and young people is a discrete area of study in and of itself.

Judge Sexton, of the Victorian County Court, presented a paper titled "Communicating with children and young people" at the Speaking their Language conference in 2015, which highlighted the impact of brain development on the ability for children to give evidence.

Judge Sexton has identified problems associated with gratuitous concurrence — agreeing or disagreeing with a proposition because the person being questioned thinks that is what the questioner wants to hear — when asking questions of children and young people, particularly those who have been exposed to trauma. In addition, she acknowledges:[30]

> Often adolescents are considered capable of communicating in an adult way, but if they have been subjected to trauma in their lives, there may be an underlying disability which means they are really functioning at the level of an under 12 year old, but will be too embarrassed to admit to not understanding.

The growing recognition of the relevance of "brain science" has driven the need for policy and legislation to "match" the research.

This issue was addressed in detail by the Principal Youth Court Judge of New Zealand, Judge Andrew Becroft, in a comprehensive paper delivered in 2014 at the Australasian Youth Justice Conference in Canberra.[31] He pointed out that the first decade of this century has been called the "decade of the teenage brain", an expression coined by the Brainwave Trust Aotearoa, a not-for-profit organisation working in the field of adolescent brain development.[32]

In his paper, Judge Becroft said some important things:[33]

> In recent years, a wealth of neurobiological data from studies of Western adolescents has emerged, suggesting that biological maturation of the brain begins (and continues) much later in life than was generally believed. Many neuroimaging studies mapping changes in specific regions of the brain have shown that the frontal lobes (which are responsible for "higher" functions such as planning, reasoning, judgement and impulse control) only fully mature well into the 20s (some

29 Cashmore, above, n 3. See also Kenny, above, n 26.
30 M Sexton, *Communicating with children and young people*, Speaking their Language Conference, Judicial College of Victoria, 19 October 2015 at p 4.
31 A Becroft, "'From little things, big things grow' — emerging youth justice themes in the South Pacific", Australasian Youth Justice Conference, 20 May 2013, Canberra.
32 See www.brainwave.org.nz, accessed 26 June 2018.
33 Becroft, above, n 32 p 5.

> even suggest that they are not fully developed until halfway through the third decade of life). Brain science research also shows that when a young person's emotions are aroused, or peers are present, the ability to impose regulatory control over risky behaviour is diminished.

Judge Becroft argues that these findings have implications for youth justice policy and will affect our perceptions of young people's culpability for their actions and the establishment of an appropriate age of criminal responsibility. He states:[34]

> They also affect our understanding of "what works" with young offenders and what our expectations should be with respect to various responses and interventions … Finally, they change any presumption that young people are simply "mini-adults" and that the same responses to offending should be used for both adults and young people …
>
> A key challenge for Australasian Courts is how to make use of this growing body of irrefutable research …
>
> It is a constant challenge for those involved in youth justice to keep learning more about adolescent brain development, and to take this into account.

In addition to Judge Becroft's paper, I was particularly attracted to the research undertaken by Richards in "What makes juvenile offenders different from adult offenders?" published by the Australian Institute of Criminology.[35]

The central theme of Richards's paper is that "most juveniles will 'grow out' of offending and adopt law-abiding lifestyles as they mature".[36]

The paper goes on to argue that a range of factors, including lack of maturity, the propensity to take risks and a susceptibility to peer influence, combined often with intellectual disability, mental illness and victimisation, operate to increase the risk of contact of juveniles with the criminal justice system.

These factors, combined with the unique capacity of juveniles to be rehabilitated can require intensive and often expensive interventions.

The paper postulates that crime is committed disproportionately by young people. Persons aged 15 to 19 years are more likely to be processed by police for the commission of a crime than are members of any population group. This does not mean, however, that juveniles are responsible for the majority of recorded crime.

On the contrary, police data indicates that 10 to 17 year olds comprise a minority of all offenders who come into contact with police. This is primarily because offending peaks in late adolescence, when young people are aged 18 to 19 years.

Thus, rates of offending peak in late adolescence and decline in early adulthood.

Although most juveniles grow out of crime, they do so at different rates. A small proportion of juveniles continue offending well into adulthood. This small "core" has repeated contact with the criminal justice system and is responsible for a disproportionate amount of crime.

The paper goes on to demonstrate that juveniles disproportionately commit certain types of offence (graffiti, vandalism, shoplifting and fare evasion).

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34 ibid, pp 5–6.

35 K Richards, "What makes juvenile offenders different from adult offenders?" (2011) 409 *Trends & issues in crime and criminal justice* 1 at https://aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html, accessed 3 April 2018.

36 ibid at 1.

Conversely, very serious offences (such as homicide and sexual offences) are less frequently committed by juveniles, as they are incompatible with developmental characteristics and life circumstances. On the whole, juveniles are more frequently apprehended in relation to offences against property than offences against the person. Juveniles are more likely than adults to come to the attention of police, for a variety of reasons, including:

- they are usually less experienced at committing offences
- they tend to commit offences in groups, and to commit their offences close to where they live
- they often commit offences in public areas, such as shopping centres, or on public transport.

Further, by comparison with adults, juveniles tend to commit offences that are attention seeking, public and gregarious, and episodic, unplanned and opportunistic.

In my view, it is our job to do our best to help juveniles through these problem years until they mature. In light of these advances in brain science and the implications these findings have for young offenders and their treatment in the criminal justice system, it is important to also consider a final reason why children must be treated differently.

There is a growing body of evidence that supports the proposition that incarceration of children and young persons is both less effective and more expensive, and doing away with juvenile incarceration will not increase the risk to the community.

Most young persons in the juvenile justice system can be adequately supervised in community-based programs or with individualised services without compromising public safety. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality. For example, Wald and Martinez assert that no experience is more predictive of future adult difficulty than confinement in a juvenile facility.[37]

Young people who go into custody mix with some other young people who are already deeply involved in criminal offending. Some will form friendships with more experienced offenders and be influenced to commit further offences as a result. This is often referred to as the "contamination" effect.

A further important consideration is the "inoculation" effect. If the young person goes into custody for a day and is then released, one of the outcomes is that some will conclude that being in custody wasn't all that bad, especially in comparison to their circumstances in the community.

If this happens on a few occasions, even for slightly longer periods of time, the deterrent effect of going into custody diminishes greatly.[38]

Children who have been incarcerated are more prone to further imprisonment. Recidivism studies in the United States show consistently that 50–70% of youths released from juvenile correctional facilities are re-arrested within 2–3 years.[39] Further, children who have been

37 M Wald and T Martinez, "Connected by 25: improving the life chances of the country's most vulnerable 14–24 year olds", William and Flora Hewlett Foundation Working Paper, 2003, at www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf, accessed 3 April 2018.

38 P Mulroney, "Illustrating the impact of bail refusal", a paper presented at the Reducing Indigenous youth incarceration conference, 27 September 2012, Sydney.

39 Justice Policy Institute, *The costs of confinement: why good juvenile justice policies make good fiscal sense*, 2009, Washington DC, at www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf, accessed 3 April 2018.

incarcerated achieve less educationally, work less and for lower wages, fail more frequently to form enduring families, and experience more chronic health problems (including addiction), than those who have not been confined.[40]

Baldwin asserts that confinement in a secure facility all but precludes healthy psychological and social development.[41] This view is further bolstered by the research findings that incarceration actually interrupts and delays the normal pattern of "aging out".[42]

Enlightened with these advances in the science of adolescent brain development, we are able to better understand, empower, protect, divert and rehabilitate children and young people falling into the youth justice system.

Conclusion

The Children's Court jurisdiction is a sensitive, specialised and complex jurisdiction. In NSW, the juvenile justice system is moving in the right direction, notwithstanding the oversimplification of juvenile offending through popular media reporting of young offending.

The NSW Bureau of Crime Statistics and Research (BOCSAR) reported on 30 January 2017 that the number of juveniles in custody in NSW has now fallen by 38%, from a peak of 405 detainees in June 2011 to 250 in December 2016.[43]

This rapid fall in the number of juveniles in custody reflects, I believe, the growing understanding of the impact of brain development on juvenile offending, and a shift in legal policy towards more effective methods of dealing with children and young people.

This is a positive step towards what I believe should be the ultimate aim of an enlightened juvenile justice system: to have no children in detention.

We can continue to strengthen and bolster the intersections of important areas, such as law, psychology and psychiatry, through meaningful collaboration and dialogue. In doing so, we move closer to the aim of no children in detention, and towards a more positive and empowering future for our children.

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40 See B Holman and J Ziedenberg, *The dangers of detention: the impact of incarcerating youth in detention and other secure facilities,* Justice Policy Institute, 2006, Washington DC, at www.justicepolicy.org/research/1978, accessed 3 April 2018; E Mulvey, *Highlights from pathways to desistence: a longitudinal study of serious adolescent offenders*, Juvenile Justice Fact Sheet, Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, 2011, Washington DC, at www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf, accessed 3 April 2018.

41 J Baldwin, *Juvenile justice reform: a blueprint,* Youth Transition Funders Group, 2012, Washington DC, p 4 at www.ytfg.org/wp-content/uploads/2015/02/Blueprint_JJReform.pdf, accessed 3 April 2018.

42 Holman and Ziedenberg, above n 35, p 6.

43 BOCSAR, "New South Wales Custody Statistics, Quarterly Update", December 2016, accessed 3 April 2018.

Still unseen and ignored: tracking community knowledge and attitudes about child abuse and child protection in Australia*

J Tucci† and J Mitchell‡

Introduction ..... [7-4000]

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Children are blamed for the behaviour of abusive adults

Child abuse still happens in someone else's neighborhood

More people than ever before turn away from the reality of child abuse

Reluctance to act leaves children unprotected

Lack of confidence is a key obstacle in protecting children

Long standing barriers to taking action to protect children from abuse continue to exist

There is common agreement about the categories of abuse and neglect which warrant further action

A significant proportion of adults continue to not recognise significant acts child abuse and neglect

A significant number of people have identified child abuse and neglect in the past five years

Many people feel sorrow, anger and powerlessness when they come face to face with child abuse

People are willing to act if resourced and supported to do so

When driven to act, it occurs quickly

A sense of responsibility and concern drives action for many

Taking action helps children

Confusion and uncertainty stops people taking action

There is significant impetus to prioritise the prevention of child abuse and the protection of children

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Discussion

Child abuse remains largely unseen and ignored

Children are left unprotected

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The community want and are prepared to do more

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Data availability statement

Ethics statement

Author contributions

Funding

Acknowledgments

Conflict of interest

Publisher's note

Supplementary material

References

In September 2003, the authors released the first results of a national community attitude tracking study about child abuse and child protection. At that time, they concluded that as a community, violence against children was tolerated. The community did not understand or appreciate the seriousness, size and cost of child abuse in Australia. There was evidence that child abuse was not viewed as an important challenge facing children in Australia. A second study conducted in 2006 found that nothing much had changed, indeed community engagement with the issue of child abuse may have even deteriorated. A third study in 2010 found that the community actively avoids the problem of child abuse, rating it less concerning than high petrol prices. In 2021, 18 years after the first report was published, we have concluded again that child abuse remains out of sight and out of mind as a community concern. This article describes the findings of this fourth iteration of our survey and analyses the implications for ensuring that individuals are more engaged and committed to taking action to preventing child abuse and/or protecting children from violation.

[7-4000] Introduction

Arguably, child abuse does not remain in community consciousness for very long. Durfee and Tilton-Durfee[1] noted that it took the publication of "The Battered Child Syndrome" by Kempe et al[2] to break a 102 year silence that followed the world first 1,860 study about fatal child abuse by French physician, Ambrose Tardieu.

1 M Durfee and D Tilton-Durfee, "Fatal child abuse and neglect", in *C Henry Kempe: a 50 year legacy to the field of child abuse and neglect*, R Krugman and J Korbin eds, Dordrecht: Springer, 2013.

2 C Kempe et al, "The battered-child syndrome" (1962) 181 *J Am Med Assoc* 143.

In his seminal work, Kempe wrote then that as a clinical condition in young children who experienced serious physical abuse from a caregiver:[3]

> it is a significant cause of childhood disability and death … yet there is reluctance on the part of many physicians to accept the radiologic signs as indications of repetitive trauma and possible abuse.

Kempe suggested that:[4]

> many physicians find it hard to believe that parents could have attacked their children and they attempt to obliterate such suspicions from their mind.

Four years later in 1966, Robert and John Birrell wrote the first paper to bring to light the extent to which children were being physically abused and neglected in Australia — a proportion of whom were killed as a result. As brothers and both pioneering doctors themselves, they prophetically argued then that:[5]

> one of the main reasons why the maltreatment syndrome is not well recognised is the general attitude of disbelief and incredulity that people would or could do such things to little children. The attitude is widespread, extending to housewife, doctor, lawyer, and even policeman. The hospital staff … tend often not to think of violence, particularly when faced by a neatly dressed and plausible husband or wife … Recognition of the "Battered Child Syndrome" is naturally the crux of any program of prevention.

Maintaining that terms missing in professional conceptualisation can lead to blind spots in practice, Durfee and Tilton-Durfee[6] found that child abuse was only formally added to the 1965 edition of Index Medicus — the most comprehensive bibliographic database of life science and biomedical science information of its time. It took another 5 years for the term infanticide — the killing of a child — to be included.

Of course, child abuse is not invisible. It is rendered so through the prevailing attitudes of the community. For this reason, it is critical to not only ascertain what these perceptions actually are, but also to understand if they change over time and how.

In 2003, we began what has become the longest running community-tracking research examining the attitudes and perceptions of adult Australians about child abuse and child protection. This paper presents an analysis of the fourth iteration in this series which has been running for almost two decades.[7]

It is not difficult to connect the ways that individuals view issues that affect the safety and wellbeing of children with their level of commitment to support efforts to prevent child abuse and protect children from violation. As such, the reduction of violence against children depends significantly on these views.

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3 ibid at 143.

4 ibid at 146.

5 R Birrell and J Birrell, "*The "maltreatment syndrome" in children*" (1966) 3 *Med J Aust* 1134 at 1137.

6 Durfee and Tilton-Durfee, above n 1.

7 J Tucci et al, *More action — less talk! Community responses to child abuse prevention*, Child Abuse and Family Violence Research Unit, Monash University and Australians Against Child Abuse, Melbourne, 2001; J Tucci et al, *Out of sight, out of mind: tracking Australian community attitudes about child abuse and child protection*, Australian Childhood Foundation and the National Research Centre for the Prevention of Child Abuse, Melbourne, 2006; J Tucci et al, *Doing nothing hurts children: community attitudes about child abuse and child protection in Australia*, Australian Childhood Foundation and Child Abuse Prevention Research Australia, Melbourne, 2010; J Tucci et al, *Tolerating violence towards children — community attitudes about child abuse and child protection*, Child Abuse and Family Violence Research Unit, Monash University and Australian Childhood Foundation, Melbourne, 2003.

Methodology

Aims

The key objectives of this research were to:

- assess the degree to which child abuse is considered a community concern
- gauge the accuracy of public knowledge about the extent, nature and impact of child abuse, and
- track community attitudes about the challenges facing children in relation to child abuse and child protection.

Survey method

An online survey of 1,009 adults aged 18 years and over in Australia was completed in November 2020 by EY Sweeney. A sample of 1,009 yields a high degree of statistical precision, with a margin of error of 3.1%. The margin of error is how likely it is that a result will differ from the "true" result (if everyone in Australia was surveyed). A maximum margin of error of 3.1 at a 95% confidence level means that for a survey result of a 50%, if the survey was repeated multiple times 95% of these times the survey result will be between 46.9–53.1%. Further to this, the data was weighted to the latest available ABS census statistics on state, gender and age to ensure a nationally representative sample.

A sample of telephone interviews was also conducted in order to compare key questions to historical results so as to calibrate the data if required given the shift from predominantly telephone surveying in 2009 to a predominantly online survey in 2020.

The composition and background of the sample are detailed in the Supplementary Tables A1–A5 in Supplementary Appendix A.[8]

Survey sample: critical findings

Child abuse remains unseen

In Table 1, the key findings mirror the results from the previous surveys in which unprompted recall for child abuse as a community concern remains low. It has shifted very little over the past 18 years. If anything, it has decreased since its peak in 2006.

As noted in Supplementary Appendix B (Supplementary Table B.1),[9] COVID-19 and related issues have understandably taken over as the primary concerns of adults in the community. It is hardly surprising given its scale and impact. In 2021, Tucci, Mitchell and Thomas reported the findings of a community survey that demonstrated there is no doubt that COVID-19 has led to an immediate and chronic fallout of negative effects on the mental health and wellbeing of children and parents across Australia.[10] A quarter of parents felt that they were failing their children and more than a third stated that they had lost confidence about their parenting.

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8 Information on the supplementary material can be found by clicking the link to "Supplementary Appendix A" then Download at www.frontiersin.org/articles/10.3389/fpsyg.2022.860212/full#S10.

9 ibid.

10 J Tucci et al, *A lasting legacy — the impact of COVID-19 on children and parents*, Australian Childhood Foundation, Melbourne, 2020.

Table 1

Key findings
Child abuse is rated thirteenth on a list of community issues
There were six times more people who had no concerns at all than there were people who were concerned about the problem of child abuse
Child abuse is rated less concerning than transport, traffic and roads
Community concern about child abuse has not changed since 2003
71% of respondents did not recall seeing or hearing any advertising or news related to child abuse or the protection of children in the past 12 months.

These problems emerged at exactly the time when parents noticed that their children needed more re-assurance and were experiencing signs of heightened stress such as eating and sleeping disturbances.

A third of parents felt isolated and left without adequate support. Almost 40% were worried that their own stress and mental health was adversely affecting the wellbeing of their children.

Concerningly, almost a third of parents were frightened that the impact of COVID-19 will have lasting mental health impacts for their children such as ongoing heightened anxiety and stress. One in five parents were concerned about their children's future social development and self-confidence.

Social distancing restrictions and lockdown measures have resulted in an overwhelming number of children experiencing a range of losses in their daily lives. The absence of their ability to play with friends during lockdown was acutely experienced by eight out of ten children. More than two-thirds of children missed their grandparents and extended family. The loss of face-to-face school and sporting activities was also significant for many children.

Given that their children were spending more time on their own in their room and using technology more, a substantial portion of parents were concerned about the safety of children online. A quarter of the parents surveyed were worried about how to best protect their children from online bullying. A third of parents were worried about how to keep their children from being abused or exploited when they are using the internet. They feel ill-equipped to know how to manage.

In the face of problems that are urgent and the subject of government, institutional and community responses (such as COVID-19, crime, economy, environment), child abuse languishes outside the consciousness of the vast majority of the population. Seven in ten of respondents could not remember seeing or hearing anything about child abuse in the media in the past 12 months. This was even more surprising given the ongoing media reports in the aftermath of the Royal Commission into Institutional Responses to Child Sexual Abuse in Australia[11] — a national formal inquiry which captured the public attention about the ways that children were systematically abused and exploited for decades within religious, sporting, out-of-home care and other organisations.[12]

11 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final report*, Commonwealth government of Australia, Canberra, ACT, 2017.

Interestingly, 6% of respondents were not worried about anything at all in their community. This confirms the results of previous studies that the community must be reminded of child abuse before any attention is paid to it.

The community is grossly uninformed about child abuse despite believing the issue to be well understood

Table 2

Key findings
7 in 10 respondents believed that child abuse was fairly well or very well recognised as a serious community problem
However, 56% were so poorly informed that they could not even hazard a guess at the number of reports of child abuse received last year in Australia
Of those willing to hazard a guess, almost all grossly under-estimated the number of reports, suggesting less than 10,000 reports were received in 2019–20 when the actual number was over 480,000
There is a lack of knowledge and confusion about which form of abuse occurs most frequently in Australia
When asked directly, 86% of respondents argued that the community still needs to better understand the extent and nature of child abuse in Australia.

The results presented in Table 2 show that, as a community, it is not surprising that adults want to feel that they understand such a critical issue as child abuse. Of course, people want children to be safe. This is reflected in the majority of respondents (70%) believing that child abuse was more than adequately recognised as a serious community problem. However, there appears to be a profound disconnect between what the community thinks it knows and what it actually does know about the true size and extent of child abuse as a community problem.

When asked to estimate the number of reports of child abuse made each year to child protection authorities, 56% were so poorly informed that they were unwilling to even hazard any sort of guess. Of the remaining 44% who were willing to give an answer, the vast majority (35%) perceived the number to be less than 10,000 — a small fraction of the real figure.

According to the Australian Institute of Health and Welfare (AIHW), there were 486,300 notifications of child abuse in 2019–2020.[13]

If the more conservative figure is used representing the total number of reports of child abuse that led to a direct investigation by child protective services, then the correct number was 183,300. In this instance only 3% of respondents in the survey were anywhere close to providing an accurate estimate.

Similarly, when asked to identify which forms of child abuse occurred most frequently in Australia, respondents identified sexual abuse and physical abuse to occur the most frequently with emotional abuse and neglect being the forms of abuse to occur least frequently

In reality, the opposite is true. According to the AIHW,[14] emotional abuse (54%) was the most common type of abuse or neglect substantiated through investigations in 2019–2020. This was followed by neglect (22%), physical abuse (14%), and sexual abuse (9%). This misconception

12 J Tucci and M Blom, "'These were terrible years. No love or kindness, no safety or warmth.' Reflections on the outcomes of the Royal Commission into Institutional Responses to Child Sexual Abuse in Australia" (2019) 20 *J Trauma Dissociation* 373.

13 AIHW, *Child Protection Australia 2019–20*, Canberra, ACT, 2021.

14 ibid.

is likely influenced by the media being a primary source of information for the community on the issue of child abuse. Media interest is more likely to report cases of serious physical and sexual violence toward children than other forms of abuse or neglect.

Children are still not trusted to tell the truth, leaving them in danger

Despite the overwhelming majority of respondents (85%) knowing the harmful implications of not believing a child's disclosures of abuse, this findings as reported here confirmed previous findings that two-thirds (67%) of respondents believe that children make up stories about being abused or are uncertain whether to believe children when they disclosed being abused. This remains a devastating result for children. It means that children really only have a one in three chance of finding an adult who will believe them if they tell them that they are being abused or violated. It is far more likely that children will not be believed or in fact perceived as lying.

Critically, three in four respondents seemed to understand that the experience of abuse was so compromising for children that they were not likely to disclose they were being hurt. Only one in four respondents believed that children will usually tell someone if they are being abused. With an understanding of how difficult it is to disclose abuse for children, it would appear to be even more important to believe children are telling the truth when they report to an adult.

Respondents understand both how difficult it is for children to disclose abuse and how devastating it can be for children to be perceived as not telling the truth and yet many continue to hold the view that children cannot be trusted.

These results provide an invaluable insight into why it is not surprising that the Royal Commission into Institutional Responses to Child Sexual Abuse found that:[15]

> Of survivors who told us about barriers to disclosure during their private session, more than one in five (22.6%) who said they had disclosed as an adult and more than a quarter (26.1%) who told us they disclosed in childhood said they had thought they would not be believed.

Nor, that they also reported that:

> Many victims do not disclose child sexual abuse until many years after the abuse occurred, often when they are well into adulthood. Survivors who spoke with us during a private session took, on average, 23.9 years to tell someone about the abuse and men often took longer to disclose than women (the average for females was 20.6 years and for males was 25.6 years).

These results are replicated around the world. Child USA (a think tank on child protection) also found that:[16]

> While it may seem intuitive that a survivor would disclose abuse when it happened, data reveals a different reality. In a study of over 1,000 survivors, the average age at the time of reporting child sex abuse was about 52 years.

Children continue to face many barriers that prevent disclosure. They often lack the knowledge needed to recognise and understand abuse, lack the ability and language to articulate that they have been abused, do not have an adult they can disclose their abuse to, do not have opportunities to disclose abuse, and ultimately are not believed when they try to disclose. Most disclosures fail to reach individuals who can report the situation and stop the perpetrator. Research shows that, when child victims do disclose, a large percentage of the disclosures are to peers instead of parents or authority figures.

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15 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final report*, above n 11.

16 Child USA, *Delayed disclosure: a factsheet based on cutting edge research on child sexual abuse*, Philadelphia, PA, 2020.

Brattfjell and Flam have argued that disclosures are more a process than a single event involving:[17]

> telling through direct and indirect hints and signs, decisions to tell, re-decisions and delaying, or withholding until adulthood, and the dependency on trusted confidants who ask and listen for final disclosure to occur.

Rather than occurring in a single moment, the process of disclosure means that the truth can take decades to finally emerge. The experience for adult survivors of abuse often replicates their experience as children. They are asked questions which cast doubt on their story. They are interrogated as to why it has taken so long to come forward. They are threatened and their integrity is impugned.

After almost two decades in which there has been no shift in the prevailing attitude that children lie about their experience of abuse, it is time for a concerted community effort to change this collective mindset and trust children's truth about their own violation.

Children are blamed for the behaviour of abusive adults

There remain many pervasive beliefs that form the basis for dismissing or minimising the true scale and impact of child abuse: Table 3. A small but significant proportion of respondents believed that children are responsible for their own abuse. It reflects the continued victim blaming of children and young people in relation to their experiences of violence. For example, it is akin to the damaging cultural myth that women who "dress or behave provocatively are asking to be assaulted".[18] In what caused a furore at the time, the then Governor General of Australia, Dr Peter Hollingworth publicly blamed a 15-year-old, young woman for being sexually exploited claiming that it was "not sex abuse" by a priest, but "rather the other way round".[19]

Table 3

Key findings
1 in 6 respondents believed that sometimes children are responsible for the abuse they receive from others
1 in 6 respondents believe that an adult should not be blamed for abusing a child if they get so angry that they lose control
14% of respondents were uncertain or did not believe that parents who have physically abused and caused injuries to their child should be charged by the police
11% of respondents were uncertain or did not believe that a parent who punches a child is committing physical abuse

This belief shifts responsibility away from the perpetrator of the violence and onto the victim. It is further reinforced by the finding that one in six of the respondents believed that adults should not be blamed for abusing a child if they get so angry that they lose control. In these circumstances, the adult's behaviour is positioned as normal and legitimate — something that everyone can understand and hence condone. Similarly, 14% of respondents did not believe that

17 M Brattfjell and A Flam, "'They were the ones that saw me and listened.' From child sexual abuse to disclosure: adults' recalls of the process towards final disclosure" (2019) 89 *Child Abuse Negl* 225.

18 CASA Forum, *What are the myths and facts about sexual assault?*, Melbourne, Vic, 2014.

19 J Robertson, "Child sex abuse victim says Anglican Church fobbed her off, then offered payout in exchange for silence", *ABC News*, 10 March 2020, at www.abc.net.au/news/2020-03-10/abuse-survivor-beth-heinrich-anglican-church-qld/12039190, accessed 9 November 2022.

parents should be held accountable if they physically assaulted and caused injuries to their child. A further 11% of respondents were uncertain or did not believe that a parent who punches a child is committing physical abuse. It is clear from these findings that children are afforded less protection from violence than adults. An adult who punched another adult would been deemed to have committed an assault. Indeed, the devastating consequences of "one punch" attacks have been the subject of significant community outcry and widely reported on in the media.

There is still an unwillingness to re-examine the personal behaviour of adults. Despite significant support for adults to recognise that their children's safety relies on them, a strong undercurrent of discriminating against victims and responsibility shifting still exists.

Child abuse still happens in someone else's neighborhood

Echoing results from the previous three studies, there is still confusion about the characteristics of the perpetrators of child abuse: Table 4. This misunderstanding speaks directly to long held myths associated with child abuse. In particular, that child abuse only occurs in poor households with uneducated parents. There is still a belief that children are most commonly abused by strangers rather than individuals known to the child and more than likely a member of his/her family.

Continuing to believe in the myth of stranger danger and the view that child abuse occurs as a result of poverty reinforces the community's tendency to locate the problem outside of families like their own, in neighborhoods that are different to their own. In so doing, it facilitates a harmful collective perception that reduces the urgency to protect children or take personal responsibility to do anything about it. Clearly, almost one in three of respondents did not believe that child abuse is a problem which affects them directly. This theme is replicated across a range of findings in the analysis section of this article. However messaging about the risks to children of exploitation online appear to be resonating with the community.

Table 4

Key findings
Almost 1 in 5 respondents were believed that children were abused by strangers rather than people known to them
13% of respondents believed that child abuse only happens in poor or disadvantaged families
3 in 10 respondents did not believe that child abuse is a social problem of direct concern to them
62% of respondents were worried about the possibility of their children being abused by someone they don't know
69% of respondents were worried about the possibility of their children being abused and exploited online

More people than ever before turn away from the reality of child abuse

The community is overwhelmed by the issue of child abuse. It is disheartening, confronting and stressful for many. It reflects the reality of the ongoing threat and danger that face children and young people every day. With such intensity involved in the reaction to child abuse for adults, it is no wonder that they prefer to turn away from it and to an extent deny the seriousness of its scale and effects for children, families and the community more broadly.

Reluctance to act leaves children unprotected

As noted in, a small but significant proportion of adults are reluctant to take action to protect children from being abused even if they were certain of the facts. Children require adults to act protectively in order for them to be safe from abuse. Adults in the community are the

early responders for children who are at risk of being abused. Yet, if these responders do not believe children or fail to take action, children remain without the backup they urgently require. Messaging from many governments across Australia that child abuse is everybody's responsibility are falling short.

Lack of confidence is a key obstacle in protecting children

Many respondents identified their own lack of confidence in recognising the signs of abuse and knowing what they needed to do to take action to protect children. This lack of confidence has not changed at all in the past decade with almost identical results being identified in the 2009 study. Knowledge, confidence and skills are core elements of community capability.

Without these qualities, the community is not able to stand up for children, leaving them arguably in danger.

Long standing barriers to taking action to protect children from abuse continue to exist

As highlighted by the findings in Table 5, there are persistent barriers acting to restrain individuals from taking action to protect children. Getting it wrong and falsely accusing parents of abuse is at the top of this list. A lack of confidence about what to do was identified again in this list. Fear for their own safety if they take action is significant. However, some are rhetorical beliefs that can be used to justify a lack of action. For example, believing that authorities will not be able to help or not wanting to get involved represent a different kind of barrier which reflects attitudinal positioning aimed at softening the unwillingness of the individual to not follow through with the information they have. This is not uncommon, there are broader discursive themes which are implicated in this lack of action, such as the sanctity of the family unit, the dissonance between the individual and society ownership of social problems, the myth that if it is serious enough someone else will take action.

There is the need to actively address each of these barriers with community education. Without concerted effort to change, it is likely that these barriers will continue as they have for at least the last two decades.

Table 5

Barriers	Percentage
I may feel unsure the abuse was actually taking place	30%
I may not know what the right thing to do is	21%
I don't know who to contact to help abused or neglected children	9%
I worry that I might make a false allegation of abuse	32%
I may feel it was not my responsibility to do something	11%
I may not want to get involved	16%
I may have fears for my own safety if I do something	24%
I may be worried the family involved might be broken up	17%
I don't think the authorities would be able to help	11%
None	14%
Don't know/No answer	7%

There is common agreement about the categories of abuse and neglect which warrant further action

When faced with some scenarios there appears to be general consensus about them constituting abuse or neglect: Table 6. This is important because the threshold to have child protection to become involved and investigate reports or offer support to children is a contentious debate. The threshold itself is never articulated or defined. It is often reported that community standards differ according to range of factors, including cultural background of reporters, their qualifications, their experience in reporting previously.

However, these results also suggest that there is greater consensus for some scenarios than others. The exercise of seeking feedback from the community about what constitutes abuse and neglect is a potential innovation that can be used by child protection authorities to determine the circumstances when they should become involved.

Table 6

Key findings
81% of respondents believed that a 4-year-old child wandering the streets unsupervised is a form of neglect
78% of respondents believed that a child who knocks on your door asking for food, saying there is no food in their house and they are hungry is suffering from neglect
91% of respondents believed that a teacher who texts a 14 year old asking him/her to meet to have sex is sexual abuse or grooming
79% of respondents believed that a child who goes to school regularly without lunch is being neglected
64% of respondents believed that a parent who regularly leaves an 11 year old to look after a 6 year old is being neglectful
79% of respondents believed that a child being cared for by a parent who has a serious drug habit is at risk of neglect
80% of respondents believed that an 8 year old being locked outside the house for 1 hour as punishment is at risk of neglect or emotional abuse
74% of respondents believed that a baby regularly left to cry for more than an hour at a time is at risk of neglect or emotional abuse
72% of respondents believed that a parent constantly yells at a child is causing emotional or psychological abuse

A significant proportion of adults continue to not recognise significant acts child abuse and neglect

There is virtually no change in the number of respondents who had difficulty in recognising clear examples of at risk or abusive situations for children. The lack of consensus on these sorts of adverse childhood experiences represents a significant barrier to taking action to protect children in these sorts of circumstances: Table 7.

Table 7

Key findings
12% of respondents were uncertain or did not believe that a 14 year old having sex with a 25 year old adult is sexual abuse
28% of respondents were uncertain or did not believe that 15 year old having sex with an 18 year old adult is sexual abuse

Key findings
10% of respondents were uncertain or did not believe that a child or teenager who is manipulated into sending a naked or semi-naked photo of themselves to an adult is being subject to grooming or sexual abuse/exploitation
12% of respondents were uncertain or did not believe that a parent who downloads photos and videos of children being sexually abused is a form of child abuse or exploitation
11% of respondents were uncertain or did not believe a public transport employee who secretly records or photographs up children and teenagers' dresses was a form of sexual abuse
19% of respondents were uncertain or did not believe a 4 year old child wandering the streets unsupervised is a form of neglect

A significant number of people have identified child abuse and neglect in the past five years

In 2009, 26% of respondents had identified a child or young person who had been abused or neglected in the past five years. The findings in Table 8 suggest even more people are identifying abuse. In the earlier survey it was not possible to undertake a detailed analysis of the kind of violation to which children had been subjected. In this study, a new set of questions were asked to specifically understand the nature of the abuse that respondents had identified.

The results in Table 8 suggest that there are significant numbers of incidents of child abuse and neglect that respondents have come across in the course of their daily lives.

Table 8

Key findings
38% of respondents had witnessed a child or teenager being humiliated or criticised by an adult family member over the past 5 years
22% of respondents had witnessed a child or teenager being physically abused by an adult family member over the past 5 years
23% of respondents had heard someone make sexually suggestive comments or jokes about a child or teenager over the past 5 years
18% of respondents had had a child or teenager disclosed that they were being abused or hurt by an adult over the past 5 years
30% of respondents knew of a child or teenager who was living with family violence at home over the past 5 years
30% of respondents suspected a child or teenager was experiencing abuse over the past 5 years
18% of respondents knew of a child or teenager who had experienced sexual abuse or exploitation online over the past 5 years

Many people feel sorrow, anger and powerlessness when they come face to face with child abuse

The initial reactions of respondents who identified children who had been abused or neglected are listed in the above table. These offer a more detailed insight into the drivers of adult behaviour in relation to taking action to protect vulnerable and at risk children.

The findings presented in Table 9 paint a picture of the anger, shock, sorrow, frustration, and powerlessness experienced by adults who become aware a child is being abused. In many ways these feelings mirror the experiences of the very children who are suffering the abuse and

neglect. Clearly, there is a need to empower the community in relation to taking action when they become aware that a child is being abused rather than them continuing to feel impotent and a hostage to the problem.

Table 9

Reaction to the becoming aware of the problem for the child	percentage
Uncertain about what to do	13%
Shocked	13%
Sorry for the child	18%
Angry about the situation	24%
Frustrated I was unable to help	18%
Guilty for not helping	8%
Don't know/ No answer	7%
Total	**100%**

People are willing to act if resourced and supported to do so

The action that each adult took after identifying the abuse and neglect is described in Table 10. In this question, respondents may have indicated that they took more than one action.

Of most concern is the one in six that did nothing to protect children they were worried about. This leaves many children in real danger.

Importantly, the results also showed that 83% took some form of action. Thirty percent of respondents took direct action that could have led to the protection of the child by reporting it to statutory child protection authorities and/or the police. Other responses were less direct and involved seeking advice from trusted others in the community or discussing concerns with the parent. Surprisingly, one in four of respondents took the step of talking about the concerns directly with the child, possibly before deciding what to do next. One in six raised the issue directly with the person who was suspected of being the perpetrator of the abuse. With nearly one-third of respondents talking to trusted people within their own informal networks, the need to equip the community with knowledge and empower them to take action is again demonstrated in these findings.

Table 10

Action taken by respondents in response to their concerns	percentage
Discussed my concerns with a family member/friend to get their advice	30%
Talked to the child who was the subject of the concerned	26%
Discussed my concerns with a professional (eg, teacher, doctor, social worker)	22%
Talked to the person who was harming the child	17%
Reported concerns to child protection authorities	16%
Reported concerns to the police	14%

Action taken by respondents in response to their concerns	percentage
Phoned a helpline for advice	14%
Did nothing	17%
Other	6%

When driven to act, it occurs quickly

The time taken for individuals to take action is set out in Table 11. Of those who took any action, almost a third responded immediately. A further 32% responded within a week. One in 10 (11%) took more than a month and some over a year. These results highlight that individuals who are motivated to take action will do so quickly and decisively.

Table 11

Period of time before respondent took action after being concerned about the child	percentage
Same day	34%
Within a week	32%
Within a month	14%
More than a month but less than 6 months	5%
Between 6 and12 months	1%
1 year or more	5%
Total	**100%**

A sense of responsibility and concern drives action for many

The main motivation for taking action is listed in Table 12. In this question, respondents may have indicated more than one reason for taking action.

Individuals engaged with their own commitment to the child or their social responsibility, as adults, to protect children. Some saw that their action would lead to the whole family receiving assistance. For others, it was the thought that they had to act because they were the last resort for the child in question. A small proportion of respondents were compelled to act as a way of avoiding feeling regret later if the child continued to be harmed.

Table 12

Main reason for taking action	percentage
I acted on my gut instinct and knew I had to do something	25%
I felt it was my personal responsibility to do something	28%
I didn't think anyone else would take action	16%
I thought the situation was serious and needed immediate action	19%
It's part of my job to protect children	16%
I didn't want to have regrets later about not doing something at the time	20%

Main reason for taking action	percentage
I cared about the child concerned	35%
I was worried about the long-term consequences for the child if I didn't do something	33%
I thought the family was under stress and needed help	14%
Don't know/No answer	4%

Taking action helps children

As noted in Table 13, for those that did take action, over half (55%) believed their intervention resulted in improved safety for the child. Smaller proportions of respondents did not know about the impact of their actions or believed that the safety of the child has been further compromised by their involvement.

Table 13

Outcomes of action taken by respondents	percentage
Made things much better	22%
Made things a little better	33%
Made no difference at all	15%
Made things worse	5%
Don't know if it made a difference	25%
Total	**100%**

Confusion and uncertainty stops people taking action

One in six (17%) of respondents stated they took no action at all. The main reasons for not taking action, despite being concerned about the possibility of a child being abused, are described in Table 14. In this question, respondents may have indicated more than one reason for not taking action.

A quarter of the respondents who did not take action were uncertain about whether or not the abuse was actually taking place. A much smaller proportion (6%) followed the advice of another person to take no action. A significant proportion (17%) identified legitimate concerns about their personal safety as a reason for not taking action.

However, the remaining reasons for not taking action reflected a number of critical barriers that are derived from an active avoidance of the problem of child abuse. These include not wanting to become involved, not knowing what steps to take and fearing that intervention would make the situation worse for the child.

Table 14

Main reason for not taking action	percentage
I was unsure the abuse was actually taking place	24%
I didn't know what was the right thing to do	22%
I didn't know who to contact to help the child	6%

Main reason for not taking action	percentage
I was worried that I might make a false allegation of abuse	25%
I didn't think it was my responsibility to do something	5%
I didn't want to get involved	24%
I had fears for my own safety if I did something	17%
I was worried the family involved might be broken up	15%
I didn't think the authorities would be able to help	3%
Someone I spoke to about the situation advised me not to do anything further	6%
No, none	5%
Other	19%
Don't know/No answer	9%

There is significant impetus to prioritise the prevention of child abuse and the protection of children

As noted in Table 15, there is strong recognition that inadequate investment in strategies to reduce the extent of child abuse will lead to severe consequences for the community. It follows that there is also a high degree of interest to be better informed and more actively involved in efforts to prevent child abuse.

Table 15

Key findings
75% of respondents believed that there is a need for national campaigns to raise awareness of child abuse and the need to protect children from child abuse
45% of respondents would be prepared to become actively involved to support a campaign or event(s) that helped the community know how to recognise child abuse and be more confident to act
85% of respondents believed that if we do not prevent child abuse now, the long term consequences for the community are enormous
80% of respondents argued that more money should be invested in protecting children from child abuse and neglect

Discussion

Child abuse remains largely unseen and ignored

Birrell and Birrell[20] had to fight community disbelief and professional skepticism to raise public alarm about the impact and scale of child abuse in Australia.

In a follow up to their original paper, Birrell and Birrell[21] wrote that it was clear that:[22]

> our community, despite some understanding of the problem, still has a long distance to travel in the recognition of this problem …

20 Birrell and Birrell, above n 5.
21 R Birrell and J Birrell, The maltreatment syndrome in children: a hospital survey (1968) 2 *Med J Aust* 1023.
22 ibid at 1028.

Over five decades later, the results of the current study suggest that there is still a gulf between the reality of child abuse as a societal problem and sufficient community appreciation of it.

In September 2003, we released the first results of a national community attitude tracking study about child abuse and child protection.[23] At that time, we argued that as a community, violence against children was tolerated. The community did not understand or appreciate the seriousness, size and cost of child abuse in Australia. There was evidence that child abuse was not viewed as an important challenge facing children in Australia. A second study conducted in 2006[24] found that nothing much had changed, indeed community engagement with the issue of child abuse may have even deteriorated. A third study in 2010 found that the community actively avoids the problem of child abuse rating it less concerning than high petrol prices.

In 2021, 18 years after the first report was published, we have concluded again that child abuse remains largely unseen and ignored as a community concern. The results are virtually identical to those found over the past three earlier studies. In 2021, child abuse rates lower than problems with public transport and roads on a list of community concerns. In 2021, seven in 10 of respondents could not remember seeing or hearing anything about child abuse in the media in the past 12 months.

In 2006, 43% respondents felt so poorly informed on the issue so as to be unable to guess at the number of reported cases of child abuse, whilst those prepared to estimate, significantly underestimated the problem. In 2021, 56% were so poorly informed that they could not even hazard a guess at the number of reports of child abuse were received last year in Australia. This is an 13% increase over that time.

In 2003, the community was extremely ambivalent about trusting children. Thirty-five (35%) percent of respondents would not believe children's stories about being abused. In 2006, 31% of respondents stated that they would not believe children's stories about being abused. In 2021, 32% of respondents believed that children can make up stories about being abused.

In 2003, just over one in three respondents did not believe that child abuse was a problem that they needed to be personally concerned about. In 2021, the result was exactly the same.

In 2010, one in six of respondents did nothing when faced with a child they believed was being abused. In 2021, the result was exactly the same.

In 2006, additional concerns came to light for the first time. For example, one in five of respondents in the survey lacked the confidence to know what to do if they suspected that a child was being abused. In 2021, one in five (22%) were not confident about knowing what to do if they suspected that a child was being abused or neglected. In addition, one in four (27%) were not confident of being able to recognise that a child was being abused or neglected.

The community lacks all of the building blocks required to prevent child abuse and adequately act to protect them from abuse and neglect. They are not aware of the true scale and impact of child abuse. They do not believe that it is as widespread as it really is. They have a shallow understanding of how it is defined, what its components are, how it develops or the level of risk that children and young people face in their own homes. They lack confidence about when, what and why they should take action when exposed to information that children

23 Tucci et al, *Tolerating violence towards children — community attitudes about child abuse and child protection*, above n 7.

24 Tucci et al, *Out of sight, out of mind: tracking Australian community attitudes about child abuse and child protection*, above n 7.

are being abused and neglected. There are still prevailing attitudes that stop them from stepping up to keep children safe. These attitudes have been there for at least 18 years and they have not changed.

Children are left unprotected

There is still significant proportion of adults who do not perceive that taking action to protect children from abuse is their responsibility. They continue to be influenced by powerful and inaccurate myths and beliefs such as:

- children lie when they disclose abuse
- child abuse only happens in poor or disadvantaged families
- outsiders should not interfere into the private lives of families, and
- children are to blame for the abusive behaviour of adults and are somehow therefore less deserving of our protection.

These mindsets shape the behaviour of many adults. It makes them more susceptible to perceiving why they should not take action to protect children. For example, respondents who had become aware of a child who was being abused in the past five years identified not knowing the right thing to do, being worried that they would be accused of making a false allegation and not carrying any responsibility to act as key reasons for doing nothing.

Such biases are inherently connected to broader themes that are reinforced by the reporting in the media.[25] These include the perception that:

- children will always be abused, it is part of human nature
- systems are not working so there is little we can do that will make a difference
- there is no sense of community anymore, so why should we bother, the best I can do is to look after me and my loved ones
- child abuse does not touch my life directly, I do not need to be worried about it, and
- perpetrators are really cunning, they have been getting away with abusing children for years, not even the police can stop them.

Each of these examples highlight how disempowering prevailing narratives are for adults who may be motivated to act in the best interests of children but end up being overwhelmed by the sheer weight of obstacles that they perceive to be in their way.

At every turn, each of these themes increases the uncertainty that adults experience as they determine how to evaluate the information they have about a child and ultimately how they choose to act. The greater the uncertainty, the greater the likelihood of inertia and in turn the higher the likelihood that children are left unprotected.

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25 FrameWorks Institute, *How the news frames child maltreatment: unintended consequences. Two cognitive obstacles to preventing child abuse: the "other-mind" mistake and the "family bubble"*, FrameWorks Institute, Washington, DC, 2003; FrameWorks Institute, *Making the public case for child abuse and neglect prevention: a FrameWorks message memo*, FrameWorks Institute, Washington, DC, 2004; FrameWorks Institute, *Framing child abuse and neglect: effects of early childhood development experimental research*, FrameWorks Institute, Washington, DC, 2009; FrameWorks Institute, *Communicating connections: framing the relationship between social drivers, early adversity, and child neglect*, FrameWorks Institute, London, 2015.

It is only when adults engage with their sense of social responsibility that they act. This is a finding that has been replicated elsewhere.[26] In this study, respondents cited the following reasons as being the main motivations behind their decision to actively intervene to protect a child they knew was being abused or neglected:

- I knew I had to do something
- I felt it was my personal responsibility to do something
- I didn't think anyone else would take action
- It's part of my job to protect children, and
- I didn't want to have regrets later about not doing something at the time.

These are the clearest results to date in favor of a strong and detailed community education campaign that builds the case for why, how and when adults need to act to keep children safe from abuse.

The community is turning away and ill-informed

Over the past decade, it appears the community is finding it more and more difficult to face up to the reality of child abuse with increasing numbers reporting they find talking about child abuse tense and difficult and that they cannot bear to see images of children who have been hurt or neglected.

In this survey, 44% of respondents reported feeling tense and anxious when they take part in a conversation about child abuse. This is an increase of 16% since 2010 when the last study in this series was undertaken. In addition, 71% of respondents reported that they cannot bear to look at pictures of children in the media who have been hurt or neglected. This is an increase of 12% since 2010 when the last study in this series was undertaken.

Perhaps due to ongoing stress directly arising from COVID-19 and the fatigue of the ongoing consequences for the community broadly,[27] more people than ever before find it hard to stay engaged with the intensity of the reality faced by so many children who are being abused or neglected. It is as if when there is community-wide danger, the risks to children need to be pushed even further away from individual and community awareness. It is a threat that is just too much to handle. It acts to make the world feel so much vulnerable at a time when uncertainty is so prevalent.

The end result is that individuals turn away from the reality of child abuse because they find the pain suffered by children intolerable. It is inevitable that a problem that the community is forced to hide from is a problem that stays in the shadows and away from active engagement and efforts to resolve. Looking away is easier than looking into the eyes of children who have been hurt and traumatised by the very adults who are supposed to care and nurture them.

All social movements that result in collective and effective common action commence with the realisation of the crisis that is occurring and the way that such escalating problems

26 FrameWorks Institute, *Making the public case for child abuse and neglect prevention: a FrameWorks message memo*, ibid; FrameWorks Institute, *Framing child abuse and neglect: effects of early childhood development experimental research*, ibid; FrameWorks Institute, *Communicating connections: framing the relationship between social drivers, early adversity, and child neglect*, ibid; NAPCAN, *"Help Break Down the Wall" — Community Attitudes Survey*, Sydney, NSW, 2010.

27 Tucci et al, *A lasting legacy — the impact of COVID-19 on children and parents*, above n 10.

affects each person in the community. Concerted action about the environment has required the collaboration of different sectors of the community playing a role to prove the existential threat it represented to the current and future generations. It requires uncomfortable truths to be realised and accepted. This is still not the case for child abuse. Its long term ramifications have been proven by the weight of scientific evidence.[28]

The cost to the community has been estimated in the billions of dollars.[29] It is at the core of downstream social consequences such as poor health, unemployment, mental illness, addiction, suicide, and more.

Yet, despite efforts to the contrary, child abuse appears to remain, at its most basic level, a topic that sits on the periphery of community consciousness.

Clearly, the results of this survey show that many people feel sorrow, anger, and powerlessness when they come face to face with child abuse in their own families and communities. They are shocked, feel sorry for the child, experience anger that children are being hurt and frustrated or guilty at not being able to help the child.

The act of turning away from it prevents the community from learning what it needs to know in order to be empowered enough to act to prevent it in the first place. The results demonstrated that nine out of ten people acknowledge that in its effort to buffer the pain that children suffer, the community stays uninformed about the real extent and nature of the problem of child abuse in Australia.

The community want and are prepared to do more

There is hope still in these results. Three quarters of respondents supported the need for a national campaign to raise awareness of child abuse and how the community can act more protectively toward children. Just under half of respondents would be prepared to become actively involved to support a campaign that helped the community know how to recognise child abuse and be more confident to act. Over eight out of ten respondents believed that if there was inadequate action taken to prevent child abuse now, the long term consequences for the community are enormous.

Changing the story

For almost 40 years, raising public awareness of child abuse through mass media campaigns has been widely recognised as an effective primary prevention strategy.[30]

King,[31] for example, suggested that public awareness campaigns be focussed on promoting debate about the notions of childhood which provide an opportunity for society to consider

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28 J Tucci et al, "The need for a new paradigm in the care and support of children in foster, relative and adoptive care" in *The handbook of therapeutic care for children — evidence informed approaches to working with traumatised children and adolescents in foster, kinship and adoptive care*, J Mitchell, J Tucci, and E Tronick eds, Jessica Kingsley, London, 2019.

29 P Taylor et al, *The cost of child abuse in Australia*, Australian Childhood Foundation, Child Abuse Prevention Research Australia and Access Economics, Melbourne, 2008; M McCarthy et al, "The lifetime economic and social costs of child maltreatment in Australia" (2016) 71 *Child Youth Serv Rev* 217.

30 D Daro, *Confronting child abuse — research for effective program design*, Free Press, New York, 1988; D Daro and R Gelles," Public attitudes and behaviours with respect to child abuse prevention" (1992) 9 *J Interpers Violence* 23; New South Wales Child Protection Council, *A review of the literature in the effectiveness of child abuse prevention programs*, NSW Child Protection Council, Sydney, NSW, 1995; D Jernigan and P Wright, "Media advocacy: lessons from community experiences" (1996) 17 *J Public Health Policy* 306.

31 M King, *A better world for children? Explorations in morality and authority*, Routledge, London, 1997.

what is and is not in the interests of children. Rayner[32] argued that the prevention of child abuse was predicated on creating and maintaining a "non-abusive" society and a healthy family environment in which children's rights to safety and security are respected and optimised. Similarly, the New South Wales Child Protection Council[33] proposed that the promotion of a "child friendly society" was the cornerstone of the prevention of child abuse.

The need for public awareness and community education campaigns to tackle abuse and neglect of children in Australia is well documented with significant consensus on the need for these programs to be multi-faceted and utilise a range of communication strategies.[34]

We need to support education with national legislation. Current laws in relation to child abuse differ markedly from state to state in Australia. These differences contribute to the confusion about how to define, identify and respond to child abuse.

Community attitudes can be changed if the public has access to a clear and unequivocal framework for understanding the issue of child abuse. We need national uniform laws which set out standards for defining, identifying, reporting and investigating cases of child abuse, family violence and neglect.

That is why all levels of government need to commit to resourcing sustained public education campaigns aimed at engaging the community in the protection of children from abuse. Increasingly, there has been significant public investment in the past five years in using community education campaigns to address gender inequality as the upstream factor leading to family violence.[35] This has not translated into similar resourcing of campaigns in relation to child abuse prevention.

Importantly, State and Commonwealth Governments need to urgently co-operate to develop and implement uniform national child abuse and child protection legislation.

And finally, individuals need to find within themselves the commitment to listen to and believe children, especially in relation to child abuse and family violence.

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32 M Rayner, *The Commonwealth's role in preventing child abuse*, Australian Institute of Family Studies, Melbourne, 1995.

33 New South Wales Child Protection Council, *A framework for building a child-friendly society*, New South Wales Child Protection Council, Sydney, NSW, 1997.

34 National Child Protection Council, *Preventing child abuse — a national strategy*, Australian Government, Canberra, ACT, 1995; A Tomison and H McGurk, *Preventing child abuse: a discussion paper for the South Australian Department of Family Services*, Australian Institute of Family Studies, Melbourne, 1996; New South Wales Child Protection Council, *A framework for building a child-friendly society*, New South Wales Child Protection Council, Sydney, NSW, 1997; J Tucci, C Goddard, B Saunders, and J Stanley, *Agenda for change: solutions to problems in Australian child protection systems*, Australians Against Child Abuse and Child Abuse and Family Violence Research Unit, Monash University, Melbourne, 1998; J Tucci et al, *More action — less talk! Community responses to child abuse prevention*, above n 7; J Tucci et al, *Doing nothing hurts children: community attitudes about child abuse and child protection in Australia*, above n 7; J Tucci et al, *Out of sight, out of mind: tracking Australian community attitudes about child abuse and child protection*, above n 7; J Tucci et al, *Tolerating violence towards children — community attitudes about child abuse and child protection*, Child Abuse and Family Violence Research Unit, Monash University and Australian Childhood Foundation, Melbourne, 2003; N Repucci et al, "Social, community and preventative intervention" (1999) 50 *Annu Rev Psychol* 387.

35 Our Watch, "Record federal funding announced for Our Watch, as prevention prioritised for all Australians", 2022 at www.ourwatch.org.au/resource/record-federal-funding-announced-for-our-watch, accessed 9 November 2022.

Conclusion

> statistics paint a horrendous picture of an Australian childhood stolen by trauma, abuse and violence. It is unquestionably one of the most pressing and critical social problems …[36]

In 2021, child abuse remains unseen and largely ignored in particular in the face of so many other issues facing the community. As this survey was conducted during a worldwide pandemic, so were earlier studies conducted at times of significant worldwide and national problems, such as the risks of terrorism.

Children cannot afford competing demands for community attention to detract from their fundamental entitlements to safety, love and care. The reality of the other challenges confronting the community is not a reason to do nothing. The most vulnerable and at risk children cannot be left to wait whilst larger problems are addressed. The problem does not go away if we choose to turn away from it. Difficult challenges facing the community require strong leadership, an understanding of where the community is up to in its understanding and what it needs to be more empowered. The results of this survey have again mapped the challenges faced by vulnerable, frightened and unprotected children and young people in the community. They have not changed, if anything the problems they experience are further compounded.

Data availability statement

The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Ethics statement

Ethical review and approval was not required for the study on human participants in accordance with the local legislation and institutional requirements. The patients/participants provided their written informed consent to participate in this study.

Author contributions

Both authors listed have made a substantial, direct, and intellectual contribution to the work, and approved it for publication.

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Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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36 Tucci et al, *Out of sight, out of mind: tracking Australian community attitudes about child abuse and child protection*, above n 7.

37 J Tucci and J Mitchell, *Still unseen and ignored: tracking community knowledge and attitudes about child abuse and child protection in Australia*, Australian Childhood Foundation, Melbourne, 2021, at www.childhood.org.au/app/uploads/2021/08/Still-unseen-and-ignored-report-FINAL-REPORT-17aug21.pdf.

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Supplementary material

The supplementary material for this article can be found online at: www.frontiersin.org/articles/10.3389/fpsyg.2022.860212/full#supplementary-material.[38]

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38 Information on the supplementary material can be found by clicking the link to "Supplementary Appendix A", then Download at www.frontiersin.org/articles/10.3389/fpsyg.2022.860212/full#S10.

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Parenting in a new environment: implications for raising Sub-Saharan African children within the Australian child protection context*

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Introduction ..... [7-5000]

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Appendix 1: Methodology

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References

[7-5000] Introduction

The number of international migrants increased from 155 million in 2000 to 258 million in 2017, and people of African descent made up about 13.95% (36 million) of that population.[1] Figures

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1 United Nations, *World Migration Report 2018*, 2017, at https://publications.iom.int/system/files/pdf/wmr_2018_en.pdf accessed 16 November 2022.

for Oceania — Australia and New Zealand — also show a significant surge in the number of African migrants, especially people from Sub-Saharan Africa.[2] The impact of migration on parenting and its flow-on effects on families and communities is becoming a global issue specifically in Western societies where government involvement in family life is active,[3] and the rise in migration has prompted increasing attention to the parenting practices of migrant communities.

Australia has been referred to as a multicultural country.[4] Data from the 2016 Australian census indicate that there has been an increase in the diversity of Sub-Saharan African migration to Australia, with migrants coming from diverse cultural backgrounds where they maintain and observe cultural practices that influence their identities.[5] Upon settling in Australia, Sub-Saharan African migrants are faced with a foreign society built on a child protection system that monitors how children are cared for and raised. The questions to be answered are: how do Sub-Saharan African pre-migration parenting practices fit within the Australian society and in particular within the child protection context? How do Sub-Saharan African migrant parents and caregivers negotiate cultural differences and conflicts as well as parenting expectations within the new cultural environment?

In Australia, child protection is institutionalised and governed by law[6] and vulnerable children are said to be protected from harm through intervention, investigation and prevention strategies.[7] In some Sub-Saharan African countries, however, while there are existing child protection laws, various factors overshadow the implementation of legal child protection values and practices.[8] Political unrest, economic problems, poor legal frameworks and cultural norms often take precedence,[9] and child protection is usually promoted through non-governmental organisations that do not have enforceable legal or political authority.[10] From such backgrounds, some Sub-Saharan African migrant families in Australia may become involved with child protection institutions during settlement.[11] Given contextual differences in child protection practices, child protection professionals working with this cohort may face challenges in addressing cultural issues within the child protection framework.[12]

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2 Australian Bureau of Statistics, 2071.0 — Census of Population and Housing: Reflecting Australia — Stories from the Census, 2016 at www.abs.gov.au/ausstats/abs@.nsf/mf/2071.0, accessed 10 November 2022; Stats NZ, "The census of population and dwellings", 2018 Census at www.stats.govt.nz/topics/census, accessed 16 November 2022.

3 P Sawrikar, *Working with ethnic minorities and across cultures in Western child protection systems*, Routledge, 2016; K Yankuzo, "Impact of globalization on the traditional African cultures" (2014) 4(1) *International Letters of Social and Humanistic Sciences* 8.

4 Australian Bureau of Statistics, 2071.0 — Census of Population and Housing: Reflecting Australia — Stories from the Census, 2016 at www.abs.gov.au/ausstats/abs@.nsf/mf/2071.0, accessed 10 November 2022.

5 J Kaur, *Cultural diversity and child protection: a review of the Australian research on the needs of culturally and linguistically diverse (CALD) and refugee children and families*, JK Diversity Consultants, Queensland, Australia, 2012; A Rasmussen et al, "'911' among West African immigrants in New York City: a qualitative study of parents' disciplinary practices and their perceptions of child welfare authorities" (2012) 75(3) *Social Science and Medicine* 516

6 *Children and Young Persons (Care and Protection) Act 1998*.

7 Australian Institute of Health and Welfare, *A picture of Australia's children*, AIHW, Canberra, 2012.

8 C Frank and L Ehlers, "Child participation in Africa", in *Children's rights in Africa*, Routledge, 2016, p 121.

9 P Lachman, "Child protection in Africa — the road ahead" (1996) 20(7) *Child Abuse and Neglect* 543; N Ng'ondi, "Child protection in Tanzania: a dream or nightmare" (2015) 55 *Children and Youth Services Review* 10.

10 M Wessells and A Edgerton, "What is child protection? Concepts and practices to support war-affected children" (2008) 3(2) *Journal of Developmental Processes* 2; R Price-Robertson et al, "International approaches to child protection" (2014) 23 *CFCA Paper* 1.

11 Sawrikar, above n 3.

A number of recent studies[13] have raised awareness of pre-migration parenting practices, cultural beliefs, norms, and the post migration adjustments of Sub-Saharan African migrant families, but studies that examine the tensions that may arise between the parenting practices of such migrants and the Australian child protection system are scarce.[14] Broad child protection guidelines are in place to address culture related issues, but little is known about the extent to which the interventions in place meet the needs of Sub-Saharan African migrant children. Thus, this study explores how Sub-Saharan African migrant parents and caregivers navigate parenting between the cultures that have shaped their lives and parenting expectations within the new environment. The findings provide evidence to inform the development and implementation of culturally appropriate and effective early intervention strategies for those working with such migrant families within the Australia child protection system.

Pre- and post-migration experiences

Culture plays a major part in childrearing and development. According to Akilapa and Simkiss, culture is:[15]

> the social heritage of a group, organized community or society that develops ways of handling problems that, over time, are seen as the correct way to perceive, think, feel and act and are passed on to new members though immersion and teaching.

Parenting and childrearing thus encompass a number of different aspects linked to culture such as beliefs, values, goals, and behaviours. The various cultural environments in which children are raised strongly influence their interactions within society.[16] Cultural differences in childrearing shape children, who will in turn later shape their own children, perpetuating some cultural norms and values related to parenting through time.[17] Hence, Sub-Saharan African cultural identities influence various aspects of life including patterns of childrearing which may differ from host culture norms and expectations. Sub-Saharan African countries and their respective communities are, however, distinct and their cultural norms are specific to a people based on their kin and ethnic group[18] and it would be misleading to argue that all Sub-Saharan African cultures are the same. Nonetheless, what is evident within those cultures is that,

12 S Raman and D Hodes, "Cultural issues in child maltreatment" (2012) 48(1) *Journal of Paediatrics and Child Health* 30; D Rombo and A Lutomia, "'This is America': narratives of parenting experiences by African immigrant parents from Cameroon, Kenya, and Somalia living in the United States" (2016) 6(1–2) *Transnational Social Review* 141.

13 S Deng and J Marlowe, "Refugee resettlement and parenting in a different context" (2013) 11(4) *Journal of Immigrant and Refugee Studies* 416; Rasmussen, above n 5; A Renzaho et al, "Parenting, family functioning and lifestyle in a new culture: the case of African migrants in Melbourne" (2011) 16(2) *Child and Family Social Work* 228.

14 Australian Institute of Family Studies, "Protecting Australia's children: research and evaluation audit, 2011–2015 — Overview of findings", Australian Institute of Family Studies, 2016; M McDonald et al, *Protecting Australia's children research audit (1995–2010): final report*, Australian Institute of Family Studies and Social Policy Research Centre, 2011.

15 R Akilapa and D Simkiss, "Cultural influences and safeguarding children" (2012) 22(11) *Paediatrics and Child Health* 490.

16 P Welbourne and J Dixon, "Child protection and welfare: cultures, policies, and practices" (2015) 19(6) *European Journal of Social Work* 1.

17 Raman and Hodes, above n 12.

18 G Idang, "African culture and values" (2015) 16(2) *Phronimon* 97.

premigration, Sub-Saharan Africans have some connections — historical, social, economic, political, linguistic — and institutional similarities that allow for transferability on aspects pertaining to childrearing within the broader Sub-Saharan African community.[19]

Mostly Sub-Saharan African communities raise their children within a collectivist worldview.[20] These collectivist cultures value interdependence, tend to be more favourable towards promoting group harmony, entail an obligation to community members and an adherence to traditional values, coupled by an expectation that family and extended kin will fulfil their various roles within the group.[21] The family unit extends beyond the immediate family[22] to an extended family system whereby grandparents, uncles, aunts, cousins, and kin contribute towards raising "good children" and extend advice, nurturance, discipline, and even mentorship of parents and caregivers in their daily childrearing responsibilities.[23] Within such an extended family system, mature older adults or community leaders are seen as custodians of tradition and "elders" who are mainly wise and expert in decision making.[24]

In contrast, child protection in Australia values parenting and childrearing within individualistic environments where relationships are more consultative and less hierarchically managed.[25] Individualistic cultures usually value independence, personal time and some degree of freedom, as well as individual rights, self-determination, and self-sufficiency in pursuit of individual goals, interests, and achievements.[26] As children grow older, parent-child relationships allow individual accountability in decision making and expect children to be more independent and to have their own lives, separate from, and not linked to, those of their parents or relatives at adulthood.[27] Consequently, pre-migration parenting styles and practices of Sub-Saharan African migrant families may be at odds with the mainstream parenting norms in Australia.

Upon settling in Australia, Sub-Saharan African migrants undergo acculturation, and this may affect their childrearing practices. Acculturation refers to processes of cultural adjustments that occur due to prolonged contact between groups of people that are culturally different.[28] It was previously viewed as a one-way process where migrants abandoned their cultural beliefs and values and adopted those of their host country.[29] Research has shown, however, that acquiring the beliefs, values and practices of the host country does not automatically imply

19 A Ndofirepi and A Shumba, "Conceptions of 'child' among traditional Africans: a philosophical purview" (2014) 45(3) *Journal of Human Ecology* 233.

20 P Amos, "Parenting and culture — evidence from some African communities" in *Parenting in South American and African Contexts*, M Seidl-de-Moura (ed), IntechOpen, 2013 at www.intechopen.com/books/3440, accessed 10 November 2022; O T'shaka, *Return to the African mother principle of male and female equality*, Pan African Publishers and Distributors, 1995.

21 Renzaho, above n 13.

22 Amos, above n 20.

23 Deng, above n 13; K Haagsman, "Parenting across borders: effects of transnational parenting on the lives of Angolan and Nigerian migrant parents in The Netherlands", dissertation at Maastricht University, 2015.

24 Amos, above n 20; Ndofirepi and Shumba, above n 19.

25 G Hofstede, "Dimensionalizing cultures: the Hofstede Model in context" (2011) 2(1) *Online readings in Psychology and Culture*.

26 G Ferraro, *The cultural dimension of international business*, 4th edn, Upper Saddle River, NJ, 2002.

27 A Marcus and E Gould, "Crosscurrents: cultural dimensions and global web user interface design" (2000) 7(4) *Interactions* 32.

28 J Berry, "Immigration, acculturation, and adaptation" (1997) 46(1) *Applied Psychology* 5.

29 K Aronson and R Brown, "Acculturation and social attitudes among majority children" (2013) 37(3) *International Journal of Intercultural Relations* 313; S Schwartz et al, "Rethinking the concept of acculturation: implications for theory and research" (2010) 65(4) *American Psychologist* 237.

that migrants discard those of their country of origin,[30] and a number of conceptual models of acculturation have been adopted in order to explain the changes that take place when different groups of people and individuals are interacting.[31]

Kramer,[32] for example, developed the theory of dimensional accrual and dissociation by combining the ideas of Jean Gebser[33] and Lewis Mumford[34] to explain cultural diversity as a form of expression. Based on structures of consciousness, the theory posits three distinct life-world dimensions — the magic (one-dimensional idolic), mythic (two-dimensional symbolic), and perspectival (three-dimensional signalic) worlds — to suggest that acculturation is not a simple linear process. As people become aware of the various life-world dimensions, they become more detached from other phenomena in the world. None of the life-world orientations are displaced or overshadowed; rather, all three are present in more complex orientations.[35]

Similarly, Berry[36] proposed a bi-dimensional model of acculturation which leads to four possible cultural orientations: (i) integration — incorporating both heritage and host cultures; (ii) assimilation — letting go of heritage culture in order to accept the host culture; (iii) separation — maintaining the heritage culture while rejecting the host culture; and (iv) marginalisation — being unable to maintain or embrace either cultures. It is this theoretical foundation that has informed our study.

Renzaho et al[37] found that Sub-Saharan African migrants acculturate differently according to their migrations status, age of migration and educational attainment. Refugees and humanitarian entrants varied significantly, with 38% integrating, 34% experiencing marginalisation, 15% remaining traditional, and only 12% assimilating; compared with skilled migrants who had language proficiency and were highly educated, and hence favoured integration and assimilation. It is with these differences in mind that we investigated the post-migration parenting practices among Sub-Saharan African migrants and how they negotiate cultural differences and conflicts within the Australian child protection context.

Methodology

The study was carried out in the Greater Western Sydney local government areas due to their strong demographic representation of Sub-Saharan African migrant communities.[38] A diversified sample was required, and the study focused on both skilled migrants and refugee entrant families. Study participants were recruited using a snowballing sampling technique[39]

30 Schwartz, ibid.

31 J Berry, "Acculturation as varieties of adaptation" in A Padilla (ed), *Acculturation: theory, models and some new findings*, Westview, Boulder, CO, 1980, p 9; E Kramer, "Dimensional accrual and dissociation" in J Grace and E Kramer (eds), *Communications, comparative cultures and civilisations*, Hampton New York, 2012, p 123.

32 ibid.

33 See https://en.wikipedia.org/wiki/Jean_Gebser.

34 See https://en.wikipedia.org/wiki/Lewis_Mumford.

35 Kramer, above n 31; E Kramer and R Ikeda, "Understanding different worlds: the theory of dimensional accrual/dissociation" (1998) 2 *Journal of Intercultural Communication* 37.

36 Berry, above n 28; J Berry, "Conceptual approaches to acculturation" (2003) *American Psychological Association* 17.

37 Renzaho, above n 13.

38 Australian Bureau of Statistics, *16th Census of Population and Housing*, 2011, at www.abs.gov.au/websitedbs/censushome.nsf/home/historicaldata2011?opendocument&navpos=280, accessed 10 November 2022.

39 P Sedgwick, "Snowball sampling" (2013) 347 *BMJ Clinical Research*; S Sheu et al, "Using snowball sampling method with nurses to understand medication administration errors" (2009) 18(4) *Journal of Clinical Nursing* 559.

as a method suitable to reach geographically dispersed families in a new spatial reorganisation of social relations.[40] The method also helps alleviate any worries that hesitant community members may have as they can be referred to participate by people whom they trust.[41] Data were collected using focus group discussions (FGDs) and semi structured one-on-one interviews.[42]

For a detailed description of the methodology of the study, including a defence of the snowball technique and an explanation of the ways in which data were verified and analysed, see Appendix 1; for the interview schedule, see Appendix 2.

Results

A total of 46 Sub-Saharan African migrant parents and carers from Nigeria, DRC, Ethiopia, Ghana, Eritrea, Sierra Leone, South Sudan, and Zimbabwe participated in the study. The results showed that while most Sub-Saharan African migrant parents tend to find ways of preserving their parenting cultural beliefs and values, those who arrived as refugees and humanitarian entrants faced more challenges around acculturation than those who arrived as skilled migrants. Four major themes emerged from the analysis: (i) culture and collectivity; (ii) parenting styles — moulding good children; (iii) family functioning and relationships; and (iv) host context — perceptions of Australian parenting.

Theme 1: culture and collectivity

During discussions, four sub-themes emerged: (i) the child within its cultural community; (ii) traditional values grounded in religion and culture; (iii) respect for and obedience to parents and community elders; and (iv) the importance of family and the duty to contribute towards family life.

The child within its cultural community

Most Sub-Saharan African parents and caregivers interpreted children's action within their cultural frames. Parents stated that their parenting views were influenced by their own childhood experiences. They were guided by their traditional beliefs and values in defining good parenting and these beliefs influenced the values they intended to pass onto their own children. Children were perceived as a symbol of a "blessed" union between husband and wife, and were expected to contribute to household tasks. Common areas of agreement among the participants included the expectation that their children would remain within the values and relationships of their ethnic community, be mentored by the community elders, and meet religious and cultural expectations relating to respect for, and obedience to, parents and community elders. They believed that being a child within their homes was not simply determined by age or maturity.

> People have adjusted to the western legal age of 18 and that's probably when they finish high school and go to university. But from my cultural point of view, a child remains a child, even when they become a parent themselves.

Traditional values grounded in religion and culture

Some parents stated that raising children involves an adherence to practices grounded in religion and culture. These parents also affirmed their religious beliefs as the basis for disciplinary

40 D Massey, *Space, place and gender*, University of Minnesota Press, Minneapolis, 1994; Renzaho, above n 13.

41 G Sadler, H Lee, R Lim and J Fullerton, "Recruitment of hard-to-reach population subgroups via adaptations of the snowball sampling strategy" (2010) 12(3) *Nursing and Health Sciences* 369.

42 H Stuckey, "Methodological issues in social health and diabetes research" (2014) 2(1) *Journal of Social Health and Diabetes* 6.

measures. Such beliefs governed children's behaviours and parent's expectations, and some parents trained their children by explaining what God expects of them in order to be called "good children".

> We do always, what God is saying … what is written in the Bible is the law of our beliefs.

Respect for and obedience to parents and community elders

Findings from this study suggest that etiquette within most Sub-Saharan African communities is governed by cultural expectations and traditions. There are specific physical (body gestures) and verbal mannerisms with which children address adults and elders in the community — mannerisms around how to greet and relate with adults; how to speak to parents, adults, and elders; and how to behave while in the presence of elders. Absolute obedience is highly valued with little room for negotiation. Parents expect a child simply to do what they are told.

> A child should be seen, not heard. The community expects a good child not to speak back to its elders. A good child should be … subservient and non-argumentative. Yes, we do allow children to express their views. To say what they want to say. But it has to be limited. They cannot express beyond certain expectations. They can express themselves based on something that the parent knows is good for them.

The importance of family and the duty to contribute towards family life

Parents in our study believed that children are born in order to continue the family name. Children play vital roles within most Sub-Saharan African homes and communities, and it is their responsibility to uphold the family name and status through positive community work, outstanding academic performances, and subsequently obtaining a good job. Additionally, children are expected to cater to their parents' needs as they grow old.

> What it means to have a child is you are ensuring continuity of the community in general, of the family name in particular, and specifically the continuity of your own identity. So it's quite an issue to be childless in the community I come from, because people see it as a dead end to your identity. So there is a bit of pressure when there are complications in having a child.

Theme 2: parenting styles — moulding good children

A strong sub-theme that emerged from our data is that of "child nurturance and community responsibility". Parents stated that they generally aim to provide their children with better opportunities, envisaging their children will imbibe good values and grow up to be respectful community members who can contribute to society. Some parents mentioned how the general community, including the extended family, helps to raise good children who respect elders and uphold cultural values. They leaned towards authoritative parenting style as a way of deterring bad behaviour in children by closely monitoring and supervising their children's behaviours in line with pre-migration beliefs and values.

Parents emphasised that raising their children was a collective responsibility. Children are assured care and protection through various community channels established to observe the child's successful development. Parents expressed concerns regarding a lack of communal relationship within their Australian settings as compared to their countries of origin.

> There is a saying within my community that a child belongs to the community. The way I grew up as a child is that every person the age of my mother, every person the age of my father in the community was a parent. So in that sense, you wouldn't let a child do something that's untoward because the child is not your own. You might not take the exact actions that the actual parents would, but you would still take responsibility.

Theme 3: family functioning and relationships

Four sub-themes were identified: (i) family dynamics and expectations; (ii) loss of extended family support; (iii) difference in child behaviour; and (iv) gender roles.

Family dynamics and expectations

Most parents noted that Sub-Saharan African families consist of family roles and established family dynamics. They emphasised that relocating to Australia meant that they lost the extended family and community support needed to raise children within culturally expected boundaries. Parents have tried making adjustments, however, by maintaining kin connections through community-based organisations like churches and associations that are culturally specific. Parents also related examples of how they use various ways to engage with their children, such as negotiating and reasoning. They maintained the view that the Australian laws give children power and control within the home environment and allow children to be assertive in their expectations of parents.

Most parents also expressed concerns around traditional family roles and dynamics being challenged. Prior to migration, the father is expected to be the breadwinner and final decision maker but, post-migration, fathers expressed discontent based on their experiences regarding their role within the family in the Australian society. Some fathers felt that they had lost control over family matters and failed in their parenting role.

> One of the problems we are facing is that the parent has become powerless in Australia. We don't have any power to control our families. Through our experiences in life, our best educators were our parents. Mum and Dad were the best. If I then expect the police to be the best educators of my child, I'm losing my culture and losing my credibility within the family.

Loss of extended family support

Parents stated that raising children traditionally involves input from extended family and community members.

> [Being a child] in my community, extends a little further than just your biological offspring within the immediate family. It goes to children as belonging to the extended family. We have a collective culture.

Parents also stated that raising children in Australia comes with ongoing struggles due to a lack of extended family support and inadequate understanding of the social systems.

> Back home the family will be there, and extended family members will be there … the church will be there, community, and religious leaders will be there. So those are the supports. But here, the difference is, even though you go to police, they would say that this is the right of the children. If you go to the community leaders, they would say this is just the law in this country.

Difference in child behaviour

Parents in this study acknowledged the effect of culture and tradition on parent-child relationships. They also acknowledged the difference in behaviour observed between children raised within and outside their home country. Some parents believe they are not raising their children in a manner that is satisfactory, and seem to face challenges in establishing a balance between their parenting role and their relationship with their children:

> [Back home] because of the culture and tradition, children, they listen more to their parents. And at the same time also, they are very respectful. But here in this country, there is a lot of choice … They can't listen to the parents, they don't listen to the elders. And this is the biggest differences between back home, how we bring up children and what is here in Australia.

Gender roles

While some fathers are trying to adjust to the shifts in gender roles, the general view remains that fathers who are seen attending to or assisting with household chores are contradicting cultural expectations.

> In my culture some people say that I'm very soft. But it's not about being soft because even when I was back home I was the one cooking breakfast for my kids … So it's good that sometimes as a father to be there and help around the home. And sometimes also you have to understand that there is resistance even from the females themselves because sometimes they're considered some of the roles are their own designated role that you don't need to touch but we have to help each other as a family.

Theme 4: host context — perceptions of Australian parenting

Five sub-themes merged: (i) parenting in a new culture; (ii) children's rights; (iii) Australian mainstream families; (iv) inter-generational and inter-societal conflicts; and (v) connection with country of origin.

Parenting in a new culture

Some parents noted that Australian laws and policies restrict them from raising their children in a manner they deem suitable. They expressed their views on Australian parenting based on their observations of Anglo-Australian children within the society and they perceived that, in mainstream Australian families, children were too independent and commanding. Some Sub-Saharan African parents reiterated that institutional systems like schools and the police interfere with effective child parenting, thus leading to family disruptions and exposing children to a way of thinking contrary to their traditional family values and expectations.

> I think most of us when we meet as a community we talk about children. We are expecting the government to leave us to train our kids in our own culture. We have our ways. So if the government would allow us to raise our own children in the way we want based on our culture it would be good even for the Australian system as this will decrease the pressure on us as well. Because the effect of this pressure is it brings up all kinds of mental health issues which cause family breakdown. Parents cannot cope with the pressures when directed on how to raise their children by the government. As a parent, l know that my love will help me raise my child well. So allow me, let me train my child the way I want so that in the future he will grow up to be a better person in society.

Children's rights

Most parents acknowledged various child rights that are upheld within the home and community such as the right to life, education, and freedom from cruel and inhumane treatment. They were, however, of the view that children should be made aware of some of the responsibilities that are associated with rights.

> The challenges I can see are that children are raised based on having rights but not really told of their responsibilities. This is one concern we have always. Because every right comes with responsibilities, and if you don't teach the child responsibilities and he only gets told this is your right, well they also need to understand that there are responsibilities. And this always contrasts with parent's values. When the parents come and tell the child you need to do this, the child can have an option and say I have right to say "NO!" The child has a large number of rights in our culture … but he has also the biggest responsibility on respecting family values … The most of good family is the family where you have a child who is displaying the value of that family.

Australian mainstream families

Most parents considered that mainstream Australian parenting styles are influenced by nuclear and individualistic characteristics. In contrast to mainstream family structures, most Sub-Saharan African parenting styles are influenced by their collective cultures.

> Our definition of family reflects our view as a culture that the community comes first. By keeping identity, children having to identify with more than one father, as their father, or with more than one mother as their mother, we are trying to make sure that the diversity is there, but it is within the collective identity. So you wouldn't want a family that is totally different from the rest of the community. In our culture you need that identity, whether it is for your clan or for your tribe or for your extended family to be maintained. And there has to be evident effort that that is happening.

Inter-generational and inter-societal conflicts

Some parents believe their children live in two societies. They observed a contrast between what children learn within the Australian society and what they are taught at home. Most parents stated that within the home environment, children are raised based on their cultural values which have been passed down through generations, but when they are exposed to the Australian society, especially within the education system, they are taught principles of independence and self-awareness. This led some parents to express concern that their children seem not to respect traditional parental authority.

> When we come here we find that the children are confronted by two societies. So they have their family, their parents, and they have the school and the school [teaches] things that are different to what the family is teaching to them. Because here at school the children say OK, if your parents say this, you report to us. The school teaches them you can say no. But in our culture, the child must respect his parents, and doesn't have a right to say no. In our culture, when parents do something wrong, the child has the right to report to another parent, an aunt, uncle or another relative. This is how we as parents and adults understand that there is a problem and we try to solve it. But here, it's the police who step in. This is wrong, because they don't respect the authority of the parents within the family. I remember that is in my community. It was on the eve of New Year, and one family they went to the shop and brought a present to their daughter. And then in the morning when this young girl opened the present, the dress that they bought was not her favourite colour. The child complained to the parents. From where I come from children should not complain. They should just accept whatever they get. But here children have a choice. So the parents tried to convince this young girl, and she completely refused. Until they all went back to the shop and exchanged the dress for the favourite colour. After this the child was happy and everyone was happy.

Connection with country of origin

Most parents acknowledged that raising their children in Australia has been a challenge. They believed that maintaining their cultural beliefs whilst making the effort to "fit" into the Australian society had consequences for their children. The effects were also observed when children visited their native country.

> When children visit back home, they relate to their family and peers based on what the Australian society teaches them. The community back home then looks at them as Australian because [they are] different. If they are not part of that community then it means they are part of the Australian community. This is very challenging for them because in Australia they are also being looked at as different.

Discussion

This study explored how Sub-Saharan African migrant parents and caregivers navigate parenting between the cultures that have shaped their lives and parenting expectations within the new environment. Consistent with acculturation theory, our findings suggest that some Sub-Saharan African migrant values were maintained, in other cases, new dimensions were introduced and in others, the host values were rejected or resisted.

Sub-Saharan African migrant parents maintained some values and beliefs that shape childrearing practices. These values and beliefs included: (i) parents' definition of children within their cultural context, traditional values grounded in religion, and culture; (ii) adherence to values of respect for, and obedience towards, elders within the community; (iii) adherence to the value of family and the expectations of children's contribution towards family life; and (iv) practices of authoritarian parenting style while monitoring and regulating children's behaviours. While our study is not representative of all Sub-Saharan African migrant communities in Australia, and while some cultures and communities sampled have limited representation, our findings are consistent with studies conducted with similar Sub-Saharan African migrant communities in other Western countries, including New Zealand,[43] the United States of America,[44] and Canada.[45]

Values and beliefs around childrearing practices that were resisted and not incorporated were closely associated with migration related challenges. Deng and Marlowe[46] also observed that migrant populations are often faced with stressful negotiations upon living in different societies to their homeland. The participants highlighted challenges they faced around raising their children in Australia, particularly on matters of respect for parents or elders, inter-societal conflicts, and child disciplinary measures. Parents face challenges in raising their children because their parenting styles differ from the Australian mainstream expectations.

Where significant differences in parenting practices are observed, various migrant communities are often at a disadvantage during their involvement with service providers and in their day to day living with the greater Australian mainstream society.[47] Such disadvantages are the result of ongoing stereotypes which are influenced via media outlets and subsequently adversely affect targeted communities, including Sub-Saharan African migrant people. The key issue is that the media, informed by individualistic values where childrearing is interpreted from independence and legal framework, tends to conceive childrearing practices governed by collectivist tendencies as inferior, oppressive, and breaching the right of the child.[48] Undoubtedly, parenting encompasses a number of different sociopolitical and cultural aspects, shaped within beliefs, values, goals, and behaviours prevalent in the macro system that influence how a child should be raised.[49] In turn, the micro-system is influenced by the political climate

43 Deng, above n 13.

44 Rasmussen, above n 5.

45 J Ochocka and R Janzen, "Immigrant parenting: a new framework of understanding" (2008) 6(1) *Journal of Immigrant and Refugee Studies* 85.

46 Deng, above n 13.

47 K Križ and M Skivenes, "'Knowing our society' and 'fighting against prejudices': how child welfare workers in Norway and England perceive the challenges of minority parents" (2010) 40(8) *British Journal of Social Work* 2634.

48 A Sanson et al, "Racism and prejudice: an Australian psychological society position paper" (1998) 33(3) *Australian Psychologist* 161.

49 Australian Human Rights Commission, "In our own words — African Australians: a review of human rights and social inclusion issues", 2010, at https://humanrights.gov.au/our-work/race-discrimination/projects/our-own-words-african-australians-review-human-rights-and, accessed 10 November 2022.

and policies of multiculturalism that help facilitate migrants' cultural adaptation.[50] Even though Sub-Saharan African migrant parents raise their children with the objective of bringing up well-mannered children and good citizens, the rampant media reports of gang and crime related matters reinforce negative perceptions of how Sub-Saharan African migrant children are parented.[51] These stereotypes may influence how child protection professionals relate to, and engage, Sub-Saharan African families that come to the attention of the child protection system.[52]

Another challenge faced by Sub-Saharan African migrant parents is that family dynamics within Sub-Saharan African homes are affected due to changing gender roles, with woman in some homes taking up full-time employment and subsequently becoming breadwinners. Sub-Saharan African migrant parents expressed that the challenges they encountered were due to culture shock and a lack of extended family support while raising children in Australia. These challenges act as stressors that may impact family functioning within Sub-Saharan African homes in the Greater Western Sydney area. While attempting to understand the "Australian" way of living, Sub-Saharan African migrant parents continue to raise their children in unfamiliar social settings. They have a desire to see their children flourish and "fit in" while also preserving and respecting their cultural values.[53]

Values and beliefs around how children are disciplined are at the core of Sub-Saharan African family functioning. Over time, Western countries like Australia have put legal measures to regulate disciplinary practices which give leeway for various institutions like schools, day-care centres, and child protection organisations to monitor and report on disciplinary methods that are deemed abusive.[54] Our participants highlighted that children are being taught different ways at school and these ways conflict with Sub-Saharan African parenting styles. Differences in discipline and expectations between the school setting and the home setting, for example, may increase the chances of Sub-Saharan African families coming to the attention of the child protection system due to children rejecting home discipline and reporting their parents to their teachers.[55] Consequently, the participants believed they have lost control of their children.

Some of the participants' anxieties are exacerbated by the fact that most of them come from countries were government's involvement with its citizens is centred on corruption, injustice and human rights violations. Subsequently, Australian government regulations around parental discipline of children are likely to be foreign, misunderstood, and held with suspicion by Sub-Saharan African migrant parents.[56] If Sub-Saharan African migrant parents regard Australian government interventions with caution, this may affect how they engage with service providers like schools and health services, thereby impacting educational and health outcomes for Sub-Saharan African migrant children.[57]

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50 A Harris, "Belonging and the uses of difference: young people in Australian urban multiculture" (2016) 22(4) *Social Identities* 359

51 F MacDonald, "Positioning young refugees in Australia: media discourse and social exclusion" (2017) 21(11) *International Journal of Inclusive Education* 1182.

52 M Phillips, "Convenient labels, inaccurate representations: turning Southern Sudanese refugees into 'African-Australians'" (2011) 32(2) *Australasian Review of African Studies* 57.

53 Rasmussen, above n 5.

54 ibid; C Bernard and A Gupta, "Black African children and the child protection system" (2008) 38(3) *British Journal of Social Work* 476.

55 Rasmussen, above n 5; Rombo, above n 12.

56 Australian Institute of Health and Welfare, *Child Protection Australia 2013–14*, Child welfare series no 61, AIHW, Canberra, 2014; McDonald, above n 14.

57 Rasmussen, above n 5.

Family migration research[58] suggest that migrant children tend to integrate much quicker into host societies than their parents, who often remain attached to traditional beliefs and values around parenting. Sub-Saharan African children's exposure to the school environment, and other social settings that raise awareness and encourage independence, appear to foster attitudes that lead to conflicts between children and parents within the home environment.[59] These challenges may cause anxiety for parents who already feel they no longer have any authority over their children. Our study highlights that Sub-Saharan African migrant parents were concerned that the Australian mainstream society gives power to the children, and existing institutional rules and policies adversely affect their parenting roles. For these reasons, our study participants generally maintained a negative view about some organisations — the police, schools — and constantly expressed fears around raising children under their watchful eye. Although our study found that some Sub-Saharan African migrant parents reported a loss of parental control, there was evidence to suggest that some parents remain consistent in their parenting roles and employed discipline measures — time out, withholding privileges, grounding, and naughty corner [among others] — that were familiar to mainstream parenting expectations.[60]

Our research established that in observing and maintaining their cultural beliefs and practices that govern childrearing, Sub-Saharan African migrant parents residing in the Greater Western Sydney area appeared to indirectly express their resistance towards policies and practices that were contrary to their cultural beliefs while simultaneously adjusting to a host environment that is defined by insecurity and vulnerability. Levitt[61] emphasises that there is no need to have expectations on people residing in the diaspora to assimilate or completely integrate into the host society as people change and often shift attitudes depending on the context. While settling in host nations, migrants tend to reposition their identity of origin within their new context, which is a significant gesture towards understanding their losses and challenges.[62] In particular, Sub-Saharan migrant families in Australia participate and engage in Australian socio-cultural, political, and economic activities, and also create spaces within their various communities as platforms to discuss experiences and reinforce specific cultural practices that form their identities.[63] Sub-Saharan African migrant parents participate in culturally specific gatherings like church attendance, Sub-Saharan African community meetings, and the establishment of community structures like homeland specific organisations, including the appointment of Sub-Saharan African community leaders and elders.[64]

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58 K Lewig et al, "Challenges to parenting in a new culture: Implications for child and family welfare" (2010) 33(3) *Evaluation and program planning* 324; Renzaho, above n 13.

59 Renzaho, ibid; A Renzaho et al, "Parenting, role reversals and the preservation of cultural values among Arabic speaking migrant families in Melbourne, Australia" (2011) 35(4) *International Journal of Intercultural Relations* 416

60 Rombo, above n 12; B Salami et al, "Parenting practices of African immigrants in destination countries: A qualitative research synthesis" (2017) 36 *Journal of Paediatric Nursing* 20

61 P Levitt, "Transnational migrants: When 'home' means more than one country" (2004) *Migration Information Source* 1.

62 M La Barbera, "Identity and migration: an introduction" in *Identity and migration in Europe: multidisciplinary perspectives*, Springer, 2015, p 1.

63 L Merla, "Salvadoran migrants in Australia: An analysis of transnational families' capability to care across borders" (2015) 53(6) *International Migration* 153; Salami, above n 60.

64 J Marlowe et al, "South Sudanese diaspora in Australia and New Zealand: reconciling the past with the present", Cambridge Scholars Publishing, Newcastle upon Tyne, 2014.

Implications

This research highlights that Sub-Saharan African migrant parents continue to uphold their cultural beliefs and values while raising their children in Australia. If this is the position, will cultural traits erode over time or do cultural practices adapt within each context? We argue that culture is influenced by society and is responsive to the environment in which it is practised. Migration studies have established that when the process of migration begins, change is inevitable in host societies and so often traditional systems and policy frameworks are challenged.[65] Sub-Saharan African migrants are thus active participants within social and legal processes in host nations.

It is important to emphasise that child protection professionals working with Sub-Saharan African families need to understand Sub-Saharan African migrant family backgrounds before engaging with them, as those that migrated for employment and educational reasons will face dissimilar challenges to those who were displaced from their country of origin. Child protection service providers should be aware of and sensitive to practices which embrace Sub-Saharan African childrearing practices in order to obtain better outcomes for Sub-Saharan African migrant children who come to the attention of the Australian child protection system.

Appendix 1: Methodology

While the snowball sampling technique has been criticised because participants know each other, have similar traits, and may lead to the data collected being biased,[66] this study mitigated bias by drawing on four methods to select participants and to analyse data:[67]

- a precise definition of the study population which implemented specific inclusion and exclusion criteria — the definition determined the sampling frame
- a sample size guided by emerging themes, data saturation and a defined study setting — this assisted to establish a reliable and adequate sample
- the utilisation of participants knowledge and lived experiences — gaining entry and access to the targeted communities assisted with the quality and validity of the research; and
- ongoing monitoring of data collection — this assisted in determining when new themes emerged and when recruitment modifications became essential to obtain a more diverse sample.

At the first instance, eligible participants were identified through community structures such as community health centres, migrant resource centres, and some local Sub-Saharan African churches. Identified families were asked to recommend other participants within the same area that met the inclusion criteria, and the process continued until the desired number of focus group members and interviews was reached.[68] The study was approved by the Western Sydney University Human Research Ethics Committee (Reference: H11825).

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65 Levitt, above n 61; V Mazzucato and D Schans, "Transnational families and the wellbeing of children: conceptual and methodological challenges" (2011) 73(4) *Journal of Marriage and Family* 704.

66 L Leung, "Validity, reliability, and generalizability in qualitative research" (2015) 4(3) *Journal of Family Medicine and Primary Care* 324.

67 M Naderifar, H Goli and F Ghaljaie, "Snowball sampling: A purposeful method of sampling in qualitative research" (2017) 14(3) *Strides in Development of Medical Education* 1; J Penrod et al, "A discussion of chain referral as a method of sampling hard-to-reach populations" (2003) 14(2) *Journal of Transcultural Nursing* 100

68 Sedgwick, above n 39; Sheu, above n 39.

Data collection and procedures

Focus groups are particularly useful when exploring multiple topics as they stimulate discussions through a diversity of ideas and spontaneity. Such groups enable verification — a process of corroboration — and a platform to explore differences in participants' responses.[69] Additionally, one-on-one interviews were useful as the most suitable method for collecting data from geographically dispersed populations, and for discussing a sensitive and personal topic such as parenting practices.[70] One-on-one interviews allowed participants privacy to share their particular experiences and the flexibility to venture into salient matters.[71]

Focus groups were complemented by one-on-one interviews as part of the triangulation process.[72] In order to increase the validity of the procedures and results, our study used two specific methods of triangulation — data triangulation and within-method triangulation.[73] Data triangulation involved the use of different sources of information, at various times, in different places, and from varying participants while within-method triangulation involved the use of more than one qualitative methods to collect data, and in this case, the use of focus groups and interviews.J Hargis, C Cavanaugh, T Kamali and M Soto, "A federal higher education iPad mobile learning initiative: triangulation of data to determine early effectiveness" (2014) 39(1) Innovative Higher Education 45.

In their analyses of focus groups, Guest, Namey and McKenna[74] found that "more than 80% of all themes were discoverable within two to three focus groups and 90% of themes could be discovered within three to six focus groups". Guest et al[75]were also able to identify the most prevalent themes within only three focus groups. A few years earlier, Coenen, Stamm, Stucki and Cieza[76] had found that data saturation was reached after conducting five focus groups and eight individual one-on-interviews. The benefits of one-on-one interviews are underscored by Galvin's study,[77] which found that the likelihood of discovering a theme among six individual participants is greater than 99% if the issue is similar among 55% of the broader study population.

Our study included five focus groups (N=40), varying from 6 to 11 participants aged between 26–78 years old; and six one-on-one interviews involving four males and two female participants aged between 38–52 years. The participants included skilled migrants from Zimbabwe, Ghana, and Nigeria, and refugees and humanitarian entrants from Ethiopia, South

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69 N Carter et al, "The use of triangulation in qualitative research: methods and meanings" (2014) 41(5) *Oncology Nursing Forum* 545.

70 S Lambert and C Loiselle, "Combining individual interviews and focus groups to enhance data richness" (2008) 62(2) *Journal of Advanced Nursing* 228; M Macdonald, "Qualitative interviewing: a few whats, hows and whys", paper presented at a Videoconference Meeting of the CIHR Strategic Training Program in Palliative Care Research, Montreal, QC, 2006.

71 J Lawton et al, "Recruiting and consenting into a peripartum trial in an emergency setting: a qualitative study of the experiences and views of women and healthcare professionals" (2016) 17 *Trials* 192, doi:10.1186/s13063-016-1323-3.

72 Carter et al, above n 69.

73 A Bekhet and J Zauszniewski, "Methodological triangulation: an approach to understanding data" (2012) 20 *Nurse Researcher* 40.

74 G Guest et al, "How many focus groups are enough? Building an evidence base for non-probability sample sizes" (2017) 29(1) *Field Methods* 3.

75 ibid.

76 M Coenen et al, "Individual interviews and focus groups in patients with rheumatoid arthritis: a comparison of two qualitative methods" (2012) 21(2) *Quality of Life Research* 359.

77 R Galvin, "How many interviews are enough? Do qualitative interviews in building energy consumption research produce reliable knowledge?" (2015) 1 *Journal of Building Engineering* 2

Sudan, Sierra Leone, Eritrea, and the Democratic Republic of Congo. Mixed gender groups were the preferred option for the focus groups as mixed gender groups tend to improve the quality of the discussion and its outcome.[78] The participants arrived via various visa streams and have been residing in Australia for periods between 3–20 years.

The focus groups schedule and interview guide (Appendix 2) were informed by a robust systematic review by a peer reviewer, and by considering the Australian and the United Nations Children's Fund child protection systems.[79] The tools were also workshopped in meetings with the Migrant Review Panel — a de facto, community-owned, steering committee that had oversight of the implementation of the research. The study was conducted in English and participation took place in community-based venues, including migrant resources centres and churches. Data collection varied between one and a half to three hours, depending on what the participants had to say. All sessions were audio recorded with note-taking being essential for recording issues that required further clarification and follow-up. Prior to data analysis all the audio files were transcribed verbatim.

Informed consent was obtained from all participants. For focus groups participants who did not fully comprehend the English language, bilingual workers were used.[80] All one-on-one interview participants were proficient in the English language. Information about the study was provided to target communities and church leaders prior to obtaining consent, and participating communities were engaged in discussion about the research through meetings within their local community gatherings. These gatherings offered an arena to ask questions and provide clarity of the study expectations.[81] Eligible individuals who consented to participate were asked to sign the consent forms. Those who could not write were allowed to sign their consent forms with the letter "X" or use their initials where appropriate. Participants were assured privacy and confidentiality, and the use of pseudonyms.[82]

Data synthesis and analysis

Thematic analysis[83] formed the basis for understanding the data captured from the participants. Thematic analysis aims to establish recurring themes that can lead to the development of a conceptual framework. In analysing the data, we developed a data coding system and categories using the NVIVO 11 Pro Software.[84] These were developed through reading each transcript word-for-word, which assisted in summarising participant encounters. Once summarised, the data were merged to form a broader view of the collective experience of participants. All transcribed materials were imported into NVIVO prior to data analysis.

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78 T Nyumba et al, "The use of focus group discussion methodology: insights from two decades of application in conservation" (2018) 9(1) *Methods in Ecology and Evolution* 20.

79 Australian Institute of Health and Welfare, above n 7; United Nations International Children's Emergency Fund, Promoting synergies between child protection and social protection: West and Central Africa, Regional Thematic Report 5 Study. UNICEF Regional Office for West and Central Africa, 2009.

80 J Lynn et al, "Researching families and relationships" in *Studies in family and intimate life*, Palgrave Macmillan, 2011, p 232.

81 M Alaei et al, "Obtaining informed consent in an illiterate population" (2013) 5(1) *Middle East Journal of Digestive Diseases* 37.

82 P Mendes et al, "Some ethical considerations associated with researching young people transitioning from out-of-home care" (2014) 8(2) *Communities, Children and Families Australia* 81.

83 V Braun and V Clarke, "Using thematic analysis in psychology" (2006) 3(2) *Qualitative Research in Psychology* 77.

84 H Alyahmady and S Al Abri, "Using Nvivo for data analysis in qualitative research" (2013) 2(2) *International Interdisciplinary Journal of Education* 181; P Bazeley and K Jackson, *Qualitative data analysis with NVivo*, Sage Publications Limited, 2013.

The synthesising process involved highlighting key phrases used by the participants with researcher comments written in NVIVO memos in order to record immediate thoughts to remarks made.[85] In order to maintain transparency and minimise bias, themes were guided by the participants' direct words through constant reference to the original data.[86] Once the recurring themes became clear we developed concepts that were linked to the themes and which helped explain the data while constantly referring to participants' words in order to preserve and report accurate beliefs, values, attitudes, practices, and migration experiences of the participants. At all times, it remained important to understand what the participants were describing as this assisted in challenging researcher assumptions and biases at the various stages of data analysis, thus adding rigour to the research. This process allowed for a situation where participant descriptions were retained at the same time as we investigated connections between data collected, known theories, and established literature, thereby enhancing the validity of our findings.

Appendix 2: Interview guide and focus group schedule

Based on your cultural background, what is your understanding of:

(a) A child? [Probe: Who is responsible for child upbringing in your community?]

(b) Parent [Probe: How is a "parent" defined in your community?]

(c) Family? [Probe: What constitutes a family within your community?]

(1) What cultural aspects of childrearing practices are essential to uphold? [Probe: what is a "good" parent in child upbringing at the Family level? At the Community level?]

(2) How has relocation to Australia impacted on your family, particularly around childrearing? [Probe: what are the cultural challenges faced when raising children within the Australian community? How do you deal with these challenges?]

(3) How do your cultural expectations of raising children compare with the Australian way of raising children? [Probe: How do you know this?]

(4) How are children disciplined in your community? [Probe: What is the expected disciplinary routine of children within your community? Whose role is it to discipline children?]

(5) What are some of the Governmental expectations on childrearing practices you aware of? [Probe: How did/ do you know about this?]

(6) What is your understanding of Child's Rights? [Probe: What governs Child Rights (within your community)? Based on your understanding of children's rights, what constitutes child abuse within your community? What is Neglect? Violence? Exploitation? Harm? Suffering? Inadequate Care?]

(7) What is your understanding of Child Protection? [Probe: Can you please tell me how child protection is practised within your community? What community structures are in place for the protection of children? How effective are these community structure?]

(8) Is there anything you would like to add or discuss?

85 Alyahmady and Al Abri, ibid; Bazeley and Jackson, ibid.

86 J Ritchie and J Lewis, *Qualitative research practice: a guide for social science students and researchers*, Sage Publications, London, 2003.

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Recognising and addressing the needs of children and families impacted by Neonatal Abstinence Syndrome

J Oei*

Neonatal Abstinence Syndrome (NAS): a modern public health crisis ..... [7-6000]

NAS is not the only problem facing babies exposed to prenatal drugs

Why are children with NAS and prenatal exposure at risk of lifetime harm?

Is there hope for children with NAS?

What can we do?

Conclusions

[7-6000] Neonatal Abstinence Syndrome (NAS): a modern public health crisis

Last reviewed: Oct 2023

Neonatal Abstinence Syndrome (NAS) is the withdrawal syndrome experienced by newborn infants who were exposed to drugs of dependency and addiction during pregnancy. With chronic exposure to addictive drugs, the fetus, like adults, develops a tolerance to the drugs. At birth, maternal drug supply is abruptly cut off and the infant withdraws.

The most common cause of NAS is exposure to prenatal opioids. For centuries, NAS was considered an almost inevitably fatal problem. First appearing in Western literature in 1874 as "congenital morphinism" (as the most common opioid used by mothers was morphine), NAS led to death and serious complications including seizures and failure to thrive in more than 80% of infants. As recently as the 1950s, mortality rates for infants with NAS was as high as 34%.[1] Today, infants seldom die of NAS because clinicians are more vigilant and administer prompt treatment, usually with the drugs that caused the withdrawal in the first place.

Unfortunately, the world is undergoing an opioid epidemic and babies are collateral damage. In North America, for example, one infant is born every 18 minutes with NAS.[2] In many countries, the use of Fentanyl, a synthetic opioid that is 100 times more potent than morphine and 50 times more potent than heroin, is increasing and often, the drugs are laced with other substances that increase the potency and adverse effects associated with drug abuse.[3]

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1 R Cobrinik et al, "The effect of maternal narcotic addiction on the newborn infant" (1959) 24(2) Pediatrics 288–304.

2 S Patrick et al, "Increasing incidence and geographic distribution of Neonatal Abstinence Syndrome: United States 2009 to 2012" (2015) 35(8) *Journal of Perinatology* 650–655.

3 National Institute on Drug Abuse, "Drug Overdose Death Rates".

NAS is not the only problem facing babies exposed to prenatal drugs

In most cases, if diagnosed early and treated promptly, most infants will completely recover from NAS and be discharged alive from their hospital of birth. However, they face many challenges, both from exposure to prenatal drugs during critical periods of fetal development and from the consequences of parental drug use.

In linked data studies, where administrative data is linked for individuals, we showed that children with a history of NAS were more likely to die, especially in the first year of life and be hospitalised even until teenage years, from external and unclear events, such as Sudden Infant Death Syndrome (SIDS), assaults, maltreatment, accidents and trauma.[4] They were also more likely to fail at school, from as early as age 8–9 years.[5]

Whether people who have been exposed to prenatal drugs of addiction are more likely to engage in risk taking behaviours in later life is unclear. Young adults with a history of prenatal cocaine exposure are more likely to be arrested and have earlier onset of sexual behaviours.[6] These problems are more likely to affect males and are considerably influenced by environmental factors such as level of parental involvement in their upbringing and exposure to violence during early life. Risk of "addictive" behaviours is an important question and requires further study because poor environmental circumstances, such as poverty, lack of education or social support, will increase a person's risk of substance use anyway.

Why are children with NAS and prenatal exposure at risk of lifetime harm?

Drugs of addiction work by altering levels of neurotransmitters. These are chemicals that transmit messages within the nervous system and are responsible for the "rush" associated with drug use. With continued use, more and more drugs are needed to achieve the "rush", resulting in tolerance. With time, the neurones that make these neurotransmitters are depleted and the person becomes dependent on the drug just to achieve normal activity. The brain is also impacted by other effects of the drugs. For example, opioids accelerate neuronal death, promote inflammation within the brain and like many drugs of addiction, are anorectic agents, reducing appetite and therefore nutrition to the exposed person.

Babies who are exposed to prenatal drugs are often born with smaller heads that fail to grow as fast as other children. In the population, lower brain volumes are equated to lower cognitive ability. However, imaging and neurodevelopmental studies also show that these changes and others are persistent. Babies with a history of opioid exposure, for example, have abnormal functional activity within their brains, manifest poorer cognitive and motor scores from infancy and have poorer academic outcomes, even until teenage years.[7]

The environment is a crucial modifying factor for babies who start of life on the back foot. Many children with a prenatal history of drug exposure are born into adverse circumstances and are at risk of child harm. In Australia, up to 50% of babies with a history of prenatal methadone exposure, are placed (whether temporarily or permanently) in out of home care

4 H Uebel et al, "Characteristics and causes of death in children with Neonatal Abstinence Syndrome" (2020) 56(12) Journal of Paediatrics and Child Health 1933–1940; H Uebel et al, "Reasons for rehospitalization in children who had Neonatal Abstinence Syndrome" (2015) 136(4) *Pediatrics* 811–820.

5 J Oei et al, "Neonatal Abstinence Syndrome and high school performance" (2017) 139(2) *Pediatrics*.

6 N De Genna et al, "Prenatal cocaine exposure, early cannabis use, and risky sexual behavior at age 25" (2022) 89 *Neurotoxicology and Teratology*.

7 J Oei et al, "Neonatal Abstinence Syndrome and high school performance" (2017) 139(2) *Pediatrics*.

(OOHC) by age 5.[8] Parents with drug use problems may have difficulties parenting due to a myriad of issues. Up to 50% may have one of more psychiatric co-morbidities, some may have low education levels and poor parenting references themselves, some may have poor social networks and some may not have adequate nutrition due to poverty and other financial stressors. The chaotic nature of many households impacted by substance use further compound the fragile neurodevelopmental trajectories of many children with a history of prenatal drug exposure and NAS.

Is there hope for children with NAS?

Often, parental drug use cannot be stopped prior to pregnancy. The brain forms by the fourth to fifth week of gestation and drug exposure, more often than not, has already occurred. However, the brain does not stop developing and this growth potential offers an opportunity to ameliorate the harms from prenatal drug use.

Neuroplasticity is a term that describes how the brain changes with experience. Over the first few years of life, brain cells, or neurones, grow and differentiate at an incredible pace. By birth, each neuron has about 2500 synapses or connections between the neurones and by age 2–3 years, each neuron has about 15,000 synapses. With experience, the brain learns to discard neurons that are not useful and grow those that are. For example, if animals have an eye blindfolded from birth, they learn not to see from the obstructed eye and sight never returns. This pruning process is shaped by experience and other factors. Excessive pruning, for example, is implicated in risk of schizophrenia while insufficient pruning, with autism spectrum disorders. Pruning starts at about 8 months within the visual cortex and continues even to young adulthood in the prefrontal cortex, an area that governs planning, prioritising and executive decision-making.

There is therefore an exciting opportunity to shape a child's experience after birth to mitigate harms from prenatal drug exposure. In both human and animal studies, environmental manipulation is crucial in ameliorating intra-uterine harm. An enriched environment (EE) with targeted educational intervention, parental support and improved dietary intake can not only promote neural development by enhancing neuroplasticity but also play a role in repairing neurons by restoring functional activities through cellular and molecular adaptations. The US Carolina Abecederian Project,[9] conducted between 1972 to 1977, enrolled children from low income families to full-time high quality educational interventions in a child-care setting from infancy to age 5. The children's progress was monitored through time. Even at 30 years of age, those engaged in early intervention showed improved educational outcomes, employability, as well as better physical and mental health. EE has even shown to improve brain development on MRI studies with a particular effect on the hippocampus, the area of the brain governing memory acquisition.

What can we do?

Parental drug use and especially, maternal drug use resulting in NAS, is a multifactorial and multi-disciplinary issue. Therefore, the many sectors involved in the care of the mother and family with drug use issues need to collaborate and work together to ensure that the needs

8 S Taplin and R Mattick, "Mothers in methadone treatment and their involvement with the child protection system: A replication and extension study" (2013) 37(8) *Child Abuse & Neglect* 500–510.

9 F Campbell et al, "Adult outcomes as a function of an early childhood educational program: An Abecedarian Project follow-up" (2012) 48(4) *Developmental Psychology* 1033–1043.

of these vulnerable families are met, not only during the birth period but also until the child grows to be an independent adult. Each sector must appreciate that the needs of the families will change and that the child may evolve, depending on the environment and how he/she has been impacted by the exposures before birth.

A large body of evidence from other countries such as the United States, show that persecutory approaches, where prenatal substance use is a considered a criminal offence, do not improve outcomes for the mother/infant dyad. Mothers with drug-use issues need to be supported to make the best decisions to keep both her and her family safe. This may include helping her with accessing antenatal, addiction and other medical services, ensuring that she or her family have food and housing security and that any other issues such as legal or social needs are met.

Although activation and involvement of child protection services is stressful for both the family and for care providers, in some circumstances, the support required by a family drug-use issues can only be accessed through such services. In the general community, children in the care of child protection services are a heterogenous group and in some situations, being engaged in these services are associated with increased risk of harm including mental health issues, poor school outcomes and even death.

In a recent linked data study, we showed that children with a history of prenatal drug exposure but who had at least one episode of out of home care (OOHC, placement in a home away from their biological parents) whether permanently or temporarily, had decreased risk of death and school failure.[10] Placement had to be culturally sensitive. This impact was only evident in First Nations children with a history of prenatal drug exposure if they were placed in kinship (related) care rather than foster (unrelated) care.

Conclusions

NAS, from prenatal drug exposure, is unlikely to "go away". People worldwide are increasingly using more drugs of addiction and the drugs are increasingly varied and potent. Women of child bearing age who use these substances risk impacting the developing fetus and growing child if they are pregnant. The ramifications of prenatal drug exposure on the child extend beyond newborn withdrawal and may continue to affect the child for life. Mitigation strategies are crucial and require a community to understand and provide multisectoral support for the mother, child as well as the clinician and care-givers. Further research is urgently required to understand the long-term impact of prenatal exposure to drugs that cause NAS and if these are adverse, to develop resources to minimise lifetime harm to the children.

10 K Lawler et al, "Impact of out of home care on risk of death in children with prenatal drug exposure — results of a 20 year follow-up of 1816153 children between 2001–2021". Available from Proceedings of the meeting of the Pediatric Academic Societies, USA; May 2023.

Toward access and equity: disability-informed practice in child protection — a guide to assessing parenting capacity with parents with intellectual disability

S Collings, M Spencer and P Kong*

Abstract ..... [7-7000]

[7-7000] Abstract

Last reviewed: February 2024

The resource aims to increase disability awareness among professionals working in care and protection, and to improve their knowledge and skills to engage with parents with intellectual disability. In particular, the resource will assist clinical assessors and experts, judicial officers, Statutory Authorities, caseworkers from government and non-government organisations (NGOs), Independent Legal Representatives, Legal Aid and private solicitors.

It aims to provide guidance to:

- **Make an Assessment Order** – for judicial officers, legal representatives, and caseworkers
- **Allocate a parenting assessment** – for specialist bodies such as the New South Wales (NSW) Children's Court Clinic to determine Authorised Clinicians selection and resources allocation
- **Complete a parenting assessment** – for Authorised Clinicians and private assessors
- **Write an Expert Report** – for Authorised Clinicians and private assessors
- **Provide background information** – for Statutory Authority (casework and legal) teams to support comprehensive assessment
- **Source suitable services** – for managers/caseworkers and NGOs with delegated case management during care matters
- **Represent a parent with intellectual disability** – for public and private solicitors to ensure parents understand their rights and can give informed instructions

S Collings, M Spencer and P Kong, "Toward access and equity: disability-informed practice in child protection — a guide to assessing parenting capacity with parents with intellectual disability", 2022.

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* This resource was produced by the Research Centre for Children and Families for the Toward Access and Equity project. The project was conducted in partnership with the NSW Children's Court Clinic, the Intellectual Disability Rights Service and WASH House Inc.

The "growing up" of Aboriginal and Torres Strait Islander children: a literature review

R Penman*

Abstract ..... [7-8000]

[7-8000] Abstract

Last reviewed: November 2024

This literature review aims to consolidate what is already known about Indigenous children, and to highlight what information is missing.

It considers the data available for understanding the care giving environment of Indigenous children, and child-specific topics such as early childhood, the school years and pathways outside of school.

R Penman, "The 'growing up' of Aboriginal and Torres Strait Islander children: a literature review", 2006.

* This literature review was commissioned as part of Footprints in Time — The Longitudinal Study of Indigenous Children.

Procedural justice and the impact of court and other decision-making processes on children and families in the child protection system

J Cashmore*

Abstract ..... [7-9000]

[7-9000] Abstract

Last reviewed: March 2025

This article examines how court processes impact children and families' experiences The importance of fairness, voice and respect in decision making and implications for improving child protection practices.

J Cashmore, "Procedural justice and the impact of court and other decision-making processes on children and families in the child protection system" (2024) 46(2) *Children Australia* 3035.

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Children's Court update 2019 (criminal jurisdiction)*

P Johnstone†

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Conclusion

[8-1000] Introduction

I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Biripi people, and pay my respects to their Elders past, present and emerging. I acknowledge and respect their continuing culture and the contribution they make to the life of this region.

The purpose of this paper is to alert Local Court Magistrates to recent developments affecting the exercise of Children's Court jurisdiction, and is designed to be a reference resource which may assist you in relation to children's matters in either care or crime.

I will firstly canvass some more general developments affecting the Children's Court over the past year or so, and then discuss some updates in the criminal and care jurisdictions, followed by a brief discussion of some recent case law.

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* This is the second part of the presentation relating to the Criminal jurisdiction in the Children's Court. The first part of the presentation on proceedings relating to care and protection of children and young persons can be found at **[2-5000]**.

† Judge Peter Johnstone, President of the Children's Court of NSW, Local Court Regional Conference, 27–29 March 2019, Port Macquarie.

General updates

Youth Koori Court evaluation

The Youth Koori Court pilot in Parramatta began in February 2015. Western Sydney University were engaged to evaluate the program and delivered the findings in May 2018.[1]

The study determined the model to be an effective and culturally appropriate means of addressing the underlying issues that lead many Aboriginal and Torres Strait Islander young people to engage with the criminal justice system.

In conducting the review, researchers observed hearings; interviewed young people and Elders; analysed Action and Support plans; and compared the time in custody for those involved in the program.

The evaluation found that prior to the Youth Koori Court, the 33 young people involved in the study each spent on average 57 days in detention. During their involvement with the court, they only spent on average 25 days in custody.

Furthermore, over the research period, over half of the items listed on young peoples' action plans were completed by the time of sentence — with most success reported in getting identity documents and managing harmful drug and alcohol habits.

The Youth Koori Court works to defer sentencing for young people until the factors which place them at risk of re-offending are addressed. For many of the young people who participate in the program, their issues with the law are either as a direct result of, or compounded by, the issues they face in their daily lives, such as jobs, safe housing and access to essential services.

Opening of Surry Hills Youth Koori Court

Following the success of the Youth Koori Court pilot in Parramatta, in May 2018 the NSW Attorney General Mark Speakman and Treasurer Dominic Perrottet announced that the Koori Court would be expanded from Parramatta to the Surry Hills Children's Court, with a $2.7 million funding boost over three years.

The Youth Koori Court in Surry Hills opened on 6 February 2019 with a ceremonial sitting to mark its commencement. The Attorney General, Mark Speakman and other distinguished guests were welcomed to the Surry Hills Children's Court for the occasion. The ceremonial sitting commenced with a welcome to country and a smoking ceremony, followed by the formal sitting which included speeches from the President, the Attorney General, Brendan Thomas, CEO of Legal Aid and Nadine Miles, Chief Legal Officer of the Aboriginal Legal Service, Indigenous elder Joanne Selfe and Children's Court Magistrate Sue Duncombe.

Children's Court Magistrate, Sue Duncombe, who presides over the Youth Koori Court, said the court was working to confront the effects of intergenerational trauma, noting that the judiciary has a "moral, ethical and legal responsibility to change that record".[2]

The expansion of the Youth Koori Court to Surry Hills will enable the Children's Court to work with more Aboriginal and Torres Strait Islander young people to address the behaviour that has brought them before the court and to access tools with which they can improve their lives.

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1 M Williams, D Tait, L Crabtree, M Meher, "Youth Koori Court: Review of Parramatta Pilot Project", *Evaluation Report*, Western Sydney University, 2018.

2 M Whitbourn, "'Rehabilitation, not punishment': Youth Koori Court opens in Surry Hills", *The Sydney Morning Herald*, 6 February 2019, www.smh.com.au/national/nsw/rehabilitation-not-punishment-youth-koori-court-opens-in-surry-hills-20190206-p50w0g.html, accessed 6 June 2019.

The Youth Koori Court will continue one day per week at Parramatta Children's Court, and initially on a fortnightly basis at Surry Hills Children's Court.

Memorandum of Understanding to facilitate the expedition of Working with Children Checks in care proceedings

In July 2018, the Children's Court of NSW, the Office of the Children's Guardian and the Department of Family and Community Services entered into a Memorandum of Understanding to facilitate the expedition of Working with Children's Checks in care proceedings.

The Office of the Children's Guardian is an independent statutory authority in NSW Government and administers the Working with Children Check under the *Child Protection (Working with Children) Act 2012*. Authorised carers and their adult household members are required to have a Working with Children Check clearance.

Where an application is made to the Children's Court for an order allocating parental responsibility for a child to the Minister, a relative or kin or another person, whether or not the child's proposed carer or the person proposed to hold parental responsibility for the child has a valid Working with Children clearance is a relevant consideration.

The Office of the Children's Guardian is not usually aware whether a matter is currently before the Children's Court when a person lodges an application for a Working with Children's Check. However, being notified of such information can help to expedite the Office of the Children's Guardian of an application.

The Department of Family and Community Services case workers and legal officers would be aware when a matter is before the Children's Court. Where a care application is soon to be filed and that a proposed carer and any other adult member of the proposed carer's household, has or will be applying to the Office of the Children's Guardian for a Working with Children's Check. By notifying the Office of the Children's Guardian of this information, the Office can expedite the Working with Children's Check application. This process will assist in avoiding delays in the Children's Court proceedings.

The continuing relevance of brain science

Ongoing research into brain science and knowledge around adolescent brain development continues to be of importance to the Children's Court in understanding children and young people, and responding appropriately to their needs.

A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobe) is the last part of the human brain to develop. The frontal lobe is that part of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.[3]

We know that rational choice theory argues that young people are able to undertake a logical risk assessment in their decision-making process. Neurobiological research, on the other hand, argues that adolescent decision-making is not linear, sophisticated and predictable.

A further complication is that brain development differs depending upon a number of variables and that "neuro-scientific data are continuous and highly variable from person to person: the bounds of 'normal' development have not been well delineated".[4]

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3 E McCuish, R Corrado, P Lussier and S Hart, "Psychopathic traits and offending trajectories from early adolescence" (2014) 42 *Journal of Criminal Justice* 66.

4 S Johnson, R Blum, J Giedd, "Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy" (2009) 45(3) *Journal of Adolescent Health* 216 at 220.

Despite this, the neurobiological research to date shows that whilst adolescents may appear to function in much the same way as adults, they are not capable of the executive function that mature adults possess.

In simple terms, according to neurobiology, a young person is unable to make any rational choice, let alone a rational choice to commit a criminal act.

This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility. Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of a young offender.

In light of these advances in brain science and the implications these findings have for young offenders and their treatment in the criminal justice system, it is important to also consider a final reason why children must be treated differently to adults.

There is a growing body of evidence that supports the proposition that incarceration of children and young persons is both less effective and more expensive.

Most young persons in the juvenile justice system can be adequately supervised in community-based programs or with individualised services without compromising public safety. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality.

Enlightened with these advances in the science of adolescent brain development, we are able to better understand, empower, protect, divert and rehabilitate children and young people falling into the youth justice system. In my view, it is our job to do our best to help juveniles through these problems years until they mature and outgrow these behaviours.

Updates in the criminal jurisdiction

Declining number of children in detention

The NSW Bureau of Crime Statistics and Research (BOCSAR) reported on 30 January 2019 that the juvenile detention population has decreased by roughly 40% since the peak of 405 detainees in June 2011.[5] The number of children and young people in detention has decreased significantly over the past six years, which is in stark contrast to the adult prison population which continues to rise.

Furthermore, three juvenile detention centres have closed over the past six years due to the falling number of young people in detention. Now only six juvenile detention centres remain in NSW.

I believe it is no coincidence that this number has fallen so significantly, and that this development has not occurred in isolation. Rather, the insights we have gained from brain science have allowed us to gain a better understanding of the adolescent brain, and paved the way for better policies, practices and procedures which highlight and emphasise the fact that children are fundamentally different to adults and must be treated as such.

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5 NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update December 2018*, 30 January 2019, accessed 4 April 2019.
Note: For comparison purposes, the custody statistics in 2011 can be obtained at NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update March 2013*, 11 July 2013, accessed 6 June 2019.

I am a strong advocate for the approach of Justice Reinvestment, which is an idea for rethinking the criminal justice system. Under this philosophy, the savings from the closure of three juvenile detention centres should be reinvested back into the community to provide services and supports to children, young people and their families.

Youth Koori Court

As discussed in my general updates, the Youth Koori Court (YKC) continues to operate in Parramatta Children's Court and has recently commenced at Surry Hills Children's Court.

The YKC was established as a pilot in 2015 at Parramatta Children's Court and has now been operating for almost three years.

The YKC was established in response to the devastating over-representation of Aboriginal young people in the justice system.

The YKC seeks to contribute to a solution to the over-representation of Aboriginal young people through the inclusion of Elders and professionals who are Aboriginal, providing low volume case management mechanisms that will facilitate greater understanding of and participation in the court process by the young person, identifying relevant risk factors that may impact on the young person's continued involvement with the criminal justice system, and monitoring appropriate therapeutic interventions to address these risk factors.

The process that has been developed for the YKC involves an application of the deferred sentencing model (s 33(1)(c2) *Children (Criminal Proceedings) Act 1987*) as well as an understanding of and respect for Aboriginal culture.

I will continue to advocate for the expansion of the YKC, particularly to communities in Dubbo.

New website for children and young people

The Advocate for Children and Young People launched a new website called "Our Local".[6] The website was built in response to feedback from children and young people who asked for an easy way to find local and State-wide opportunities, activities, services and events

The "Our Local" website may be a valuable tool for judicial officers engaging with young people. Notably, 40% of opportunities on the website are in regional and remote areas of NSW.

Criminal Legislation Amendment (Child Sexual Abuse) Act 2018

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* was assented to by the NSW Parliament in June 2018 and partially proclaimed in August and December 2018. The Bill was introduced in response to the criminal justice recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* made a suite of reforms to a number of Acts. I would like to discuss three important amendments that were made under these reforms that are relevant to cases involving children and young people.

Section 80AG Crimes Act 1900

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* introduced s 80AG *Crimes Act 1990*. Section 80AG creates a defence of similar age in relation to certain child sex offences.

6 See www.ourlocal.nsw.gov.au, accessed 4 April 2019.

Section 80AG(1) provides that:

> It is a defence to a prosecution for an offence … if the alleged victim is of or above the age of 14 years and the age difference between the alleged victim and the accused person is no more than 2 years.

In any criminal proceedings involving the defence of similar age, the prosecution has the onus of proving, beyond reasonable doubt, that the alleged victim was less than 14 years of age or that the difference in age between the alleged victim and the accused person is more than two years: s 80AG(2).

Section 91H Crimes Act 1900

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* amended s 91H *Crimes Act*. Section 91H(3) was inserted to provide that proceedings for an offence related to the production, dissemination or possession of child abuse material against a child or young person may only be instituted by or with the approval of the Director of Public Prosecutions.

The amendments to s 91H also allows for an exception for the possession of child abuse material under s 91HAA if the possession occurred when the accused person was under the age of 18 years, and a reasonable person would consider the possession as acceptable having regard to the following circumstances:

- the nature and content of the material
- the circumstances in which the material was produced and came into the possession of the accused person
- the age, intellectual capacity, vulnerability or other relevant circumstances of the child depicted in the material
- the age, intellectual capacity, vulnerability or other relevant circumstances of the accused person at the time the accused person first came into possession of the material and at the time that the accused person's possession of the material first came to the attention of the police officer, and
- the relationship between the accused person and the child depicted in the material.

Finally, the amendment also created a defence to s 91H. Subsections 91HA(9) and (10) now provide that it is a defence in proceedings for an offence against s 91H of possessing child abuse material if the only person depicted in the material is the accused person, if the production or dissemination of the material occurred when the accused person was under the age of 18 years. The onus of proving either defence lies with the accused person on the balance of probabilities.

Section 3C Child Protection (Offenders Registration) Act 2000

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* also made an amendment to the *Child Protection (Offenders Registration) Act 2000*. The amending Act inserted s 3C into the Act, which provides courts with the discretion to treat child offenders as non-registrable.

The amendment permits a court that sentences a person for a sexual offence committed by the person when the person was a child to make an order declaring that the person is not to be treated as a registrable person in respect of that offence. The *Child Protection (Offenders Registration) Act 2000* provides for certain obligations to be placed on registrable persons, including reporting obligations.

The court may make an order only if the victim of the offence was under 18 years of age, the offender has not been convicted of certain other offences, the court does not impose a sentence of full-time detention or a control order in respect of the offence and the court is satisfied that the person does not pose a risk to the lives or sexual safety of children.

Amendments to the Children (Criminal Proceedings) Act 1987: Early appropriate guilty pleas and committals

The *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* was passed by the NSW Government in October 2017 and commenced on 30 April 2018. The amendments aim to address indictable offences at the early stage of the justice process by the early appropriate guilty plea reforms.

That Act made significant amendments to committal proceedings generally, including the addition of Pt 3, Div 3A to the *Children (Criminal Proceedings) Act 1987* which creates separate committal procedures for children charged with certain indictable offences.

I will outline some of the key changes made to the *Children (Criminal Proceedings) Act 1987* in relation to committal proceedings and early guilty pleas.

Pursuant to s 31(1) of the *Children (Criminal Proceedings) Act 1987*, an offence before the Children's Court will be dealt as a summary proceeding under Ch 4 *Criminal Procedure Act 1986* unless it is a serious children's indictable offence or unless, and until, it is to be dealt with as a committal proceeding under ss 31(2), (3) or (5) *Children (Criminal Proceedings) Act 1987*.

If the young person pleads not guilty in a summary proceeding, the court will direct the prosecutor to serve the brief of evidence within four weeks and the court will adjourn the case for seven weeks to allow the young person to reply to the brief.

This will not be required for an offence for which a brief is not required under cl 24 *Criminal Procedure Regulation 2017* or the offence is a domestic violence offence as defined in s 11 *Crimes (Domestic and Personal Violence) Act 2007* but is not a prescribed sexual offence as defined by s 3 *Criminal Procedure Act 1986*.

On the next court date if the young person maintains his or her plea of not guilty, the case will be listed for hearing at the earliest opportunity.

If the young person pleads guilty, or the court finds the young person guilty, the court may sentence the young person on the same day or the case may be adjourned for sentence with a background report being provided by Juvenile Justice.

If the court directs that a background report be prepared by Juvenile Justice, the court will adjourn the case for six weeks in the case of a young person who is not in custody and two weeks in the case of a young person who is in custody.

If a prosecutor intends to make a submission to the Children's Court that the court should consider exercising its discretion under ss 31(3) or (5) *Children (Criminal Proceedings) Act 1987*, the prosecutor is to advise the young person and the court at the earliest opportunity and no later than:

(a) in respect of a s 31(5) application: the time that a guilty plea is entered for the offence for which the application relates and the matter is adjourned for a background report;

(b) in respect of a s 31(3) application: the time that the court adjourns the matter for a summary hearing.

If the young person intends to inform the Children's Court that he or she wishes to have the case dealt with according to law under s 31(2), the young person is to notify the prosecutor and the Children's Court at the earliest opportunity.

Useful case law

This section will canvass some recent case law which is relevant to, or impacts on the exercise of the Children's Court care and protection and criminal jurisdiction.

These cases have been published on the *Children's Law News* website in 2018.[7]

R v AH [2018] NSWSC 973

The offender was convicted of the offence of doing an act in preparation for, or planning a terrorist act. The offender is sentenced to 12 years imprisonment, to date from 24 April 2016, expiring 23 April 2028. A non-parole period is fixed at 9 years, expiring 23 April 2025. The offender is to be detained as a juvenile until [the date of his 21st birthday].

The NSW Supreme Court held that pursuant to s 105A.23 *Criminal Code Act 1995*, the offender is warned that an application may be made under Div 105A *Criminal Code* for a continuing detention order requiring that the offender be detained in a prison after the end of his sentence for the offence.

DM v R [2018] NSWCCA 305

The NSW Criminal Court of Appeal held that the sentencing judge made a factual error in finding that the applicant knew that the victim had nowhere to go on the night of the offence, made a material factual error in finding that the applicant was in a position of leadership in relation to the offending conduct and erred in failing to make a finding of objective seriousness.

The court allowed the appeal, quashing the sentence imposed at first instance. The offender was sentenced to imprisonment for four years and six months with a non-parole period of two years and five months.

Johnson v R (2018) 92 ALJR 1018

The High Court of Australia unanimously dismissed an appeal that concerned convictions for historical sexual offences, and whether the evidence of alleged sexual misconduct was admissible on the trial of certain counts. The High Court unanimously found that the impugned evidence had relevance in its connection to the family background in which the complainant and appellant were raised.

Conclusion

I hope this paper has been useful in outlining the changes in the Children's Court jurisdiction which have occurred over the past few years, and which will continue to unfold over the course of the year.

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7 Children's Court of NSW, *Children's Law News*, at www.childrenscourt.justice.nsw.gov.au/Pages/publications/lawnews/cln-2018.aspx, accessed 4 April 2019. See also **Important cases** at **[9-1000]**.

Socioeconomic circumstances of young offenders — 2022 young people in custody health survey report — selected findings

Social determinants of health ..... [8-2000]

Mental health

Language and reading

Offending behaviour

Physical health

Smoking, alcohol and drugs

This is a summary of selected findings from the Young People in Custody Health Survey Report 2022, published in February 2026. Please see the Report for further details, analysis and comparison with previous surveys.

The Young People in Custody Health Survey (YPICHS) was undertaken in 2003, 2009 and 2015 in collaboration with Justice Health and Forensic Mental Health Network. The 2022 survey was conducted solely by Youth Justice NSW. The survey involved an interviewer-administered questionnaire about physical and mental wellbeing, and a range of standardised cognitive, mental health, and speech and language assessments. Participation in the study was voluntary.

Number of young people surveyed: 147 (65.9% of all young people in custody).

Sample: 96% male with an average age of 16 years. 55% of participants were Aboriginal young people.

[8-2000] Social determinants of health

Last reviewed: May 2026

- 17% of all participants had been placed in care before the age of 16 years (Aboriginal participants: 21%).
- 60% of all participants reported that one or both of their parents had ever been incarcerated (Aboriginal participants: 80%).
- 29% were attending school or another type of educational institution (eg TAFE) in the 6 months prior to custody (Aboriginal participants: 24%).
- 39% were employed in the 6 months prior to custody (Aboriginal participants: 24%).
- 41% had been bullied. Bullying others was also prevalent, with 53% of participants reporting that they had bullied others.
- 4% of participants reported being unsettled or having no fixed place of abode in the four weeks prior to custody.

Mental health

- 64% had experienced childhood abuse/neglect.
- 30% had experienced severe childhood abuse/neglect.
- 20% had an intelligence quotient (IQ) in the "Extremely Low" (intellectual disability) range (under 69). Aboriginal participants were more likely to have an IQ in the Extremely Low range (33%).
- 41% scored in the "Borderline" range (IQ 70 to 79).
- 28% had self-harmed in the past.
- 26% had thought about suicide. Since coming into custody, 15% of participants had thought about suicide.

Language and reading

- 42% had Severe Difficulties in core language skills, with Aboriginal young people more likely to have such difficulties (54%).
- 69% had Severe Difficulties in reading comprehension, with such difficulties more likely among Aboriginal participants (81%).

Offending behaviour

- 75% had been in custody prior to the current custodial period. 82% of Aboriginal participants had a history of youth justice custody.
- The average age at which all participants entered custody for the first time was 15 years, with Aboriginal participants first entering custody at an earlier age than non-Aboriginal participants (14 years).
- Participants had been in custody between 1 and 37 times, with an average of 5.

Physical health

- 29% have had ever asthma.
- 44% have had a head injury resulting in unconsciousness.
- Diet improved while in custody. Eating fresh fruit three or more times a week increased from 41% in the community to 85% since in custody; and eating fresh vegetables three or more times a week increased from 48% in the community to 75% since in custody.

Smoking, alcohol and drugs

- 86% had ever smoked a full cigarette, with a mean age of initiation of 11.9 years. 87% of participants had ever vaped, with a mean age of initiation of vaping (with nicotine) of 13.9 years.
- Of those who had ever smoked, 67% had smoked cigarettes every day/almost every day in the 12 months prior to custody and 63% of those who had vaped, vaped daily or almost daily in the 12 months prior to custody.
- The majority (89%) of participants had consumed a full serve of alcohol in the past and 89% had ever been intoxicated, with a mean age of first becoming intoxicated of 13.7 years.

- Of those who had consumed alcohol in the 12 months prior to custody, 60% of those aged 18 years or older, and 84% of those under 18, were drinking at hazardous and harmful (ie “risky”) levels.
- 92% had engaged in illicit drug use with cannabis (91%) the most used illicit drug, followed by cocaine (50%), ecstasy/MDMA (49%), methamphetamine (ice) (29%) and hallucinogens (27%).
- 74% reported illicit drug use at least weekly in the year prior to custody.
- 62% reported committing crime to obtain alcohol or drugs.
- 65% reported that they were intoxicated (on alcohol, drugs or both) at the time of their offence.

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Important cases — Admission of evidence

R v Diallo (No 2) [2024] NSWSC 853 ..... [9-1000]

Gray v R [2020] NSWCCA 240

CO v DPP [2020] NSWSC 1123

PQR v DPP (NSW) [2020] NSWSC 731

Johnson v The Queen (2018) 266 CLR 106

Tikomaimaleya v R (2017) 95 NSWLR 315

R v SG [2017] NSWCCA 202

AL v R [2017] NSWCCA 34

The Queen v GW (2016) 258 CLR 108

JB v R (No 2) [2016] NSWCCA 67

DPP v Martin (a pseudonym) [2016] VSCA 219

JP v DPP (NSW) [2015] NSWSC 1669

[9-1000] R v Diallo (No 2) [2024] NSWSC 853

Last reviewed: March 2025

Evidence — admissions by conduct — lies and consciousness of guilt — statements made by accused near the scene of the murder — no adult, lawyer or support person present — statutory prohibition on admissibility — whether exception to prohibition established — where questions asked in urgent circumstances — accused member of suburban gang — differences leading to violent confrontation — overview of prosecution case — eye witness testimony by other witnesses — taking the contempt charge rather than an affirmation or oath — repeated mantra of "no comment" — circumstantial case — assessment of accused's vulnerability — palpable fear and confusion – satisfactory explanation of absence of adult — a lot happening — other factors militating against admission of evidence — evidence not admissible.

Gray v R [2020] NSWCCA 240

Evidence Act 1995 ss 12, 13 — witness competence — 5-year-old child complainant diagnosed with autism spectrum disorder and hearing impairment — judge did not err by finding complainant competent to give unsworn evidence — Witness Intermediary Assessment Report indicated complainant able to give evidence if appropriately questioned — question of reliability separate to competence.

CO v DPP [2020] NSWSC 1123

Children (Criminal Proceedings) Act 1987 s 25 — background reports — magistrate erred by sentencing plaintiff without background report — breach of s 25 invalidates sentence — matter remitted to Children's Court.

PQR v DPP (NSW) [2020] NSWSC 731

Appeal against magistrate's refusal to hear three sets of charges separately — plaintiff charged with indecent assault offences against three complainants — evidence of each complainant cross-admissible as tendency evidence — court does not have jurisdiction to intervene to disturb magistrate's refusal of application for separate hearings — applicant has failed to identify a question of law alone or jurisdictional error — leave not granted.

Johnson v The Queen (2018) 266 CLR 106

"discreditable conduct evidence" admitted under s 34P(2) *Evidence Act 1929* (SA) to show propensity — appellant convicted of five counts of sexual offending against the complainant, his sister — Crown relied on uncharged acts as relationship or context evidence to rebut presumption of doli incapax and to show relationship between appellant and complainant — evidence of other sexual misconduct admissible — probative value substantially outweighed any prejudicial effect to the appellant — appeal dismissed.

Tikomaimaleya v R (2017) 95 NSWLR 315

Children's evidence — examination-in-chief given by a complainant in recorded interview with police — witness to be competent at time of interview — trial judge not obliged to direct jury of distinction between sworn and unsworn evidence — no requirement to warn jury of reliability of unsworn evidence s 165(2) *Evidence Act 1995* — judge did not err by admitting complainant's pre-recorded interview — significant advantage in jury seeing and hearing witness — evidence did not give rise to reasonable doubt — appeal allowed and dismissed.

R v SG [2017] NSWCCA 202

Appeal — exclusion of corroborating evidence by child — respondent charged with multiple offences of assaulting wife — 10-year-old daughter of respondent/victim gave evidence to police — trial judge ruled evidence not relevant — further determination evidence be excluded as probative value substantially outweighed by danger of unfair prejudice — relevance under *Evidence Act 1995* to be given wide interpretation — evidence could rationally affect assessment of probability facts in issue under s 55 — judge erred in not assessing probative value of evidence under s 137 — evidence could be tested in court to remove risk of unfair prejudice — held evidence relevant and admissible — appeal allowed.

AL v R [2017] NSWCCA 34

Young offender — appeal — sexual intercourse with a child under the age of 10 — offender aged 12 to 13 and complainant aged 4 to 5 — whether trial judge failed to appropriately warn the jury as to the unreliability of the complainant's evidence — s 165 of the *Evidence Act 1995* direction — *Murray* direction — capacity of jury to assess evidence — whether trial judge failed to adequately direct jury as to the burden and standard of proof – whether trial judge failed to adequately direct jury as to the accused's evidence — whether judge failed to adequately direct jury on question of doli incapax — *RP v The Queen* (2016) 259 CLR 641 considered (see **[9-1140]**) — whether verdict unreasonable or cannot be supported by evidence — open to jury to find guilt beyond reasonable doubt — appeal dismissed.

The Queen v GW (2016) 258 CLR 108

Young offender — 6-year-old witness — directions — Uniform Evidence Law — competence — s 13 *Evidence Act 2011* (ACT) (in virtually identical terms to s 13 *Evidence Act 1995* (NSW))

— pre-trial ruling that young child witness' evidence be received unsworn — ruling open — Court of Appeal (ACT) erred in holding the trial judge should have directed the jury as to the differences between sworn and unsworn evidence in assessing the reliability of the witness' evidence — neither the common law nor the Evidence Act required such a direction.

JB v R (No 2) [2016] NSWCCA 67

Young offender — murder committed on 21 April 2008 — material discovered subsequent to the exhaustion of the avenues of appeal — application for inquiry into conviction made to Supreme Court pursuant to s 78 *Crimes (Appeal and Review) Act 2001* — referral to Court of Criminal Appeal under s 79(1)(b) *Crimes (Appeal and Review) Act 2001* — concession by Crown that appeal must succeed and conviction be quashed — new trial should only be ordered where it would more adequately remedy the miscarriage of justice than any other order the Court could make — undertaking by Crown not to call a compromised witness on retrial — evidence of that witness very important in original trial — remaining evidence not capable of proving applicant guilty of murder — detailed analysis of evidence likely to be called at retrial — evidence unlikely to establish guilt of applicant — interests of justice did not require that a new trial be had — verdict of acquittal entered.

DPP v Martin (a pseudonym) [2016] VSCA 219

Young offender — incest involving biological sister attributed to the respondent when he was aged 16 — prosecution sought to lead other acts of misconduct when he was aged between 11 and 13 as "context evidence" — whether exclusion of "context evidence" would substantially weaken the prosecution case — trial judge ruled against admissibility — whether error in treating presumption of doli incapax as relevant when assessing admissibility of the "uncharged" acts — presumption not relevant in way in which invoked — appeal allowed — matter remitted to trial judge for reconsideration.

JP v DPP (NSW) [2015] NSWSC 1669

Young offender — aggravated breaking and entering — fingerprint left at the scene — challenge to admissibility of fingerprint expert's conclusion that plaintiff's fingerprint found at the crime scene — whether admission of expert certificate involved a question of law alone — whether ground involved mixed question of fact and law — whether magistrate's reasons for admitting certificate inadequate — whether magistrate's reasons for convicting plaintiff inadequate — complaint not made out — whether magistrate wrongly purported to apply different standard to admission of expert evidence in Children's Court compared to other courts — complaint not made out that magistrate devolved decision-making task to expert — leave to challenge conviction refused.

Important cases — Admissions

R v Aayan [2025] NSWChC 9 ..... [9-1020]

R v Mercury [2019] NSWSC 81

R v FE [2013] NSWSC 1692

R v Cortez (unrep, 3/10/2002, NSWSC)

R v Phung [2001] NSWSC 115

[9-1020] R v Aayan [2025] NSWChC 9

Last reviewed: November 2025

Children — crime — diversions — disqualification orders — youth justice conference — pleas, findings and admissions of guilt.

R v Mercury [2019] NSWSC 81

Evidence — s 13 *Children (Criminal Proceedings) Act 1987* — objection to admissibility of alleged confession to murder — accused aged 17 years at time of interview — no parent, guardian, adult or lawyer present at interview — no rules mandating presence of support person in 1971 — low intellect, immaturity, disturbed upbringing, disturbed mental state and personal vulnerability of accused considered — record of interview inadmissible in the "particular circumstances of the case".

R v FE [2013] NSWSC 1692

15-year-old girl — improperly obtained evidence — whether grave improprieties — failure to caution the accused prior to or during questioning — interview conducted notwithstanding initial refusal to answer questions — whether unfair deprivation of right to silence — failure to take the accused to the custody manager who was obliged, since she was a vulnerable person, to assist her to exercise her legal rights — the accused's rights under Pt 9 *Law Enforcement (Powers and Responsibilities) Act 2002* were neither read out nor explained to her — interview with the accused excluded — improperly obtained evidence from a juvenile excluded under ss 90, 138 and 139 *Evidence Act 1995*.

R v Cortez (unrep, 3/10/2002, NSWSC)

Young offenders aged 17 years at the time of arrest and interview — murder — admissibility of certain statements — application for evidence to be excluded under s 90 *Evidence Act 1995* — police gave no indication that the young offenders were under arrest or suspected of murder — whether each offender could be deemed to have been arrested — whether the accepted support person attending the interview with each offender was appropriate — whether each offender was made aware of his entitlements or properly advised as to the seriousness of his position —

failure to be told of the right to obtain free legal advice — the offenders were not afforded the protection the legislature intended — evidence tendered was inadmissible by virtue of s 90 and in breach of s 138 *Evidence Act* as evidence improperly obtained.

R v Phung [2001] NSWSC 115

Young offender aged 17 years — armed robbery and murder — admissibility of certain statements — objection to two electronic records of interview — compliance with s 13 *Children (Criminal Proceedings) Act 1987* and Pt 10A (rep) *Crimes Act 1900* as to the provision of a support person — whether the accused was properly advised as to his entitlements — whether offered the opportunity of obtaining legal assistance — overall irregularity in compliance with the statutory regime although various irregularities were not contumelious or deliberate — serious concern as to whether the rights of the accused were properly protected — in combination, there were sufficient circumstances involving non compliance with the statutory regime, so as to give rise to serious concern as to whether the accused, a 17-year-old with a somewhat disturbed background, had been sufficiently advised as to his rights, and as to whether those rights were adequately protected, to require exclusion of the evidence under ss 90 and 138 *Evidence Act 1995*.

Important cases — Appeal

TC v Director of Public Prosecutions [2026] NSWSC 86 ..... [9-1040]

AB v R [2023] NSWCCA 165

Kannis v R [2020] NSWCCA 79

BC v R [2019] NSWCCA 111

[9-1040] TC v Director of Public Prosecutions [2026] NSWSC 86

Last reviewed: May 2026

Appeal against conviction — appeal by rehearing — appellant was found guilty of property offences after a trial before judge alone — appeal allowed.

AB v R [2023] NSWCCA 165

Conviction appeal — sexual intercourse with child under 10 years — applicant 13 years old at time of offending — whether a miscarriage of justice was occasioned by trial judge's failure to give a "lies direction" or "*Zoneff* direction" in response to Crown Prosecutor's submissions — to ensure a fair trial it was necessary for trial judge to have given an *Edwards* or *Zoneff* direction — majority verdict — *Jury Act 1977*, s 55F(2)(b) — whether it was open to trial judge to conclude that the preconditions for taking a majority verdict were satisfied — in the circumstances it was open to trial judge to be satisfied of the requirements of s 55(2)(b) — appeal allowed — whether retrial or acquittal should be entered — notwithstanding the Crown having a reasonably strong case the cause of the error favours entering an acquittal — applicant acquitted.

Kannis v R [2020] NSWCCA 79

Conviction appeal — applicant pleaded guilty to child pornography and grooming offences — full-time custodial sentence imposed with applicant to be released on recognizance release order after 15 months — reliance upon sentencing decisions failed to give effect to findings favourable to applicant — sentencing decisions dissimilar to applicant's case in significant respects and did not identify sentencing range — applicant re-sentenced to imprisonment to be released after 11 months on recognizance release order.

BC v R [2019] NSWCCA 111

Conviction appeal — applicant sentenced for 20 counts of child sexual assault offences — applicant was aged between 11–13 at the time of committing three counts of child sexual assault offences — evidence in Crown case did not rebut presumption of doli incapax — no evidence of applicant's maturity or intelligence — guilty verdicts unreasonable for counts 1–3 — tendency evidence correctly admitted — common features of each incident sufficiently specific and of significant probative value — directions to jury about use of tendency evidence ameliorated its prejudicial effect — applicant's convictions quashed in respect of counts 1–3 and re-sentenced — imposition of a new sentence deferred until further hearing on tendency evidence.

Important cases — Apprehended violence orders

Police v BS [2011] CLN 4 ..... [9-1060]

[9-1060] Police v BS [2011] CLN 4

Last reviewed: June 2024

Children — criminal — young offenders — double jeopardy — charges establishing contravention of AVO — same facts for each offence — prosecution to elect which charge to proceed.

Important cases — Arrest

DPP (NSW) v SB [2020] NSWSC 734 ..... [9-1080]

DPP (NSW) v GW [2018] NSWSC 50

DPP (NSW) v CAD [2003] NSWSC 196

[9-1080] DPP (NSW) v SB [2020] NSWSC 734

Last reviewed: June 2024

Appeal against dismissal of proceedings for assaulting police officer in execution of duty and resist/hindering police officer in execution of duty — objective test of lawfulness under s 99(1)(b) LEPRA — reasonably necessary to arrest to protect workers from Housing NSW and the applicant from committing further offences — arresting officer's state of mind, that it was reasonably necessary to arrest, relevant under s 99(1)(b) — appeal allowed — matter remitted to Local Court.

DPP (NSW) v GW [2018] NSWSC 50

Appeal — breach of bail — evidence obtained improperly and excluded under s 138 *Evidence Act 1995* — the failure by arresting officer to consider arrest alternatives — arrest for breach of bail without consideration of alternatives is not necessarily improper — court did not adequately disclose reasoning nor conclusions of facts — Supreme Court unable to determine finding of fact in regards to magistrate's finding of impropriety — magistrate failed to conduct a balancing exercise under s 138 — appeal allowed in part.

DPP (NSW) v CAD [2003] NSWSC 196

Young offenders — allegations of assaulting a police officer — informations against defendants in the Children's Court dismissed — appeal — whether magistrate wrong in refusing to receive certain evidence of the events giving rise to the charges — whether matter should be restored to the Children's Court — whether complainant had acted unlawfully or improperly in arresting a young person for a minor offence in circumstances that did not call for an arrest — whether it was possible for the magistrate to apply the test mandated by s 138 *Evidence Act 1995* — whether matter to be remitted to the magistrate to be dealt with according to law.

Important cases — Bail

Section 22C matters ..... [9-1100]
R v KC [2025] NSWSC 258
R v JS [2025] NSWSC 116
R v TB [2025] NSWSC 38
R v BH [2024] NSWSC 1577
R v TW [2024] NSWSC 1504
RB v R (No 2) [2024] NSWSC 845
R v KO [2024] NSWSC 679
R v RB [2024] NSWSC 471
Other bail matters ..... [9-1110]
LT v Director of Public Prosecutions (NSW) [2025] NSWSC 1288
LF v Director of Public Prosecutions (NSW) [2026] NSWSC 212
DC v R [2026] NSWSC 81
ZT v R [2025] NSWCCA 116
R (Cth) v IA [2025] NSWSC 761
R v YA [2024] NSWSC 1445
R (Cth) v OK [2024] NSWSC 1411
R v GW [2023] NSWSC 664
R v JB [2023] NSWSC 94
R v JH [2023] NSWSC 93
DPP (NSW) v PH [2022] NSWSC 1245
R v LM [2022] NSWSC 987
JD v Commissioner of Police, NSW Police Force [2022] NSWSC 911
R v ET [2022] NSWSC 905
R v Fontaine (a pseudonym) [2021] NSWSC 177
AB v R (Cth) [2016] NSWCCA 191
R v NK [2016] NSWSC 498

[9-1100] Section 22C matters

Last reviewed: November 2025

R v KC [2025] NSWSC 258

Bail — release application — break enter and steal — taking and driving a motor vehicle — driving unlicensed — offences committed whilst on bail — young person — 14 years old — s 22C *Bail Act 2013* test — unacceptable risk test — positive conduct in custody — motivation to address issues — strength of bail proposal — bail granted with conditions.

R v JS [2025] NSWSC 116

Bail — 15-year-old Aboriginal child — further offences committed whilst on bail — s 22C *Bail Act* test — attempt to commit substantive offence is not a "relevant offence" as required by s 22C — unacceptable risk test — bail granted with conditions.

R v TB [2025] NSWSC 38

Bail — 14 year old Aboriginal child — charged with police pursuit and knowingly carried in conveyance while on bail — these charges to be dropped — Court is still required to apply s 22C *Bail Act 2013* because charges not yet dropped — tension between s 22C *Bail Act* and s 6 *Children (Criminal Proceedings) Act 1987* — s 22C *Bail Act* requires a child not to be treated equally before the law when accused of certain crimes — child in custody for 3 months as a result of charges that are to be withdrawn — consideration of unacceptable risk — prosecution not established bail should be refused — conditional bail granted.

R v BH [2024] NSWSC 1577

Bail — Applicant 14 year old Aboriginal child — operation of s 22C *Bail Act 2013* — whether high degree of confidence requires certainty that the applicant will not reoffend — application of s 6 *Children (Criminal Proceedings) Act 1987* to the bail proceedings — consideration of unacceptable risk — prosecution failed to establish that bail should be refused — conditional bail granted.

R v TW [2024] NSWSC 1504

Bail — Aboriginal juvenile — observations on the application of s 22C *Bail Act 2013* — bail granted.

RB v R (No 2) [2024] NSWSC 845

Bail — juvenile applicant — whether bail concerns give rise to an unacceptable risk — risk of failing to appear — risk of serious offences — strong Crown case — protective factors — Bail Casework 22C plan — long criminal history for similar offences — history of non-compliance with bail — breaches of bail occurred at proposed bail address — observations on s 22C *Bail Act 2013* — relevant offence — motor theft offence — relevant young person — meaning of a high degree of confidence — release application refused.

R v KO [2024] NSWSC 679

Bail — release application — young person — 14 years old — concerning charges — further offence committed whilst on bail — s 22C *Bail Act 2013* test — relevant offences — attempt to commit substantive offence is not a relevant offence — unacceptable risk test — bail granted with conditions.

R v RB [2024] NSWSC 471

Bail — Aboriginal youth — multiple offences — whether unacceptable risks can be ameliorated by proposed conditions — a number of services actively engaged with by RB — close to age 18 — application for some of his other offences (part heard) to be dealt with under s 31(3) of the *Children (Criminal Proceedings) Act 1987* — s 22C *Bail Act 2013* commenced 3 April 2024 — applicability to the offending — *Bail and Crimes Amendment Act 2024* — tension with *Children (Criminal Proceedings) Act* — unfairly discriminatory against a class of children accused of crimes — police letters — expressed in generalities rather than facts — police letters expressing

opinions as to whether a person should be released — *Director of Public Prosecutions (NSW) v Mawad* [2015] NSWCCA 227 at [33]–[34] and [38]–[39] s 22C does not apply as all alleged offending before s 22C commenced so no further relevant offence committed whilst on bail.

[9-1110] Other bail matters

Last reviewed: May 2026

LT v Director of Public Prosecutions (NSW) [2025] NSWSC 1288

Bail — child in Minister's care — accommodation requirement — pre-release condition — where accommodation not organised within 24 hours in accordance with Youth Justice report — where court to list case every two days to ensure suitable accommodation is organised — power to seek information from officers of relevant government bodies — child released to bail.

LF v Director of Public Prosecutions (NSW) [2026] NSWSC 212

Bail — release application — 14-year-old offender — confronting and difficult application — 10 sets of offences — resort to violence — inability to control and regulate emotions — more positive recent progress — where sentencing proceedings in Children's Court imminent — where defended hearings delayed. Bail granted on conditions.

Bail — whether grant of bail fetters the subsequent exercise of sentencing discretion — different considerations applicable — whether refusal of bail has similar capacity to "fetter" as the grant of bail

DC v R [2026] NSWSC 81

Bail — release application — unacceptable risk test — juvenile applicant proposed to be released to residential rehabilitation program — sentencing listed in 19 days' time — sentence likely to be a control order — whether grant of bail to rehabilitation program would fetter discretion of sentencing magistrate — bail refused.

ZT v R [2025] NSWCCA 116

Bail — release application — murder — where conviction quashed by Court of Criminal Appeal — unreasonable verdict — Director's appeal to High Court allowed — matter remitted to Court of Criminal Appeal for determination according to law — offence for which an appeal is pending in Court of Criminal Appeal — whether special or exceptional circumstances exist that justify a decision to grant bail — consideration of the relative strength of the ground of appeal — whether the appeal has reasonable prospects of success — whether the appeal is reasonably arguable — whether bail concerns are capable of amelioration by imposition of conditions.

R (Cth) v IA [2025] NSWSC 761

Bail — variation application — detention application — terrorist offences — "exceptional circumstances" — *Bail Act 2013* s 30A — private electronic monitoring — variation granted.

Bail — release application — child abuse material offences — bail granted.

R v YA [2024] NSWSC 1445

Bail — detention application — where court satisfied respondent will be sentenced to full-time imprisonment — *Bail Act 2013* s 22B — "special or exceptional circumstances" — where offender under 18 at the time of the offences — where kept in juvenile detention centre before bail granted — where offender now an adult — where legislation provides no power or discretion in bail court for offender to be detained in detention centre on remand —

possible lacuna in legislation — where sentencing court has power to order offender to be detained in juvenile institution upon sentence — threats from other accused — where sentencing proceedings to occur in the next 6 weeks — prosecution of detention application fairly and properly muted — special or exceptional circumstances established — application refused.

R (Cth) v OK [2024] NSWSC 1411

Bail – release application — young person — conspiring to engage in an act in preparation for or planning a terrorist act contrary to ss 11.5(1) and 101.6(1) of the Criminal Code (Cth) — show cause — unacceptable risk — extremist ideology — co-conspirators — risk of re-radicalisation — bail concerns — community supports — risk mitigated — bail granted subject to conditions.

R v GW [2023] NSWSC 664

Applicant is 11-year-old Aboriginal child — offences of aggravated break, enter, and steal; armed robbery; larceny; destroying property; being carried in a conveyance without consent; and riot — present allegations committed while applicant subject to bail for a number of different charges — Juvenile Justice not able to provide formal supervision because applicant had not entered any pleas of guilty to the offences — distinction between "bail supervision" and "bail support" at [36]–[40] — essential that children who have a multiplicity of complex needs are provided with the support, supervision, and guidance they require in the community as opposed to having them detained in custody — service providers actively engaged — multiple underlying issues that need to be addressed — necessary to ensure that a suitably qualified individual coordinates the various services — Applicant released on bail with conditions.

R v JB [2023] NSWSC 94

Bail Act 2013 s 19(1) — applicant is a 14-year-old Aboriginal child — initially granted bail, then bail refused after further offending — Youth Justice can supervise a child on bail in the community where the child has pleaded not guilty to the offence — applicant has complex needs and vulnerabilities that are better treated and protected in the community — applicant has strong family and community ties — proposed bail conditions ameliorate risk of reoffending — conditional bail granted.

R v JH [2023] NSWSC 93

Applicant is 12 years old — offences of shoplifting, minor violence towards his carer, using lighters to damage property and allegation of breaking into a school and causing damage by fire — application is opposed by the Crown due to risk of nonappearance, risk of commission of a further serious offence and risk of danger to the victim, individuals and/or community — Bail Protocol, which prohibits supervision by Youth Justice of young people on bail unless there has been a plea of guilty or a finding of guilt, is not a necessary precondition to supervision on bail — appropriate that a young person with vulnerability should be supported and supervised intensively in the community rather than detained — bail granted.

DPP (NSW) v PH [2022] NSWSC 1245

Bail Act 2013 s 22B — defendant 14 years old at time of offences, now 16 years — pleaded guilty to child sexual assaults — no prior convictions — no drug and alcohol dependencies — Aboriginal background — bullied at school — father died when defendant 10 years, grandfather, a primary carer, died recently — sexual abuse as a child — court must consider three questions: s 22B *Bail Act*, whether it is "practically inevitable" that defendant will be the subject of full-time imprisonment when he is sentenced; whether there are special or

exceptional circumstances that should not lead to immediate detention; whether there are any risks that are unacceptable and that cannot be ameliorated by conditions — not satisfied that full-time incarceration is practically inevitable — difficulty of attending grandfather's funeral if defendant was in custody would constitute special circumstances — on bail for 2 years without further criminal conduct — essential precondition for engagement of s 22B *Bail Act* not established — detention application is refused — bail condition varied so defendant is not to be alone with any child under 13 years.

R v LM [2022] NSWSC 987

Bail Act 2013 ss 19, 22B — release application — applicant 16 years old — arrested for offence of armed robbery — applicant also faces charges of two counts of assault occasioning actual bodily harm; two counts of using an offensive weapon with attempt to commit an indictable offence of intimidation; four counts of damaging property; and one count of reckless wounding in company — court not satisfied, on balance of probabilities, that applicant will be sentenced to imprisonment to be served by full-time detention — test in s 22B does not apply — applicant must still satisfy unacceptable risk test under s 19 — charges reflect a large number of very serious allegations, repeatedly involving use of a knife — unacceptable risk of further serious offence — unacceptable risk of danger to community — bail refused.

JD v Commissioner of Police, NSW Police Force [2022] NSWSC 911

Bail Act 2013 s 8(2) — appeal against bail determination — plaintiff 15 years old during original proceedings — pleaded guilty to counts of larceny, robbery, using an offensive weapon to commit an indictable offence, destroying or damaging property — bail granted — sentencing decision and bail variation application listed on same day — magistrate made finding of failure to comply with a bail condition after sentencing decision — *Bail Act* s 8(2) bail decision cannot be made if substantive proceedings for the offence have concluded and no further substantive proceedings are pending before a court — once sentences were handed down, magistrate ceased to have jurisdiction to determine whether plaintiff had failed to comply with bail — "bail decision" in s 8(2) is confined to 4 types of bail decisions listed in s 8(1) and, by extension, to a variation application, but it does not include the discrete determination of whether a person has failed to comply with a bail condition — magistrate applied incorrect standard of proof in making a failure to comply finding — jurisdictional error established — appeal upheld — order that plaintiff breached a condition of bail set aside.

R v ET [2022] NSWSC 905

Bail Act 2013 ss 22, 22B(1)(a) — bail sought after conviction for affray but before sentence — applicant in custody for 2 years 3 months and 16 days — at time of offending applicant aged 17 years — need to show special or exceptional circumstances if time he has presently served will or might not be less than the sentence that might be imposed upon him when he comes to be sentenced — non-parole period will probably not exceed time applicant has spent in custody on remand — special or exceptional circumstances shown — bail concern not an unacceptable risk — bail granted on conditions.

R v Fontaine (a pseudonym) [2021] NSWSC 177

Application to delete curfew condition — 10-year-old applicant — no evidence of offending at night — bail conditions are calculated to mitigate risk — must be reasonably necessary, reasonable and proportionate, and no more onerous than necessary — should not be used to attempt social engineering or for paternalistic interventions — curfew condition deleted.

AB v R (Cth) [2016] NSWCCA 191

Bail application — youth aged 17 years with psychiatric issues and a history of making threats and self-harm — charged with intentionally doing an act in preparation for or planning a terrorist act — threatening posts on Facebook placed over a significant period of time — whether exceptional circumstances established — youth held to pose an unacceptable risk of committing a serious offence and endangering the safety of the community if released — bail refused.

R v NK [2016] NSWSC 498

Young offender was a school student 16 years old living with her mother and siblings — charged with an offence of collecting funds for, or on behalf of, a terrorist organisation — application for bail refused in the Children's Court — rebuttable presumption against bail being granted to a person charged with a terrorism offence — exceptional circumstances to justify the granting of bail — youth of the applicant — vulnerability of youth to adult persuasion or influence — bail conditions can be imposed to appropriately address bail concerns.

Important cases — Brain science

R v JR [2022] NSWDC 618 ..... [9-1120]

Dungay v R [2020] NSWCCA 209

LS v R [2020] NSWCCA 120

BM v R [2019] NSWCCA 223

Howard v R [2019] NSWCCA 109

CA v R [2019] NSWCCA 93

R v MW [2019] NSWDC 307

R v Flanagan [2019] NSWDC 306

Ingrey v R [2016] NSWCCA 31

Kiernan v R [2016] NSWCCA 12

RC v DPP [2016] NSWSC 665

LCM v State of WA [2016] WASCA 164

BP v R [2010] NSWCCA 159

[9-1120] R v JR [2022] NSWDC 618

Last reviewed: June 2024

Offender, 14 or 15 years of age, and the victim, 8 or 9 years of age, are stepbrothers — all counts involved fellatio — Juvenile Justice Background Reports indicate offender has no pre-existing psychological injuries and enjoyed a good upbringing, but struggled emotionally due to having lost friends to suicide and had a self-reported addiction to pornography — offender's compulsive pattern of pornography use exacerbated mental health difficulties and contributed to offending behaviour — offender has undertaken and completed an active course of treatment and is placed within low range for violent reoffending — age of offender at time of offending and efforts at rehabilitation weighed against objective seriousness of offending — offender released on Community Correction Order.

Dungay v R [2020] NSWCCA 209

Children (Criminal Proceedings) Act 1987 ss 14, 15 — Appeal against sentence — applicant found guilty of aggravated break, enter and committing serious indictable offence, robbery in company — sentenced to 12 years imprisonment, with a non-parole period of 8 years — court erred in admitting evidence regarding applicant's Children's Court criminal history — *Bugmy* principles applied — youth and history of dysfunction — appeal allowed — applicant re-sentenced to 10 years of imprisonment with a non-parole period of 6 years and 6 months.

LS v R [2020] NSWCCA 120

Severity appeal — applicant found guilty under ss 66A and 91H(2) *Crimes Act 1900* of producing child abuse material and sexual intercourse with a child under 10 years — sentence of 6 years and 9 months' imprisonment, with non-parole period of four years imposed — applicant 16 years of age when offences occurred — applicant diagnosed with Autism, Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder and Conduct Disorder, expressive and receptive language, sensorimotor difficulties, and attention/executive function deficits — psychology reports show no or very little risk of similar re-offending — offender re-sentenced to an aggregate sentence of 4 years and 9 months' imprisonment with a non-parole period of 2 years and 9 months.

BM v R [2019] NSWCCA 223

Severity appeal — the applicant was sentenced to an aggregate term of imprisonment for 2 years and 6 months with a non-parole period of 1 year and 3 months for sexual assault on a minor — applicant has a learning disorder and ADHD — applicant aged 13 years at time of offending — sentencing judge did not take applicant's age and causative mental condition into account in assessing objective seriousness — offending was at or near the bottom of the range of objective seriousness for offences of this kind — re-sentenced to aggregate sentence of 1 year and 6 months with an aggregate non-parole period of 9 months.

Howard v R [2019] NSWCCA 109

Severity appeal — applicant threw an explosive with intent to burn — applicant sentenced to imprisonment for 9 years, 6 months, with a non-parole period of 6 years — applicant's youth and immaturity, genuine remorse and gathering insight were not reflected in sentence — applicant re-sentenced to a term of imprisonment of 6 years, 9 months with a non-parole period of 4 years and a balance of term of 2 years, 9 months.

CA v R [2019] NSWCCA 93

Severity appeal — applicant sentenced to imprisonment for 3 years, 9 months with non-parole period of 2 years for specially aggravated break and enter and committing a serious indictable offence — 78-year-old woman severely beaten with bricks and a piece of wood — applicant aged 12 years 10 months — sentence manifestly excessive — judge gave insufficient weight to applicant's youth, immaturity, impulsivity and deprived background — appeal granted — applicant re-sentenced to a term of imprisonment for a non-parole period of 1 year, 4 months with a balance of term of 1 year, 8 months.

R v MW [2019] NSWDC 307

Sentencing — offender pleaded guilty to three separate sexual offences against children — Count 1 and Form 1 offences occurred when offender aged 15 years — Count 2 offence occurred when offender 26 years of age — offender has mild intellectual disability, ADHD, sexually abused by uncle when younger — criminality in count 1 is above mid-range due to young age of victim — offender is entitled to substantial mitigation for count 1 and Form 1 matters as they would have been dealt with in Children's Court had they been reported closer to time of offending — unable to conclude that count 1 matter crosses the threshold of s 5 *Crimes (Sentencing Procedure) Act 1999* — Community Corrections Order for 3 years for count 1 — 3 years, 6 months with a non-parole period of 1 year. 9 months for count 2.

R v Flanagan [2019] NSWDC 306

Flanagan was 18 years and 10 months at time of offending — Brennan was 17 years and 10 months — aggravated break and enter — aggravated take and drive vehicle — knife used on one victim — both offenders on parole at time of offending — offenders' youth, immaturity, deprived background, long history of offending, drug use, intellectual disability taken into account on sentencing — parity of sentence as equally liable for offences — Flanagan's two sentences to be served concurrently — aggregate sentence 3 years and 9 months, non-parole period of 1 year and 11 months — Brennan's sentence of 3 years and 4 months, non-parole period 1 year 8 months

Ingrey v R [2016] NSWCCA 31

Aboriginal offender — sentence appeal — applicant aged 19 at time of offence — found guilty after trial of one count of attempted robbery armed with a dangerous weapon — ss 97(2) and 344A(1) of the *Crimes Act 1900* (NSW) — sentencing judge had no regard to applicant's social disadvantage when exercising sentencing discretion — applicant's disadvantaged background was a factor the judge ought to have considered: at [35]; *Bugmy v The Queen* (2013) 249 CLR 571 — error in failing to take into account a material consideration; *House v The King* (1936) 55 CLR 499 — supportive family background taken into account — applicant's exposure to crime at an early age among members of his wider family and peers — interplay of conflicting sentencing considerations — independent re-exercise of the sentencing discretion — mitigating factors — age of applicant — exposure to criminal activity during his formative years — potentially crushing nature of a sentence which the applicant is already serving — other factors taken into account: lack of remorse, lengthy criminal history and poor compliance with supervision — sentence reduced.

Kiernan v R [2016] NSWCCA 12

Sentence appeal — wounding with intent to cause grievous bodily harm — s 33(1)(a) *Crimes Act 1900* (NSW) — no error in finding that offence was within the midrange of objective seriousness — applicant's subjective case including abusive upbringing properly taken into account — sentence not manifestly excessive — adult applicant with poor criminal record including a conviction as a juvenile and a history of drug use from the age of 10-years-old — psychologist's report that applicant was subjected to ritual and constant physical, sexual and psychological abuse — leave to appeal granted but appeal dismissed.

RC v DPP [2016] NSWSC 665

Sentencing appeal — youth identifies as Aboriginal — intellectual and emotional deficits — Attention Deficit Hyperactivity Disorder — multiple property offences — break, enter and steal — break and enter with intent — aggravated break, enter and steal — some offences committed while on parole and another while on conditional liberty — disconnection from Juvenile Justice — need for supervision identified — two-year control order reduced to 1 year and 10 months — non-parole period of 14 months reduced to 12 months — two-year good behaviour bond ordered — condition of bond that the youth accept the supervision of Juvenile Justice and the supervision of any other organisation or person directed by Juvenile Justice.

LCM v State of WA [2016] WASCA 164

Manslaughter of the offender's newborn son — offender aged under 16 years — highly dysfunctional childhood — sentence of 10 years' detention — appeal — new evidence that

offender suffered from foetal alcohol spectrum disorders (FASD) — relevance of FASD to sentencing — whether a material mitigating factor — offender re-sentenced to a term of 7 years' detention.

BP v R [2010] NSWCCA 159

Severity appeal — s 61I *Crimes Act 1900* — sexual intercourse without consent — applicant a week short of his 17th birthday at the time of the offence — judge erred by using standard non-parole period as a guide — relevance of the applicant's youth — emotional maturity and impulse control may not be fully developed until the early to mid-twenties — application of *R v Fernando* (1992) 76 A Crim R 58 — whether appropriate to give effect to the applicant's deprived background.

Important cases — Contempt

In the matter of KL [2024] NSWSC 1334 ..... [9-1130]

[9-1130] In the matter of KL [2024] NSWSC 1334

Last reviewed: March 2025

Criminal contempt in the face of the court — refusal to answer questions— where contemnor a juvenile — applicability of sentencing legislation —whether "criminal" or "civil" proceedings — *Children (Criminal Proceedings) Act 1987* held not to apply.

Important cases — Doli incapax

R v Harry [2025] NSWChC 3 ..... [9-1140]

BDO v The Queen [2023] HCA 16

R v IP [2023] NSWCCA 314

R v Greg [2023] NSWChC 13

Director of Public Prosecutions v PM [2023] VSC 560

EL v R [2021] NSWDC 585

Pickett v WA (2020) 270 CLR 323

BC v R [2019] NSWCCA 111

RP v The Queen (2016) 259 CLR 641

DPP v Martin (a pseudonym) [2016] VSCA 219

RP v R (2015) 90 NSWLR 234

RP v R [2015] NSWCCA 215

R v GW [2015] NSWDC 52

DPP (NSW) v NW [2015] NSWChC 3

RH v DPP (NSW) [2014] NSWCA 305

RH v DPP (NSW) [2013] NSWSC 520

BP and SW v R [2006] NSWCCA 172

[9-1140] R v Harry [2025] NSWChC 3

Last reviewed: June 2025

Children — crime — 100 police interactions — accusatorial system is not focused on the referral to expert services or the reasons why you have been in conflict with the law — doli incapax means the greater the background of disadvantage the less likely a child will be held criminally responsible — the greater the need for intervention the less likely there will be intervention — children under 14 never get to be supervised by Youth Justice — refused to participate or engage with police.

BDO v The Queen [2023] HCA 16

Criminal liability and capacity — 11 sexual assault offences, five of which were alleged to have been committed when the appellant was under 14 years of age — s 29(2) *Criminal Code* (Qld)

provides that a person under 14 is not criminally responsible for an act, unless it is proved the person had capacity to know that they ought not act (no NSW equivalent) — presumption of incapacity under s 29(2) not equivalent to moral wrongness required by common law (*RP v The Queen* (2016) 259 CLR 641) but is informed by it — difference between what is meant by a person's capacity to know and their knowledge — distinction between ability to understand moral wrongness with what in fact they know or understand — appeal allowed, convictions quashed for the relevant five counts and remitted for resentencing.

R v IP [2023] NSWCCA 314

Crown appeal pursuant to *Criminal Appeal Act 1912* s 5F(3A) — doli incapax — where respondent aged between 10 and 14 at time of alleged offending — knowledge and development for doli incapax purposes — whether evidence if admitted would substantially weaken the Crown case — appeal allowed.

R v Greg [2023] NSWChC 13

Young offender — aged 10 years and 5 months at time of first offence — 72 offences — range of seriousness — prosecution failed to rebut the presumption of doli incapax beyond reasonable doubt.

Director of Public Prosecutions v PM [2023] VSC 560

Trial by judge alone — accused 13 at time of alleged offending — presumption of doli incapax — whether accused knew his conduct was seriously wrong in a moral sense — consideration of moral development of a child — expert psychiatric and psychological evidence — *RP v The Queen* (2016) 259 CLR 641 — *BDO v The Queen* [2023] HCA 16 — *Crimes Act 1958* (Vic) s 324 — *Children, Youth and Families Act 2005* (Vic) s 534.

EL v R [2021] NSWDC 585

Conviction appeal — appellant 13-and-a-half years old — found guilty of charges of robbery armed with offensive weapon and dishonestly obtain a financial advantage by deception — diagnosed with Autism Spectrum Disorder, Attention Deficit/Hyperactivity Disorder and Oppositional Defiant Disorder — use of alcohol and drugs — emotional maturity is similar to that of someone aged between 10 and 12 years of age — lacks capacity to understand the impact of his actions on others — numerous suspensions from schools, homeless, and un-medicated at time of offence — not satisfied that the Crown has proved beyond reasonable doubt that appellant knew, at the time of the offence, that what he was doing was seriously or gravely wrong — Crown has not rebutted the presumption of doli incapax beyond reasonable doubt — appeal upheld.

Pickett v WA (2020) 270 CLR 323

Sexual assault offences — ss 7(b), (c), 8, 29 Criminal Code (WA) — group of eight males, including a child aged 11 years, assaulted victim — child offender inflicted fatal stab wound — under s 29 Criminal Code child offender could not be criminally responsible for acts unless he had capacity to know he ought not to do act — no evidence to establish capacity — Crown alleged seven males, who did not stab victim, deemed to have taken part in committing offence under ss 7(b), (c) or 8 — regardless of one person having an immunity from criminal responsibility, ss 7 and 8 is not prevented from operating against the other persons — ss 7 and 8

expression "an offence is committed" taken to include not only an act or omission which renders the actor liable to criminal punishment but also an act or omission which, but for the actor or omitter being excused of criminal responsibility, would be an "offence" — appellants' liability does not depend upon proof beyond reasonable doubt either that child offender had capacity to know that he ought not to strike the blow, or that he did not strike that blow — appeal dismissed.

BC v R [2019] NSWCCA 111

Conviction appeal — applicant sentenced for 20 counts of child sexual assault offences — applicant was aged between 11–13 at the time of committing three counts of child sexual assault offences — evidence in Crown case did not rebut presumption of doli incapax — no evidence of applicant's maturity or intelligence — guilty verdicts unreasonable for counts 1–3 — tendency evidence correctly admitted — common features of each incident sufficiently specific and of significant probative value — directions to jury about use of tendency evidence ameliorated its prejudicial effect — applicant's convictions quashed in respect of counts 1–3 and re-sentenced — imposition of a new sentence deferred until further hearing on tendency evidence.

RP v The Queen (2016) 259 CLR 641

Criminal liability and capacity — doli incapax — appellant convicted of two counts of sexual intercourse with a child under 10 — the appellant's brother is the complainant — appellant was 11 years and six months at time of offending — appellant found to be of very low intelligence — prosecution required to point to evidence from which an inference can be drawn beyond reasonable doubt that child's development is such that he/she knew that it was morally wrong to engage in conduct — prosecution did not adduce any evidence to establish appellant's understood the moral wrongness of his acts — appellant's conduct went well beyond ordinary childish sexual experimentation, but not conclusive that he understood his conduct was seriously wrong in a moral sense, as distinct from being rude or naughty — appellant knew about anal intercourse and to use a condom which strongly suggests he had been exposed to inappropriate sexually explicit material or subjected to sexual interference — earlier convictions unreasonable because rebuttal of presumption the appellant was doli incapax was not established to criminal standard — appeal allowed — convictions quashed — appellant acquitted.

DPP v Martin (a pseudonym) [2016] VSCA 219

Young offender — incest involving biological sister attributed to the respondent when he was aged 16 — prosecution sought to lead other acts of misconduct when he was aged between 11 and 13 as "context evidence" — whether exclusion of "context evidence" would substantially weaken the prosecution case — trial judge ruled against admissibility — whether error in treating presumption of doli incapax as relevant when assessing admissibility of the "uncharged" acts — presumption not relevant in way in which invoked — appeal allowed — matter remitted to trial judge for reconsideration.

RP v R (2015) 90 NSWLR 234

Young offender — sexual intercourse with a child under 10 years — accused aged between 11 and 12 years, 3 months — accused was older half-brother of victim — doli incapax — whether presumption rebutted — what acts may be considered — whether surrounding circumstances of first offence could be used in assessing if presumption rebutted for later

offences — ground of appeal asserting unreasonable verdict — how Court of Criminal Appeal considers unreasonable verdict ground in a judge-alone trial — accused occupied a position of trust — see also *RP v The Queen* (2016) 259 CLR 641.

RP v R [2015] NSWCCA 215

Conviction and sentencing appeal — sexual intercourse with a younger half-brother under 10 years of age — aggravated indecent assault — accused aged between 11 and 12 years at the time of offending — judge-alone trial — sole issue at trial was doli incapax — not open to his Honour to conclude that the Applicant was in a position of trust with respect to the complainant — trial judge did not err in failing to take into account s 22A *Crimes (Sentencing Procedure) Act 1999* — power to reduce penalties for facilitating the administration of justice — not necessary to consider whether sentence imposed was manifestly excessive — necessary to consider whether lesser sentence warranted after an independent exercise of sentencing discretion — see also *RP v The Queen* (2016) 259 CLR 641 and *RP v R* (2015) 90 NSWLR 234.

R v GW [2015] NSWDC 52

Doli incapax — age of criminal responsibility — defacing a wooden bench with a graffiti item — presumption that child between 10 and 14 years not criminally responsible — whether presumption of no criminal responsibility of child rebutted — previous findings of guilt — whether issue of doli incapax requires urgent attention by the legislature — s 4(1) *Graffiti Control Act 2008*.

DPP (NSW) v NW [2015] NSWChC 3

Young offender — intellectual disability — aggravated indecent assault upon a person under 16 — offender approximately 13 years and 1 month at time of the alleged offence — sexual harm counselling prior to alleged offending conduct — development of a safety plan — offender of low intelligence but on the evidence the offender possessed an appreciation of the seriousness of his conduct — presumption of doli incapax rebutted — offender had knowledge of conduct as being gravely or seriously wrong in a moral sense.

RH v DPP (NSW) [2014] NSWCA 305

Children — criminal — young offenders — appeal — doli incapax — age of criminal responsibility — break-in at a country fire station — child aged 12 when offence occurred — presumption that child between 10 and 14 years not criminally responsible — whether presumption of no criminal responsibility of child rebutted — use of subjective test to determine whether presumption rebutted — see also *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520 at **[9-1140]**.

RH v DPP (NSW) [2013] NSWSC 520

Offender aged 12 —aggravated break and enter — break and enter at an emergency services building (a country fire station) in the company of another — issue on appeal whether prosecution rebutted presumption of doli incapax — whether the magistrate erred in law in finding that there was evidence capable of rebutting beyond a reasonable doubt the presumption of doli incapax — whether the magistrate erred in law in applying an objective test to the question of whether the presumption of doli incapax was rebutted beyond reasonable doubt — whether the magistrate erred in law in relying on factual matters that constituted no more

than the commission of the offence itself to rebut the presumption of doli incapax — a doli incapax cannot be rebutted merely by virtue of the commission of the offence itself — sufficient evidence to rebut presumption — see also *RH v DPP (NSW)* [2014] NSWCA 305.

BP and SW v R [2006] NSWCCA 172

Doli incapax — sexual intercourse without consent — in circumstances of aggravation, namely being in the company of another person — appeal — the Crown must prove beyond reasonable doubt that the child (aged between 10–14 years) knew the act was seriously wrong as distinct from an act of mere naughtiness or mischief — the directions given in the case were sufficient — court not satisfied that the jury's verdict was unreasonable.

Important cases — Exclusion of evidence

R v KS (No 2) [2023] NSWSC 1475 ..... [9-1160]

R v Jai [2023] NSWChC 9

Dungay v R [2020] NSWCCA 209

R v Mercury [2019] NSWSC 81

DS v R [2018] NSWCCA 195

Application of the Attorney General for NSW dated 4 April 2014 [2014] NSWCCA 251

R v FE [2013] NSWSC 1692

R v Cortez (unrep, 3/10/2002, NSWSC)

R v Phung [2001] NSWSC 115

[9-1160] R v KS (No 2) [2023] NSWSC 1475

Last reviewed: June 2024

Crime — murder — where the young person is a 16 year-old child — where the young person has pleaded guilty to murder — where there is an issue as to the basis of murder — whether the young person is to be sentenced on the basis of an intention to kill or an intention to inflict grievous bodily harm — where the prosecution relies upon the Electronically Recorded Interview (ERISP) as part of the evidence supporting an intention to kill — where the ERISP contains an admission of an intention to kill — whether the custody manager "assisted" the young person to obtain legal advice — whether the support person fulfilled that role appropriately — whether there was an obligation on police to obtain consent from the young person as to the nominated support person — whether the evidence was obtained improperly or in contravention of an Australian law — having regard to the circumstances in which the admission was made, whether it would be unfair to use the evidence — strict protections afforded by LEPRA provisions — ERISP not admissible.

R v Jai [2023] NSWChC 9

Evidence — s 189 *Evidence Act* — voir dire — admissibility of ERISP.

Dungay v R [2020] NSWCCA 209

Children (Criminal Proceedings) Act 1987 ss 14, 15 — Appeal against sentence — applicant found guilty of aggravated break, enter and committing serious indictable offence, robbery in company — sentenced to 12 years imprisonment, with a non-parole period of 8 years —

court erred in admitting evidence regarding applicant's Children's Court criminal history — *Bugmy* principles applied — youth and history of dysfunction — appeal allowed — applicant re-sentenced to 10 years of imprisonment with a non-parole period of 6 years and 6 months.

R v Mercury [2019] NSWSC 81

Evidence — s 13 *Children (Criminal Proceedings) Act 1987* — objection to admissibility of alleged confession to murder — accused aged 17 years at time of interview — no parent, guardian, adult or lawyer present at interview — no rules mandating presence of support person in 1971 — low intellect, immaturity, disturbed upbringing, disturbed mental state and personal vulnerability of accused considered — record of interview inadmissible in the "particular circumstances of the case".

DS v R [2018] NSWCCA 195

Admissibility of tendency evidence — ss 97 and 101(2) *Evidence Act 1995* — presumption of doli incapax as appellant under 14 years of age — tendency incidents subject of acquittals based on failure to prove offender capable of criminal intent — principle that prosecutor cannot rely upon conduct, which has been the subject of a previous charge and acquittal, in a way which would controvert the acquittal — evidence has little or no probative value, but involves a significant risk of prejudicial effect — evidence of appellant's alleged prior sexual conduct should not have been admitted — appeal upheld, conviction quashed.

Application of the Attorney General for NSW dated 4 April 2014 [2014] NSWCCA 251

Submission by Attorney General to court of Criminal Appeal of questions of law after the accused is acquitted of the murder of a child — trial judge sitting alone in the Supreme Court made order for the production by Department of Family and Community Services of reports concerning the deceased child — whether court precluded from making such an order by s 29 Care Act — s 29 should not be construed so as to preclude the accused in a criminal trial from compelling, by subpoena, production of s 29 reports that are relevant to the issues at the trial — principle of legality requires that the general words of s 29 should be read down so as not to interfere with the accused's fundamental right to a fair trial.

R v FE [2013] NSWSC 1692

15-year-old girl — improperly obtained evidence — whether grave improprieties — failure to caution the accused prior to or during questioning — interview conducted notwithstanding initial refusal to answer questions — whether unfair deprivation of right to silence — failure to take the accused to the custody manager who was obliged, since she was a vulnerable person, to assist her to exercise her legal rights — the accused's rights under Pt 9 *Law Enforcement (Powers and Responsibilities) Act 2002* were neither read out nor explained to her — interview with the accused excluded — improperly obtained evidence from a juvenile excluded under ss 90, 138 and 139 *Evidence Act 1995*.

R v Cortez (unrep, 3/10/2002, NSWSC)

Young offenders aged 17 years at the time of arrest and interview — murder — admissibility of certain statements — application for evidence to be excluded under s 90 *Evidence Act 1995* — police gave no indication that the young offenders were under arrest or suspected of murder —

whether each offender could be deemed to have been arrested — whether the accepted support person attending the interview with each offender was appropriate — whether each offender was made aware of his entitlements or properly advised as to the seriousness of his position — failure to be told of the right to obtain free legal advice — the offenders were not afforded the protection the legislature intended — evidence tendered was inadmissible by virtue of s 90 and in breach of s 138 *Evidence Act* as evidence improperly obtained.

R v Phung [2001] NSWSC 115

Young offender aged 17 years — armed robbery and murder — admissibility of certain statements — objection to two electronic records of interview — compliance with s 13 *Children (Criminal Proceedings) Act 1987* and Pt 10A (rep) *Crimes Act 1900* as to the provision of a support person — whether the accused was properly advised as to his entitlements — whether offered the opportunity of obtaining legal assistance — overall irregularity in compliance with the statutory regime although various irregularities were not contumelious or deliberate — serious concern as to whether the rights of the accused were properly protected — in combination, there were sufficient circumstances involving non compliance with the statutory regime, so as to give rise to serious concern as to whether the accused, a 17-year-old with a somewhat disturbed background, had been sufficiently advised as to his rights, and as to whether those rights were adequately protected, to require exclusion of the evidence under ss 90 and 138 *Evidence Act 1995*.

Important cases — Family violence/dysfunction

Hoskins v R [2021] NSWCCA 169 ..... [9-1180]

WB v R [2020] NSWCCA 159

CA v R [2019] NSWCCA 93

R v MW [2019] NSWDC 307

R v Flanagan [2019] NSWDC 306

Ohanian v R [2017] NSWCCA 268

Ingrey v R [2016] NSWCCA 31

Kiernan v R [2016] NSWCCA 12

LCM v State of WA [2016] WASCA 164

[9-1180] Hoskins v R [2021] NSWCCA 169

Last reviewed: June 2024

Severity appeal — applicant convicted of two counts of reckless wounding, affray, aggravated break and enter and commit serious indictable offence — sentenced to 5 years and 6 months imprisonment with a non-parole period of 3 years and 6 months — social disadvantage and hardship — excellent upbringing with non-biological parents until aged 13 — return to biological family where criminal conduct normalised — alcohol and drug abuse, and history of offending — childhood and adolescent years equally formative — primary judge erred in not applying *Bugmy v The Queen* (2013) 249 CLR 571 principles — reduced moral culpability notwithstanding passage of time and intervening custodial sentences — effects of deprivation do not diminish over time — appeal allowed — re-sentenced to aggregate sentence of 5 years imprisonment with a non-parole period of three years.

WB v R [2020] NSWCCA 159

Severity appeal — applicant 16 years at time of offending, not sentenced until 45 years later — applicant pleaded guilty to attempted buggery and indecent assault on a male — aggregate sentence of imprisonment for 8 years with a non-parole period of 5 years 7 months — applicant sexually abused as a child — assessment of objective seriousness on a collective basis was an error — aggregate sentence manifestly excessive — objective seriousness of offences is below mid-range — leave to appeal granted — appellant sentenced to an aggregate sentence of imprisonment for 3 years with a non-parole period of 2 years.

CA v R [2019] NSWCCA 93

Severity appeal — applicant sentenced to imprisonment for 3 years, 9 months with non-parole period of 2 years for specially aggravated break and enter and committing a serious indictable

offence — 78-year-old woman severely beaten with bricks and a piece of wood — applicant aged 12 years 10 months — sentence manifestly excessive — judge gave insufficient weight to applicant's youth, immaturity, impulsivity and deprived background — appeal granted — applicant re-sentenced to a term of imprisonment for a non-parole period of 1 year, 4 months with a balance of term of 1 year, 8 months.

R v MW [2019] NSWDC 307

Sentencing — offender pleaded guilty to three separate sexual offences against children — Count 1 and Form 1 offences occurred when offender aged 15 years — Count 2 offence occurred when offender 26 years of age — offender has mild intellectual disability, ADHD, sexually abused by uncle when younger — criminality in count 1 is above mid-range due to young age of victim — offender is entitled to substantial mitigation for count 1 and Form 1 matters as they would have been dealt with in Children's Court had they been reported closer to time of offending — unable to conclude that count 1 matter crosses the threshold of s 5 *Crimes (Sentencing Procedure) Act 1999* — Community Corrections Order for 3 years for count 1 — 3 years, 6 months with a non-parole period of 1 year. 9 months for count 2.

R v Flanagan [2019] NSWDC 306

Flanagan was 18 years and 10 months at time of offending — Brennan was 17 years and 10 months — aggravated break and enter — aggravated take and drive vehicle — knife used on one victim — both offenders on parole at time of offending — offenders' youth, immaturity, deprived background, long history of offending, drug use, intellectual disability taken into account on sentencing — parity of sentence as equally liable for offences — Flanagan's two sentences to be served concurrently — aggregate sentence 3 years and 9 months, non-parole period of 1 year and 11 months — Brennan's sentence of 3 years and 4 months, non-parole period 1 year 8 months

Ohanian v R [2017] NSWCCA 268

Sentencing — supplying a prohibited drug — early exposure to illegal drug use — dysfunctional childhood relevant — sentencing judge found ample opportunity to reform as "mature" man — approach contrary to *Bugmy v The Queen* (2013) 249 CLR 571 — effects of childhood deprivation do not diminish — sentencing not manifestly excessive — re-exercise of sentencing discretion warranted due to error — appeal allowed and upheld and original sentence quashed — applicant re-sentenced.

Ingrey v R [2016] NSWCCA 31

Aboriginal offender — sentence appeal — applicant aged 19 at time of offence — found guilty after trial of one count of attempted robbery armed with a dangerous weapon — ss 97(2) and 344A(1) of the *Crimes Act 1900* (NSW) — sentencing judge had no regard to applicant's social disadvantage when exercising sentencing discretion — applicant's disadvantaged background was a factor the judge ought to have considered: at [35]; *Bugmy v The Queen* (2013) 249 CLR 571 — error in failing to take into account a material consideration; *House v The King* (1936) 55 CLR 499 — supportive family background taken into account — applicant's exposure to crime at an early age among members of his wider family and peers — interplay of conflicting sentencing considerations — independent re-exercise of the sentencing discretion — mitigating factors — age of applicant — exposure to criminal activity during his formative years —

potentially crushing nature of a sentence which the applicant is already serving — other factors taken into account: lack of remorse, lengthy criminal history and poor compliance with supervision — sentence reduced.

Kiernan v R [2016] NSWCCA 12

Sentence appeal — wounding with intent to cause grievous bodily harm — s 33(1)(a) *Crimes Act 1900* (NSW) — no error in finding that offence was within the midrange of objective seriousness — applicant's subjective case including abusive upbringing properly taken into account — sentence not manifestly excessive — adult applicant with poor criminal record including a conviction as a juvenile and a history of drug use from the age of 10-years-old — psychologist's report that applicant was subjected to ritual and constant physical, sexual and psychological abuse — leave to appeal granted but appeal dismissed.

LCM v State of WA [2016] WASCA 164

Manslaughter of the offender's newborn son — offender aged under 16 years — highly dysfunctional childhood — sentence of 10 years' detention — appeal — new evidence that offender suffered from foetal alcohol spectrum disorders (FASD) — relevance of FASD to sentencing — whether a material mitigating factor — offender re-sentenced to a term of 7 years' detention.

Important cases — Forensic procedure

NSW Police v Evan [2025] NSWChC 10 ..... [9-1200]

Kindermann v JQ [2020] NSWSC 1268

DL v R [2017] NSWCCA 57

Police v JC [2016] NSWChC 1

TS v Constable Courtney James [2014] NSWSC 984

[9-1200] NSW Police v Evan [2025] NSWChC 10

Last reviewed: May 2026

Interim orders — forensic procedure application — intimate and non-intimate forensic procedure — balance of public interest — unauthorised forensic procedure.

Kindermann v JQ [2020] NSWSC 1268

Crimes (Forensic Procedures) Act 2000, ss 30, 32, 33, 115A — interim forensic procedure order imposed on child — magistrate erred by finding interim order could not be made without representation and a hearing — only final forensic procedure orders require hearing and representation.

DL v R [2017] NSWCCA 57

Appeal — murder — offender just turned 16 and murder victim aged 15 at time of offence — Crown case included expert blood spatter analysis evidence — expert performed further experiments based on defence case during trial — Crown advised of experiments and how expert would respond if cross-examined on defence case — no report provided — alleged denial of procedural fairness — fresh evidence adduced on appeal — established material error in expert's evidence at trial — whether there was substantial miscarriage of justice — aside from blood spatter evidence Crown case at trial pointed to guilt beyond reasonable doubt — further evidence available on appeal strengthened Crown case — operation of proviso — appeal dismissed.

Police v JC [2016] NSWChC 1

Crimes (Forensic Procedures) Act 2000 — application for authorisation to carry out forensic procedures on the young person — the applicant must prove the young person was a "suspect" — grounds upon which the person is suspected and the reasonableness of those grounds — on the balance of probabilities the young person was not a "suspect" within the meaning of the *Crimes (Forensic Procedures) Act*.

TS v Constable Courtney James [2014] NSWSC 984

Suspected offence of aggravated break and enter — appeal against order authorising the taking of a buccal swab — evidence — common ground that the magistrate decided incorrectly that

the*Evidence Act 1995* (NSW) did not apply to the application for a buccal swab — *Evidence Act* must be read together with *Crimes (Forensic Procedures) Act 2000* along with any other applicable Act — meaning of reasonable grounds for forming a suspicion or belief.

Important cases — Jurisdiction

R v Callum [2023] NSWChC 7 ..... [9-1220]

R v Patrick [2023] NSWChC 4

R v CL [2022] NSWChC 5

Lacey (a pseudonym) v Attorney General for NSW (2021) 104 NSWLR 333

Watson v R [2020] NSWCCA 215

PQR v DPP (NSW) [2020] NSWSC 731

R v RI [2019] NSWDC 129

JW v District Court of NSW [2016] NSWCA 22

DPP (NSW) v JJM & ALW [2010] CLN 1

JIW v DPP (NSW) [2005] NSWSC 760

[9-1220] R v Callum [2023] NSWChC 7

Last reviewed: June 2024

Alternative verdicts in Children's Court and Local Court — aggravated sexual assault — s 80AB *Crimes Act* does not operate to enable a Children's Court Magistrate to return an alternative verdict to s 61J(1) in circumstances where the aggravating feature of the charge is not proven.

R v Patrick [2023] NSWChC 4

Patrick 16 years and 9 months at time of offending — charged with robbery in company, use offensive weapon to commit indictable offence and reckless wounding — on parole for a robbery in company and matters of violence at time of offending — *R v CL* [2022] NSWChC 5 followed: "detained" does not include when a person is in the community on parole — s 53B permits Court to impose an aggregate sentence of up to 5 years including non-parole and parole period — jurisdictional limit of 2 years for a single offence: s 33(1)(g) — sentenced for a non-parole period of 13 months and a total term of 2 years — conviction not imposed due to age, cognitive functioning, the immaturity that comes with not properly understanding consequence and to not hinder rehabilitation.

R v CL [2022] NSWChC 5

CL 17 and a half at the time of alleged offending — charged with aggravated break, enter and commit larceny — *Children (Criminal Proceedings) Act 1987* s 31(3) court to determine whether indictable offences should progress through a committal process prior to discharge or committal for trial — evidence is capable of satisfying a jury beyond reasonable doubt that CL committed offences — charges not to be disposed of in a summary manner — CL serving a control order when these offences occurred — "detained" under s 33A(4) refers to a person who

is in custody, under restraint, and does not include when a person is in the community on parole — offences cannot properly be disposed of in a summary manner because level of planning, the additional circumstances of aggravation, the value of the property stolen, CL's age and the fact that the offences were committed in breach of parole on a two-year aggregate control order for like offences — dealt with as committal proceedings.

Lacey (a pseudonym) v Attorney General for NSW (2021) 104 NSWLR 333

Crimes (Appeal and Review) Act 2001, s 53 — application for order that female magistrate hear matter amounted to request for conditional permanent stay — stay may, in an appropriate case, include condition that matter be heard by female magistrate — power available under s 8 *Court Suppression and Non-publication Orders Act 2010* to order restricted viewing of evidence in appropriate cases.

Watson v R [2020] NSWCCA 215

Applicant found guilty of contravening child protection prohibition orders — s 3A(2) *Child Protection (Offenders Registration) Act 2000* exempts a person from the definition of "registrable person" if offence committed when they were a child or if they were found guilty of a registrable offence before 15 October 2001 — applicant fulfilled both because she committed a single offence involving an act of indecency when she was 13 years old and found guilty before 15 October 2001 — Local Court had no power to make Child Protection Prohibition Order as she was not a registrable person — Crown could not establish that she had contravened order as invalid — matter remitted to District Court for sentence.

PQR v DPP (NSW) [2020] NSWSC 731

Appeal against magistrate's refusal to hear three sets of charges separately — plaintiff charged with indecent assault offences against three complainants — evidence of each complainant cross-admissible as tendency evidence — court does not have jurisdiction to intervene to disturb magistrate's refusal of application for separate hearings — applicant has failed to identify a question of law alone or jurisdictional error — leave not granted.

R v RI [2019] NSWDC 129

Sexual assault offences — juvenile offender dealt with on indictment — offender 17 years, 11 months and 28 days of age at the time of offences contrary to s 61J *Crimes Act 1900* — offender offered to plead guilty to charges in the Children's Court — offender to be dealt with according to Pt 3 Div 4 *Children (Criminal Proceedings) Act 1987* rather than by law — offender found guilty — offender is not to be treated as a registrable person — offender released on probation.

JW v District Court of NSW [2016] NSWCA 22

Dangerous driving causing death — committed for trial in the District Court by a magistrate in the Children's Court — notice of motion filed in District Court seeking a temporary stay of proceedings — stay of proceedings refused — summons filed in the Court of Appeal — s 69 *Supreme Court Act 1970* — order sought to set aside magistrate's order in the Children's Court committing applicant for trial — order sought to set aside judgment or order of the District Court refusing stay of proceedings — Court of Appeal has jurisdiction to set aside orders of District Court refusing stay of proceedings — Court of Appeal does not have jurisdiction to set

aside orders of Children's Court magistrate — s 48 *Supreme Court Act* — proceedings under s 69 concerning orders of a specified tribunal — District Court a specified tribunal under s 48(1) — Children's Court not a specified tribunal under s 48(1) — s 46(2)(b) *Supreme Court Act*.

DPP (NSW) v JJM & ALW [2010] CLN 1

Matters to be taken into consideration when determining whether to exercise the discretion under s 31 *Children (Criminal Proceedings) Act 1987* and commit the young persons to the District Court to be dealt with according to law.

JIW v DPP (NSW) [2005] NSWSC 760

Sections 6, 18, 31 *Children (Criminal Proceedings) Act 1987* — applicant committed for trial rather than dealt with summarily in the Children's Court — requirement to "… forthwith furnish to the person a statement of reasons for decision" in s 31(4) — magistrate neither erred by failing to give sufficient reasons nor in deciding the applicant should be dealt with according to law.

Important cases — Juvenile detention centre

R v AH [2018] NSWSC 973 ..... [9-1240]

HJ v R [2014] NSWCCA 21

R v KT [2007] NSWSC 83

[9-1240] R v AH [2018] NSWSC 973

Last reviewed: June 2024

Guilty plea to doing an act in preparation for, or planning, a terrorist act, pursuant to s 101.6(1) Criminal Code (Cth) — offence is objectively serious and a substantial term of full-time imprisonment is appropriate — offence above the low end of the range of objective gravity — 12 years imprisonment with non-parole period of 9 years — detention as a juvenile offender up to the age of 21.

HJ v R [2014] NSWCCA 21

Applicant aged 17 years and 8 months at the time of the offence — two offences contrary to s 112(2) *Crimes Act 1900* — breaking and entering into a house and committing a serious indictable offence — aggravated offence committed in the company of another — application for leave to appeal against sentence — whether the sentencing judge failed to give proper attention to the fact applicant was the mother of a very young baby — whether juvenile detention appropriate if offender has a very young baby — error found — applicant re-sentenced.

R v KT [2007] NSWSC 83

Offender aged 16 — manslaughter by unlawful and dangerous act — offender pleaded guilty to a serious children's indictable offence — sentencing — offender was in a group of youths engaged in throwing eggs at members of the public from a moving vehicle — the offender had assaulted a man who threw a can back at the car in retaliation — the assault caused the man to fall and strike his head heavily to the ground thereby sustaining fatal injuries — examination of the offender's background and subjective circumstances — no prior criminal history — whether offender should serve any sentence in juvenile detention, given his age and limitation, rather than in the adult prison system — objective seriousness of the offence assessed — continued detention at the juvenile detention centre — sentenced to a term of 6 years imprisonment with a non-parole period of 4 years — see also *KT v R* [2008] NSWCCA 51 for application for leave to appeal against sentence at **[9-1340]**.

Important cases — Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)

DPP (NSW) v SB [2020] NSWSC 734 ..... [9-1260]

Poidevin v Semaan (2013) 85 NSWLR 758

R v FE [2013] NSWSC 1692

[9-1260] DPP (NSW) v SB [2020] NSWSC 734

Last reviewed: June 2024

Appeal against dismissal of proceedings for assaulting police officer in execution of duty and resist/hindering police officer in execution of duty — objective test of lawfulness under s 99(1)(b) LEPRA — reasonably necessary to arrest to protect workers from Housing NSW and the applicant from committing further offences — arresting officer's state of mind, that it was reasonably necessary to arrest, relevant under s 99(1)(b) — appeal allowed — matter remitted to Local Court.

Poidevin v Semaan (2013) 85 NSWLR 758

Police powers and duties — resisting arrest — power to seize property to prevent breach of the peace — police officer attempted to seize respondent's mobile phone — police officer obliged to inform respondent, as soon as reasonably practicable after exercising the power, of his name, place of duty and the reason for exercising the power — elements of offence made out even though no evidence that information was given — no obligation to prove that officer formed view that it was impracticable to give information before exercising power — consideration of nature of power at common law and as preserved by statute — s 201 LEPRA.

R v FE [2013] NSWSC 1692

15-year-old girl — improperly obtained evidence — whether grave improprieties — failure to caution the accused prior to or during questioning — interview conducted notwithstanding initial refusal to answer questions — whether unfair deprivation of right to silence — failure to take the accused to the custody manager who was obliged, since she was a vulnerable person, to assist her to exercise her legal rights — the accused's rights under Pt 9 *Law Enforcement (Powers and Responsibilities) Act 2002* were neither read out nor explained to her — interview with the accused excluded — improperly obtained evidence from a juvenile excluded under ss 90, 138 and 139 *Evidence Act 1995*.

Important cases — Mental Health and Cognitive Impairment Forensic Provisions Act 2020

R v Louie [2024] NSWChC 10 ..... [9-1270]

[9-1270] R v Louie [2024] NSWChC 10

Last reviewed: November 2024

Community Treatment Order (CTO) — s 20 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* — multiple offences — Youth Koori Court participant for other offences — CTO for 6 months.

Important cases — Mental Health (Forensic Provisions) Act 1990 (now repealed)

Jones v Booth [2019] NSWSC 1066 ..... [9-1280]

R v Richard (a pseudonym) [2019] NSWDC 272

DPP (NSW) v Saunders [2017] NSWSC 760

Police v DMO [2015] NSWChC 4

[9-1280] Jones v Booth [2019] NSWSC 1066

Last reviewed: June 2024

Civil procedure — mental health — declaratory relief sought concerning qualifications of a psychologist to furnish a report in support of a s 32 *Mental Health (Forensic Provisions) Act 1990* application — report rejected by magistrate as it was not a psychiatric report — report later accepted by different magistrate — application under s 32 later successful — type of report which may be appropriate will depend on particular case — court should consider the qualifications and expertise of author, together with report contents, to determine whether report should be admitted and what weight is given to it — conditions which fall within the definition of "cognitive impairment" are frequently reported on by psychologists — live controversy does not exist for grant of declaratory relief — declaration refused.

R v Richard (a pseudonym) [2019] NSWDC 272

Fitness to be tried — accused charged with serious sexual offence — s 10 *Mental Health (Forensic Provisions) Act 1990* — fitness tests directed to minimum requirements for a fair trial — experts agree accused is not fit to stand trial due to intellectual disability — matter referred to the Mental Health Review Tribunal for determination pursuant to s 16 *Mental Health (Forensic Provisions) Act 1900*.

DPP (NSW) v Saunders [2017] NSWSC 760

Appeal — magistrate dismissed charges s 32(3)(b) *Mental Health (Forensic Provisions) Act 1990* — order that person attend psychiatrist/psychologist — magistrate must name a particular place or person s 32(3)(b) — enforcement provisions and object and purpose of the Act to be considered — appeal allowed.

Police v DMO [2015] NSWChC 4

Young person pleaded guilty to intimidating police office in execution of his duty — matter set down for defended hearing — whether admission of young person to mental health facility under s 33(1)(b) *Mental Health (Forensic Provisions) Act 1990* (MHFP Act) operates to finalise charges — no decisions of intermediate or higher courts dealing with the interpretation of s 33 — an order under s 33(1)(b) where the person is detained in the mental health facility does not

operate to finalise charges — s 33 provides court with a mechanism to have persons who appear to be suffering from mental illness to be assessed by an authorised medical officer at a mental health facility — the contention that once the person is admitted the charges cannot be relisted could not have been the legislature's intention — no requirement in MHFP Act to establish link between offences charged and the mental illness.

Important cases — Non-publication and suppression orders

MA v State of NSW [2024] NSWSC 1366 ..... [9-1300]

Burton v DPP [2022] NSWCA 242

Burton v DPP (2019) 100 NSWLR 734

AB (a pseudonym) v R (No 3) (2019) 97 NSWLR 1046

Secretary, DFaCS v Smith (2017) 95 NSWLR 597

[9-1300] MA v State of NSW [2024] NSWSC 1366

Last reviewed: March 2025

Application for suppression and non-publication orders under the *Court Suppression and Non-publication Orders Act 2010* — prohibition on publication already enlivened by s 15A of the *Children's (Criminal Proceedings) Act 1987* — necessity — appropriateness of further orders — application refused.

Burton v DPP [2022] NSWCA 242

Care Act s 105 — appellants argue s 105 invalid for burdening the implied constitutional freedom of communication on political and government matters — prohibition in s 105 only applies when there is some connection in the publication or broadcast between identification of the child/young person and pending, contemplated or completed proceedings, non-court proceedings or a relevant report — implicit that the ability of a relevant child or young person to consent to publication or broadcast does not cease upon them turning 18 — constitutional freedom is burdened insofar as people are prohibited from publicly protesting or discussing the removal of particular children by governmental action — s 105 is not invalid for breach of implied freedom — appeal dismissed.

Burton v DPP (2019) 100 NSWLR 734

Appeal of dismissal of proceedings — non-publication order — ss 7, 11, 12 *Court Suppression and Non-publication Orders Act 2010* — the order of the Children's Court was not an interim order and therefore did require the place or period of its operation to be specified — leave to appeal granted.

AB (a pseudonym) v R (No 3) (2019) 97 NSWLR 1046

Respondent pleaded guilty to historic sex offences committed when he was a child — primary judge ordered non-publication and suppression of respondent's name under s 8 *Court Suppression and Non-publication Orders Act 2010* — suppression and non-publication orders revoked on appeal — appeal against decision not to make non-publication order — court materially misconstrued s 8(1)(c) *Court Suppression and Non-publication Orders Act* by

adopting probable harm test — calculus of risk approach adopted — evidence of risk of physical harm to applicant — evidence of significant psychological harm to applicant and applicant's family — circumstances of misreporting by media and threats to applicant — appeal allowed, non-publication order made under s 8(1)(c).

Secretary, DFaCS v Smith (2017) 95 NSWLR 597

Child under parental responsibility of the Minister and in foster care — court engaged a "balancing exercise" of child's interest — paramount interest of child cannot be raised on appeal — construction of strict liability offence for publication of child's name contrary to s 105 Care Act — primary judge's construction not arguably wrong — exercise of discretion in refusing to grant injunction arguably miscarried — leave to appeal refused.

Important cases — Recording of conviction

Cmr of Police, NSW Police Force v TM [2023] NSWCA 75 ..... [9-1320]

R v Fay [2020] QCA 154

Watson v R [2020] NSWCCA 215

Dungay v R [2020] NSWCCA 209

Siddiqi v R (Cth) [2015] NSWCCA 169

[9-1320] Cmr of Police, NSW Police Force v TM [2023] NSWCA 75

Last reviewed: June 2024

17 year old respondent sentenced to 14 month good behaviour bond for three possess child abuse material offences under *Crimes Act 1900* s 91H(2) — respondent a "registrable person" under *Child Protection (Offenders Registration) Act 2000* s 3A but not notified of obligation to report information to Commissioner of Police — charged with failing to comply with reporting obligations under Register — judge at first instance declared respondent's entry on Child Protection Register erroneous on basis exception in s 3A(2) applied — meaning of "arising from the same incident" in s 3A only if they (i) are committed within a single 24 hour period and (ii) are committed against the same person: s 3(3) — possessing child abuse material involving actual children is an offence committed against those children — offences did not arise from the same incident as they were not committed against the same person — respondent was not entitled to the benefit of s 3A(2)(c)(ii) exception to s 3A(1) — respondent was within s 3A(1) as a registrable person and subject to consequences of that status.

R v Fay [2020] QCA 154

Applicant sought leave to appeal the recording of a conviction — applicant pleaded guilty to one count of armed robbery in company — applicant sentenced to detention for 8 months with an order that he be released immediately, after serving 140 days on remand, and on conditional release for 3 months — conviction was recorded due to seriousness of charge and criminal history — sentencing judge failed to consider relevant countervailing factors and the pre-sentence report — appeal allowed — recording of conviction set aside — order that no conviction be recorded.

Watson v R [2020] NSWCCA 215

Applicant found guilty of contravening child protection prohibition orders — s 3A(2) *Child Protection (Offenders Registration) Act 2000* exempts a person from the definition of "registrable person" if offence committed when they were a child or if they were found guilty of a registrable offence before 15 October 2001 — applicant fulfilled both because she committed a single offence involving an act of indecency when she was 13 years old and found guilty before 15 October 2001 — Local Court had no power to make Child Protection Prohibition Order as she was not a registrable person — Crown could not establish that she had contravened order as invalid — matter remitted to District Court for sentence.

Dungay v R [2020] NSWCCA 209

Children (Criminal Proceedings) Act 1987 ss 14, 15 — Appeal against sentence — applicant found guilty of aggravated break, enter and committing serious indictable offence, robbery in company — sentenced to 12 years imprisonment, with a non-parole period of 8 years — court erred in admitting evidence regarding applicant's Children's Court criminal history — *Bugmy* principles applied — youth and history of dysfunction — appeal allowed — applicant re-sentenced to 10 years of imprisonment with a non-parole period of 6 years and 6 months.

Siddiqi v R (Cth) [2015] NSWCCA 169

Sentencing appeal — error in having regard to non-conviction criminal record — Parity principle — whether erroneous sentences imposed upon co-offenders give rise to a justified sense of grievance — whether intervention of appellate court is justified — question of proper reflection of objective.

Important cases — Sentencing

Severity appeal ..... [9-1340]
Dismissed
Remitted for re-sentencing

Parity principle ..... [9-1342]
AJ v R [2023] NSWCCA 235
Apulu v R [2022] NSWCCA 244
JE v R [2019] NSWCCA 225
R v Flanagan [2019] NSWDC 306
R v BJ [2018] NSWDC 122
Siddiqi v R (Cth) [2015] NSWCCA 169

Aggregate sentence ..... [9-1344]
R v JH [2025] NSWDC 314
R v Diallo (No 17) (Sentence) [2024] NSWSC 1650
PD v Director of Public Prosecutions (NSW) [2025] NSWSC 16
R v RM [2015] NSWCCA 4
PD v R [2012] NSWCCA 242

Non-parole period error ..... [9-1346]
Singh v R (2020) 104 NSWLR 43
TF v R [2020] NSWCCA 248
DL v The Queen (2018) 265 CLR 215
DL v R (No 2) [2017] NSWCCA 58

Full-time imprisonment ..... [9-1348]
R v TH [2025] NSWSC 1578
R v KL [2025] NSWSC 1574
R v XE [2025] NSWSC 877
R v SH [2025] NSWDC 410
R v Taumalolo [2022] NSWSC 1696
IM v R [2019] NSWCCA 107
R v AH [2018] NSWSC 973
R v Alou (No 4) [2018] NSWSC 221

Community Service Order/Community Correction Order ..... [9-1350]
R v BP [2023] NSWDC 415
R v AR [2022] NSWCCA 5
RC v DPP [2016] NSWSC 665

Multiple offences, partly occurred when young offender ..... [9-1352]
R v MW [2019] NSWDC 307

[9-1340] Severity appeal

Last reviewed: November 2025

Dismissed

LK v R [2025] NSWCCA 143

Appeal against sentence — manifest excess — manslaughter — fight between two young persons where applicant brought a knife — unlawful and dangerous act — appeal dismissed.

TH v R [2025] NSWCCA 121

Appeals — appeal against sentence — aggravated sexual intercourse without consent — applicant 15 years and 11 months old at the time of offending — where grounds of appeal assert that insufficient weight was given to youth, mental health and background — reduced moral culpability as a result of mental health and disadvantaged background — where good prospects of rehabilitation — efficacy of labels such as "adult like conduct" — whether the sentence is manifestly excessive — appeal dismissed.

Tukuafu v R [2024] NSWCCA 84

Severity appeal — whether open to the sentencing judge to find that the male victim suffered "life threatening injuries" — whether permissible to take into account a further offence on a Form 1 document in assessing and determining the objective seriousness of a principal offence — s 15 *Children (Criminal Proceedings) Act 1987* — admissibility of juvenile criminal record.

ZXT v R (a pseudonym) [2023] NSWCCA 222

Severity appeal — reckless wounding in company — Children's Court — young person — whether control order ought be suspended — re-sentence — whether lesser sentence is warranted — re-sentence not less than the sentence imposed by the sentencing judge — appeal dismissed.

Carreno v R [2023] NSWCCA 20

Applicant 19 years and 10 months when committed offences, at the time of sentencing applicant was 42 years old — pleaded guilty to specially aggravated break, enter and commit a felony, stealing property in dwelling house and two counts of aggravated sexual assault in company — sentenced to 16 years imprisonment with a non-parole period of 12 years imprisonment — applicant's youth was appreciated by the sentencing judge but that such factors were to be given "much less weight" in light of the applicant's behaviour which involved "extreme violence" — emphasis on need to provide an opportunity for rehabilitation has little part to play because sentencing was dealt with so many years after its commission — sentence not manifestly unreasonable — appeal dismissed.

TA v R [2023] NSWCCA 27

Severity appeal — appellant 16 ½ years of age when she committed a series of serious crimes for which she was sentenced to a term of imprisonment — at first instance, the principles in *Bugmy*

v The Queen (2013) 249 CLR 571 were considered due to exposure to risks of psychological harm, physical abuse, sexual acts of exploitation, serious self-harming, risk taking behaviour and significant neglect as a child — mental condition considered — Appellant contended sentencing judge failed to make findings as to her reduced moral culpability — sentencing judge substantively addressed the relevant factors and there is no essential requirement to expressly use the phrase "moral culpability" — appeal dismissed.

CW v R [2022] NSWCCA 50

Appeal against sentence — reckless infliction of grievous bodily harm — victim 9-week-old infant — sentencing Judge took matters of age and dysfunctional childhood into account in accordance with *Bugmy v The Queen* principles — sentencing Judge took into account impact of applicant's background on his moral culpability — criminality involved repeated assaults on a helpless infant — stern sentence inevitable — appeal dismissed.

R v Lovett (a pseudonym) [2021] QCA 46

Appeal against sentence — applicant juvenile and convicted of armed robbery in company — sentenced to period of detention of 15 months with conviction recorded — applicant refused to accept responsibility for offence and had relevant lengthy criminal history sentence — recording of conviction did not render sentence manifestly excessive.

Schembri v The Queen [2020] VSCA 217

Severity appeal — sexual penetration of child under 16 (3 composite charges) — Drug trafficking (6 charges) — sentenced to 5 years' imprisonment, non-parole period 2 years, 6 months — Difference in age and maturity, applicant was 18, victim 13 — Applicant aware sexual activity unlawful — weight given to guilty pleas, prior good character, youth, good prospects of rehabilitation, remorse and delay — Sentence within range — Leave to appeal refused.

SW v R [2019] NSWCCA 194

Severity appeal — applicant pleaded guilty to 3 counts of aggravated sexual intercourse without consent with a person under 16 years and 3 counts of aggravated indecent assault of a person under 16 years — applicant sentenced to an aggregate sentence of 3 years with a non-parole period of 1 year, 6 months — 16-year delay in prosecution — applicant no longer has benefit of serving sentence in juvenile detention centre — offending considered significant and involved coercion — applicant convicted of a number of offences including offences of violence, drug offences, two offences of driving while disqualified and two offences of contravening an apprehended violence order between 2004–2013 — no subsequent sexual offending, but criminal record shows disregard for the law was not the product of mere immature offending — sentence was not unjust nor manifestly excessive — appeal dismissed.

DPP v Hutchison [2018] VSCA 153

Committing indecent act with child under 16 (3 charges), producing child pornography for use through carriage service and knowingly possessing child pornography — sentenced to community correction orders for 3 and a half years, with conditions, and three year good behaviour bond — mitigating circumstances of age, death of mother, groomed online to commit offence — excellent prospects for rehabilitation — sentence imposed by the judge was not manifestly inadequate — appeals dismissed.

DJ v R [2017] NSWCCA 319

Sentencing appeal — 16-year-old pleaded guilty to discharging a firearm with intent to cause grievous bodily harm — applicant/Crown requested sentence for two related offences under s 166 certificate *Criminal Procedure Act 1986* — sentences of imprisonment imposed — appeal on grounds that s 166 certificate procedure not available — applicant must establish sentence unreasonable or unjust — sentences not manifestly excessive — appeal allowed and dismissed.

DS v R [2017] NSWCCA 37

Sentencing appeal — leave to appeal granted — youth aged 16 years — affected by alcohol and ecstasy — six offences committed at an 18th birthday party — causing grievous bodily harm with intent — reckless wounding in company causing actual bodily harm — affray — common assault — assault occasioning actual bodily harm — causing catastrophic brain injuries to one victim with consequential cognitive impairments and permanent physical injuries (count 1) — objective seriousness of a high order — whether failure to pay proper regard to the fact that offences other than count 1 could have been dealt with in the Children's Court — due to the extremely violent conduct, other relevant counts (numbers 3 to 7) could not be dealt with under s 18 *Children (Criminal Proceedings) Act 1987* — no miscarriage of justice or serious injustice demonstrated — whether failure to take into account youth's immaturity other than in relation to the issue of rehabilitation — no failure demonstrated — youth sentenced to an aggregate sentence of 12 years and 6 months' imprisonment, with a non-parole period of 8 years — aggregate sentence not manifestly excessive — appeal dismissed.

OK v R [2016] NSWCCA 318

Sentencing appeal — youth aged under 18 — cognitive impairment — emotional immaturity — multiple offences — aggravated armed robbery in adult company and armed with a dangerous weapon — aggregate sentence of 11 years' imprisonment with a non-parole period of 7 years — whether failure to properly apply principle for sentencing youthful offenders — failure to take into account the youth's no prior criminal history, emotional immaturity and cognitive impairment — no evidence of "profound deprivation" — sentence not manifestly excessive even given the significance of the subjective features affecting the youth — appeal against sentence dismissed.

BH v R [2016] NSWCCA 290

Sentencing appeal — youth aged 17 years and 3 months at time of offence — Attention Deficit Hyperactivity Disorder — borderline intellectual disability — manslaughter — single punch — early guilty plea — sentence of imprisonment of 5 years and 3 months with a non-parole period of 3 years and 11 months — whether sentencing judge sentenced applicant on basis of factual findings not open — matter of motivations a point of serious dispute — sentencing judge made no order under s 19(3) *Children (Criminal Proceedings) Act 1987* with regard to the sentence for the serious children's indictable offence of manslaughter — sentence not manifestly excessive — appeal dismissed.

Kiernan v R [2016] NSWCCA 12

Sentence appeal — wounding with intent to cause grievous bodily harm — s 33(1)(a) *Crimes Act 1900* (NSW) — no error in finding that offence was within the midrange of objective seriousness — applicant's subjective case including abusive upbringing properly taken into account — sentence not manifestly excessive — adult applicant with poor criminal record

including a conviction as a juvenile and a history of drug use from the age of 10-years-old — psychologist's report that applicant was subjected to ritual and constant physical, sexual and psychological abuse — leave to appeal granted but appeal dismissed.

TC v R [2016] NSWCCA 3

Sentence appeal — offender 17-and-a-half at the time of the offence — offender aged 55 years at the time of sentence — indecent assault committed 38 years earlier by the then young person on 9-year-old boy contrary to s 81 (rep) *Crimes Act 1900* (NSW) — further historical indecent assault on 12-year-old girl contrary to s 76 (rep) *Crimes Act* on a Form 1 — sentencing judge convicted applicant and imposed 2-year good behaviour bond — essential objective of application was to have the formal conviction expunged — sentencing judge failed to take into account sentencing options under the *Child Welfare Act 1939* (NSW) (rep) — sentencing judge failed to sentence in accordance with standards at time of the offence — sentence imposed on applicant clearly within the range of sentences which could be imposed — sentence not unreasonable or plainly unjust but leave to appeal granted as one ground of appeal made out — appeal against conviction dismissed — offence warranted withholding, to some degree, leniency to the applicant in light of his youth — no lesser sentence warranted in law.

RL v R [2015] NSWCCA 106

Sentencing appeal — sentencing adult for sexual offences committed as juvenile — effect of delay between the commission of the offences and when the charges were laid — whether sufficient allowance made for applicant's youth at time of offending — whether sentence accorded with sentencing principles applied at time of offending — no need for further rehabilitation — use of victim impact statement — statement not limited to harm directly resulting from offence whether to consider ground of manifest excess if specific error established — whether need for appeal court to determine appropriate sentence — finding that it is not sufficient to ask if impugned sentence within range — *Kentwell v The Queen* (2014) 252 CLR 601 applied — s 6(3) *Criminal Appeal Act 1912*.

Johan v R [2015] NSWCCA 58

Sentencing appeal — offences involved the use of dangerous weapons, four armed robbery offences as well as an aggravated break and enter offence, most offences were committed in the company with another person — whether there was failure to give appropriate weight to age and background when assessing moral culpability — compelling evidence of the applicant's personal circumstances — applicant's intelligence assessed in the mild intellectual disability range and the applicant had a serious drug habit — whether sentence imposed was manifestly excessive — although leave to appeal was granted, the appeal against sentence was dismissed.

BP v R [2010] NSWCCA 159

Severity appeal — s 61I *Crimes Act 1900* — sexual intercourse without consent — applicant a week short of his 17th birthday at the time of the offence — judge erred by using standard non-parole period as a guide — relevance of the applicant's youth — emotional maturity and impulse control may not be fully developed until the early to mid-twenties — application of *R v Fernando* (1992) 76 A Crim R 58 — whether appropriate to give effect to the applicant's deprived background.

YS v R [2010] NSWCCA 98

Aggravated break and enter commit serious indictable offence — sexual assault — circumstances of aggravation in the deprivation of liberty of the victim — young person aged

16 years at the time of the offence — sentence of a term of imprisonment of 8 years — appeal — whether sentence imposed was manifestly excessive because of a failure to properly reflect the applicant's youth, mental illness and totality in the sentence imposed — principles relating to mental illness and to youth canvassed — no identifiable or manifest error — appeal dismissed.

KT v R [2008] NSWCCA 51

Manslaughter — single punch constituting an unlawful and dangerous act — principles relevant to sentencing young offenders — considerations of punishment, general deterrence and rehabilitation when sentencing young offenders — whether sentencing judge had sufficient regard to offender's youth and immaturity — whether sentence manifestly excessive — open to sentencing judge to find applicant conducted himself in an adult manner and had committed a crime of violence of considerable gravity (see *R v KT* [2007] NSWSC 83 at **[9-1240]**).

R v SDM (1997) 127 A Crim R 318

Offences include stealing a motor vehicle, aggravated armed robbery and maliciously shooting with intent to prevent lawful apprehension — two offenders, including applicant who was a young offender — applicant evidence of an unfortunate family history — two of the crimes committed were of considerable gravity — Judge at first instance was well within the confines of the sentencing discretion he had — appeal dismissed.

Remitted for re-sentencing

JL v R [2024] NSWCCA 246

Appeal against sentence — juvenile offender — mental health — moral culpability — general deterrence — *Bugmy v The Queen* — youth — where applicant subject to conditional liberty at time of offence — manifest excess.

Barker v R [2024] NSWCCA 227

Appeal against sentence — where sentencing judge took into account applicant's juvenile criminal record — where sentencing judge erroneously took into account unproved allegations — *Bugmy v The Queen*.

BAP v R [2024] NSWCCA 206

Appeal against sentence — sexual touching and sexual intercourse with a child — plea of guilty at District Court "super call-over" — whether the sentencing judge should have found that the applicant facilitated the administration of justice — where s 22A *Crimes (Sentencing Procedure) Act 1999* was not raised before the sentencing judge — failure by the sentencing judge to consider the principles relevant to sentencing youth — complex interplay between youth, mental illness and cognitive impairment — error established — applicant re-sentenced.

Dennis v R [2024] NSWCCA 137

Appeal against sentence — application for leave to appeal — whether the sentencing judge mistook facts in finding aggravating circumstances for a Form 1 offence — whether the sentencing judge erred in admitting on sentence, and having regard to, the applicant's criminal history for offences committed as a child.

AJ v R [2023] NSWCCA 235

Appeal against sentence of 3 years 3 months imprisonment with non-parole period of 1 year 6 months — offence of aggravated robbery causing grievous bodily harm — whether sentencing

judge erred in failing to have regard to youth in assessing moral culpability and weight afforded to general deterrence — errors established — where same sentencing judge sentenced co-offender — where same errors were established and co-offender re-sentenced on appeal — issue of parity addressed when during re-sentence – appeal allowed and offender re-sentenced to 3 years 3 months imprisonment with non-parole period of 1 year.

AH v R [2023] NSWCCA 230

Appeal against sentence of 12 years imprisonment with non-parole period of 9 years imprisonment — offence of doing an act in preparation for, or planning, a terrorist act — large body of material addressing offender's youth, lack of insight, mental illness, remorse and prospect of rehabilitation — whether error in failing to make findings in respect of offender's subjective case — whether sentence manifestly excessive — significance for purpose of re-sentencing of harsher conditions of imprisonment than could have been foreseen — significance of subsequently enacted legislation restricting availability of parole — appeal allowed and offender re-sentenced to 7 years and 6 months imprisonment.

TM v R [2023] NSWCCA 185

Appeal against sentence of 3 years imprisonment with non-parole period of 12 months imprisonment — TM 15 years old — pleaded guilty to aggravated robbery causing grievous bodily harm and a further charge of robbery in company was taken into account on sentence — sentencing judge failed to explain how TM's young age was taken into account when assessing moral culpability — failed to have regard to TM's young age when considering emphasis to be given to general deterrence — original sentence quashed — re-sentenced to imprisonment comprising a non-parole period of 9 months, with an additional term of 2 years and 3 months imprisonment.

DS v R (2022) 109 NSWLR 82

Sentence appeal — DM 16 years and 8 months old and DS 15 years — DM and DS had dysfunctional upbringings and mental health issues — various offences including murder and take and drive motor vehicle without consent of owner while owner present in circumstances of aggravation — DS sentenced to imprisonment totalling 18 years and 4 months, including a sentence of 15 years and 4 months for murder — DM sentenced to imprisonment totalling 35 years and 6 months, including a sentence of 31 years and 6 months for murder — assessment of objective seriousness of DS's offence by reference to DM's offending was erroneous as proper approach was to sentence DS for offence that he committed — sentence imposed on DS for the take and drive conveyance offence excessive — assessment of objective seriousness of DM's offence of murder as substantially above the mid-range of objective seriousness was open to sentencing judge — no errors made in sentencing judge's consideration of youth, background of dysfunction, mental illness — unnecessary to address parity between sentences — sentences imposed on DM manifestly excessive — appeal allowed — DS re-sentenced to an aggregate term of imprisonment of 14 years and 6 months, non-parole of 10 years — DM re-sentenced to an aggregate term of imprisonment of 27 years, non-parole period 20 years and 7 months.

Spinks v DPP (Cth) [2021] NSWCCA 308

Severity appeal — applicant convicted of one count of importing a marketable quantity of MDMA — sentenced to imprisonment for 3 years with 18 months parole — offender aged 18 years at offending — failure to properly consider offender's youth, prior good behaviour

and ongoing rehabilitation — appeal allowed — re-sentenced to imprisonment for 2 years, 3 months, period of full-time custody 15 months, condition of good behaviour for 12 months post-release.

Hoskins v R [2021] NSWCCA 169

Severity appeal — applicant convicted of two counts of reckless wounding, affray, aggravated break and enter and commit serious indictable offence — sentenced to 5 years and 6 months imprisonment with a non-parole period of 3 years and 6 months — social disadvantage and hardship — excellent upbringing with non-biological parents until aged 13 — return to biological family where criminal conduct normalised — alcohol and drug abuse, and history of offending — childhood and adolescent years equally formative — primary judge erred in not applying *Bugmy v The Queen* (2013) 249 CLR 571 principles — reduced moral culpability notwithstanding passage of time and intervening custodial sentences — effects of deprivation do not diminish over time — appeal allowed — re-sentenced to aggregate sentence of 5 years imprisonment with a non-parole period of three years.

WB v R [2020] NSWCCA 159

Severity appeal — applicant 16 years at time of offending, not sentenced until 45 years later — applicant pleaded guilty to attempted buggery and indecent assault on a male — aggregate sentence of imprisonment for 8 years with a non-parole period of 5 years 7 months — applicant sexually abused as a child — assessment of objective seriousness on a collective basis was an error — aggregate sentence manifestly excessive — objective seriousness of offences is below mid-range — leave to appeal granted — appellant sentenced to an aggregate sentence of imprisonment for 3 years with a non-parole period of 2 years.

LS v R [2020] NSWCCA 120

Severity appeal — applicant found guilty under ss 66A and 91H(2) *Crimes Act 1900* of producing child abuse material and sexual intercourse with a child under 10 years — sentence of 6 years and 9 months' imprisonment, with non-parole period of four years imposed — applicant 16 years of age when offences occurred — applicant diagnosed with Autism, Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder and Conduct Disorder, expressive and receptive language, sensorimotor difficulties, and attention/executive function deficits — psychology reports show no or very little risk of similar re-offending — offender re-sentenced to an aggregate sentence of 4 years and 9 months' imprisonment with a non-parole period of 2 years and 9 months.

BM v R [2019] NSWCCA 223

Severity appeal — the applicant was sentenced to an aggregate term of imprisonment for 2 years and 6 months with a non-parole period of 1 year and 3 months for sexual assault on a minor — applicant has a learning disorder and ADHD — applicant aged 13 years at time of offending — sentencing judge did not take applicant's age and causative mental condition into account in assessing objective seriousness — offending was at or near the bottom of the range of objective seriousness for offences of this kind — re-sentenced to aggregate sentence of 1 year and 6 months with an aggregate non-parole period of 9 months.

Howard v R [2019] NSWCCA 109

Severity appeal — applicant threw an explosive with intent to burn — applicant sentenced to imprisonment for 9 years, 6 months, with a non-parole period of 6 years — applicant's youth and

immaturity, genuine remorse and gathering insight were not reflected in sentence — applicant re-sentenced to a term of imprisonment of 6 years, 9 months with a non-parole period of 4 years and a balance of term of 2 years, 9 months.

CA v R [2019] NSWCCA 93

Severity appeal — applicant sentenced to imprisonment for 3 years, 9 months with non-parole period of 2 years for specially aggravated break and enter and committing a serious indictable offence — 78-year-old woman severely beaten with bricks and a piece of wood — applicant aged 12 years 10 months — sentence manifestly excessive — judge gave insufficient weight to applicant's youth, immaturity, impulsivity and deprived background — appeal granted — applicant re-sentenced to a term of imprisonment for a non-parole period of 1 year, 4 months with a balance of term of 1 year, 8 months.

Best v R [2019] VSCA 124

Applicant sentenced to 5 years, 3 months and 21 days' imprisonment with a non-parole period of 3 years for 3 charges of sexual penetration of a child under the age of 16 years — application for leave to appeal against sentence granted — early guilty plea, young offender, remorse, low risk of recidivism, family support — need for protective custody in adult gaol — applicant re-sentenced to 2 years, 10 months and 21 days' imprisonment with a non-parole period of 1 year and 9 months.

Clarke-Jeffries v R [2019] NSWCCA 56

Severity appeal — 18-year-old applicant sent messages to 15-year-old victim to procure sexual activity — applicant sought money from the victim in exchange for destroying photographs she had sent to him — applicant sentenced to 4 years, 4 months imprisonment with non-parole of 2 years for using a carriage service to solicit child pornography material and procuring a person under 16 years to engage in sexual activity contrary to s 474.26 Criminal Code (Cth) — serious mental health issues at time of offending — sentence manifestly excessive — applicant re-sentenced to 2 years with non-parole period of 9 months.

DM v R [2018] NSWCCA 305

Severity — sexual offences — at first instance applicant sentenced to 5 years with non-parole period of 2 years 9 months, co-offender received a lesser sentence due to age and positive background report — sentencing judge erred in finding the applicant was a leader in relation to the offending conduct — applicant had a justifiable sense of grievance when comparing his sentence to that of his co-accused — Leave to appeal granted — sentence imposed at first instance quashed — offender re-sentenced to imprisonment for 4 years 6 months with non-parole period of 2 years 5 months.

Campbell v R [2018] NSWCCA 87

Sentencing appeal — 13 year-old pleaded guilty to serious sexual offences on younger relatives — sentence of imprisonment imposed — strong evidence of rehabilitation — interference with education of applicant — primary judge erred in deciding no alternatives to full-time custodial sentence were appropriate — applicant's rehabilitation should be primary focus of proceedings — matter remitted to District Court for re-sentencing.

LD v R [2016] NSWCCA 217

Sentencing appeal — youth under 18 years of age at the time of the offence — aggravated break, enter and commit serious indictable offence — reckless wounding, in circumstances of

aggravation — being in company — sentence of imprisonment for three years with a non-parole period of 1 year and 6 months imposed by sentencing judge — conceded failure of sentencing judge to apply provisions of the *Children (Criminal Proceedings) Act 1987* — matter remitted.

[9-1342] Parity principle

Last reviewed: June 2024

_AJ v R_ [2023] NSWCCA 235

Appeal against sentence of 3 years 3 months imprisonment with non-parole period of 1 year 6 months — offence of aggravated robbery causing grievous bodily harm — whether sentencing judge erred in failing to have regard to youth in assessing moral culpability and weight afforded to general deterrence — errors established — where same sentencing judge sentenced co-offender — where same errors were established and co-offender re-sentenced on appeal — issue of parity addressed when during re-sentence – appeal allowed and offender re-sentenced to 3 years 3 months imprisonment with non-parole period of 1 year.

Apulu v R [2022] NSWCCA 244

Applicant sentenced for 3 years and 6 months imprisonment with a non-parole period of 2 years for robbery whilst armed with an offensive weapon — applicant 19 years old, co-offender 17 years old — the co-offender was sentenced in the Children's Court so the parity principle cannot be considered — no error in the approach of the sentencing judge to the operation of the principle of parity — a person sentenced for two armed robberies should ordinarily expect to receive a full-time custodial sentence — failure to demonstrate aggregate sentence was manifestly excessive.

JE v R [2019] NSWCCA 225

Severity appeal — applicant and co-offender found guilty of two offences of aggravated sexual assault in company, one count of aggravated indecent assault, one count of producing child abuse material — applicant sentenced to an aggregate term of imprisonment of 4 years with a non-parole period of 2 years — co-offender sentenced to an aggregate term of imprisonment of 4 years and 3 months with a non-parole period of two years — applicant aged 15 years and 4 months and co-offender aged 14 years and 7 months at time of offending — co-offender played a greater role in offending, the incidents occurred in his house, he engaged in two separate instances of sexual intercourse, he provided alcohol and made recording — offending by co-offender more serious than that of applicant — disparity error has occurred in relation to aggregate sentence — aggregate sentence of 3 years with a non-parole period of 1 year and 6 months.

R v Flanagan [2019] NSWDC 306

Flanagan was 18 years and 10 months at time of offending — Brennan was 17 years and 10 months — aggravated break and enter — aggravated take and drive vehicle — knife used on one victim — both offenders on parole at time of offending — offenders' youth, immaturity, deprived background, long history of offending, drug use, intellectual disability taken into account on sentencing — parity of sentence as equally liable for offences — Flanagan's two sentences to be served concurrently — aggregate sentence 3 years and 9 months, non-parole period of 1 year and 11 months — Brennan's sentence of 3 years and 4 months, non-parole period 1 year 8 months

R v BJ [2018] NSWDC 122

Aggravated sexual intercourse child between 14–16 — co-offenders pleaded guilty — offenders were children at the time of the offence — BJ was 14 years old at time of offence — mitigating factors of youth, immaturity of decision-making, influence of older co-offenders, deprived background taken into account — sentenced to 4 years with non-parole period of 2 years — co-offenders, HA and DM, 17 years old at time of offending — HA sentenced to 4 years 8 months with non-parole period of 2 years 4 months — DM sentenced to 5 years with non-parole period of 2 years and 9 months.

Siddiqi v R (Cth) [2015] NSWCCA 169

Sentencing appeal — error in having regard to non-conviction criminal record — Parity principle — whether erroneous sentences imposed upon co-offenders give rise to a justified sense of grievance — whether intervention of appellate court is justified — question of proper reflection of objective.

[9-1344] Aggregate sentence

Last reviewed: November 2025

R v JH [2025] NSWDC 314

Sentencing — sexual offences against children — juvenile at the time of offending— aggravated sexual assault — victim <16 years — deprivation of victim's liberty — infliction of actual bodily harm.

R v Diallo (No 17) (Sentence) [2024] NSWSC 1650

Sentencing — offences of violence — violent melee in a suburban street — six people stabbed — one child killed — manslaughter — attempted murder — wound with intent — animosity between groups of young men — where jury rejects proposition that joint criminal enterprise abandoned — dispute over content of joint criminal enterprise — relevance of self-defence — fact finding on sentence — finding that subjective component established but objective component rejected — relevance of extent to which conduct exceeded what was reasonable — different findings in relation to each offence — devastating impact on victims — eloquent and moving victim impact statement — subjective circumstances of offenders — requirement for stern punishment — balancing competing considerations — a place for leniency — assessment of moral culpability — different findings in each case — where one offender contended subjective factors fed into assessment of moral culpability — application of cases — submission rejected — parity and proportionality in sentencing co-offenders — different considerations — varying assessment of objective criminality — individualised justice — application for direction that three offenders serve sentences as juvenile offenders — Prosecutor chooses to oppose — direction made — special circumstances.

PD v Director of Public Prosecutions (NSW) [2025] NSWSC 16

Children's Court — sentencing — control order — period not to exceed 2 years unless accumulating on existing order — aggregate control order subject to 2-year limit — limit of 3 years applicable only to new order extending term of existing order.

R v RM [2015] NSWCCA 4

Child sex offences — respondent was juvenile when offences were committed — pleaded guilty to seven charges — sentenced to a five year good behaviour bond and a suspended aggregate

sentence of 2 years imprisonment — whether error in identifying qualified discount for remorse — whether error in imposing a suspended aggregate sentence — whether error in imposing a single bond for five offences — whether indicated sentences reveal error in aggregate sentence — whether aggregate sentence manifestly inadequate — whether indicating non-parole periods for indicated sentences was in error — whether individual bonds were manifestly inadequate — whether overall sentence was manifestly inadequate — the court, exercising its residual discretion, declined to intervene to do other than correct the technical errors made by the sentencing judge.

PD v R [2012] NSWCCA 242

Aggregate sentence for multiple offences including a serious home invasion — applicant aged 16 years at the time of the offence in the company of his brother who was then aged 21 — appeal — whether sentencing judge failed to consider statutory principles relevant to sentencing juveniles — Pt 3 Div 4 *Children (Criminal Proceedings) Act 1987* — whether sentence manifestly excessive — aggravated break and enter — motor vehicle stolen — reckless wounding of a police officer — commission of one serious children's indictable offence and three other offences — whether erroneous for all four offences to be dealt with "according to law" — no prior convictions — intellectual impairment — s 53A *Crimes (Sentencing Procedure) Act 1999*.

[9-1346] Non-parole period error

Last reviewed: June 2024

Singh v R (2020) 104 NSWLR 43

Fraud — applicant 23–26 years old when offences committed — offences involved premeditation, sophistication and major breach of trust — *Crimes (Sentencing Procedure) Act 1999*, s 44 — special circumstances — observations concerning relationship between s 44 and aggregate sentences — judge properly took into account applicant's youth when sentencing.

TF v R [2020] NSWCCA 248

Severity appeal — applicant sentenced to aggregate sentence of 10 years imprisonment with a non-parole period of five years for five offences of robbery and aggravated taking of a motor vehicle with a person in it — disproportion between overall sentence and non-parole period — assumption offender released on completion of non-parole period — balance of term excessive — applicant re-sentenced to an aggregate sentence of imprisonment for seven years and six months, with a non-parole period of five years.

DL v The Queen (2018) 265 CLR 215

Appeal *DL v R (No 2)* [2017] NSWCCA 58 — murder — powers of appellate court when re-exercising sentencing discretion — Court of Criminal Appeal substituted primary judge's findings (intention to inflict grievous bodily harm) with aggravated finding (intention to kill) — error to depart from primary judge's findings without giving notice to parties — procedural unfairness occasioned — factual findings of primary judge not challenged by either party on appeal.

DL v R (No 2) [2017] NSWCCA 58

Sentencing appeal — murder — offender aged 16 and murder victim aged 15 — sentencing judge remarked that "against the statutory provision of a non-parole period of 25 years, I do

not feel able to reduce the non-parole period below 17 years and see no point in a further term exceeding 5 years" — *Muldrock* error — *Muldrock v The Queen* (2011) 244 CLR 120 — the High Court in *Muldrock* clarified that the standard non-parole period is but one guidepost and is not to be used as a starting point in the sentencing process — appeal dismissed (by majority) — see appeal, *DL v The Queen* (2018) 265 CLR 215, below.

[9-1348] Full-time imprisonment

Last reviewed: May 2026

R v TH [2025] NSWSC 1578

Sentence — manslaughter — juvenile offenders — one stabs deceased acting in self-defence with excessive force — three others convicted on basis of joint criminal enterprise — significant subjective cases — issue of parity with each other and other people present — prospects of rehabilitation.

R v KL [2025] NSWSC 1574

Murder — single count of murder — where offender pleaded not guilty of murder but guilty of manslaughter — trial by judge-alone — verdict — not guilty of murder but guilty of manslaughter — application of *Muldrock*.

Sentencing — aggravating factors — offence involved the actual use of violence — offence involved the use of a weapon — offence was committed in the presence of a number of juveniles — offence was committed in a public place — offender has a record of previous convictions — offender was on conditional liberty at the time of the offence.

Sentencing — mitigating factors — offender was not fully aware of the consequences of their actions because of their age — offender entered a plea of guilty to the offence of which they were ultimately convicted — offender has good prospects of rehabilitation.

Sentencing — objective seriousness — allowance made for offender's youth and psycho-social immaturity — determined to be below the mid-range — sentencing of a juvenile — principles of sentencing a juvenile — plea of guilty — entitlement to discount.

R v XE [2025] NSWSC 877

Sentencing — murder — where offender previously found guilty by a jury and sentenced for murder — where offender successfully appealed against the conviction — where offender pleaded guilty to murder before retrial — application of the ceiling principle — discount to reflect utilitarian value of plea — objective seriousness of offending — where moral culpability reduced by reason of youth and background of disadvantage — where offender has made progress toward rehabilitation in custody.

R v SH [2025] NSWDC 410

Sentencing — young offender — attempt to possess a commercial quantity of an unlawfully imported border controlled drug.

R v Taumalolo [2022] NSWSC 1696

Sentencing for manslaughter and affray — victim killed at a birthday party after being attacked by a number of young men — one of the persons charged, Tafuna Taumalolo, pleaded guilty to murder and was sentenced to imprisonment for 18 years and 10 months with a non-parole period

of 14 years and 1 month — ST pleaded guilty to manslaughter, and other offenders pleaded guilty to affray — objective seriousness of affray is above mid-range, objective seriousness of manslaughter is serious — ST was 17 years and one month at time of offence — sentenced to 6 years and 9 months' imprisonment, with a non-parole period of imprisonment for 4 years and 1 month — special circumstances justify ST serving the remainder of his sentence after turning 21 as a juvenile offender — Suliasi Taumalolo was aged 20 years at the time of the offence — sentenced to 3 years and 9 months with a non-parole period of 2 years and 3 months — ET was 17 time of the offence — sentenced to 3 years and 4 months with non-parole period of 2 years — Mateaki Taumalolo was aged 18 years and 9 months at the time of the offending — sentenced to 3 years and 9 months' imprisonment with a non-parole period of 2 years and 4 months — Mayol aged 22 at time of offending — sentenced to 3 years and 9 months' imprisonment with a non-parole period of 2 years and 4 months.

IM v R [2019] NSWCCA 107

Severity appeal — *Criminal Appeal Act 1912* (NSW), s 5(1)(c) — offender 14 years, 2 months old at time of offending — sentenced to imprisonment for 13 years, 6 months for terrorist offence — appeal that guilty plea not given appropriate weight — due to significance given to punishment, general deterrence and protection of community in cases involving terrorist offences, mitigating factors such as youth and rehabilitation given less weight — a discount of 10% should be allowed for the late plea of guilty — re-sentenced to a term of imprisonment of 10 years, 9 months with a non-parole period of 8 years.

R v AH [2018] NSWSC 973

Guilty plea to doing an act in preparation for, or planning, a terrorist act, pursuant to s 101.6(1) Criminal Code (Cth) — offence is objectively serious and a substantial term of full-time imprisonment is appropriate — offence above the low end of the range of objective gravity — 12 years imprisonment with non-parole period of 9 years — detention as a juvenile offender up to the age of 21.

R v Alou (No 4) [2018] NSWSC 221

Aiding, abetting, counselling or procuring the commission of a terrorist act — 18 year-old offender supplied firearm to 15-year old killer — supporter of Islamic State — remains radicalised — lack of contrition — weak prospect of rehabilitation — sentenced to a term of imprisonment of 44 years with non-parole period of 33 years.

[9-1350] Community Service Order/Community Correction Order

Last reviewed: June 2024

R v BP [2023] NSWDC 415

Sentence — aggravated sexual assault by an object — serious children's indictable offence — sentencing according to law — s 6 *Children (Criminal Proceedings) Act 1987* — production of child abuse material — filming of dry humping — Snapchat — child offender — rehabilitation — immaturity — remorse — good character — excellent prospects of rehabilitation — Community Correction Order — not to be treated as a registrable person.

R v AR [2022] NSWCCA 5

Appeal of variation of sentence — Respondent pleaded guilty to aggravated take and detain — Community Correction Order of 18 months — sentencing judge later reopened proceedings

and ordered no conviction to be recorded under s 14(1) *Children (Criminal Proceedings) Act 1987* — serious children's indictable offence to be dealt according to law — a conviction can be recorded under s 14(2) in respect of a child who is charged with an indictable offence that is not disposed of summarily — Community Correction Order may only be imposed upon a person who has been convicted — sentencing judge made no error of law when he did not exercise a discretion concerning the entry of a conviction at the time of making a Community Correction Order — vacate the order that no conviction be recorded in respect of aggravated take and detain for advantage and confirm initial order.

RC v DPP [2016] NSWSC 665

Sentencing appeal — youth identifies as Aboriginal — intellectual and emotional deficits — Attention Deficit Hyperactivity Disorder — multiple property offences — break, enter and steal — break and enter with intent — aggravated break, enter and steal — some offences committed while on parole and another while on conditional liberty — disconnection from Juvenile Justice — need for supervision identified — two-year control order reduced to 1 year and 10 months — non-parole period of 14 months reduced to 12 months — two-year good behaviour bond ordered — condition of bond that the youth accept the supervision of Juvenile Justice and the supervision of any other organisation or person directed by Juvenile Justice.

[9-1352] Multiple offences, partly occurred when young offender

Last reviewed: June 2024

R v MW [2019] NSWDC 307

Sentencing — offender pleaded guilty to three separate sexual offences against children — Count 1 and Form 1 offences occurred when offender aged 15 years — Count 2 offence occurred when offender 26 years of age — offender has mild intellectual disability, ADHD, sexually abused by uncle when younger — criminality in count 1 is above mid-range due to young age of victim — offender is entitled to substantial mitigation for count 1 and Form 1 matters as they would have been dealt with in Children's Court had they been reported closer to time of offending — unable to conclude that count 1 matter crosses the threshold of s 5 *Crimes (Sentencing Procedure) Act 1999* — Community Corrections Order for 3 years for count 1 — 3 years, 6 months with a non-parole period of 1 year. 9 months for count 2.

Important cases — Serious indictable offences

R v KL [2025] NSWSC 1414 ..... [9-1353]

[9-1353] R v KL [2025] NSWSC 1414

Last reviewed: May 2026

Murder — Single count of murder — Where accused pleaded not guilty of murder but guilty of manslaughter — trial by judge alone.

Features of offending — gang violence — stabbing death by single stab wound — offence committed at Sydney Royal Easter Show — two groups of young males confronting each other in public — post-offence conduct of the accused — videos posted mocking the death of the deceased — relevance of disrespectful post-offence conduct to the s 23A(1)(b) test.

Manslaughter — alternative to murder — intention — what was the accused's intention at the time he inflicted the stab wound — where Crown asserts that the accused had the intention to kill or cause grievous bodily harm — where the accused was affiliated with a gang and may have been motivated by a desire for revenge — where accused armed with a weapon at a public event — where accused had witnessed the fatal consequences of a stab wound previously.

Manslaughter — alternative to murder — excessive self-defence — whether the accused acted in excessive self-defence — whether the accused believed that his actions were necessary in the defence of himself or others in the circumstances as he perceived them — whether the accused observed the deceased to be a threat — whether the accused's group were the aggressors — where PTSD impacted the accused's perception of events.

Manslaughter — alternative to murder — substantial impairment — s 23A *Crimes Act 1900* (NSW) — substantial impairment because of mental health impairment or cognitive impairment — whether the accused's capacity to understand events, or to judge whether his actions were right or wrong, or to control himself, was substantially impaired by a mental health impairment or a cognitive impairment — whether the impairment was so substantial as to warrant liability for murder being reduced to manslaughter — application of community standards — factors relevant — young age and vulnerability of the accused — diagnosis of PTSD — accused's history of involvement in gang activity and violence — lack of developmental maturity.

Witness evidence — eyewitness evidence — expert psychiatric evidence — where both psychiatric experts agree on mental health diagnosis but disagree on degree of impairment.

Important cases — Sexual assault

R v JH [2025] NSWDC 314 ..... [9-1355]

R v Ezra [2024] NSWChC 16

R v Adam [2024] NSWChC 6

[9-1355] R v JH [2025] NSWDC 314

Last reviewed: November 2025

Sentencing — sexual offences against children — juvenile at the time of offending— aggravated sexual assault — victim <16 years — deprivation of victim's liberty — infliction of actual bodily harm.

R v Ezra [2024] NSWChC 16

Children — crime — registration — *Child Protection (Offenders Registration) Act 2000*.

R v Adam [2024] NSWChC 6

Children — sexual assault — Directions — trauma informed — knowledge.

Important cases — Witness intermediaries

R v MR, JB and CS (young persons) (No 4) [2024] NSWSC 909 ..... [9-1356]

[9-1356] R v MR, JB and CS (young persons) (No 4) [2024] NSWSC 909

Last reviewed: November 2025

Crime — application for presence of a witness intermediary — accused young persons — use of witness intermediary while giving evidence.

Important cases — Young Offenders Act

R v Aayan [2025] NSWChC 9 ..... [9-1357]

R v Ben [2025] CLN 2

[9-1357] R v Aayan [2025] NSWChC 9

Last reviewed: November 2025

Children — crime — diversions — disqualification orders — youth justice conference — pleas, findings and admissions of guilt.

R v Ben [2025] CLN 2

Children — crime — *Young Offenders Act 1997*.

Important cases — Youth parole

R v Nadj [2025] NSWChC 4 ..... [9-1360]

Secretary of the Department of Communities and Justice v Minster [2020] NSWChC 10

Secretary of the Department of Communities and Justice v Rivers [2020] NSWChC 9

Robb v R [2019] NSWCCA 113

DL v R (No 2) [2017] NSWCCA 58

BP v R [2010] NSWCCA 159

[9-1360] R v Nadj [2025] NSWChC 4

Last reviewed: June 2025

Children — crime — on bail — on parole — post and boast — knife.

Secretary of the Department of Communities and Justice v Minster [2020] NSWChC 10

Young person sentenced to 12-month control order for offences of larceny and break and enter in company, eligible for parole after 6 months — committed a fresh offence of larceny prior to parole — Children's Court in its parole jurisdiction revoked the parole order — young person committed another offence and was fined — Children's Court has implied power in its parole jurisdiction to rescind an order for revocation of parole when necessary for the purposes of avoiding extending a detention order by the number of days the person was at large after the order took effect — avoids injustice to young person, satisfies objects of *Children (Detention Centres) Act 1987*, and furthers the objects of all relevant legislation in the Children's Court and principles that apply in terms of prioritising rehabilitation of children — previous order for revocation rescinded and original order of parole continues.

Secretary of the Department of Communities and Justice v Rivers [2020] NSWChC 9

Children's Court Parole jurisdiction — defendant pleaded guilty to reckless wounding in company — sentenced to detention for 12 months and non parole period and period of parole — released and committed further offences on parole — Secretary requested court confirm revocation of parole or make a fresh revocation — original revocation of parole not confirmed — order rescinding the original revocation of parole order pursuant to the implied power of Children's Court — no need for fresh revocation of parole because young person has been further sentenced for affray and will be under a control order for another two months and under conditions of parole for a further six months — reinstatement of the original order for parole which has expired — following obiter dicta binding on all future parole proceedings in

Children's Court — calculation of the period referred to in s 68(3) *Children (Detention Centres) Act 1987* which provides that if young offender is not taken into custody until after the day on which the order revoking the parole order takes effect, the term of the offender's detention order is extended by the number of days the person was at large after the order took effect ("Street Time") — proper method of calculating the extension of a detention order where there has been a breach of parole and the young person has been at large — the calculation of street time under s 68(3) is to be made having reference to time at large and time in custody not referable to the original offences for which the parole order in question was made — *Palizio v NSW Parole Authority* [2013] NSWSC 1829 followed.

Robb v R [2019] NSWCCA 113

Appeal against commencement of sentence — applicant sentenced to four years with a non-parole period of two years — towards the end of the non-parole period the applicant committed a further offence while on day release — erroneous understanding that applicant had been released on parole and was subject to parole conditions — sentence held to commence consecutively after first sentence of four years expired — applicant was refused bail and remained in custody — commencement of sentence for third offence to commence after non-parole period of two years.

DL v R (No 2) [2017] NSWCCA 58

Sentencing appeal — murder — offender aged 16 and murder victim aged 15 — sentencing judge remarked that "against the statutory provision of a non-parole period of 25 years, I do not feel able to reduce the non-parole period below 17 years and see no point in a further term exceeding 5 years" — *Muldrock* error — *Muldrock v The Queen* (2011) 244 CLR 120 — the High Court in *Muldrock* clarified that the standard non-parole period is but one guidepost and is not to be used as a starting point in the sentencing process — appeal dismissed (by majority) — see appeal, *DL v The Queen* (2018) 265 CLR 215, below.

BP v R [2010] NSWCCA 159

Severity appeal — s 61I *Crimes Act 1900* — sexual intercourse without consent — applicant a week short of his 17th birthday at the time of the offence — judge erred by using standard non-parole period as a guide — relevance of the applicant's youth — emotional maturity and impulse control may not be fully developed until the early to mid-twenties — application of *R v Fernando* (1992) 76 A Crim R 58 — whether appropriate to give effect to the applicant's deprived background.

Important cases — Youth Koori Court

R v John [2023] NSWChC 6 ..... [9-1380]

R v Thomas [2023] NSWChC 3

R v Linda [2022] NSWChC 3

R v Nerri [2022] NSWChC 2

R v ST [2018] NSWDC 22

Honeysett v R (2018) 56 VR 375

[9-1380] R v John [2023] NSWChC 6

Last reviewed: June 2024

YKC graduation — minor and aggravated break and enter offences — participated in YKC and no further offending — employed — leader in community — less serious matters dismissed under s 33(1)(a)(i) and bonds imposed under s 33(1)(a)(i) for more serious matters.

R v Thomas [2023] NSWChC 3

Thomas is Wiradjuri and Kamilaroi — suffers from attention deficit hyperactivity disorder, oppositional defiant disorder, post-traumatic stress disorder and mild intellectual disability — removed from parents when 1 and lived in multiple short-term family and refuge placements — removed from culture — guilty of threatening others with knife, arson on train — participated in YKC and no further offending — secured job and home — graduation from Youth Koori Court — matter dismissed with a caution under s 33(1)(a)(i).

R v Linda [2022] NSWChC 3

YKC graduation — 13 or 14 years at time of offending — 1 count affray, 5 counts assault occasioning bodily harm and assault — young person part of juvenile criminal network — 26 prior charges — young person complied with Action and Support Plan — no matters of violence for over 12 months — causal connection between mental health and commission of offences reducing moral culpability: *Muldrock v The Queen* (2011) 244 CLR 120 — charges dismissed under s 33(1)(a) *Children (Criminal Proceedings) Act 1987*.

R v Nerri [2022] NSWChC 2

Child 13 years old at time of offending — extensive criminal history with over 40 charges — 21 prior admissions into youth detention — child is Kamilaroi and Yuin — admitted to YKC — Action and Support Plan developed to reduce personal risk factors related to re-offending — child has not offended for 3 years — plan complied with and exceeded — prior offences dismissed under s 33(1)(a) *Children (Criminal Proceedings) Act 1987*.

R v ST [2018] NSWDC 22

Appropriate forum for sentencing — Children's Court best placed to administer the requirements of the *Children (Criminal Proceedings) Act 1987* and rehabilitation outcomes, and can to refer to the Youth Koori Court (YKC) — remittance to Children's Court under s 20 *Children (Criminal Proceedings) Act* for purpose of imposing penalties — recommend referring defendant to YKC.

Honeysett v R (2018) 56 VR 375

Appellant pleaded guilty to one charge of armed robbery and one charge of theft — sentenced to 5 years imprisonment with non-parole period of 3 years — insufficient weight given to appellant's youth, deprived background and Aboriginality — insufficient weight given to the appellant's engagement with the Koori Court process — history of re-offending and previously used Koori Court to mitigate sentence — Koori Court has power to inform itself, but no obligation to request "Gladue" reports — appeal dismissed.

Legislation

Bail Act 2013 ..... [10-1000]

Children (Criminal Proceedings) Act 1987

Children (Criminal Proceedings) Regulation 2021

Children (Community Service Orders) Act 1987

Children (Detention Centres) Act 1987

Children (Detention Centres) Regulation 2015

Children (Interstate Transfer of Offenders) Act 1988

Children's Court Act 1987

Children's Court Regulation 2024

Children's Court Rule 2000

Crimes Act 1900

Crimes (Administration of Sentences) Act 1999

Crimes (Sentencing Procedure) Act 1999

Young Offenders Act 1997

Young Offenders Regulation 2016

[10-1000] Bail Act 2013

Last reviewed: November 2024

Children — bail conditions in relation to accommodation: s 28 — prohibition against multiple or detention applications to the same court unless there are grounds for a further release application: s 74 — an application for release may be made in relation to a child: s 74(3)(d).

Children (Criminal Proceedings) Act 1987

Children — criminal proceedings — age of criminal responsibility — Children's Court jurisdiction — commencement of proceedings — hearings — publication and broadcasting of names — penalties — compensation — background reports — criminal proceedings — adjournments — charges hearings — cumulative or concurrent orders — guilty plea — non-association and place restriction orders — reasons for decisions — compensation — term of control order — variation of good behaviour bond or probation — enforcement — suspension of control order — mistake in exercise of jurisdiction — proceedings for offences — procedures for remitting cases from one court to another — drug rehabilitation programs.

Children (Criminal Proceedings) Regulation 2021

Children — criminal proceedings — serious children's indictable offence — lists of adults willing to attend interviews — background reports — explanations to accused persons in committal proceedings — conditions that may be imposed by certain orders — explanatory

material for orders — authorised officers — consultation required before conditions as to residence or treatment imposed on parole — parole orders — warrants of commitment — savings — any act, matter or thing that, immediately before the repeal of the *Children (Criminal Proceedings) Regulation 2016*, had effect under that Regulation continues to have effect under this Regulation.

Children (Community Service Orders) Act 1987

Children — criminal proceedings — applicable to children under 21 years and guilty or convicted of an offence — making children's community service orders by courts — administration of children's community service orders — extension and revocation of children's community service orders — liability in respect of community service work — notice of revocation of orders — orders to be taken into account in subsequent dealings — disclosure of information.

Children (Detention Centres) Act 1987

Children — criminal — detention centres — establishment, control, management and inspection — Official Visitors — admission to detention centres — persons on remand and persons subject to control — exceptions — transfers — detention orders — treatment of detainees — maintenance of physical, psychological and emotional well-being of detainees — promotion of social, cultural and educational development — maintenance of discipline and good order — facilitation of the proper control and management of detention centres — leave — escorted absences — restrictions on and conditions of leave — medical attention — riots and disturbances — transfers — detention centre offence — discharge — termination of detention orders — offences — administration — appointment of medical officers — testing of juvenile justice officers for alcohol and prohibited drugs — Serious Young Offenders Review Panel — Victims Register.

Children (Detention Centres) Regulation 2015

Children — criminal — detention centres — administration — admission — information — classification — health and medical attention — health, medical attention and maintenance of physical well-being — segregation — uniform — searching of detainees — property, possession and disposal — education and training — access to programs — case management — preparation and development of case plans — visits — letters and parcels — telephone communications — communications with staff members — complaints — leave — maintenance of order — use of dogs to assist in drug detection — use of force — testing for alcohol or drugs — list of punishments for misbehaviour — inquiry into misbehaviour — misbehaviour dealt with by the Children's Court — parole — conduct of juvenile justice officers regarding alcohol and prohibited drugs — health, mental illness and death of detainees — diet, exercise and treatment — spiritual welfare — list of general misbehaviour — serious misbehaviour — forms — notice of revocation of parole order — arrest warrant — warrant of commitment to detention centre.

Children (Interstate Transfer of Offenders) Act 1988

Children — criminal — interstate transfer of offenders — general agreement — arrangements — transfer orders — transfer to NSW in custody of escort — escape from custody — transfer of sentence or order — transit through NSW — revocation of transfer orders — reports — proceedings for offences.

Children's Court Act 1987

Children — Children's Court of NSW — constitution — jurisdiction — Children's Court Advisory Committee — Children's Court Clinic — functions of the President — reports — venue — contempt — judicial notice of signatures — appeals — rules — practice notes — directions may be given in circumstances not covered by the rules or the practice notes — provisions relating to Children's judges.

Children's Court Regulation 2024

Children — Children's Court of NSW — appeals in relation to decisions of Presidential Children's Court — appeals etc under *Children and Young Persons (Care and Protection) Act 1998* — appeals under *Crimes (Appeal and Review) Act 2001* — appeals relating to apprehended violence orders — appeals relating to forfeiture orders under Sch 2 to the *Bail Act 2013* — appeals under *Crimes (Domestic and Personal Violence) Act 2007* — definitions — savings.

Children's Court Rule 2000

Children — Children's Court of NSW — general practice and procedure — application of the Rule — administration of the court, including seal, venue, sittings and delegation of functions — filing, lodgment and service of documents — care proceedings — functions of Children's Registrars — applications — children and young persons as witnesses — evidence of school attendance — application for appointment of a person to act as guardian ad litem — record of proceedings — subpoenas — criminal proceedings — Children's Court Clinic — Children's Court Advisory Committee — forms.

Crimes Act 1900

Crimes — child murder — injuries to child at time of birth — abandoning or exposing a child under 7 years — failure of persons with parental responsibility to care for child — sexual intercourse with a child under 10 — attempting or assaulting with intent to have sexual intercourse with child under 10 — sexual intercourse with child between 10 and 16 — attempting or assaulting with intent to have sexual intercourse with child between 10 and 16 — persistent sexual abuse of a child — procuring or grooming a child under 16 for unlawful sexual activity — child abduction — child prostitution — child abuse material — measures to protect children in AVO proceedings.

Crimes (Administration of Sentences) Act 1999

Crimes — children — custody of persons during proceedings — subject to *Children (Detention Centres) Act 1987* — see above.

Crimes (Sentencing Procedure) Act 1999

Crimes — children — provisional sentencing for child offenders — power to impose provisional sentence — case plan to be provided — effect of provisional sentence — progress reviews — progress reports to be provided by person responsible for detention of an offender — final sentence — time limit for imposition of final sentence — appeals.

Young Offenders Act 1997

Children — scheme to provide alternative processes to the court system — youth justice conferences — cautions — warnings — proceedings for offences — publication and

broadcasting of names — disclosure of records — certain statements inadmissible — interventions not to be disclosed as criminal history — range of investigating officials — notices — liability of officers — conference convenors.

By operation of s 8 *Young Offenders Act 1997*, certain matters and offences, including serious indictable matters, drug matters, sexual offences, domestic violence offences and traffic offences, cannot be sent to youth conferencing.

Young Offenders Regulation 2016

Children — Youth justice conferences — notification of referrals — notice of referrals to be given to conference administrators — times for outcome plans — maximum period of community service work — outcome plans in respect of bush fire or arson offences — outcome plans in respect of graffiti offences — records of conferences — Disclosure of records — disclosure relating to cautions and conferences to Department of Justice — disclosure relating to warnings, cautions and conferences to the Bureau of Crime Statistics and Research — disclosure relating to warnings, cautions and conferences to the Australian Bureau of Statistics and the Australian Institute of Criminology — Miscellaneous — penalty notice offences subject to young offenders scheme — records of warnings and cautions — form and content of written victim statements — delegation of Secretary's functions — authorised officers — savings — any act, matter or thing that, immediately before the repeal of the *Young Offenders Regulation 2010*, had effect under the 2010 Regulation continues to have effect under the 2016 Regulation.

Practice and procedure, practice notes, guide and protocols

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Practice and procedure

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Age-based system

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Parole: transitional provisions ..... [11-1140]

[11-1000] Sentencing snapshot — Common offences in the Children's Court

Last reviewed: November 2025

Sentencing Snapshot — Common Offences in the Children's Court was issued by the Judicial Commission of NSW and covers the period January 2021 to December 2024.

For further information about criminal proceedings in the Children's Court, please see *Sentencing Bench Book* at **[15-090]**, **[15-100]** and *Local Court Bench Book* at **[38-080]** for sentencing orders and principles.

The *Bail Act 2013* commenced operation on 20 May 2014. Section 28 provides for a form of pre-release requirement that suitable accommodation arrangements be made for the accused person before their release on bail. This requirement is only available where the person is a child and once imposed, a court must re-list the matter every two days, until the requirement is met. Section 74(3)(d) provides that an application for release may be made in relation to a child as an exception to the prohibition against multiple or detention applications to the same court.

[11-1020] Sentencing options — Murphy/Still sheet

Last reviewed: August 2025

Please also refer to the "Sentencing alternatives in the Children's Court jurisdiction" table at **[38-080] Sentencing orders and principles** in the *Local Court Bench Book*. That table sets out a practical hierarchy of court-ordered penalties available in the Children's Court.

Young Offenders Act 1997

s 31	Dismissal with caution (results in the police being notified that the young person was dealt with by way of a caution)
s 40	Direct a YOA conference
s 57	Dismissal after a YOA conference

Children (Criminal Proceedings) Act 1987

s 33(1)(a)(i)	Dismissal with/out caution
s 33(1)(a)(ii)	Discharge on condition that the person enter into a good behaviour bond (maximum 2 years)
s 33(1)(b)	Good behaviour bond (maximum 2 years)
s 33(1)(c)	Fine (maximum is lesser of maximum fine for offence or 10 penalty units)
s 33(1)(c1)	Release on condition that the person complies with an outcome plan determined at a YOA conference [ONLY 3 REFERRALS ARE ALLOWED BY THE COURT]
s 33(1)(c2)	Adjournment for maximum 12 months, and grant of bail under the *Bail Act 2013*
s 33(1)(d)	Good behaviour bond and fine
s 33(1)(e)	Probation (maximum 2 years)
s 33(1)(e1)	Probation and fine
s 33(1)(f)	Community service s 13(2), (3) *Children (Community Service Orders) Act 1987* (a) if under 16, maximum of 100 hours in total (b) if 16 or over: (i) maximum 100 hours in total if maximum control order on the most serious offence does not exceed 6 months (ii) maximum 200 hours in total if maximum control order on the most serious offence is between 6 and 12 months (iii) maximum 250 hours in total if maximum control order on the most serious offence exceeds 12 months s 3 [Definition of "relevant maximum period"] Relevant maximum period for performance is 12 months s 20A Application to extend period of community service orders
s 33(1)(f1)	Probation and community service
s 33(1B)	Suspended control order Good behaviour bond under s 33(1B)(b) for the period of the sentence

s 33(1)(g)	Control order (maximum 2 years) s 33A(4) Continuous periods of detention must not exceed 3 years s 33AA Cumulative or concurrent control orders — assault on juvenile justice officers s 33B Reduction for guilty plea s 33(2) Control order only if satisfied other options are wholly inappropriate
s 36	Compensation Maximum 10 penalty units if the person is less than 16 years at time of offence, 20 penalty units otherwise.

Children (Detention Centres) Act 1987

s 24	Persons subject to control may be granted leave, discharged, etc

Although it may be expedient in a particular case for a court to make a recommendation or suggestion, as a general rule it is undesirable that the court should do so: *R v Sherbon* (unrep, 5/12/91, NSWCCA).

For further information on referrals for conferences by DPP and the courts under *Young Offenders Act 1997*, please see *Sentencing Bench Book* at **[15-120]** and *Local Court Bench Book* at **[38-320]**.

For further information about dismissal, good behaviour bonds, variation of good behaviour bonds or probation and enforcement of conditions, fines, probation, community service orders, control orders, other orders and compensation, please see *Sentencing Bench Book* at **[15-110]**. See *Local Court Bench Book* for sentencing draft orders at **[38-120]**ff, and information on suspended sentences at **[38-160]** and control orders at **[38-180]**.

[11-1040] Sentencing considerations for serious criminal matters

Last reviewed: August 2025

No matter what the serious offence is the sentencing exercise follows a regular pattern that we all may tamper with slightly, but generally it requires a consideration of the following, not necessarily in this order:

- the charge
- the maximum penalty
- the facts
- an assessment of the seriousness of the conduct
- aggravating factors
- when the plea was entered
- criminal history, if any, of the offender
- subjective features of the offender
- application of general sentencing factors in light of or modified by the rehabilitative emphasis provided for by the common law in relation to children and as reflected in the legislation: *KT v R* [2008] NSWSC 51
- what is the appropriate penalty

- Is any alternative to imprisonment "wholly inappropriate"
- If not, consider CSO
- If CSO not appropriate consider the appropriate term of imprisonment and then apply any discounts of which there are only two or possibly three …

1. the discount for the plea of guilty,
2. the discount for any assistance including a quantification of future assistance … if future assistance includes the intention to give evidence for the crown in future proceedings and
3. finally compliance with any court orders eg house arrest or court ordered attendance at a rehabilitation programme. Also see *R v Perry* [2000] NSWCCA 375 and *R v Campbell* [1999] NSWCCA 76

Only after determining the appropriate length of the term should you then consider if a suspended sentence is appropriate.

- Are there any special circumstances to cause an adjustment to the non-parole period
- The commencement date, should it be backdated; should it be accumulated
- When you pronounce your sentence, comply with s 44 *Crimes (Sentencing Procedure) Act 1999* and express the sentence as a non-parole period with a balance of parole.

For further information on children's indictable offences heard in higher courts, please see *Sentencing Bench Book* at **[15-040]** and **[15-070]**. For maximum community service orders for juveniles under the *Children (Community Service Orders) Act 1987*, see *Local Court Bench Book* at **[38-120]**.

[11-1060] Child sexual assault offences

Last reviewed: August 2025

A "child sexual assault offence" is defined under s 83 *Criminal Procedure Act 1986* where the complainant is under the age of 16 years on the date of the alleged offence, or under 18 years of age where the offence is under ss 73, 73A *Crimes Act 1900*. If a person is charged before the Children's Court with a child sexual assault offence, the prosecution may request the proceedings be dealt with on indictment under Pt 3 Div 3AA: s 31(3A) *Children (Criminal Proceedings) Act 1987*. If the Children's Court is of the opinion the evidence is capable of satisfying a jury beyond reasonable doubt that the accused has committed a child sexual assault offence, then the proceedings are to be dealt with as committal proceedings in accordance with Pt 3 Div 3A: s 31(3B) *Children (Criminal Proceedings) Act*.

[11-1080] Committal proceedings

Last reviewed: August 2025

See generally the *Local Court Bench Book* at **[38-060]**.

[11-1100] Presidential Children's Court appeals

Last reviewed: August 2025

An appeal under Pt 3 *Crimes (Appeal and Review) Act 2001*, s 84(2) *Crimes (Domestic and Personal Violence) Act 2007* and cl 17 Sch 2 *Bail Act 2013*, if relating to a decision of the

Presidential Children's Court, is taken to be an appeal to the Supreme Court, and is subject to any relevant rules of court applying to appeals to the Supreme Court: cl 4 *Children's Court Regulation 2024*.

[11-1120] Parole in matters commencing on or after 26 February 2018

Last reviewed: August 2025

Part 4C of the *Children (Detention Centres) Act 1987* applies to parole matters commencing on or after 26 February 2018. The Children's Court has jurisdiction to determine matters relating to parole, and conditions of parole, for juvenile offenders: s 41. When the detention order is for a period of 3 years or less, a juvenile offender is taken to be subject to a statutory parole order: s 44. If the detention order is for a period of more than 3 years, the Children's Court must consider whether the offender should be released on parole: s 45(1).

See also *Local Court Bench Book* at **[42-000]**.

Age-based system

The juvenile parole system applies to offenders under 18 years when the offender first becomes eligible for parole (s 40(1)). Part 4C ceases to apply to juvenile offenders when they reach the age of 18 years (s 40(2)), whereupon the provisions of the *Crimes (Administration of Sentences) Act 1999* relating to parole of adult offenders apply. The exceptions at s 40(3) *Children (Detention Centres) Act 1987* are if:

(a) the offender reaches the age of 18 years while on parole and the birthday occurs during the last 12 weeks of the parole period, or

(b) the Secretary of the Department of Justice considers that it is appropriate that the offender, or a class of offenders of which the offender is a member, continue to be dealt with under Pt 4C.

Where offenders are over 18 but are particularly vulnerable, the Secretary can consider if it is appropriate for the offender to be dealt with under the Juvenile Justice system.

Principle of community safety

Section 38 introduces the principle that the purpose of parole for children is to promote community safety, recognising that the rehabilitation and reintegration of children into the community may be highly relevant to that purpose. The Children's Court must not make a parole order directing the release of a juvenile offender unless it is satisfied that it is in the interests of the safety of the community: s 46(1). The Children's Court must have regard to the following principal matters relating to the promotion of community safety, while recognising that the rehabilitation and re-integration of the offender into the community may be highly relevant to the promotion of community safety (s 46(2)):

(a) the risk to the safety of members of the community of releasing the offender on parole,

(b) whether the release of the offender on parole is likely to address the risk of the offender re-offending,

(c) the risk to community safety of releasing the offender at the end of the sentence without a period of supervised parole or at a later date with a shorter period of supervised parole.

Under s 46(3), the Children's Court must also have regard to the following matters:

(a) the nature and circumstances of the offence to which the offender's sentence relates,

(b) any relevant comments made by the sentencing court,

(c) the offender's criminal history,

(d) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole,

(e) if applicable, whether the offender has failed to disclose the location of the remains of a victim,

(f) any report in relation to the granting of parole that has been prepared by or on behalf of the Department,

(g) any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of any authority of the State,

(h) any other matters that the Children's Court considers to be relevant.

A parole order is subject to the standard conditions imposed by Pt 4C and cl 94 *Children (Detention Centres) Regulation 2015*. See s 54 *Children (Detention Centres) Act 1987* for conditions of parole as to non-association and place restriction.

Supervision

It is a condition of a parole order that the juvenile offender is to be subject to supervision: s 55. This is consistent with the evidence that supervision reduces reoffending. Exemptions from supervision will be given in exceptional circumstances: s 56. See cl 95 *Children (Detention Centres) Regulation 2015* for conditions of supervision.

Terrorism related offences

Part 4C Division 5 re-enacts adult parole provisions that restrict release on parole for terrorism-related offenders. There is a presumption against parole for terrorism related offences.

The State may make submissions to the Children's Court in parole proceedings concerning a juvenile offender who is a terrorism related offender: s 86 *Children (Detention Centres) Act 1987*.

Revocation

The Children's Court may make an order revoking parole at any time before the offender to whom the order relates is released under the order, if the court is satisfied under s 63 that:

(a) the offender, if released, would pose a serious identifiable risk to the safety of the community and the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or

(b) the offender, if released, would pose a serious and immediate risk to the offender's safety and the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or

(c) the offender has requested the revocation, or

(d) in the case of a parole order made by the court, there has been a substantial change to a matter considered by the court in making the order, or

(e) any other circumstances prescribed by the regulations.

Section 64 provides for actions that can be taken by the Secretary in the event of failure by the offender to comply with a parole order. The Children's Court may take any of the following actions under s 65(2), if satisfied that a juvenile offender has failed to comply with the offender's obligations under a parole order:

(a) record the non-compliance and take no further action

(b) give the juvenile offender a formal warning

(c) impose additional conditions on the parole order

(d) vary or revoke conditions of the parole order (other than conditions imposed by this Act or the regulations),

(e) make an order revoking the parole order.

The Children's Court may make an order under s 66(1) revoking a parole order aside from non-compliance at any time after the release of a juvenile offender:

(a) if it is satisfied that the offender poses a serious and immediate risk to the safety of the community and that the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or

(b) if it is satisfied that there is a serious and immediate risk that the offender will leave NSW in contravention of the conditions of the parole order and that the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or

(c) in the case of an offender who has been granted parole under s 47 on the grounds that the offender is dying or because of exceptional extenuating circumstances, if it is satisfied that those grounds or circumstances no longer exist, or

(d) if the offender fails to appear before the Children's Court when required to do so, or

(e) if the offender has applied for the order to be revoked.

A revocation order takes effect on the day on which it is made or on any earlier day specified in the order: s 68(1).

The Attorney General, Minister or Director of Public Prosecutions may request the Children's Court to revoke a parole order where the offender was sentenced for a serious children's indictable offence and the order was made on the basis of false, misleading or irrelevant information: s 69.

Victims Register

A Victims Register is to be kept by the relevant government agency to record the names of victims of juvenile offenders who have requested they be given notice of the possible release of the juvenile offender: s 100A *Children (Detention Centres) Act 1987*. The government agency that keeps the Victims Register must give notice to any victim if a serious offender is being considered for release on parole or has applied for parole: s 100B. The victim can make a submission to the Review Panel which must be considered: s 100C. Information which is to be provided to the victim concerning the juvenile offender is set out at s 100D.

[11-1140] Parole: transitional provisions

Last reviewed: August 2025

The former parole regime applying to juvenile offenders in the *Crimes (Administration of Sentences) Act 1999*, as applied by s 29 (rep), continues to apply generally to any act, matter or thing done or omitted to be done under any of the former parole provisions in force immediately before 26 February 2018. Section 29, before its repeal by the *Parole Legislation Amendment Act 2017*, is set out below:

29 Application of *Crimes (Administration of Sentences) Act 1999* to detainees [R]

(1) The provisions of Parts 6 and 7 of the *Crimes (Administration of Sentences) Act 1999* apply to a detainee within the meaning of this Act in the same way as they apply to an offender referred to in those provisions, and so apply as if in those provisions:

(a) a reference to a correctional centre were a reference to a detention centre, and

(b) a reference to the Parole Authority or a member of the Parole Authority were a reference to the Children's Court or a Children's Magistrate, respectively, and

(c) a reference to the Secretary of the Parole Authority were a reference to a Registrar of the Children's Court, and

(d) a reference to the Commissioner were a reference to the Director-General.

(2) If a detainee who is being detained as a result of the revocation or suspension of a parole order by the Children's Court is transferred to a correctional centre, this section (subsection (1)(a) excluded) continues to apply in relation to the parole order as if the transferred detainee were still a detainee. Accordingly, the Children's Court is to continue to exercise the functions of the Parole Authority under Pt 7 Div 4 *Crimes (Administration of Sentences) Act 1999* with respect to the detainee's parole order.

Practice Notes

General ..... [11-2000]

Practice Note 12: Criminal proceedings in the Children's Court ..... [11-2020]

Practice Note 16: Mandatory Disease Testing ..... [11-2040]

Practice Note 20: Bail proceedings ..... [11-2050]

[11-2000] General

Last reviewed: August 2025

Links to the following Children's Court Practice Notes that relate to criminal matters can be found below. For Children's Court Practice Notes that concern care and protection matters see **[6-1000]**ff.

- Practice Note 8: Apprehended domestic and personal violence proceedings in the Children's Court (see **[13-1020]**)
- Practice Note 11: Youth Koori Court (see **[15-1100]**).

[11-2020] Practice Note 12: Criminal proceedings in the Children's Court

Last reviewed: August 2025

Practice Note 12 commenced 18 May 2018 and applies to criminal proceedings commenced on or after 30 April 2018.

[11-2040] Practice Note 16: Mandatory Disease Testing

Last reviewed: August 2025

Practice Note 16 commenced on 29 July 2022. For further information see *Mandatory Disease Testing Act 2021* in "Specific Penalties and orders", *Local Court Bench Book*.

[11-2050] Practice Note 20: Bail proceedings

Last reviewed: November 2025

Practice Note 20 commenced on 7 July 2025 and applies to all bail proceedings in the Children's Court conducted by the President, a Children's Judge or any other Judge exercising the jurisdiction of the Children's Court: s 13(1) *Children's Court Act 1987*.

Guide — criminal jurisdiction

Relevant legislation ..... [11-3000]

Jurisdiction ..... [11-3020]

Jurisdiction and criminal responsibility

Jurisdiction and driving matters

Doli incapax ..... [11-3040]

The codified presumption — proceedings commenced on or after 1 March 2026

The common law presumption — proceedings commenced before 1 March 2026

Admissions ..... [11-3060]

Forensic procedure ..... [11-3080]

Bail ..... [11-3100]

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Background report

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Young Offenders Act ..... [11-3160]

Youth Koori Court ..... [11-3180]

Apprehended violence orders ..... [11-3200]

Fines and compensation ..... [11-3220]

Parole ..... [11-3240]

Compulsory schooling orders ..... [11-3260]

[11-3000] Relevant legislation

Last reviewed: May 2026

- *Children (Criminal Proceedings) Act 1987* (CCPA)
- *Children's Court Act 1987* (CCA)
- Children's Court Rule 2000 (CCR)

- *Children (Community Service Orders) Act 1987* (CCSO)
- *Children (Detention Centres) Act 1987* (CDCA)
- *Children (Protection and Parental Responsibility) Act 1997* (CPPR)
- *Young Offenders Act 1997* (YOA)
- *Crimes (Sentencing Procedure) Act 1999* (CSPA)
- *Education Act 1990*

[11-3020] Jurisdiction

Last reviewed: August 2025

Jurisdiction and criminal responsibility

Section 28 of the CCPA states that the Children's Court has jurisdiction to hear and determine proceedings if the offence is alleged to have been committed by a person:

(a) who was a child when the offence was committed; and

(b) who was under the age of 21 years when charged before the Children's Court with the offence.

Jurisdiction and driving matters

The Children's Court only has jurisdiction for driving matters where:

(a) at least one other charge for an offence committed at the same time comes within the Children's Court criminal jurisdiction: s 28(2)(a) CCPA;

(b) the young person is under licensable age (cl 12(2), (3) *Road Transport (Driver Licensing) Regulation 2017*): s 28(2)(b) CCPA. The licensable age is 16 years for driving cars and 16 years and 9 months for driving motorbikes.

See also *Local Court Bench Book* at **[38-020] Children's Court — Criminal procedure generally**.

[11-3040] Doli incapax

Last reviewed: May 2026

It is conclusively presumed that a child who, at the time of the alleged commission of an offence, is under 10 years of age cannot be guilty of the offence: s 5(1) CCPA. Where a child is over 10 years old but under 14, there is a common law presumption of doli incapax. This presumption has been codified in s 5(2) CCPA which applies to proceedings commenced on or after 1 March 2026: CCPA Sch 2, Pt 22, cl 37.

Note: cases decided before the codification of the common law presumption may remain useful in the application of the amended legislation.

The codified presumption — proceedings commenced on or after 1 March 2026

Section 5(2) CCPA provides there is a presumption that a child who is 10, 11, 12 or 13 at the time of the alleged commission of an offence cannot be guilty of the offence. This presumption can be rebutted if the prosecution proves beyond reasonable doubt the child knew, at the time

of the alleged offence, their conduct was seriously wrong in a moral sense, based on the child's knowledge: s 5(3), (4)(c). It is a question of fact and must not be inferred merely from the fact the child engaged in the act(s) constituting the alleged offence: s 5(4)(a), (b).

In determining whether the presumption has been rebutted, the court must have regard to (if known):

- the conduct constituting the offence
- the circumstances surrounding the commission of the offence (for example, the child taking steps to plan the conduct, including equipping themself for the conduct or to avoid detection)
- the child's intellectual and moral development and education, and
- the environment in which the child was raised: s 5(5).

This list is not exhaustive: s 5(6).

Section 5(7) provides, to avoid doubt, a court may determine the presumption has been rebutted based on evidence of the conduct constituting the alleged offence and the circumstances surrounding its commission, without or despite other evidence of the child's intellectual and moral development so long as it is sufficient to satisfy s 5(3).

The common law presumption — proceedings commenced before 1 March 2026

In relation to a child from 10 years of age until attaining the age of 14 years, the presumption of doli incapax may be rebutted by evidence that the child knew it was wrong to engage in the conduct constituting the physical element(s) of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that their conduct is merely naughty or mischievous. This distinction may be captured by stating the requirement in terms of proof the child knew the conduct was "seriously wrong" or "gravely wrong". No matter how obviously wrong the act(s) constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act(s). The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that they knew it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which they have been raised: *RP v The Queen* (2016) 259 CLR 641 at [8]–[12]; see also *Stapleton v The Queen* (1952) 86 CLR 358; *M v The Queen* (1994) 181 CLR 487.

Judgments on doli incapax are located at **[9-1140]**ff.

See also *Local Court Bench Book* at **[38-020] Children's Court — Criminal procedure generally**.

[11-3060] Admissions

Last reviewed: August 2025

Under s 13 of the CCPA, admissions are not to be admitted unless a parent, chosen support person or lawyer was present, unless the court is satisfied that there was a proper and sufficient reason for the absence of such an adult, and considers that, in the particular circumstances of the case, the statement or admissions should be admitted: s 13(1)(b) CCPA; *R v Mercury* [2019] NSWSC 81.

Judgments on admissions are located at **[9-1020]**ff.

[11-3080] Forensic procedure

Last reviewed: August 2025

The law permitting orders to be made to undertake forensic procedures on suspects applies to a child: s 3(1) *Crimes (Forensic Procedures) Act 2000* (CFPA).

A child cannot consent to a procedure and a court order must be obtained: ss 7, 23 CFPA.

Where a child over 14 years old is in lawful custody for any offence, a police officer may take or cause identity particulars to be taken, including the child's photograph, fingerprints or palm prints: s 136 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

If the Children's Court finds a child not guilty, or finds the offence proven but dismisses the charge, it is to make an order requiring the destruction of any photographs, fingerprints and palm prints relating to the offence: s 38(1) CCPA.

Judgments on forensic procedure are located at **[9-1200]**ff.

[11-3100] Bail

Last reviewed: August 2025

The *Bail Act 2013* applies to any person accused of an offence (s 7(2)), including children. However, the show cause requirement does not apply if the accused was under 18 years old at the time of the offence: s 16A(3). The court must consider whether any of the unacceptable risks listed in s 19(2) are present before making a bail decision. If satisfied there are no unacceptable risks, bail is to be granted unconditionally: s 20. If satisfied one or more unacceptable risks exist, bail may nonetheless be granted if conditions can be imposed that sufficiently mitigate that risk. When determining bail for a child, one of the factors to be considered in deciding whether there is an unacceptable risk is "any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment": s 18(1)(k).

Bail conditions for children, as with adults, should be determined according to the legislative provisions in the *Bail Act* and not influenced by considerations associated with the welfare of the child (unless provided for in the *Bail Act*). For example, the imposition of a curfew on a child for an offence which occurred during the day may not be reasonable and proportionate to the offence for which bail is granted (see *Bail Act* s 20A(2)(b)).

Section 28 permits the court to make an accommodation requirement as a bail condition where the accused is a child: s 28(1), (3). If an accommodation requirement is imposed in respect of a child, the court must ensure the matter is re-listed for further hearing at least every 2 days until that requirement is complied with: s 28(4). This is for the purpose of monitoring and ensuring the child's release, and is not a review of bail as bail has already been granted. The court may direct any officer of a Division of the Government Service to provide information about the action being taken to secure suitable arrangements for accommodation of an accused person: s 28(5).

Magistrates should not require a young person to reside as directed by Youth Justice as a bail condition. A child in OOHC cannot be denied bail on account of the fact there is no suitable placement available for them.

Unless a young person has pleaded guilty, Youth Justice will not provide bail supervision to a young person as a condition of bail. If a young person has not pleaded guilty Youth Justice may provide them with bail support but it should not be a condition of bail.

Note the limitation on bail in s 22C for young persons, aged 14–17 (inclusive), alleged to have committed a relevant offence when on bail for another relevant offence.

A relevant offence is a:

- "motor theft offence" (*Crimes Act 1900*, ss 154A, 154C, 154F)
- "serious breaking and entering offence" (*Crimes Act*, Pt 4 Div 4 offence with a maximum penalty of 14 years imprisonment or more), or
- "performance crime offence" (*Crimes Act*, s 154K, if the underlying offence is a motor theft offence or serious breaking and entering offence): s 22C(6).

In such cases, bail must not be granted unless the court has a "high degree of confidence" the person will not commit a serious indictable offence while on bail: s 22C(1). This determination may be made only after an assessment of bail concerns and whether any conditions could reasonably address the risk of the person committing a further serious indictable offence: s 22C(2). The requirement to establish that bail should be refused remains with the prosecution: s 22C(3). The transitional provision for s 22C in Sch 3, Pt 4, cl 14 *Bail Act* states the provision applies retrospectively to offences alleged prior to its commencement on 3 April 2024 (Sch 3). In *R v RB* [2024] NSWSC 471, Lonergan J held that, in respect of the transitional provision, the Second Reading Speech makes clear s 22C applies when the offence for which bail is being sought is alleged to have been committed after the provision commenced: [39]. This provision was extended and now will be repealed on 1 October 2026: s 22C(5).

Judgments on bail are located at **[9-1100]**ff.

See also *Local Court Bench Book* at **[38-040] Children's Court — Bail**.

Bail report

The court will typically be required to adjourn for seven days to allow for the preparation of a bail plan by Youth Justice.

[11-3120] Committals

Last reviewed: August 2025

The court has no jurisdiction to deal with a "serious children's indictable offence" to finality: ss 3, 17, 28(1) CCPA. Generally, if a child is charged with an offence (other than a serious children's indictable offence) the proceedings are dealt with summarily: s 31(1).

See Div 3AA on child sexual assault offences.

See ss 31G and 31H on guilty pleas.

See also *Local Court Bench Book* at **[38-060] Children's Court — Committals**.

[11-3140] Sentencing

Last reviewed: August 2025

See generally, *KT v R* [2008] NSWCCA 51. See also **[11-1020]** "Sentencing options — Murphy/Still sheet".

See also, s 6 CCPA, Principles relating to exercise of functions under Act.

Judgments on sentencing are located at **[9-1340]**ff.

See also *Local Court Bench Book* at **[38-080] Children's Court — Sentencing orders and principles** and **[38-120] Children's Court — Sentence — further details and draft orders**.

Background report

Section 25(2)(a) of the CCPA provides that a court cannot make an order under s 33(1)(g) unless a background report has been prepared. The court will typically adjourn for the preparation of a background report for approximately 6 weeks if the young person is on bail or 2 weeks if the young person is in custody.

Children's Court orders and application of Criminal Records Act

Order under s 33 CCPA	**Section of CCPA**	**When conviction is spent under *Criminal Records Act 1991* (CRA)**
Dismissal without caution	33(1)(a)(i)	s 5(c) CRA specifically excludes this order. It defines conviction as "an order under s 33 of the [CCPA], other than an order dismissing a charge".
Dismissal with caution	33(1)(a)(i)	An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered: s 8(3) CRA.
Discharge on condition of entering into good behaviour bond	33(1)(a)(ii)	Spent upon satisfactory completion of the bond period: s 8(4)(a) CRA. Although there is no reference to s 8(4) within the parenthesis in s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period [as set out in s 10], except as provided by this section".
Good behaviour bond	33(1)(b)	This is ambiguous but arguably this order is caught by s 8(4) CRA on the basis that s 33(1)(b) CCPA previously stated "it may make an order releasing the person on condition that the person enters into a good behaviour bond … as it thinks fit". This conforms with the text in s 8(4) which requires the words "or the making of an order releasing" to be read disjunctively. Therefore, the conviction is spent upon satisfactory completion of the bond period: s 8(4)(a).
Fine	33(1)(c)	This is difficult to discern from the text of the CRA. It may be a long shot to argue that where the Children's Court imposes a fine without proceeding to conviction, the finding of guilt is "spent immediately after the finding is made": s 8(2) CRA. The argument rests on a proposition that s 8(2) can be utilised for orders in addition to s 10 CSPA. The parenthesis in s 10(1) CRA suggests s 8(2) applies to s 33 orders. Note, though s 8(2) may apply even if a fine is only part of the court's order under s 33(1)(d), (e1) CCPA. If the Children's Court proceeds to conviction, the order is not caught by s 8(2) or s 8(3) and the crime-free period of 3 years applies: ss 8(1), 10(1) CRA.
Release subject to compliance with outcome plan	33(1)(c1)	It is arguable that a conviction under s 33(1)(c1) CCPA is spent upon satisfactory completion of outcome plan: s 8(4)(a) CRA. The terms within s 8(4)(a) "the making of an order releasing, the offender … on other conditions" appears to include orders under s 33(1)(c1).
Adjournment	33(1)(c2)	Not a final sentencing order (akin to s 11 CSPA with regard to the deferral of sentencing for rehabilitation, participation in an intervention program or other purposes).

Good behaviour bond and fine	33(1)(d)	As to the fine, see above. Otherwise, this is ambiguous. Arguably this order is caught by s 8(4) CRA on the basis that s 33(1)(b) CCPA previously stated "it may make an order releasing the person on condition that the person enters into a good behaviour bond … as it thinks fit". This conforms with the text in s 8(4). It requires the words "or the making of an order releasing" to be read disjunctively. Therefore, the conviction is spent upon satisfactory completion of the bond period: s 8(4)(a).
Probation	33(1)(e)	Spent upon satisfactory completion of the probation period: s 8(4)(b) CRA. Although there is no reference to s 8(4) within s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period, except as provided by this section".
Probation and fine	33(1)(e1)	Spent upon satisfactory completion of the probation period: s 8(4)(b) CRA. Although there is no reference to s 8(4) within s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period, except as provided by this section".
Community service order	33(1)(f)	The order is not caught by ss 8(2), 8(3) or 8(4) CRA. Therefore, the crime-free period of 3 years applies: ss 8(1), 10(1) CRA.
Probation and community service order	33(1)(f1)	Spent upon satisfactory completion of the probation period: s 8(4)(b) CRA. Although there is no reference to s 8(4) within s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period, except as provided by this section".
Control order	33(1)(g)	The order is not caught by ss 8(2), 8(3) or 8(4) CRA. Therefore, the crime-free period of 3 years applies: ss 8(1), 10(1) CRA. Section 7(4) CRA provides that "prison sentence" for the purposes of the exceptions (where convictions cannot be spent) does not include "detaining of a person under a control order".
Suspended control order	33(1B)	The order is not caught by ss 8(2), 8(3) CRA. Therefore, the crime-free period of 3 years applies: ss 8(1), 10(1) CRA.

Recording a conviction

A conviction cannot be recorded if the young person is under 16 years at the time of the offence: s 14(1) CCPA. A court can choose not to record a conviction for young people above 16 years.

Judgments on recording of conviction are located at **[9-1320]**ff.

Placement on Child Protection Register

Section 3C of the *Child Protection (Offenders Registration) Act 2000* states that a court that sentences a person for a sexual offence committed by the person when the person was a child may make an order declaring that the person is not to be treated as a registrable person for the purposes of this Act in respect of that offence.

See *R v Ezra* [2024] NSWChC 16 at [184]–[186]:

> Section 3C(1) of the CPOR Act vests in the Court a discretion to declare that a person is not registrable. The exercise of that discretionary power can only be exercised if each of the requirements stipulated in s 3C(3) are satisfied.

The discretion in s 3C(3) cannot be exercised to permit the Court to make an order unless it is satisfied that the registrable offender does not pose a risk to the lives or sexual safety of one or more children, or of children generally.

Unless the Court reaches a state of actual satisfaction that the young person does not pose the defined risk it cannot declare the young person as not being registrable.

Mental Health Forensic Provisions

Part 2 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* applies to children in the Children's Court.

Judgments on the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* are located at **[9-1270]**ff.

[11-3160] Young Offenders Act

Last reviewed: August 2025

The Children's Court may utilise the YOA in three ways:

(1) by giving a caution (s 31(1) YOA);

(2) by referral to a youth justice conference (YJC) per Pt 5; and

(Matters are usually adjourned for 2 months for YJC assessment and for a plan to be approved by the court and dispensed with.)

(3) if the matter (though admitted) was referred without the making of a finding of guilt, upon receiving notice that an outcome plan has been satisfactorily completed, dismiss the charge (s 57(2) YOA), or otherwise make an order releasing the child on condition that the child complied with an outcome plan: s 33(1)(c1) CCPA.

See also *Local Court Bench Book* at **[38-320] Children's Court — Young Offenders Act 1997** .

[11-3180] Youth Koori Court

Last reviewed: August 2025

Children's Court Practice Note 11 sets out the relevant processes regarding the Youth Koori Court ("YKC"). A referral to the YKC can only be made on the application of the young person. When the young person has entered a plea of guilty the presiding judicial officer will refer the case to the YKC if satisfied that the eligibility criteria are met.

To be referred to the YKC a young person must:

- have indicated that he or she will plead guilty to the offence or the offence has been proven following a hearing;
- be descended from an Aboriginal person or Torres Strait Islander, identify as an Aboriginal person or Torres Strait Islander and must be accepted as such by the relevant community;
- be charged with an offence within the jurisdiction of the Children's Court that is to be determined summarily;
- at a minimum, be likely to be sentenced to an order which would involve Youth Justice supervision or a control order;

- be 10 to 17 years of age, at the time of the commission of the offence(s) and under 19 years of age when proceedings commenced; and
- be willing to participate.

Judgments on YKC are located at **[9-1380]**ff. See **Youth Koori Court [15-1000]**ff for further information.

[11-3200] Apprehended violence orders

Last reviewed: August 2025

The Children's Court is authorised to deal with such cases where the defendant is less than 18 years of age at the time the application is made: s 91(1) *Crimes (Domestic and Personal Violence) Act 2007*.

Special provisions apply to amend the meaning of domestic relationship as it applied to a young person and a paid carer: ss 5A and 5.

Section 41(4) provides that a child should not be required to give evidence in any manner about a matter unless the court is of the opinion that it is in the interests of justice for the child to do so. Also see s 41AA.

See Children's Court Practice Note 8, which sets out Children's Court procedures in cases where apprehended domestic violence or personal violence order proceedings have been commenced against a young person.

Judgments on apprehended violence orders are located at **[9-1060]**ff. See **Apprehended violence orders [13-1000]**ff for further information.

See also *Local Court Bench Book* at **[38-340] Children's Court — Apprehended violence orders** and **[24-000]**ff **AVO proceedings involving children**.

[11-3220] Fines and compensation

Last reviewed: August 2025

A court should not impose a fine which a person cannot pay: *Rahme v R* (1989) 43 A Crim R 81. The amount of the fine is relevant to the sentence imposed: *Tapper v R* (1992) 64 A Crim R 281.

Section 36(3) of the CCPA provides:

> (3) The maximum amount of compensation that may be awarded is:
>
> (a) the amount that is equivalent to 10 penalty units (in the case of a person who is under the age of 16 years at the time the order is made), or
>
> (b) the amount that is equivalent to 20 penalty units (in any other case).

[11-3240] Parole

Last reviewed: August 2025

Part 4C of the CDCA confers jurisdiction on the Children's Court to determine parole for young offenders: s 41(1). Parole determinations can be made by the President of the Children's Court or a specialist Children's judge. If a child pleads or is found guilty on parole, the matter should be referred to the parole clerk at Parramatta Children's Court.

Judgments on youth parole are located at **[9-1360]**ff.

[11-3260] Compulsory schooling orders

Last reviewed: August 2025

Where a child's school attendance is not satisfactory the Secretary of the Department of Education may apply to the Children's Court for an order under s 22D of the *Education Act 1990*. The Children's Court may direct a parent and/or child to attend a compulsory conference per s 22C of the Act.

See **Compulsory schooling orders** at **[14-1000]**ff for further information.

Protocols and guidelines

Bail protocol ..... [11-4000]

Children's Court of NSW bail guidelines ..... [11-4020]

[11-4000] Bail protocol

Last reviewed: June 2024

This version of the Bail protocol was issued in 2013.

[11-4020] Children's Court of NSW bail guidelines

Last reviewed: June 2024

The Bail guidelines (including 2024 Bail Act amendments) cover: general principles, procedural steps, decision to grant or refuse bail, assessing bail concerns, bail conditions and breaches of bail.

Articles and other resources

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Proving the criminal responsibility of children: *RP v The Queen*[2]

H Dhanji SC, J Roy and S McLaughlin[1]

Introduction ..... [12-2000]

1. Criminal Responsibility of children

Minimum age of criminal responsibility

The case of RP v the Queen

2. Rebutting the presumption of *doli incapax*

2.1 The onus is on the prosecution to rebut the presumption of *doli incapax* as part of the prosecution case;

2.2 Proof of capacity requires proof the child appreciated the moral wrongness of the act or omission and is to be distinguished from the child's awareness that his or her conduct was merely naughty or mischievous

2.3 The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction

2.4 The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be

Conclusion

[12-2000] Introduction

Last reviewed: May 2023

Discussions in this area frequently commence with the observation "No civilised society regards children as accountable for their actions to the same extent as adults".[3] The observation of course begs the question as to whether that differentiation should be made with respect to liability or penalty or both and as to how any differentiation should be made. The purpose of this paper is to discuss how the law deals with liability. The age of criminal responsibility may be regarded as the age at which the law considers that a person "has the capacity and a fair opportunity or chance to adjust his behaviour to the law".[4] Criminal offences are, at their core, prohibitions on interference with the rights of others. Adults, as full members of society, have rights and can be expected to respect the rights of others. Children do not have the same rights, either to property or personal autonomy. The extent of a child's rights in this regard will depend

2 *RP v The Queen* [2016] HCA 53; 91 ALJR 248.

1 With acknowledgement and appreciation to Shaun Croner who assisted in compiling the paper in its current form.

3 Colin Howard, *Criminal Law* (Law Book Co, 4th ed, 1982) 343, cited in *R (A Child) v Whitty* (1993) 66 A Crim R 462 (*Whitty*), 462 (Harper J), *C v DPP* [1996] AC 1 (*C v DPP*), [73] (Lord Lowry) and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (*CRH*).

4 HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968) 181 and see also 152, and Mathew Hale, *History of the Pleas of the Crown* (Vol 1, 1736) 14–15.

on his or her age, maturity and determinations of caregivers. Having limited rights and being at an earlier stage of development, children will have limited personal experience to draw upon in understanding the rights of others. This fundamentally distinguishes children from adults. Importantly for present purposes it highlights the need to eschew adult value judgments in determining whether children can be held responsible for a particular crime.

1. Criminal Responsibility of children

Minimum age of criminal responsibility

The common law recognised that children below the age of seven (often termed "the age of discretion") were not criminally responsible for their acts. The common law also long distinguished a second age range for liability, above the absolute minimum, in which the individual child may be assessed for sufficient capacity (since at least the reign of King Edward III, 1327–1377).[5] The upper threshold of 14 years was set around the first half of the seventeenth century.[6] A child over seven but less than 14 was presumed to be "doli incapax", or incapable of forming a criminal intent.

In New South Wales (and all Australian jurisdictions) the minimum age of criminal responsibility has been set by statute at 10 years: *Children (Criminal Proceedings) Act 1987* (NSW) s 5.[7] The legislature has not otherwise interfered with the common law position. The result is that in New South Wales, the common law rebuttable presumption of doli incapax is applied to children between 10 and 13 years of age (inclusive): *BP v R* [2006] NSWCCA 172 (*BP*) at [27]. It is also applied in Victoria and South Australia: *R v ALH* (2003) 6 VR 276 (*ALH*) at [20], [24] and [86]; *The Queen v M* (1977) 16 SASR 589 (*M*). In the remaining Australian jurisdictions the presumption has been replaced with statute.[8] The language used varies between jurisdictions, but the provisions have either been accompanied by an express legislative intention to "repeat" the common law or else silence as to the desired effect of the provision.[9]

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5 Sir William Blackstone, *Commentaries on the Laws of England* (Vol 4, 1769) 23.

6 *C v DPP* at 24 citing Sir Edward Coke

7 *Criminal Code Act 1995* (Cth) s 7.1, *Criminal Code Act 1899* (Qld) s 29, *Criminal Code Act Compilation Act 1913* (WA) s 29, *Criminal Code Act 1924* (Tas) s 18 *Criminal Code Act 1983* (NT) s 38, Criminal Code 2002 (ACT) s 25. Ten is towards the lower end of the scale internationally. The most common age of criminal responsibility around the world (below which there is absolute protection) is 14, the median age is 13.5 years, and the average is 11.9. Excluding four countries that do not set a minimum age, the mean is 12.5 and the median is 14: Neal Hazel, *Cross-National Comparison of Youth Justice* (Youth Justice Board, 2008) 31. And see UN Committee on the Rights of the Child, *Concluding Observations on the Rights of the Child: Australia* (1997) CRC/C/15/Add.79 [29], and UN Committee on the Rights of the Child, *General Comment No. 10* (2007) CRC/C/GC/10 [30]–[33].

8 *Criminal Code Act 1995* (Cth) s 7.2, *Criminal Code Act 2002* (ACT) s 26 *Crimes Act* s 4N; Criminal Code (Tas) s 18(2); Criminal Code (WA) s 29; Criminal Code (Qld) s 29(2); *Childrens Services Act 1986* (ACT) s 27(2); Criminal Code (NT) s 38(2). In NSW, SA and Vic the presumption continues to be based on the common law: eg *IPH v Chief Constable of New South Wales* [1987] Crim LR 42. Doli incapax also applies in NZ: *Crimes Act 1961* (NZ) s 22. Around the common law world, the presumption continues to operate in (at least) Hong Kong, Ireland, New Zealand, South Africa, India, Malaysia and Singapore (the last three set the range at 10–12 years): Thomas Crofts, "Reforming the Age of Criminal Responsibility" [2016] *South African Journal of Psychology* 1, 4, and Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate, 2009) 187–224. The presumption for children between 10 and 14 years of age was abolished in England and Wales in 1998.

9 Eg "This provision also repeats the law as it currently stands in the ACT and the rest of Australia": Explanatory Memorandum to the Criminal Code 2002 (ACT) Clause 26 (which provision is in the same terms as the Commonwealth Code), and see *M v J* [1989] Tas R 212

In *RP v The Queen* [2016] HCA 53; (2016) 91 ALJR 248 (*RP*) the High Court noted that "[t]he rationale for the presumption of doli incapax is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea.[10]

The case of *RP v the Queen*[11]

In *RP* the appellant was convicted, after a judge alone trial, of two counts of sexual intercourse with a child under 10 years. The complainant was the appellant's half-brother. At the time of the offending, the appellant was aged approximately 11 years and six months and the complainant was aged six years and nine months. The only issue at trial was whether the prosecution had rebutted the presumption of *doli incapax* by proving that the appellant knew that his actions were seriously wrong in a moral sense.

The first offence took place in circumstances where there were no adults in the house; the appellant grabbed the complainant and held him down; the complainant was crying and protesting; the appellant put his hand over the complainant's mouth; and the appellant stopped the intercourse when he heard an adult returning to the house and told the complainant not to say anything. The second offence took place a few weeks later, in circumstances where: the appellant and complainant were again without adult supervision; the appellant took hold of the complainant; and the appellant stopped intercourse when he heard an adult returning. There was also evidence that, when the appellant was aged 17 and 18 years old, he was twice assessed as being in the borderline disabled range of intellectual functioning and was found by the trial judge to be of "very low intelligence". The trial judge held that the circumstances surrounding the first offence proved beyond reasonable doubt that the presumption was rebutted in relation to that offence. His Honour found that it logically followed that the presumption was rebutted in relation to the second offence.

The Court of Criminal Appeal dismissed the appellant's appeal against his two convictions. The Court unanimously held that the presumption was rebutted in relation to the first offence. A majority of the Court held that it was also rebutted in relation to the second offence, finding that the appellant's understanding of the wrongness of his actions in the second offence was informed by the finding that he knew his actions in the first offence were seriously wrong. The appellant was granted special leave to appeal to the High Court of Australia. The appeal raised fundamental questions regarding the principle of *doli incapax* which are dealt with below.

2. Rebutting the presumption of *doli incapax*

In *RP* the High Court restated the principles in relation to the presumption of *doli incapax*. Those principles had previously been set out in *C v DPP* (1996) AC 1 (particularly at 38). Whilst essentially restating the existing law, the decision in *RP* is useful in its statement of the principles, its emphasis on the moral quality of what is to be proved and the need for evidence to be adduced in order to prove it. The test can be summarised as follows:

1. The onus is on the prosecution to rebut the presumption of *doli incapax* as part of the prosecution case;
2. Proof of capacity requires proof the child appreciated the moral wrongness of the act or omission and is to be distinguished from the child's awareness that his or her conduct was merely naughty or mischievous;

10 At [8].
11 This summary is taken from the High Court case note dated 21 December 2016.

3. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction; and
4. The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be.

2.1 The onus is on the prosecution to rebut the presumption of *doli incapax* as part of the prosecution case;

The onus is on the prosecution to prove that the child is *doli capax* (that is, not *doli incapax*). Accordingly, the prosecution must call evidence to prove, to the criminal standard, that the presumption does not apply.[12] The determination of whether the presumption has been rebutted is a matter for the tribunal of fact.

"No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts."[13] If at the end of the prosecution case, no evidence has been called to rebut the presumption, the prosecution has failed to establish their case. The defence may make a no case submission in this circumstance.[14]

Where evidence relevant to rebutting the presumption is adduced, the defendant may choose to call evidence in response. However, there is no requirement for the defendant to establish that the presumption applies.

2.2 Proof of capacity requires proof the child appreciated the moral wrongness of the act or omission and is to be distinguished from the child's awareness that his or her conduct was merely naughty or mischievous

It has been repeatedly said that in a case in which the presumption of *doli incapax* applies, the prosecution must prove beyond reasonable doubt that when doing the act charged the child "knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief".[15]

It had been observed that this test is simply stated but difficult in application: *RP v the Queen* [2015] NSWCCA 215 at [129] (*RP CCA Decision*) per Hamill J and, see also, *C v DPP* at [53] (3) and [73].

In *RP*, the High Court made clear that the test is directed to "[k]noweldge of moral wrongness".[16] Whilst not new, this stress is an important part of the decision in *RP*. A child's acknowledgment that he or she understood that an act was "seriously wrong" will not, of itself, provide an indication that the child appreciated the moral wrongness of the act or omission. That is, a child might view conduct as "seriously wrong" in the sense that he or she is likely to be in serious trouble if found out, without the requisite understanding of the act for the purposes of criminal responsibility. Focussing on the child's belief that the act was more than mischievous or naughty may tend to obscure what it is that has to be established.

Further the evidence must concern the particular child. In *RP* the High Court noted at [12]:

> The only presumption which the law makes in the case of child defendants is that those aged under 14 are doli incapax. Rebutting that presumption directs attention to the intellectual and

12 *RP v The Queen* at [32].
13 *RP v The Queen* at [9].
14 *C v DPP* at [36]–[37].
15 Ibid.
16 At [9].

> moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.

In relation to the specific offences in that matter, the Court said at [35]:

> The conclusion drawn below that the appellant knew his conduct, in having sexual intercourse with his younger sibling, was seriously wrong was largely based on the inferences that he knew his brother was not consenting and that he must have observed his brother's distress. It cannot, however, be assumed that a child of 11 years and six months understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant's intellectual limitations does not preclude a finding that the presumption had been rebutted, it does point to the need for clear evidence that, despite those limitations, he possessed the requisite understanding.

Assuming a child within a certain age range has a proper understanding of which intrusive acts are permissible, in what circumstances, and by whom, and which might be seriously wrong as opposed to frowned upon, naughty or merely wrong, fails to give effect to the presumption and may reverse the onus of proof. It is also contrary to the psychological and neurological understanding of the moral development of children and adolescents. Knowing something is "seriously wrong" involves:

> more than a child-like knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand an event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge.[17]

2.3 The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction

To rebut the presumption, the prosecution must adduce evidence that proves, beyond all doubt, that the child knew that his or her actions, in committing the offence, were seriously wrong. In *C v DPP* Lord Lowry described the quality of the evidence that the prosecution was bound to adduce, at [38C]:

> … What is required has variously been expressed, as in Blackstone, "strong and clear beyond all doubt or contradiction", or in *Rex v Gorrie* (1919) 83 JP 136, "very clear and complete evidence" or in *B v R* (1958) 44 Cr App R 1 at 3 per Lord Parker CJ, "it has often been put this way, that … guilty knowledge must be proved and the evidence to that effect must beyond all reasonable possibility of doubt.

As noted above, it is essential to focus on the child's capacity and not that of a hypothetical child. In this regard, it has been recognised that in jurisdictions where the protection of the absolute presumption is not available to children over 10 years, the rebuttable presumption at least allows for the "vast differences" in the development of the capacities necessary for criminal responsibilities between individuals of the same biological age to be taken into account and, in theory, for children under 14 lacking adult capacity to be protected.[18]

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17 N J Lennings and C J Lennings, "Assessing serious harm under the doctrine of doli incapax: A case study" (October 2016) *Psychiatry Psychology and Law* 1, 2.

18 Thomas Crofts, "A Brighter Tomorrow: Raise the Age of Criminal Responsibility" (2015) 27 *Current Issues in Criminal Justice* 123, 126.

The ability of children, even at the upper end of the presumption age range, to understand the "serious wrongness" of an act (or omission), cannot be presumed, and, if anything, from a modern neurological perspective, remains presumptively in doubt throughout adolescence.

In *RP*, apart from evidence of the acts said to constitute the offences themselves, and the circumstances surrounding those events, the only evidence of the appellant's capacity was contained in experts' reports addressed to the appellant's capacity at ages 17 and 18, in relation to different issues, (themselves made some five to six years after the offending conduct).

The circumstances around the events established that the appellant knew the conduct was wrong in at least some sense. (He was anxious to avoid parental scrutiny of the acts.) He also, from the reaction of the complainant, could be inferred to have known that he was causing his brother significant distress. This latter fact was regarded as being of particular significance in the determination in the CCA. The Court, however, had no evidence directed to the appellant's intellectual or moral development at ages 11–12. As such, the appellant submitted that the CCA misconceived the nature of the presumption and the quality of evidence necessary to rebut it beyond a reasonable doubt in finding that the presumption was rebutted.

The appellant in *RP* also submitted that various aspects of the Crown's evidence tended to cast doubt on the appellant's capacity; namely, that the appellant may have thought the actions were not seriously wrong because he had been himself subjected to sexual abuse or else had been inappropriately exposed to pornography. The expert reports served to underscore this possibility.

The report of a psychologist, Mr Champion, raised the possibility that the appellant may have been experiencing PTSD type issues which may have flowed from "past adverse events such as possible molestation or exposure to violence in earlier years", stated that the appellant "does not have the level of understanding of the proceedings that a person of his age with average intelligence would have"; and noted his disadvantage "by reason of his intellectual limitations": At the time of the report the appellant fell within the "borderline disabled range" (albeit towards the top of that range), meaning his IQ was 79 or less. A Job Capacity Assessment Report, conducted two years earlier, was also tendered in the Crown case. This also cast doubt on the appellant's capacity. The evidence suggestive of molestation, considered together with the act itself and use of the condom, also gave rise to a strong inference that the appellant had himself been inappropriately sexualised.

In relation to that evidence Davies J said (*RP CCA Decision* at [67]):

> Reliance on the report of Mr Champion has a number of difficulties. His examination of the Applicant was conducted in January 2012 which was more than six years after the events complained of. It is not easy to determine, for example, what violence the Applicant was exposed to nor how it had affected him at the relevant time. Certainly a reading of paragraph 29 of Mr Champion's report leads to the strong inference that the violence was not directed towards the Applicant. Moreover, Mr Champion speaks of "possible molestation" without the Applicant having suggested it or made complaint about it, and despite there being no other evidence of it. Contrary to the Applicant's submission it cannot be concluded on the evidence that he was highly sexualised.

Davies J's criticisms of the report can be accepted. However, it was not for the appellant to prove a lack of capacity. The High Court ultimately accepted that the reports served to highlight the gap in the prosecution evidence.

Importantly, the High Court accepted that the conduct itself (far from proving that the presumption was rebutted), raised a real question as to the appellant's understanding of his act. The plurality said (at [34], footnotes omitted):

> The evidence of the appellant's use of the condom is significant. Given the way the appeal was conducted, it was an error for Davies and Johnson JJ to disregard it in determining whether, upon the whole of the evidence, it was open to the trial judge to be satisfied that the presumption had been rebutted and the appellant's guilt of the offence charged in count two established beyond reasonable doubt. The fact that a child of 11 years and six months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the subject of sexual interference. Mr Champion's report did not serve to allay the latter suggestion.

The High Court agreed that the prosecution had not established, to the criminal standard, that the appellant knew his actions were "seriously wrong", as at [36]:

> … In relation to the offences charged in counts two and three, there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development. The circumstance that at the age of 11 years and six months he was left at home alone in charge of his younger siblings does not so much speak to his asserted maturity as to the inadequacy of the arrangements for the care of the children, including the appellant. No evidence of the appellant's performance at school as an 11-year-old was adduced. In the absence of evidence on these subjects, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct, charged in counts two and three, in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense.

Importantly, the fact that the appellant may have been aware he was causing great distress to another human being was not sufficient to establish that he was aware that what he was doing was seriously wrong for the purposes of rebutting the presumption (see *RP* at [35]; cf the approach of the trial judge in *RP* set out by the CCA at [34]; and Hodgson JA in *BP* at [30]). The absence of evidence as to RP's development meant that the necessary inference could not be drawn from this circumstance.

2.4 The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be

In *C v DPP* Lord Lowry commented that, apart from evidence of what the child has said or done (in addition to the alleged act), the prosecution must rely on interviewing the child or having him or her psychiatrically examined, or on evidence from someone such as a teacher: at [70]. To this might be added a requirement that the evidence address the moral maturity (which Lord Lowry distinguished from mental development: at [70]) of the child at the time of the offending.

There had been a divergence between NSW and Victoria as to whether the act constituting the offence could be sufficient (together with the child's age) to rebut the presumption beyond reasonable doubt. It was held in *C v DPP* and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (*CRH*), that although the act is relevant, there must be more than proof of the act charged. In Victoria, Cummins AJA held in *ALH* that the requirement "that mere proof of the act charged cannot constitute evidence of requisite knowledge" (at [86], Callaway JA and Batts JA agreeing at [20] and [24]):

> doubtless is founded upon the danger of circular reasoning. But proper linear analysis could have regard to the nature and incidents of the acts charged without being circular. What is required

> is the eschewing of adult value judgments. Adult value judgments should not be attributed to children. If they are not, there is no reason in logic or experience why proof of the act charged is not capable of proving requisite knowledge. Some acts may be so serious, harmful or wrong as properly to establish requisite knowledge in the child; others may be less obviously serious, harmful or wrong, or may be equivocal, or may be insufficient. I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the acts themselves were seriously wrong. Further, I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilised society.

The High Court resolved this divergence in *RP* stating, at [9]:

> … No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.[19] To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH20*[20] suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised

Conclusion

While the case of *RP* confirms the law relating to *doli incapax*, the judgment highlights the heavy burden that the prosecution bears when prosecuting children, reiterating that "[t]he starting point … is that [a child] is presumed in law to be incapable of bearing criminal responsibility for his acts."

The case underscores the importance of proving the child's knowledge of the moral quality of his or her act and makes clear that the inquiry will involve an analysis of the child's capacity through an examination of the child's background and psychological history, rather than the application of adult value judgments on the child's behaviour or undue regard to the abhorrent nature of the alleged crime itself.

A review of the decision of the House of Lords in *C v DPP* (some 20 years ago) against the recent exposure of the treatment of children in custody alerts us to the fact that we are not as enlightened as we would sometimes give ourselves credit for. The High Court's decision in *RP* provides a timely reminder that the State's exercise of power over children through prosecution (and imprisonment) should not be approached lightly and can only be appropriate where criminal responsibility has been properly established.

19 *R v Smith (Sidney)* (1845) 1 Cox CC 260 per Erle J; *C v DPP* at 38; *BP* at [29]; *R v T* [2009] AC 1310 at 1331 [16] per Lord Phillips of Worth Matravers.

20 (2003) 6 VR 276 at 298 [86]; see also at 280–281 [19], 281 [24].

Did a High Court decision on doli incapax shift court outcomes for 10–13 year olds?

Summary ..... [12-2500]

[12-2500] Summary

Last reviewed: June 2025

Between 2016 and 2023, there was a sharp fall in the proportion of matters where a 10–13 year old was found guilty of a criminal offence in the Children's Court of NSW. This paper investigates whether this decline and other trends in court outcomes can be explained by the impact of a 2016 High Court of Australia decision (*RP v R*), which clarified the application of *doli incapax* (ie, legal protections available to 10–13 year olds). This report examines trends across five outcomes. First, the volume of court appearances involving a 10–13 year old. Second, whether these court appearances result in a proven offence. Third, among cases with a proven offence, the severity of the sanction imposed. Fourth, the extent to which prosecutors elect to withdraw charges. Finally, the proportion of 10–13 year olds who enter a plea of guilty.

J Gu, "Did a High Court decision on doli incapax shift court outcomes for 10–13 year olds?", published in May 2025 by the NSW Bureau of Crime Statistics and Research.

Youth justice in Australia 2023–2024

Summary ..... [12-3000]

[12-3000] Summary

Last reviewed: June 2025

This report looks at young people who were under youth justice supervision in Australia during 2023–2024 because of their involvement or alleged involvement in crime. It explores the key aspects of supervision, both in the community and in detention, as well as recent trends. Some data are included from the period during which COVID-19 and related social restrictions were present in Australia, specifically between March 2020 and June 2022.

"Youth justice in Australia 2023–2024", published in 2024 by the Australian Institute of Health and Welfare. See also "Youth justice in New South Wales 2023–2024".

Youth justice in Australia: themes from recent enquiries

G Clancey, S Wang and B Lin

Abstract ..... [12-4000]

[12-4000] Abstract

"The administration of youth justice systems in Australia is a state and territory responsibility. Almost all states and territories have in recent years undertaken extensive reviews of their youth justice systems. In addition, various oversight bodies (such as ombudsmen, inspectors of custodial services, children's guardians and advocates), Commonwealth agencies (such as the Australian Law Reform Commission), and non-government organisations (such as Amnesty International) have also completed reviews and published reports in this area. The catalysts for some of these reviews were incidents in youth justice detention centres which captured national (and international) attention. A key theme arising from many of these reviews is the need for youth justice detention to be a measure of last resort. Detention, especially for young people who have been victims of abuse and neglect or who have mental illness and intellectual disabilities, is often detrimental and has little benefit in reducing recidivism. This paper explores this and other key themes arising from the recent reviews into Australian youth justice systems."

"Youth justice in Australia: themes from recent enquiries", published in (2020) 605 *Trends & issues in crime and criminal justice* 1 by the Australian Institute of Criminology.

What are the characteristics of effective youth offender programs?

K Pooley

Abstract ..... [12-5000]

[12-5000] Abstract

"A large body of literature has attempted to answer the question: what works in reducing youth reoffending? However, this literature often fails to provide specific guidance on program implementation. This review consolidates research on the practical implementation of tertiary youth offender programs to identify the design, delivery and implementation factors associated with positive changes in youth offending behaviours.

A systematic review of 44 studies revealed nine common components of effective programs. These components have been empirically associated with program effectiveness in methodologically diverse studies conducted in various contexts, suggesting they may contribute to reduced reoffending among young people who come into contact with the criminal justice system."

"What are the characteristics of effective youth offender programs?", published in (2020) 604 *Trends & issues in crime and criminal justice* 1 by the Australian Institute of Criminology.

Youth detention population 2024

Summary ..... [12-6000]

[12-6000] Summary

Last reviewed: June 2025

This report presents information on the youth detention population in Australia from June 2020 to June 2024. Among the 845 young people in detention on an average night in the June quarter 2024, most were male (90%), aged 14–17 (81%) and First Nations (60%). Over the 4-year period, the number of young people in detention fluctuated across quarters, though rose overall from 791 in the June quarter 2020.

"Youth detention population in Australia 2024", published in 2024 by the Australian Institute of Health and Welfare.

Youth crime in NSW: An environmental scan

P Johnstone*

Abstract ..... [12-7000]

[12-7000] Abstract

This paper provides an overview of the criminal jurisdiction of the Children's Court. It discusses some of the key trends in youth crime including Indigenous over-representation and the crossover between care and crime. It also considers the major drivers likely to shape youth crime in New South Wales over the next five years and beyond including current initiatives such as the review of the *Young Offenders Act*, the recommendations of the Ice Inquiry, the expansion of the YKC, and the Short Term remand Project.

P Johnstone, "Youth Crime in NSW: An Environmental Scan", 2020.

* Judge Peter Johnstone, President of the Children's Court of NSW, Local Court of NSW Southern Regional Conference 4–6 March 2020.

Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia

C Bower* et al

Abstract ..... [12-8000]
Objectives
Design
Participants
Findings
Conclusions

[12-8000] Abstract

Last reviewed: Oct 2023

Objectives

To estimate the prevalence of fetal alcohol spectrum disorder (FASD) among young people in youth detention in Australia. Neurodevelopmental impairments due to FASD can predispose young people to engagement with the law. Canadian studies identified FASD in 11%–23% of young people in corrective services, but there are no data for Australia.

Design

Multidisciplinary assessment of all young people aged 10–17 years 11 months and sentenced to detention in the only youth detention centre in Western Australia, from May 2015 to December 2016. FASD was diagnosed according to the Australian Guide to the Diagnosis of FASD.

Participants

99 young people completed a full assessment (88% of those consented; 60% of the 166 approached to participate); 93% were male and 74% were Aboriginal.

Findings

88 young people (89%) had at least one domain of severe neurodevelopmental impairment, and 36 were diagnosed with FASD, a prevalence of 36% (95% CI 27% to 46%).

Conclusions

This study, in a representative sample of young people in detention in Western Australia, has documented a high prevalence of FASD and severe neurodevelopmental impairment, the

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majority of which had not been previously identified. These findings highlight the vulnerability of young people, particularly Aboriginal youth, within the justice system and their significant need for improved diagnosis to identify their strengths and difficulties, and to guide and improve their rehabilitation.

C Bower et al, "Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia", published in 2018.

Fetal alcohol spectrum disorder: the importance of assessment, diagnosis and support in the Australian justice context

N Reid* et al

Abstract ..... [12-9000]

[12-9000] Abstract

Last reviewed: Oct 2023

Fetal alcohol spectrum disorder (FASD) is a neurodevelopmental condition with life-long implications. Individuals with FASD can experience communication, cognitive, behavioural, social and emotional difficulties that impact their functional capacity. Due to these brain-based impairments, previous research suggests that individuals with FASD are over-represented in the justice system. The current article outlines how individuals with FASD may experience inequities within the justice system, why assessment, diagnosis and intervention is important, and the role of health and justice partnerships in promoting more equitable outcomes for justice-involved individuals with FASD. Increased resources and collaborations between health and justice professionals are required to enable the provision of neurodevelopmental assessments for all complex presentations, including FASD.

N Reid et al, "Fetal alcohol spectrum disorder: the importance of assessment, diagnosis and support in the Australian justice context", published in (2020) 27 *Psychiatry, Psychology and Law* Issue 2.

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Addressing the challenges of FASD for adolescents in the justice system*

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Fetal Alcohol Spectrum Disorder (FASD) and disadvantage create barriers to wellbeing and help-seeking. This article explores the behavioural and cognitive implications of FASD for Australian children and adolescents in the justice system and primary, secondary and tertiary crime prevention strategies. There is a clear intersection between FASD, crime and incarceration. FASD includes a range of cognitive, behavioural and neurodevelopmental impairments that increase the likelihood of contact with the justice system. Children and adolescents (10–18 years) with undiagnosed FASD are often misunderstood. Without a diagnosis, opportunities for early intervention to prevent children and adolescents from entering the youth justice system are missed.

Acknowledgement ..... [12-9200]

Introduction

Importance of FASD diagnosis

Reducing harm from prenatal alcohol exposure

Children and adolescents under youth justice supervision

FASD and youth justice

Why children and adolescents with FASD come into the justice system

Behavioural implications of FASD for children and adolescents in the justice system

Youth crime prevention and the media

Strengthening the justice and health systems to respond

Strengthening community-based support

Conclusion

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* Originally published in (2025) 2(1) *JQR* 11.

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[12-9200] Acknowledgement

Last reviewed: June 2025

We respectfully acknowledge and celebrate the many Traditional Owners of the lands throughout Australia and pay our respects to ancestors of this country and Elders past and present. We recognise that First Nations communities, culture and lore have existed within Australia continuously for 65,000 years.

The *Uluru Statement from the Heart* says:[1]

> Proportionally, [First Nations peoples] are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

We support the Uluru Statement and acknowledge the ongoing leadership of First Nations communities across Australia, who have worked and continue to work tirelessly to address inequalities and improve justice outcomes for First Nations children and adolescents.

Introduction

Fetal Alcohol Spectrum Disorder (FASD) is a neurodevelopmental disorder caused by prenatal alcohol exposure and has lifelong impacts.[2] Children and adolescents (10–18 years) with FASD experience cognitive and behavioural problems, mental illness and substance use that can increase contact with, and be exacerbated by, the justice system.[3]

Crime prevention benefits society by minimising economic, personal and social costs.[4] Prevention requires three tiers of action: primary prevention (stopping crime before it starts), secondary prevention (early intervention initiatives with groups considered to be at higher risk of committing crime) and tertiary prevention (focusing on better outcomes for those who have already committed crime).[5]

There is a clear intersection between FASD, crime, substance use and incarceration. Young people with FASD are more likely to encounter the justice system than young people without FASD.[6] International research suggests that FASD rates are 30.3 times more prevalent among young people in the justice system than in the general population.[7]

International approaches to youth justice emphasise the rights of children and adolescents, including those with disability. Australia is a signatory to key human rights instruments, including the Convention on the Rights of the Child[8] and the Convention on the Rights of

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1 Referendum Council, *Uluru Statement from the Heart*, 2017, accessed 26/7/2024.
2 EJ Elliott, "Fetal alcohol spectrum disorders in Australia — the future is prevention" (2015) 25(2) *Public Health Research & Practice* e2521516.
3 A Dudley et al, *Critical review of the literature: Fetal Alcohol Spectrum Disorders*, Telethon Kids Institute, 2015, accessed 5/8/2024.
4 S Battams et al, "Reducing incarceration rates in Australia through primary, secondary, and tertiary crime prevention" (2021) 32(6) *Criminal Justice Policy Review* 618–645.
5 ibid.
6 C Bower et al, "Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia" (2018) 8(2) *BMJ Open* e019605; S Lange et al, "Global prevalence of Fetal Alcohol Spectrum Disorder among children and youth: a systematic review and meta-analysis" (2017) 171(10) *JAMA Pediatrics* 948–956.
7 Lange et al, ibid.
8 United Nations General Assembly, Convention on the Rights of the Child (1989).

People with Disabilities.[9] Recently, there has been international pressure on Australia to raise the minimum age of criminal responsibility, which is as low as 10 years in most Australian States. The United Nations Committee on the Rights of the Child recommended increasing the minimum age to reflect research findings in child development and neuroscience that the capacity for abstract reasoning is not fully developed in children aged 13 years and under.[10]

The Australian Government's *National Fetal Alcohol Spectrum Disorder Strategic Action Plan 2018–2028* (National FASD Action Plan) was developed to "provide a clear pathway of priorities and opportunities to improve the prevention, diagnosis, support and management of FASD in Australia".[11] The National FASD Action Plan identifies that young people in contact with the justice system are more likely to have FASD than those in the general population and aims to reduce the prevalence and impact of FASD and improve the quality of life for people living with FASD. Strategies include providing FASD screening, early intervention, management and post-release referral services to young people in custody; enabling community programs for young people who offend; and working with the criminal justice system to implement therapeutic justice interventions. The National FASD Action Plan recommends activities to strengthen education for staff in youth justice systems and community policing, processes to identify FASD early, clear referral pathways for assessment and support, and access to case management and diversionary programs.

However, an independent review of the National FASD Action Plan in 2022[12] identified that "Recognition of FASD in the criminal justice system is lacking in many jurisdictions"[13] and recommended a greater emphasis on screening and diagnosis in education and criminal justice sectors.

Economic analyses confirm that FASD is expensive to society involving health, child protection, education, disability and justice sectors.[14] The implications of a late diagnosis of FASD include a lack of recognition of the support needs of these children and adolescents and missed opportunities to provide holistic support and prevent longer-term adverse health and social outcomes. Conversely, identifying children and adolescents with FASD early can enhance their social and emotional wellbeing, prevent re-offending and improve their life trajectory.

This paper explores the behavioural and cognitive implications of FASD for Australian children and adolescents in the justice system and primary, secondary and tertiary crime prevention strategies.

1. For primary prevention, there is a need for ongoing investment in the prevention of harm from prenatal alcohol exposure, screening and early identification of FASD in children and adolescents, and early intervention to decrease their risk of contact with the justice system.
2. For secondary prevention, the justice system needs reform to minimise the incarceration of children, particularly those with cognitive and neurodevelopmental impairments. Investment should be made in evidence-based diversion programs that provide

9 United Nations General Assembly, Convention on the Rights of Persons with Disabilities (2007).
10 United Nations Office of the High Commissioner, "General comment no. 24 (2019) on children's rights in the child justice system", 2019, accessed 29/7/2024.
11 Department of Health and Aged Care, *National Fetal Alcohol Spectrum Disorder (FASD) Strategic Action Plan 2018–2028*, Commonwealth of Australia, 2018, p 3, accessed 26/7/2024.
12 A Curtis et al, *Three-year formal review of the implementation of the National Fetal Alcohol Spectrum Disorder (FASD) Strategic Action Plan 2018–2028*, Final Evaluation Report, Deakin University, 2022, accessed 26/7/2024.
13 ibid, p 10.
14 Elliott, above n 2 at 2.

rehabilitation and/or treatment for underlying disorders as alternatives to incarceration, particularly for children and adolescents with neurodevelopmental impairments such as FASD.

3. For tertiary prevention, the justice system must provide staff training to increase awareness of FASD and enable assessments to identify disability in children and adolescents as early as possible after contact with the justice system. A FASD diagnosis can indicate the need for support to negotiate the court system and a comprehensive and holistic management plan to prevent re-offending or incarceration.

Importance of FASD diagnosis

FASD is a complex condition with variable presentation.

A FASD diagnosis is based on three main criteria:[15]

1. Confirmed prenatal alcohol exposure.
2. Severe neurodevelopmental impairment in at least three of 10 specified functional domains.
3. Characteristic facial features (small palpebral fissures, smooth philtrum and thin upper lip) and birth defects associated with prenatal alcohol exposure *may or may not* be present. When physical features are absent FASD becomes an "invisible" disability.

Despite the availability of the *Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder* since 2016,[16] many health professionals remain unaware of the FASD diagnostic criteria and do not routinely ask pregnant women about their alcohol use or seek input from a multidisciplinary team for assessment of children with prenatal alcohol exposure. Also, FASD symptoms often overlap with those of attention deficit hyperactivity disorder, autism spectrum disorder, speech and language disorders, mental health disorders, conduct disorder, intellectual disability and oppositional defiant disorder,[17] which can lead to misdiagnosis, delayed diagnosis or failure to consider FASD.

FASD has lifelong impacts, including physical, cognitive, behavioural and neurodevelopmental impairments.[18] Children and adolescents with FASD have poorer conduct, attention, and social and emotional skills than peers without FASD.[19] Early and accurate diagnosis and access to multidisciplinary services and support for individuals living with FASD and their families will enable children to fulfil their potential, improve health and wellbeing, and prevent the development of adverse long-term consequences.[20] Failure to recognise FASD will exacerbate functional impairments and put children at risk of contact with the justice system.

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15 C Bower and EJ Elliott, *Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder (FASD)*, updated February 2020, accessed 26/7/2024.

16 ibid.

17 National Aboriginal Community Controlled Health Organisation (NACHO) and The Royal Australian College of General Practitioners (RACGP), Ch 3: "Fetal Alcohol Spectrum Disorder", *National guide to a preventive health assessment for Aboriginal and Torres Strait Islander people*, 3rd edn, 2018, accessed 26/7/2024; SD Popova et al, "Comorbidity of fetal alcohol spectrum disorder: a systematic review and meta-analysis" (2016) 387(10022) *The Lancet* 978–987.

18 National Health and Medical Research Council (NHMRC), *Australian guidelines to reduce health risks from drinking alcohol*, Australian Government, 2020, accessed 26/7/2024.

19 TW Tsang et al, "Behavior in children with Fetal Alcohol Spectrum Disorders in remote Australia: a population-based study" (2017) 38(7) *Journal of Developmental and Behavioral Pediatrics* 528–537.

20 S Popova et al, "Fetal alcohol spectrum disorders" (2023) 9(1) *Nature Reviews Disease Primers* 11.

The needs of individuals with FASD generally are not adequately addressed, partly due to the lack of availability of timely assessments and support.[21] Making a formal FASD diagnosis is a specialised and complex process which can have a high cost and/or long wait times, making it prohibitive for many. Access to healthcare is often difficult for marginalised children, adolescents and families, especially those experiencing multiple health and social issues.[22] Children and adolescents with FASD are at risk of substance use disorders and harmful alcohol use,[23] making it difficult to engage them in health care services or in a comprehensive neurocognitive assessment. It is not surprising that children, adolescents and families in the community are unlikely to access these services independently without support.

Fortunately, FASD assessment services in Australia are expanding with increased funding in many States and territories, including the NSW-based CICADA FASD service.[24] The services use multidisciplinary teams and best practice based on the *Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder*.[25]

Reducing harm from prenatal alcohol exposure

Prevention of harm from prenatal alcohol exposure is vital to promoting good health and social outcomes.[26] Alcohol use in pregnancy occurs throughout Australia, in all socioeconomic groups: a systematic review of 78 Australian studies comprising 16 birth cohorts estimates that 48% (95% Confidence Interval 38 to 57%) of women use alcohol during pregnancy.[27] Further, almost half of all pregnancies in Australia are unplanned and many women are unaware of the risks of drinking alcohol during pregnancy.[28]

Although alcohol is used throughout society, social disadvantage is one determinant of frequent, risky alcohol use.[29] Thus, some children with FASD are born into chaotic families where parents frequently use alcohol and other substances and experience high rates of life adversity, which also impacts neurodevelopment.[30] In a population-based study in remote WA

21 N Reid et al, "Fetal alcohol spectrum disorder: the importance of assessment, diagnosis and support in the Australian justice context" (2020) 27(2) *Psychiatry, Psychology and Law* 265–274.

22 F Robards et al, "Intersectionality: social marginalisation and self-reported health status in young people" (2020) 17(21) *International Journal of Environmental Research and Public Health* 8104.

23 Research and Evaluation Service, Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young people in custody health survey: full report*, Malabar NSW, 2017, accessed 29/7/2024.

24 Sydney Children's Hospitals Network, "Drug and alcohol services (CICADA Centre NSW)", updated 15/5/2024, accessed 24/7/2024.

25 *Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder (FASD)*, above n 15.

26 EJ Elliott, "Childproofing Australia's future health: preventing alcohol harms" (2020) 59(102949) *EBioMedicine*.

27 SL Young et al, "Prevalence and patterns of prenatal alcohol exposure in Australian cohort and cross-sectional studies: a systematic review of data collection approaches" (2022) 19(20) *International Journal of Environmental Research and Public Health* 13144.

28 Elliott, above n 2 at 2–3.

29 ibid.

30 GKY Tan et al, "Adverse childhood experiences, associated stressors and comorbidities in children and youth with fetal alcohol spectrum disorder across the justice and child protection settings in Western Australia" (2022) 22(1) *BMC Pediatrics* 1–587.

communities, 55% of First Nations children aged 7–9 years were exposed to high levels of alcohol in pregnancy and 19% had a diagnosis of FASD — a rate amongst the highest recorded internationally.[31]

These data suggest that public health approaches to reduce prenatal alcohol harm need strengthening. Education has an important role in preventing FASD by promoting awareness of the risks of harm from alcohol use during pregnancy, such as via the "Every Moment Matters" campaign.[32] However, evidence-based strategies — adequate pricing and taxation, restrictions on advertising and promotion, and restrictions on the number and opening hours of liquor outlets — are also needed to change behaviour.[33]

Children and adolescents under youth justice supervision

In 2022–2023, 4,542 children and adolescents aged 10–17 years were under youth justice supervision on an average day in Australia, with 3,743 (82%) supervised in the community and 828 (18%) in detention.[34]

In NSW, children and adolescents with disability (some of whom may have FASD) have higher rates of contact with the youth justice system than those without disability and are significantly overrepresented in youth custody.[35] Furthermore, children and adolescents with disability have more justice contact for violent offences (including domestic violence), property offences, sexual assault and related offences, and offences against justice procedures, government security and government operations.[36] Factors including older age at initial engagement with disability-related services, remoteness of residence and high frequency of contact with child protection were strongly associated with an increased likelihood of a child or adolescent with disability having criminal justice contact before the age of 18 years.[37]

Of great concern is the over-representation of Australian First Nations people involved with youth justice systems in every State and territory. In 2022–2023, about half (55%) of children aged 10–17 years who were under community-based supervision and 63% aged 10–17 years in detention were First Nations Australians.[38] On an average day in 2022–2023, First Nations children and adolescents aged 10–17 years were 23 times more likely to be under supervision and 28 times more likely to be in detention than non-First Nations children and adolescents.[39] In March 2024, two-thirds (66.4%) of the youth detention population comprised First Nations children and adolescents, the highest rate on record.[40]

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31 JP Fitzpatrick et al, "Prevalence and profile of neurodevelopment and Fetal Alcohol Spectrum Disorder (FASD) amongst Australian Aboriginal children living in remote communities" (2017) 65 *Research in Developmental Disabilities* 114–126; JP Fitzpatrick et al, "The Marulu Strategy 2008–2012: overcoming Fetal Alcohol Spectrum Disorder (FASD) in the Fitzroy Valley" (2017) 41(5) *Australian and New Zealand Journal of Public Health* 467–473.

32 Foundation for Alcohol Research and Education (FARE), "Every moment matters: FARE", 2024, accessed 23/7/2024.

33 Elliott, above n 2.

34 Australian Institute of Health Welfare (AIHW), *Youth justice in Australia 2022–23*, web report, Canberra, last updated 28/3/2024, accessed 23/7/2024.

35 SP Boiteux and S Poynton, NSW Bureau of Crime Statistics and Research (BOSCAR), "Offending by young people with disability: a NSW linkage study" (2023) No. 254 *Crime and Justice Bulletin*, accessed 23/7/2024.

36 ibid.

37 ibid.

38 AIHW, "Characteristics of young people under supervision", above n 34.

39 ibid.

40 BOCSAR, *NSW custody statistics: quarterly update,* March 2024, accessed 23/7/2024.

The over-representation of First Nations young Australians with cognitive impairment in the criminal justice system was a focus of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.[41] In a 2015 NSW survey, almost one in four First Nations young people (aged 12–21 years) in detention had an intellectual disability (Full Scale Intelligence Quotient score below 70), compared with one in 12 non-First Nations young people.[42] The Royal Commission recommendations included increasing disability training for staff in youth detention, improving screening and assessment practices for children with disability, increasing access to diversion programs, raising the age of criminal responsibility to 14 years, prohibiting use of solitary confinement, and clearly defining safeguards that apply to isolation or seclusion of children with disability in Australia.[43]

FASD and youth justice

Individuals with FASD are disproportionately represented in youth justice systems,[44] with a prevalence rate 30.3 times greater than the general population.[45]

In Australia, it is likely that many children and adolescents who enter the justice system have undiagnosed FASD. Research at WA's Banksia Hill Juvenile Detention Centre found that of 99 adolescents aged 13–17 years who underwent the complete FASD assessment, over one third (36%) had a diagnosis of FASD and 89% had at least one domain of severe neurodevelopmental impairment.[46] Of the 36 adolescents diagnosed with FASD, only two had previously been diagnosed. Many had never had a neurodevelopmental assessment. The Banksia Hill study highlighted the significant level of communication disorders among children and adolescents in the justice system: 74 participants (75.5%) demonstrated language skills below the average range expected for their age, and 45 (45.9%) met the criteria for a language disorder.[47] An earlier study in Victoria found a similar rate of language disorders in justice-involved children and adolescents (46%).[48]

Why children and adolescents with FASD come into the justice system

So why are FASD and juvenile justice inexorably linked? FASD contributes to a range of physical, cognitive, behavioural and neurodevelopmental impairments that can lead children and adolescents to come in contact with the law.[49] Children and adolescents with FASD are

41 Commonwealth of Australia, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Report, September 2023, accessed 23/7/2024.

42 *2015 Young people in custody health survey: full report*, above n 23, pp 80–81.

43 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, above n 41. For the Government's response to the recommendations see Australian Government, *Australian Government response to the Disability Royal Commission*, July 2024, accessed 23/8/2024.

44 Bower et al, above n 6; R Borschmann et al, "The health of adolescents in detention: a global scoping review" (2020) 5(2) *The Lancet Public Health* e114–e26.

45 S Lange et al, "Global prevalence of Fetal Alcohol Spectrum Disorder among children and youth: a systematic review and meta-analysis" (2017) 171(10) *JAMA Pediatrics* 948–956.

46 Bower et al, above n 6.

47 NR Kippin et al, "Language diversity, language disorder, and fetal alcohol spectrum disorder among youth sentenced to detention in Western Australia" (2018) 61 *International Journal of Law and Psychiatry* 40–49.

48 PC Snow and MB Powell, "Oral language competence in incarcerated young offenders: links with offending severity" (2011) 13(6) *International Journal of Speech Language Pathology* 480–489.

49 Popova et al, above n 20.

often impulsive, are easily misled, fail to distinguish right from wrong and do not understand the consequences of their actions — or learn from their mistakes — particularly if they have cognitive impairment.[50]

The deficits in cognition in FASD can impact children and adolescents' understanding of cause and effect, learning from past experiences and decision-making. Impairments in executive function and hyperactivity increase the risk of offending.[51] The neurological disability can also lead to problems with school, mental health, social exclusion and substance abuse.

Misdiagnosis or failure to recognise impairment can result in inappropriate treatment and support, particularly in the context of education. This can result in children and adolescents disengaging in education and an increased risk of offending.[52]

Further, children and adolescents, especially those from marginalised backgrounds, can be discriminated against when they encounter the justice system due to difficulty interacting with police and courts; current approaches often fail to identify and respond to their communication and support needs.[53] As a result, those with undiagnosed FASD are entering the justice system rather than being referred for more appropriate community-based support.

Justice professionals should see diagnosis as vital to enable the youth justice system to respond appropriately, including facilitating diversion rather than criminalising children and adolescents due to their impairment.[54] Early diagnosis and receipt of disability support are important protective factors for avoiding involvement with the justice system for individuals with FASD.[55]

Beyond issues associated with an individual's impairment, system factors also play a role. These factors include poor identification of FASD, lack of awareness by police and justice professionals of FASD and a lack of appropriate diversionary alternatives.[56]

Behavioural implications of FASD for children and adolescents in the justice system

FASD increases the likelihood that a child or adolescent will come into contact with the law and presents challenges for the justice system. Once in the justice system, children and adolescents with FASD have difficulty providing reliable witness statements and may not understand or remember court instructions.

Alcohol use during pregnancy can damage and impair the function of any part of the brain, which impacts daily function. The clinical presentation is very heterogeneous, depending on dose, timing and frequency of prenatal alcohol exposure and moderating maternal and fetal characteristics. Table 1 on p 541 describes the 10 neurodevelopmental domains assessed

50 H Blagg et al, *Decolonising justice for Aboriginal youth with fetal alcohol spectrum disorders*, Routledge, Taylor & Francis Group, 2021.

51 JM Ogilvie et al, "Neuropsychological measures of executive function and antisocial behavior: a meta-analysis" (2011) 49(4) *Criminology* 1063–1107.

52 Australasian Youth Justice Administrators, Ad hoc information request response table — FASD Disability Action Plan (NSW), unpublished internal document, May 2022.

53 N Hughes et al, "A systematic review of the prevalence of foetal alcohol syndrome disorders among young people in the criminal justice system" (2016) 3(1) *Cogent Psychology* 1214213.

54 E Baldry, "'Cruel and unusual punishment': an inter-jurisdictional study of the criminalisation of young people with complex support needs" (2018) 21(5) *Journal of Youth Studies* 636–652.

55 N Reid et al, "Fetal alcohol spectrum disorder: the importance of assessment, diagnosis and support in the Australian justice context" (2020) 27(2) *Psychiatry, Psychology and Law* 265–274.

56 Blagg et al, above n 50.

during the FASD diagnostic process and the impact of impairment on function, along with challenges of these impairments for the justice system. Some impairments seen in FASD could be interpreted as wilful behaviour unless an underpinning FASD diagnosis and associated disability is recognised.[57]

Language disorders can lead to a mismatch between the communication skills of a child or adolescent and the professionals with whom they interact. Misunderstanding of legal information and expectations placed on them by the justice system may also occur. Legal processes are often lengthy, complex and highly verbal, and complex language skills are required for understanding and effective communication.[58] Although many children and adolescents with FASD appear to have good verbal skills, many experience difficulty interacting with staff and understanding youth justice system processes due to their severe expressive and receptive language disorders.

Communication problems will likely affect children and adolescents' participation in investigative interviews and undermine their capacity for self-advocacy.[59] Children and adolescents who do not understand their legal rights may provide unnecessary or incorrect information to the police, legal services and the children's courts.[60] Due to their poor memory, they may confabulate, provide inconsistent evidence, be suggestible or plead guilty to crimes they have not committed.[61] They may not comprehend or comply with court orders because of poor oral language and communication skills.

FASD raises particular issues for appropriate sentencing and the admissibility of evidence, given that many people with FASD are highly suggestible and have difficulty linking their actions to consequences, controlling impulses and remembering events.[62] When sentencing, a diagnosis of FASD (particularly when it is associated with intellectual disability) may be viewed by courts as a mitigating factor, as it diminishes the child or adolescent's moral culpability for the offence and their ability to act deliberately and understand and show remorse.[63] If the individual's impairments and functional abilities are known, the conditions of the legal outcomes can be tailored to the child or adolescent's specific circumstances and their level of capacity and function.[64] Conversely, the court will likely issue a harsher sentence without this knowledge. *Churnside v The State of Western Australia* [2016] WASCA 146, a decision of the WA Court of Appeal that focused on providing appropriate support for an offender with FASD, has been proposed by Ian Freckelton AO KC as a model for sentencing judges and magistrates.[65] Freckelton argues: "[i]t is imperative that adequate diagnostic and treatment resources are directed as a matter of urgency to dealing with persons with FASD".[66]

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57 GKY Tan et al, "Exploring offending characteristics of young people with foetal alcohol spectrum disorder in Western Australia" (2022) 30(4) *Psychiatry, Psychology and Law* 1–22.

58 Reid et al, above n 55; H Blagg and T Tulich, "Diversionary pathways for Aboriginal youth with fetal alcohol spectrum disorder" (2018) No 557 *Trends & Issues in Crime and Criminal Justice* 1–15.

59 Reid et al, above n 55.

60 RA Pedruzzi et al, "Navigating complexity to support justice-involved youth with FASD and other neurodevelopmental disabilities: needs and challenges of a regional workforce" (2021) 9(1) *Health & Justice* 8.

61 Blagg et al, above n 50.

62 H Douglas, "Foetal Alcohol Spectrum Disorders: a consideration of sentencing and unreliable confessions" (2015) 23(2) *Journal of Law and Medicine* 427.

63 Reid et al, above n 55.

64 ibid.

65 I Freckelton, "Sentencing offenders with foetal alcohol spectrum disorder (FASD): the challenge of effective management" (2016) 23(6) *Psychiatry, Psychology and Law* 815–825.

In addition, the justice workforce may fail to adequately understand the challenges and needs of the child or adolescent.[67] There is also a lack of appropriate treatment and management options in custody, where people with FASD are unlikely to comply with rules, which can exacerbate the individual's condition.[68]

Youth crime prevention and the media

FASD and youth crime have been in the Australian news in recent years and governments are looking for community-based solutions. In 2016, the nation was shocked by images of a child masked and restrained in the Don Dale Youth Detention Centre, which precipitated the Royal Commission into the Protection and Detention of Children in the Northern Territory. The Inquiry found FASD is a major contributor to the incarceration of children.[69] The Royal Commission recommended a comprehensive medical and health assessment on the admission of a child or young person to a detention centre, including an assessment of both physical and mental health and an assessment for FASD.[70]

In 2023 and 2024, youth unrest prompted curfews in central Australia, where "Experts say earlier FASD diagnosis [is] a key step in tackling Alice Springs youth crime".[71] In March 2024, as a response to the increase in youth crime, a 12-hour overnight curfew was introduced by the NT Government which banned children and adolescents under 18 years of age from entering the central business district of Alice Springs.[72] The Alice Springs curfew aimed to provide an immediate response to the pressing issue of youth crime, setting the stage for a broader discussion on long-term, sustainable community safety solutions.

In comments following riots at the Banksia Hill Juvenile Detention Centre in May 2023, then WA Premier, Hon Mark McGowan AC MLA, described the teenagers as engaging in "a form of terrorism".[73] When asked if he accepted that many of the children at the facility had disabilities and medical conditions, such as FASD, which impacted their consequential thinking, McGowan replied that this was "more excuse-making".[74]

No one condones aggressive or destructive behaviour, but the Banksia Hill riots occurred in the context of the recent conviction of a guard for the assault of a child, the use of solitary

66 I Freckelton, "Assessment and evaluation of Fetal Alcohol Spectrum Disorder (FASD) and its potential relevance for sentencing: a clarion call from Western Australia: LCM v The State of Western Australia [2016] WASCA 164 per Martin CJ, Mazza JA and Beech J" (2017) 24(4) *Psychiatry, Psychology and Law* 485–495 at 494.

67 Kippin et al, above n 47.

68 Blagg et al, above n 50.

69 Commonwealth of Australia, *Royal Commission into the Protection and Detention of Children in the Northern Territory*, Report, November 2017, accessed 26/8/2024.

70 ibid, Recommendation 15.1(3). This recommendation has been supported by the NT Government: NT Government, Whole-Of-Government Reform Management Office, *Response to the 227 recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, March 2018, p 6, accessed 23/8/2024.

71 C Allison, "Experts say earlier FASD diagnosis a key step in tackling Alice Springs youth crime wave", *ABC News*, 4/2/2023, accessed 24/7/2024.

72 NT Police Fire and Emergency Services, *Youth curfew for high risk area — Alice Springs*, media release, 28/3/2024, accessed 24/7/2024.

73 Parliament Western Australia, Parliamentary Debates (Hansard), 41st Parliament, First session 2023, Legislative Council, 18/5/2023, accessed 26/6/2024.

74 ibid.

confinement and restraint, and the inappropriate detention of children in the adjacent adult prison facility. Many children had been locked in their cells for extended periods, for up to 24 hours a day, one boy on 26 occasions in the prior six months.[75]

The incarceration of children is unpalatable. However, in Australia, a child can be deemed guilty of a criminal offence and imprisoned from the age of 10 years. Several States and territories have recently committed to raising the age of criminal responsibility from 10 to 14 years,[76] consistent with United Nations recommendations, and we strongly argue that this approach must be adopted nationally. Many of the children aged between 10 and 16 years in justice detention, including many children with FASD, are repeatedly detained for petty crime. This can lead to a perpetual cycle of criminal justice system involvement, with the ultimate risk of death in custody.

Strengthening the justice and health systems to respond

Strengthening the justice and health systems to address FASD requires a comprehensive strategy encompassing primary, secondary and tertiary prevention measures. This approach includes bolstering child and adolescent services to prevent crime, reforming the justice system to focus on early intervention and diversion programs and improving the identification and support for children and adolescents with FASD. Strengthening these areas is crucial for enhancing wellbeing, ensuring fair treatment and reducing youth crime.

In primary prevention (to stop crime before it starts), there is a need to increase the funding, capacity and staff training in child and adolescent services within the health, education, child protection and justice systems. These factors limit access to multidisciplinary assessments and diagnosis of neurodevelopmental impairments, including FASD. FASD and disadvantage create barriers to wellbeing and help-seeking. Navigating health and social service systems is complex and challenging, particularly for marginalised adolescents and families who require active support.[77]

In secondary prevention (early intervention initiatives with children and adolescents at higher risk of offending), the justice system needs reform. As well as increasing the minimum age of criminal responsibility from 10 to 14 years, there is a need for investment in evidence-based diversion programs for children and adolescents as alternatives to incarceration.

Diversion programs reduce reoffending and are significantly cheaper than placing children and adolescents in custody.[78] In 2022–2023, the total recurrent expenditure nationally on detention-based supervision, community-based supervision and group conferencing for children and adolescents aged 10–17 years was $1.3 billion. Detention-based supervision accounted for the majority of this expenditure (64.7% or $855.3 million).[79] In Australia in

75 D Zadvirna and J Sturmer, "Youth detainees at Banksia Hill subjected to unlawful confinement on a 'frequent basis', WA Supreme Court finds", *ABC News*, 11/7/2023, accessed 24/7/2024.

76 Including the NT, the ACT, Victoria and Tasmania: see AIHW, "Raising the age of criminal responsibility", above n 34. See also Australian Human Rights Commission, *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing*, Report, 2024, accessed 26/8/2024.

77 F Robards et al, "Health care equity and access for marginalised young people: a longitudinal qualitative study exploring health system navigation in Australia" (2019) 18(1) *International Journal for Equity in Health* 41.

78 DB Wilson et al, "Police-initiated diversion for youth to prevent future delinquent behavior: a systematic review" (2018) 14(1) *Campbell Systematic Review* 1–88; Office of the Auditor General Western Australia, *Diverting young people away from court*, Report 18, 2017, accessed 24/7/2024.

79 Australian Government, Productivity Commission, "17 Youth justice services", *Report on Government services 2024*, Pt F, s 17, released 22/1/2024, accessed 29/7/2024.

2022–2023, the average cost per day per child or adolescent subject to community-based supervision was $305 — much lower than detention-based supervision, which was $2,827 per day.[80] Diversion programs have advantages for government budgets, the community, and child and adolescent wellbeing.

In tertiary prevention (focusing on children and adolescents who have already committed a crime), there is a need to identify disability, including neurodevelopmental impairments such as FASD, at the earliest possible opportunity following a young person's engagement with youth justice services so they can receive adequate support to develop pro-social life outcomes. Complicating factors such as substance use can create barriers to accessing developmental and cognitive assessments for children and adolescents who are engaged with the justice system and at risk of FASD. Opportunistic neurodevelopmental and FASD assessments should be considered at the time of incarceration to enable appropriate management during detention and wrap-around support on release.

There is a need to improve the knowledge about FASD and skills for dealing with people with FASD among justice professionals. Professionals working within the justice system should be supported to recognise indicators of children and adolescents with disabilities and understand the implications for behaviour and engagement.[81] Judicial officers should receive relevant continuing education to understand the ways in which neurodevelopmental disabilities might affect a child or adolescent's capacity to engage in justice processes.[82] The Banksia Hill study found that youth custodial officers in WA had limited in-depth knowledge of FASD and welcomed the option to attend training on FASD with a particular interest in applying behaviour management strategies.[83] Training for youth custodial officers improved knowledge and changed attitudes. The intervention was considered highly necessary, appropriate and valuable by the workforce.[84]

Screening of children and adolescents for neurodevelopmental disability and possible FASD can help identify their capacity to understand and interact with the youth justice system. Screening also identifies individuals who can benefit from additional clinical assessment for neurodevelopmental impairments, including FASD. The National Aboriginal Community Controlled Health Organisation (NACCHO) and The Royal Australian College of General Practitioners (RACGP) recommend all children and adolescents at high risk for FASD should be screened when they have initial contact with the child protection, police or justice systems[85] for prenatal alcohol exposure and cognitive, language and behavioural problems. However, justice systems in Australia currently lack standardised procedures for screening individuals for FASD, leading to a failure to identify and appropriately support affected individuals.

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80 ibid.

81 JC McCormack et al, "Knowledge, attitudes, and practices of fetal alcohol spectrum disorder in health, justice, and education professionals: a systematic review" (2022) 131 *Research in Developmental Disabilities* 104354–.

82 N Hughes et al, "Ensuring the rights of children with neurodevelopmental disabilities within child justice systems" (2020) 4(2) *The Lancet Child & Adolescent Health* 163–166.

83 HM Passmore et al, "Fetal Alcohol Spectrum Disorder (FASD): knowledge, attitudes, experiences and practices of the Western Australian youth custodial workforce" (2018) 59 *International Journal of Law and Psychiatry* 44–52.

84 HM Passmore et al, "Reframe the behaviour: evaluation of a training intervention to increase capacity in managing detained youth with fetal alcohol spectrum disorder and neurodevelopmental impairments" (2021) 28(3) *Psychiatry, Psychology and Law* 382–407.

85 *National guide to a preventive health assessment for Aboriginal and Torres Strait Islander people*, above n 17.

In Canada, a "red flag" model for screening for FASD is used by the Manitoba FASD Youth Justice Program.[86] Young people are referred to a FASD diagnostic program if they exhibit the following "red flags":

- repeated failure to comply
- lack of empathy
- trouble in school/drop-out
- difficulties with intuitions
- poor compliance and peer interactions
- inability to connect actions with consequences
- do not seem affected by past punishments
- are followers rather than leaders in crime, and
- commit crimes involving risky behaviour for little gain and gang involvement.

Another Canadian FASD screening tool developed for youth justice settings is the Asante Centre for Fetal Alcohol Syndrome Probation Officer Screening and Referral Tool (the Asante Tool).[87] This pre-coded questionnaire enables collection of information on the social and neurodevelopmental history of the young person and the professional's knowledge of the young person and FASD.[88]

An evaluation comparing the red flag and Asante Tool screening methods found they identified different individuals as being at risk of FASD and recommended using both methods together.[89]

Beyond screening, the justice system can adapt its processes to take into account the challenging behaviours and impairments associated with neurodevelopmental impairment. By providing support to respond to communication challenges, children and adolescents will better understand complex legal language and proceedings. Speech pathologists, working in collaboration with local cultural and language advisors, are needed as a core service in youth justice systems.[90]

Given that behaviours are often misunderstood or misinterpreted, understanding an individual's behaviour using a FASD lens will help develop support and strategies based on an individual's strengths and difficulties. A strengths-based approach that enhances a child and adolescent's abilities and interests rather than their deficits, and a partnership with families, is central to planning and providing support.[91] Professionals may need to reframe their

86 S Longstaffe et al, "The Manitoba Youth Justice Program: empowering and supporting youth with FASD in conflict with the law" (2018) 96(2) *Biochemistry and Cell Biology* 260–266; D Singal et al, "Screening and assessment of FASD in a youth justice system: comparing different methodologies" in E Jonsson et al (eds), *Ethical and legal perspectives in Fetal Alcohol Spectrum Disorders (FASD)*, Springer International Publishing, 2018, pp 95–124.

87 Singal et al, ibid.

88 Longstaffe et al, above n 86.

89 Singal et al, above n 86.

90 "Drug and alcohol services (CICADA Centre NSW)", above n 24.

91 FASD HUB Australia, "Principles of management and successful interventions", updated 14/10/2021, accessed 24/7/2024.

expectations of children and adolescents' skills and abilities. Further, effective, coordinated and consistent support and interventions that are culturally appropriate are needed across an individual's lifespan, given that FASD is a lifelong disability.

Strengthening community-based support

In the pursuit of community-driven strategies to reduce youth crime, governments are implementing various initiatives ranging from curfews to substantial funding for crime prevention programs with a focus on supporting vulnerable populations such as First Nations children and adolescents. Addressing complex issues like FASD is needed as part of primary, secondary and tertiary crime prevention.

In 2022, to strengthen community capacity to prevent crime, the Australian Government committed $69 million over four years to the Justice Reinvestment Program, a crime prevention program that redirects funding from justice systems to targeted communities.[92] The approach aligns with the priority reforms in the *National Agreement on Closing the Gap*,[93] which aims to reduce the over-representation of First Nations children, adolescents and adults in the criminal justice system. These models provide evidence-based rehabilitation and diversionary programs that have better outcomes than prison by reducing crime and recidivism and are cheaper than detaining an adolescent — estimated in 2010–2011 at $16.73 per day in NSW compared with $652 per day for detention.[94]

In primary prevention, community-based support for children and adolescents with FASD can mitigate behavioural issues by promoting social inclusion for individuals with FASD. Community-based support, including recreational programs such as youth work, is vital to keeping children and adolescents engaged, developing their life skills and giving them meaningful activities to prevent youth crime. The federal Government's financial commitment to the Justice Reinvestment Program indicates a clear recognition of the value of shifting resources towards proactive, community-led initiatives that address the causes of crime.

There is also need for long-term infrastructure investment in First Nations community-controlled organisations to support First Nations children, adolescents and families, considering their unique cultural and historical contexts and the ongoing effects of colonisation and systemic inequalities. First Nations families living in remote areas have limited access to professionals trained in FASD and multidisciplinary teams.[95] This contributes additional barriers to the early detection and treatment of FASD. Stigma and shame are important considerations when screening for and diagnosing FASD in First Nations people.[96]

The *Australian FASD Indigenous Framework* guides First Nations and non-First Nations peoples to journey together to heal the harms from colonisation, which laid the foundations

92 Australian Government, Attorney-General's Department, "The Australian Government's justice reinvestment commitments", *Justice reinvestment*, accessed 24/7/2024.

93 Commonwealth of Australia, *National Agreement on Closing the Gap*, July 2020, accessed 26/7/2024.

94 Parliament of Australia, *Value of a justice reinvestment approach to criminal justice in Australia*, Report, June 2013, 3.8, p 20, accessed 24/7/2024.

95 T Tsang et al, National Health and Medical Research Council (NHMRC), *Early diagnosis of Fetal Alcohol Spectrum Disorder in Indigenous children*, 2021, accessed 26/7/2024.

96 S Hamilton et al, "Review of Fetal Alcohol Spectrum Disorder (FASD) among Aboriginal and Torres Strait Islander people" (2021) 2(1) *Journal of the Australian Indigenous HealthInfoNet* 1–40.

for FASD in First Nations communities.[97] Changes in ways of knowing, being and doing are proposed to enable space for two-way learning, respect and trust. The Framework draws on First Nations wisdom and practices, which are inherently strengths-based, presenting a transformative approach to healing and culturally-informed interventions in communities.

In secondary prevention, diversion programs are vital. In particular, First Nations children and adolescents with FASD can benefit from being diverted into non-stigmatising therapeutic alternatives run by First Nations people.[98] The co-design of a FASD assessment approach with First Nations workers identified a desire for shared responsibility, a more prominent role for First Nations health workers in the assessment process, and a greater emphasis on First Nations perspectives.[99] The National FASD Action Plan[100] identifies that community-controlled processes "on country" in First Nations communities will provide a culturally secure and appropriate environment for supporting children with FASD.

In tertiary prevention, community-based education, life skills training, therapeutic and diversionary activities and family support are crucial to facilitating community reintegration following contact with the youth justice system.[101] Access to age-appropriate drug and alcohol services which take into consideration the cognitive and behavioural challenges, care needs and supports for children and adolescents with FASD should be available. Without appropriate and widely-available community programs, including those that provide FASD support, children and adolescents experiencing disability and multiple disadvantage will continue to be criminalised.[102] Community-based education and therapeutic programs are key components of effective tertiary prevention, ensuring that children and adolescents have the skills and support necessary to lead constructive lives free from involvement in the justice system. In Australia, the National Disability Insurance Scheme (NDIS), therapies and behaviour management are just the start of support required for children and adolescents with FASD.

A three-year Canadian Youth Outreach Program (beginning in 2011) for First Nations young people with suspected FASD was evaluated positively.[103] The comprehensive program involved one-to-one support and advocacy by youth support workers. Youth Outreach Program activities[104] included: providing emotional and practical support (for example, transportation and accompaniment to meetings and appointments); assisting young people to understand legal or medical issues or service systems; advocating for young people to access legal, health, education, child welfare, recreational and/or support-related services; connecting young people to school through support with homework, attendance and communication with educators; support to apply for employment; promotion of safe recreation; connection with trusted

97 NN Hewlett et al, "Development of an Australian FASD Indigenous framework: Aboriginal healing-informed and strengths-based ways of knowing, being and doing" (2023) 20(6) *International Journal of Environmental Research and Public Health*.

98 Blagg and Tulich, above n 58.

99 L Miller et al, "Preventing drift through continued co-design with a First Nations community: refining the prototype of a tiered FASD assessment" (2022) 19(18) *International Journal of Environmental Research and Public Health* 11226.

100 *National Fetal Alcohol Spectrum Disorder (FASD) Strategic Action Plan*, above n 11.

101 NK Russell et al, "Therapeutic recommendations in the youth justice system cohort diagnosed with Foetal Alcohol Spectrum Disorder" (2021) 23(1) *Youth Justice*.

102 Save the Children and 54 Reasons, *Putting children first: a rights respecting approach to youth justice in Australia*, April 2023, accessed 5/8/2024.

103 C Hubberstey et al, "Evaluation of a three-year Youth Outreach Program for Aboriginal youth with suspected Fetal Alcohol Spectrum Disorder" (2014) 3(1) *The International Journal of Alcohol and Drug Research* 63–70.

104 ibid.

supports; assisting young people in finding safe housing; assisting young people with conflict resolution, peer and family relationships; and identifying risky behaviours and promoting harm reduction and healthy lifestyles.

The Youth Outreach Program outcomes[105] included improvements in safety, health (sexual health, mental wellbeing, nutrition, dental health), social relationships, support from peers and self-confidence; healthier relationships with partners; increased emotional and practical support; improved life skills, school-related success, job-related skills, knowledge and/or use of other community resources, and participation in healthy recreational activities; and reduced substance use. Although many young people were distrustful of programs, systems or workers, the Program's focus on providing support within the community and building trusting relationships over time deepened the intensity and effectiveness of the support-related activities.[106]

Conclusion

This paper explored the behavioural and cognitive implications of FASD for Australian children and adolescents in contact with the justice system. It is likely that significant numbers of children and adolescents with undiagnosed FASD encounter the justice system, where behaviours and communication can be misunderstood. Substantive action at multiple levels is urgently required to address the challenges faced by children and adolescents with FASD within the Australian justice system.

How can we move forward? To prevent interaction with the justice system, a proactive commitment is needed to the primary prevention of alcohol harm in pregnancy, early diagnosis of FASD and better support for children and adolescents with FASD and their families.

For secondary prevention of harm, we strongly argue that justice system reform is required. We need to start by acknowledging that custody is not the right place for children and adolescents with severe developmental or cognitive disability and is harmful to their physical and mental health. We must consider new ways to respond to youth crime, such as justice reinvestment models which shift costs and services into the community. These models provide rehabilitation and diversionary programs that provide alternatives to incarceration, are evidence-based, have better outcomes by reducing crime and recidivism, are far cheaper than custody and are preferable for children, including children with disability. There is also a need for investment in health and education for children and adolescents, particularly groups at higher risk of committing crime. By raising the age of criminal responsibility and investing in diversion programs, we will adopt a more humane approach to justice and ensure that vulnerable children and adolescents, like those with FASD, receive more appropriate, community-based support that is tailored to their needs.

In tertiary prevention, the justice system nationally must be improved to better support children and adolescents who have already committed a crime. We should screen all children and adolescents for FASD and other neurodevelopmental impairments at first contact with the justice system (and indeed at entry to the child protection system). Children and adolescents who are detained within the justice system and who have not accessed cognitive or FASD assessment in the community should be provided with FASD screening and neurocognitive assessment. We must help children and adolescents charged with a crime to understand their

105 ibid.
106 ibid.

court attendance notices and fact sheets and the consequences of their actions and assist them in making their plea. Children and adolescents in contact with the justice system require access to requisite healthcare and support to diagnose neurodevelopmental impairments such as FASD and tailor support to their strengths and difficulties. The justice system can be strengthened by identifying children and adolescents with FASD and responding appropriately by providing specialised support, including education and vocational training, that takes into account their strengths and difficulties to prevent reoffending or incarceration.

Without reform, children and adolescents with undiagnosed FASD may miss out on the support they need and continue to experience poor outcomes that could otherwise be avoided. A justice system that is attuned to the needs of children and adolescents with neurodevelopmental disabilities, including FASD, will not only mitigate the risk of reoffending but will also empower children and adolescents to build their strengths and overcome challenges.

Table 1. Neurodevelopmental domains, their impact on children and adolescents' functioning and potential challenges for the justice system

Neurodevelopmental domain	Impact on daily functioning	Challenges of impairment in function for the justice system
1. Brain structure/ neurology	Potential for seizures, cerebral palsy, vision and hearing impairment, and other neurological diagnoses.	Brain injury may result in significant illness, cognitive problems and sensory dysfunction.
2. Motor skills	Impaired fine and gross motor skills, graphomotor skills, balance, coordination and visuo-motor integration.	Difficulty with balance and coordination, handwriting, daily living skills, manual tasks, work, driving, operating machinery, and sports and recreational activities.
3. Cognition	IQ may be in the normal range or low (cognitive impairment or intellectual disability), with impaired verbal and non-verbal reasoning skills and processing speed.	Difficulty understanding court orders and charges; difficulty distinguishing right from wrong, comprehending consequences of actions, or learning from mistakes. Difficulty in reading and comprehending complex written and verbal instructions. May be suggestible, admit to a crime they did not commit, be an unreliable witness (cannot recall details or sequence of events), think slowly and require repeated instructions.
4. Language	Poor expressive and receptive language skills.	May appear to have good verbal skills but have difficulty understanding and complying with police or legal instructions or processes (eg inaccurate or incoherent when providing a statement or plea). First Nations children may need interpreters to translate charges or orders.
5. Academic achievement	Limited skills in reading, mathematics and/or literacy (including written expression and spelling).	Difficulty understanding written judgments or directions. May have specific learning difficulties in reading (eg dyslexia), writing or numeracy beyond what is expected for their IQ level, impacting education.

Neurodevelopmental domain	Impact on daily functioning	Challenges of impairment in function for the justice system
6. Memory	Difficulty accessing, selecting and organising required information. Impaired overall memory, verbal memory and visual memory.	May forget prior knowledge. Difficulty remembering complex instructions. May confabulate when memory fails, appearing to lie, but just “filling in the blanks”.
7. Attention	Attention deficits manifest as problems with concentration, task focus and work organisation. May have a diagnosis of ADHD.	Becomes easily distracted, overstimulated or impulsive. Inattention interferes with task completion. Difficulty sitting still. Difficulty transitioning from one task to another.
8. Executive function (EF), including impulse control, hyperactivity and working memory	Poor EF (planning and problem-solving, shifting and cognitive flexibility). Poor impulse control and inhibition response. May result in hyperactivity aggression. Poor working memory — unable to recall prior knowledge or skills.	Difficulty with planning, sequencing, problem-solving and organisation. Impulsive nature may result in unplanned acts of petty crime aggression. Transitions and change are challenging. Repeats mistakes and has difficulty understanding what is wrong and the consequences of actions. Difficulty controlling emotions. Lacks understanding of abstract ideas. Difficulty managing time — may miss or be late for court appearances.
9. Affect regulation	Disrupted mood. May have diagnoses of anxiety, depression, conduct disorder or panic attacks.	Experiences emotional swings. Mental illness affects everyday functioning and participation, and social interactions.
10. Adaptive behaviour, social skills or social communication	Lacks the skills required to live safely, independently and socially responsibly. May have a diagnosis of Autism.	Lack of empathy, social judgment, interpersonal communication skills, and the ability to connect with people and make and retain friendships. Lack of skills required for self-management in personal care and daily living, job responsibilities, money management, recreation and organising at school and work.

Sentencing juvenile offenders on indictment

His Honour Judge Gordon Lerve*

Sentencing juvenile offenders on indictment is uncommon and involves the application of different principles to those applied to adult offenders. Sentencing juvenile offenders involves the application of the Children (Criminal Proceedings) Act 1987 (the Act) as well as the various common law principles regarding rehabilitation. An important consideration is whether the offence is a children's serious indictable offence or whether s 18(1A) of the Act applies and a determination needs to be made whether to deal with those offences according to law or in accordance with Pt 3 Div 4 of the Act. Other differences in sentencing juvenile offenders from adult offenders are: not recording a conviction; the inadmissibility of previous criminal record; the requirement for a background report if a custodial sentence is being imposed; service of a custodial sentence in a juvenile justice institution; the application of the R v Henry guideline judgment for robbery offences and a discretion not to include a juvenile on the Child Protection Register.

Introduction ..... [12-9500]

Children's serious indictable offences

Other offences — need for determination whether to deal with according to law

Section 6 Children (Criminal Proceedings) Act

Principles to be applied according to the authorities

Recording a conviction

Criminal history or record

Requirement for a Juvenile Justice Background Report if a sentence of custody is being considered

Section 33 Children (Criminal Proceedings) Act

Offender over 18 may serve a sentence in a juvenile justice institution

Henry guideline applies to juveniles

SNPPs do not apply to juvenile offenders

Discretion not to have a juvenile on the Child Protection Register

Conclusion

[12-9500] Introduction

Last reviewed: June 2024

Sentencing is part of the routine work of a judge. However, sentencing juvenile offenders on indictment is relatively uncommon. The short decision of the Court of Criminal Appeal in

* Judge of the District Court of NSW. Previously published in (2023) 1(1) *Judicial Quarterly Review* 31.

LD v R [2016] NSWCCA 217 highlighted a number of issues so far as sentencing juvenile offenders is concerned, particularly on indictment in the Supreme and District Courts. The principal reason why the appeal was upheld is because at first instance the relevant provisions of the *Children (Criminal Proceedings) Act 1987* were not applied. Particular care needs to be taken when sentencing juvenile offenders on indictment. One particular aspect is whether the offence is a children's serious indictable offence.

Children's serious indictable offences

Almost all criminal offences committed by juveniles are dealt with to finality in the Children's Court. However, there are a number of offences which are defined within s 3 *Children (Criminal Proceedings) Act* as children's serious indictable offences that are not justiciable in the Children's Court. Those matters are:

(a) homicide,

(b) an offence punishable by imprisonment for life or for 25 years,

(c) an offence arising under s 61J (otherwise than in circumstances referred to in subs (2)(d) of that section) or s 61K of the *Crimes Act 1900* (or under s 61B of that Act before the commencement of Sch 1(2) to the *Crimes (Amendment) Act 1989*),

(c1) an offence under the *Firearms Act 1996* relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years,

(d) the offence of attempting to commit an offence arising under s 61J (otherwise than in circumstances referred to in subs (2)(d) of that section) or s 61K of the *Crimes Act 1900* (or under s 61B of that Act before the commencement of Sch 1(2) to the *Crimes (Amendment) Act 1989*), or

(e) an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.

Section 61J(2)(d) *Crimes Act* provides for the circumstance of aggravation of the complainant being under 16 years of age.

Section 17 *Children (Criminal Proceedings) Act* provides that "children's serious indictable offences must be dealt with according to law". "According to law" in s 17 means "according to the principles of sentencing ordinarily applied by the courts, without reference to those provisions in Pt 3, Div 4 of the *Children (Criminal Proceedings) Act* which are otherwise applicable only in the Children's Court. Part 3, Div 4 comprises ss 32–38, wherein available penalties are prescribed".[1]

Other offences — need for determination whether to deal with according to law

Often when dealing with a children's serious indictable offence, there will be other offences which the court will need to pass sentence that are not children's serious indictable offences. Although any children's serious indictable offence must be dealt with according to law, in respect of any other indictable offence which the court is passing sentence, s 18(1A) *Children (Criminal Proceedings) Act* will need to be considered and a determination made whether to deal with those offences according to law or in accordance with Pt 3 Div 4 of the Act.

1 *R v WKR* (1993) 32 NSWLR 447 at 449; *R v AR* [2022] NSWCCA 5 at [14].

Section 18(1A) relevantly provides:

> In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:
>
> (a) the seriousness of the indictable offence concerned,
>
> (b) the nature of the indictable offence concerned,
>
> (c) the age and maturity of the person at the time of the offence and at the time of sentencing,
>
> (d) the seriousness, nature and number of any prior offences committed by the person, and
>
> (e) such other matters as the court considers relevant.

A situation can also arise where sentence is to be passed in respect of a serious children's indictable offence and there are related matters attaching to a Certificate pursuant to s 166 *Criminal Procedure Act 1986* that are not children's serious indictable offences. Although it would be preferable for a determination to be made whether to deal with those matters according to law or in accordance with Pt 3 Div 4 *Children (Criminal Proceedings) Act*, it has been held by the Court of Criminal Appeal that it is permissible for summary and table offences attaching to a s 166 Certificate to be dealt with at the same time, and in the same manner, as the serious children's indictable offence.[2]

Section 6 Children (Criminal Proceedings) Act

In passing sentence on a juvenile offender, reference should always be had to s 6 *Children (Criminal Proceedings) Act*, and preferably should be set out in full within the reasons. The section relevantly provides:

> A person or body that has functions under this Act is to exercise those functions having regard to the following principles:
>
> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
>
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
>
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
>
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
>
> (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,
>
> (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
>
> (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
>
> (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

2 *DJ v R* [2017] NSWCCA 319 at [68]–[73], [86]–[88] per Johnson J (Macfarlan JA, Hulme J agreeing).

Justice Yehia said recently in *R v KS (No 1)* [2023] NSWSC 696 at [122]:

> As was noted by Hamill J in *Paul Campbell v R* [2018] NSWCCA 87 at [27]–[29] it is significant that paragraph (h) provides that the effect of the crime on the victim (or victims) is to be considered but that this is "subject to" the principles set out in paragraphs (a)–(g). The fundamental principles set out in s 6 remain relevant where the offence is to be dealt with according to law.

Principles to be applied according to the authorities

The aspect of rehabilitation attains a much greater emphasis in a sentencing exercise involving a juvenile offender. However, the objective criminality and other aspects of the sentencing process are not overlooked merely because the offender is a juvenile, particularly where the offending is serious. Chief Justice McClellan in *R v KT* [2008] NSWCCA 51 at [21]–[26] succinctly summarised the authorities relating to sentencing juvenile offenders. His Honour was in dissent on the ultimate issue, however, with unfeigned respect, the judgment is an excellent summary of the relevant principles. His Honour said at [22]–[26]:

> The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence. In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation. These principles were considered in *R v GDP* (1991) 53 A Crim R 112 at 115–116 (NSWCCA), *R v E (a child)* (1993) 66 A Crim R 14 at 28 (WACCA) and *R v Adamson* (2002) 132 A Crim R 511; [2002] NSWCCA 349 at [30].
>
> The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age. (*R v Hearne* (2001) 124 A Crim R 451; [2001] NSWCCA 37 at [25]). The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence (*Hearne* at [24]). Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult. (*Hearne* at [25]; *R v MS2* (2005) 158 A Crim R 93; [2005] NSWCCA 397 at [61]).
>
> Although accepted to be of less significance than when sentencing adults, considerations of general deterrence and retribution cannot be completely ignored when sentencing young offenders. There remains a significant public interest in deterring antisocial conduct. In *R v Pham and Ly* (1991) 55 A Crim R 128 Lee CJ at CL said (at 135):
>
> > "It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. *In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their own homes*. It is appropriate to refer to the decision of *Williscroft* (1975) VR 292 at 299, where the majority of the Full Court of Victoria expressed the view that, notwithstanding the enlightened approach that is now made to sentencing compared to earlier days, the concept of punishment ie coercive action is fundamental to correctional treatment in our society."
>
> The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him or herself in the way an adult might conduct him or herself and has committed a crime of violence

> or considerable gravity (*R v Bus*, unreported, NSWCCA, 3 November 1995, Hunt CJ at CL; *R v Tran* [1999] NSWCCA 109 at [9]–[10]; *R v TJP* [1999] NSWCCA 408 at [23]; *R v LC* [2001] NSWCCA 175 at [48]; *R v AEM Snr, KEM and MM* [2002] NSWCCA 58 at [96]–[98]; *R v Adamson* (2002) 132 A Crim R 511 at [31]; *R v Voss* [2003] NSWCCA 182 at [16]). In determining whether a young offender has engaged in "adult behaviour" (*Voss* at [14]), the court will look to various matters including the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and the nature and circumstances of the offence (*Adamson* at [31]–[32]). Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.
>
> The weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity (*R v Hoang* [2003] NSWCCA 380 at [45]). A "child-offender" of almost eighteen years of age cannot expect to be treated substantially differently from an offender who is just over eighteen years of age (*R v Bus*, unreported, NSWCCA, 3 November 1995; *R v Voss* [2003] NSWCCA 182 at [15]). However, the younger the offender, the greater the weight to be afforded to the element of youth (*Hearne* at [27]).

The Court of Criminal Appeal also extensively reviewed the issue of sentencing juvenile offenders in *R v BP* [2010] NSWCCA 159. Justice Johnson said in that decision at [98]–[103]:

> The authorities make clear that the youth and immaturity of a young offender are matters to be taken into account in passing sentence. Emphasis is given to this issue by s 6(b) *Children (Criminal Proceedings) Act 1987*, which requires a sentencing court to have regard to the principle that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance (see [73] above). The fact that youth and immaturity may be relevant to sentence may serve to explain why the standard non-parole period system does not apply to juvenile offenders. The weight to be given to an offender's youth and immaturity will depend upon the circumstances of the particular case.
>
> The applicable principle is that where immaturity is a significant contributing factor to an offence, then it may fairly be said that the criminality involved is less than it would be in the case of an adult of more mature years: *R v Hearne* [2001] NSWCCA 37; 124 A Crim R 451 at 458 [25]; *KT v R* at 577 [23].
>
> Factors such as youth and immaturity do not have automatic consequences in the exercise of sentencing discretion. A process of individualised justice is involved in which a sentence is passed having regard to the circumstances of the offence and the offender: *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 at 276 [147]. This process involves an assessment of the role of youth and immaturity in the particular case. In making this assessment, a sentencing court should take into account what the evidence reveals concerning the significance of youth and immaturity, including the degree of learning, experience and understanding of the young offender of relevant legal rules and the consequences of breaking those rules.
>
> It may be taken that the Applicant had the maturity of a person aged 16 years, 11 months and three weeks at the time of the commission of the sexual assault on 6 March 2008. However, the Applicant possessed as well by that time, the considerable experience, learning and understanding which he had acquired from his involvement with the criminal justice system following his earlier sexual assault offence and the process of sexual assault counselling which he had received whilst in custody and after his return to the community. In my view, a practical and concrete assessment of the role of the Applicant's youth and immaturity in the commission of this offence requires these aspects of the Applicant's makeup (which are known to the Court) to be taken into account. An assessment of the role of youth and immaturity on sentence is not an abstract process.
>
> The need for the law to avoid an abstract or automatic response to the youth and immaturity of an offender is illustrated by sentencing cases in Victoria and New South Wales for the offence

> of dangerous driving causing death. The laws of these States permit persons aged 17 years to obtain a driver's licence with the attendant obligations and responsibilities attaching to that privilege. The youth, immaturity and inexperience of an offender who kills or seriously injures persons whilst driving dangerously play a limited and subordinate role on sentence: *Director of Public Prosecutions v Neethling* [2009] VSCA 116; (2009) 22 VR 466 at 474–475 [40]–[44], 477 [53]–[55]; *SBF v R* [2009] NSWCCA 231 at [141]–[160]; *TG v R* [2010] NSWCCA 28 at [33].
>
> Hodgson JA identified certain factors at [6] which were to be taken into account. To these factors, I would add the learning, experience and understanding of the Applicant concerning this class of offence. As *KT v R* makes clear at 578 [25], in determining whether an offender has engaged in adult behaviour, a sentencing court will look at a range of matters including the existence of an extensive criminal record, as well as the type of factors referred to by Hodgson JA. This reflects the fact that a repeat offender, such as this Applicant, may have acquired a level of knowledge, understanding and insight into his offending behaviour, but nevertheless committed a further offence.

Hodgson JA said at [4]–[6]:

> First, statements that, in relation to young offenders, principles of retribution may be of less significance and considerations of rehabilitation may be of more significance, may tend to obscure the point that even in relation to retribution the youth of an offender may be a mitigating circumstance. In my understanding, considerations of retribution direct attention to what the offender deserves; and in my opinion, where emotional immaturity or a young person's less-than-fully-developed capacity to control impulsive behaviour contributes to the offending, this may be seen as mitigating culpability and thus as reducing what is suggested by considerations of retribution: see *TM v R* [2008] NSWCCA 158 at [33]–[36].
>
> Second, while I agree with the statements in *KT* at [26] that the weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity, and that a "child offender" of almost 18 years cannot expect to be treated substantially differently from an offender who is just over 18 years of age, it does not follow that the age of maturity is 18 (albeit that for certain purposes the law does draw a line there: *Children (Criminal Proceedings) Act 1987*). In my understanding, emotional maturity and impulse control develop progressively during adolescence and early adulthood, and may not be fully developed until the early to mid twenties: see *R v Slade* [2005] 2 NZLR 526 at [43], quoted by Kirby J in *R v Elliott* [2006] NSWCCA 305; (2006) 68 NSWLR 1 at 27 [127]. As shown by *R v Hearne* [2001] NSWCCA 37; (2001) 124 A Crim R 451, youth may be a material factor in sentencing even a 19 year old for a most serious crime.
>
> Third, I do not think courts should be over-ready to discount the relevance of an offender's youth on the basis that the offender has engaged in adult behaviour or acted as an adult. In the present case, the offence is a very serious one; but it did not involve significant planning or reflection, or any other indicia of mature decision-making. The applicant was 16 years old, and in my opinion the circumstances of the offence suggest rather that emotional immaturity and less-than-fully-developed capacity to control impulses were likely to be contributing factors.

On the issue of rehabilitation, Hodgson JA said at [84]–[85]:

> This Court has observed that there can be rehabilitation without confession, and that offenders found guilty after trial are not to be automatically deprived of a finding of good prospects of rehabilitation unless they acknowledge their guilt: *Alseedi v R* [2009] NSWCCA 185 at [65]; *Ali v R* [2010] NSWCCA 35 at [48]. Nevertheless, it has been said that remorse will be a major factor in determining whether an offender is unlikely to reoffend and has good prospects of rehabilitation and that, without true remorse, it is difficult to see how either finding could be made: *R v MAK*

> [2006] NSWCCA 381; 167 A Crim R 159 at 169–170 [41]; *Ali v R* at [47]. A particular difficulty for the Applicant in this respect is that his denial of guilt concerning the 2003 sexual assaults is accompanied by the fact that he reoffended, in a similar way, in 2008 (and again denies his guilt) despite custodial and community sex-offender counselling in the intervening period. This element of recidivism does not bode well for the Applicant's prospects of reoffending.
>
> It is desirable that children who commit offences accept responsibility for their actions and consideration should be given to the effect of the crime on the victim: s 6(g), (h) *Children (Criminal Proceedings) Act 1987*. The purposes of punishment include the making of the offender accountable for his actions and the recognition of harm done to the victim of the crime and the community: s 3A(e), (g) *Crimes (Sentencing Procedure) Act 1999*. The lack of contrition and remorse on the Applicant's part means that no act or statement on his part serves these purposes.

The seriousness of the offending is not irrelevant in sentencing juvenile offenders. Justice Hall in his remarks on sentence in *R v JP* [2014] NSWSC 698 at [130]–[131] said:

> The weight of authority is that the seriousness of an offence is relevant to the emphasis that can be given to the youth of an offender. It has been observed, however, that that does not mean that youth is not an important consideration; but retribution and deterrence cannot, in a case as serious as the present case, give way entirely or even substantially to the interests of rehabilitation: *JM v R* [2012] NSWCCA 83 per Simpson J at [108] (dissenting but not on this point).
>
> In a case such as the present where there was a use of extreme violence occasioning death and occurring in the circumstances to which I have referred, general deterrence and retribution cannot be ignored.

What was said in *R v BP* have been followed many times. A recent example is the remarks on sentence of Rothman J in *R v Kovaleff* [2023] NSWSC 302. His Honour said at [124]:

> In dealing with youth crime, it is necessary to take into account the principles that apply to persons who have not yet fully developed maturity and, in that, not yet fully developed an appreciation of the full consequences of their actions. As made clear by Hodgson JA in *BP v R*, relying on earlier judgements of the Court and the Court's experience, emotional maturity and impulse control develop progressively during adolescence and early adulthood and are not fully developed until the early to mid-20's.

This was also cited with approval by Yehia J in *R v KS (No 1)*, above, at [123]ff. Her Honour sets out a number of authorities to the same effect including *JA v R* [2021] NSWCCA 10 at [56], *Miller v R* [2015] NSWCCA 86 at [96] per Schmidt J and *Sarhene v R* [2022] NSWCCA 79 at [25].

However, driving cases are generally an exception to where youth is a mitigating factor. Justice Howie in giving the judgment of the Court in *TG v R* [2010] NSWCCA 28 at [33] said:

> Thirdly, evidence from a psychiatrist as to the immaturity of young males of the age of the applicant was irrelevant. If a young male is old enough to be licensed to drive a motor vehicle, he is to be assumed to be mature enough to comply with its conditions and the traffic rules. In *SBF v R* [2009] NSWCCA 231; 53 MVR 438 Johnson J stated at [151]:
>
> > Ms Francis referred in submissions to the Applicant "having little appreciation of his own mortality" (T5.35, 22 June 2009). The Applicant's counsel in the District Court had submitted that "it is also a fact of life that people at this tender age tend to — their brains tend to not allow them to deal with the responsibility that they sometimes demand so vocally" (T6.10, 5 August 2008). In a similar vein, the sentencing Judge in the Victorian

> County Court in *Neethling* at [51] had observed that the offender "like many young men ... saw [himself] as 'bullet proof'". The fact that young men (in particular) may have such perceptions is a significant reason for general deterrence to be a prominent factor in cases such as these. Inexperience and immaturity, in persons aged 17 years and over, cannot operate as mitigating factors where the offender commits grave driving offences, with fatal consequences, as exemplified by *Neethling* and this case.

The reference to "*Neethling*" was a reference *DPP v Neethling* [2009] VSCA 116; (2009) 52 MVR 422.

See also for example *R v AB* [2011] NSWCCA 229 at [101]; *WW v R* [2012] NSWCCA 165 at [68]ff; and the additional comments of Bell P (as the Chief Justice then was) in *Byrne v R* [2021] NSWCCA 185 at [5].

Recording a conviction

Section 14 *Children (Criminal Proceedings) Act* relevantly provides:

> (1) Without limiting any other power of a court to deal with a child who has pleaded guilty to, or has been found guilty of, an offence, a court—
>
> (a) shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years, and
>
> (b) may, in respect of an offence which is disposed of summarily, refuse to proceed to, or record such a finding as, a conviction in relation to a child who is of or above the age of 16 years.
>
> (2) Subsection (1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily.

"Disposed of summarily" means disposed of in the Children's Court. In *R v AR* [2022] NSWCCA 5 at [17] the Court of Criminal Appeal (Meagher JA, Wright and Fagan JJ) said:

> We respectfully disagree with that interpretation. When the District Court is dealing according to law with a serious children's indictable offence, subs (2) of s 14 does not confer a discretion upon that court to record or not to record a conviction. The subsection is not expressed in the language of conferring a discretion and it does not have that effect. The clear words of the subsection confine its effect to that of negating a limitation prescribed elsewhere, namely in subs (1)(a). With that limitation removed, the question whether his Honour had power to refrain from recording a conviction when imposing a Community Correction Order was to be answered, in Hunt CJ at CL's words, "according to the principles of sentencing ordinarily applied by the courts". Those principles, relevantly, include that under s 8 of the *Crimes (Sentencing Procedure) Act*, a Community Correction Order may only be imposed upon a person who has been convicted.

A little later the Court said at [19]:

> The respondent contended that, where a charge against a child is "not disposed of summarily", the District Court's power to record or not to record a conviction is wider than the power, in that respect, that is applicable to all adult offenders pursuant to the general law of sentencing. The respondent submitted that the source of the wider discretion is s 14(2). In support of that interpretation the respondent appealed to "section 18, and the scheme of the Act, permitting 'other indictable offences' to be dealt with by a higher court as if sentenced by the Children's Court". The respondent submitted that when subs (2) is read "in context with the purpose and scheme of

> the Act", it is amenable to interpretation as the source of a discretion, independent of the general law, not to enter a conviction in the case of any child who is dealt with for an offence "according to law". We are not able to find in the Act any definitive scheme or context that points to such an interpretation and that would thereby contradict the straightforward language of s 14(2).

Criminal history or record

Section 15 *Children (Criminal Proceedings) Act* provides:

> (1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if—
>
> (a) a conviction was not recorded against the person in respect of the first mentioned offence, and
>
> (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.
>
> (2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.
>
> (3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act 1997* (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

In *Dungay v R* [2020] NSWCCA 209 at [92], Adams J (Bell P (as the Chief Justice then was), Davies J agreeing) said:

> The practical effect of s 15 is that if a child is found guilty in the Children's Court but without any conviction entered and the offender is not subject to any other judicially-imposed punishment for a period of two years then the finding of guilt is not admissible in any subsequent criminal proceedings.

This is also something of which judges of the District Court should be aware when dealing with appeals from the Children's Court. Depending on the length of the history tendered it can be somewhat laborious to determine whether there is in fact that period of two years.

Requirement for a Juvenile Justice Background Report if a sentence of custody is being considered

In the event that the court is contemplating imposing a custodial sentence on a juvenile offender, that is, either according to law or in accordance with Pt 3 Div 4 *Children (Criminal Proceedings) Act*, it is necessary for the court to consider a Juvenile Justice Background Report. Section 25 *Children (Criminal Proceedings) Act* provides:

> (1) This section applies to a person—
>
> (a) who has pleaded guilty to an offence (other than contempt of court) in, or has been found guilty or convicted of an offence (other than contempt of court) by, a court,
>
> (b) who was a child when the offence was committed, and
>
> (c) who was under the age of 21 years when charged before the court with the offence.

(2) A court shall not sentence a person to whom this section applies to a term of imprisonment, or make an order under s 33(1)(g) in respect of the person, in connection with an offence unless—

(a) a background report, prepared in accordance with the regulations, has been tendered in evidence with respect to the circumstances surrounding the commission of the offence, and

(b) copies of the report have been given to the child and any other person appearing in the proceedings, and

(c) the court has, subject to the rules of evidence, taken into account the matters contained in the report and any submissions made in relation to those matters by the persons referred to in paragraph (b).

Section 33 Children (Criminal Proceedings) Act

This section only applies to offences that are not children's serious indictable offences and the court is dealing with the juvenile offender pursuant to Pt 3 Div 4 *Children (Criminal Proceedings) Act*. The section sets out the penalties available.

Offender over 18 may serve a sentence in a juvenile justice institution

Section 19(1) provides:

> If a court sentences a person under 21 years of age to whom this Division applies to imprisonment in respect of an indictable offence, the court may, subject to this section, make an order directing that the whole or any part of the term of the sentence of imprisonment be served as a juvenile offender.
>
> **Note:** The effect of such an order is that the person to whom the order relates will be committed to a detention centre (see subsection (6)). There he or she will be detained as specified in the order. In certain circumstances, he or she may subsequently be transferred to a correctional centre pursuant to an order under s 28 *Children (Detention Centres) Act 1987*.
>
> **Note:** Section 9A *Children (Detention Centres) Act 1987* provides that persons who are 18 years of age or older are not to be detained in a detention centre in certain circumstances.

In particular, note the restrictions in s 19(3) if met with this situation.

Henry guideline applies to juveniles

The decision of *SDM v R* (2001) 58 NSWLR 530 is authority for the proposition that the guideline judgment of *R v Henry* (1999) 46 NSWLR 346 applies to juvenile offenders. Chief Justice Wood at [7] said:

> If the effect of these decisions was to construe *Henry* in a way that would entirely exclude its application to juvenile offenders, ie those who qualify as a "child" within the meaning of the *Children (Criminal Proceedings) Act 1987*, s 3(1), then that approach would, in my view, have been inappropriate, having regard to the nature and purpose of a guideline judgment.

Justice Giles at [4] specifically agreed with Wood CJ at CL. Justice Simpson (as her Honour then was) said at [40]:

> That does not mean that the guideline is of no relevance to offenders under the age of eighteen years. Like all guideline judgments, *Henry* is to be applied flexibly.

SNPPs do not apply to juvenile offenders

Section 54D(3) *Crimes (Sentencing Procedure) Act 1999* provides that standard non-parole periods to not apply to persons under 18 years at the time of the offending.

Discretion not to have a juvenile on the Child Protection Register

Note carefully the provisions of s 3A(2)(c) *Child Protection (Offender's Registration) Act 2000*. Also note the decision of *Cmr of Police v TM* [2023] NSWCA 75 where the offence involved related to child abuse material. Each child depicted is a separate victim.

Relevantly s 3C *Child Protection (Offender's Registration) Act* provides:

(1) A court that sentences a person for a sexual offence committed by the person when the person was a child may make an order declaring that the person is not to be treated as a registrable person for the purposes of this Act in respect of that offence.

(2) While the order remains in force, the person is not a registrable person under this Act because of that offence.

(3) A court may make an order under this section only if:

(a) the victim of the offence was under the age of 18 years at the time that the offence was committed, and

(b) the person has not previously been convicted of any other Class 1 offence or Class 2 offence, and

(c) the court does not impose in respect of the offence

(i) a sentence of full-time detention, or

(ii) a control order (unless the court also, by order, suspends the execution of the control order), and

(d) the court is satisfied that the person does not pose a risk to the lives or sexual safety of one or more children, or of children generally.

(4) This section applies only if the sexual offence concerned is a registrable offence and does not limit s 3A(2)(c) as it applies to offences committed by children.

(5) If an order is made under this section, the order is taken, for the purpose of any provisions that enable the Crown or a prosecutor to appeal against a sentence imposed on the person, to be a part of the person's sentence.

(6) In this section:

"control order" means an order under s 33(1)(g) *Children (Criminal Proceedings) Act 1987*.

"full-time detention" has the same meaning as in the *Crimes (Sentencing Procedure) Act 1999*.

"sexual offence" means the following offences regardless of when the offence occurred:

(a) an offence under a provision of Division 10, 10A, 15 or 15A of Part 3 *Crimes Act 1900* or under section 91J, 91K or 91L of that Act,

(b) an offence under a provision of that Act set out in Column 1 of Schedule 1A to that Act,

(c) an offence under section 233BAB *Customs Act 1901* of the Commonwealth involving items of child pornography or child abuse material,

(d) an offence under Subdivision D of Division 474 of Part 10.6 of the *Criminal Code* of the Commonwealth,

(e) an offence of attempting to commit any offence referred to in paragraphs (a)–(d),

(f) an offence under a previous enactment that is substantially similar to an offence referred to in paragraphs (a)–(e).

Conclusion

Juvenile offenders can commit very serious offences. However, sentencing juvenile offenders involves the application of principles that are markedly different to those applied to adult offenders. Particular care needs to be taken to apply the relevant provisions of the *Children (Criminal Proceedings) Act* as well as the various common law principles referred to within this article.

The involvement of young people aged 10 to 13 years in the NSW criminal justice system

K Freeman and N Donnelly*

Abstract ..... [12-9600]

[12-9600] Abstract

Last reviewed: November 2024

This paper examines interactions between young people aged 10 to 13 years and the New South Wales (NSW) criminal justice system. It seeks to inform the current discussion on the minimum age of criminal responsibility by examining the number and nature of legal proceedings initiated against young people aged 10 to 13 years, the outcomes and penalties imposed by the NSW Children's Court and the number of young people under 14 years of age held in youth detention.

"The involvement of young people aged 10 to 13 years in the NSW criminal justice system", NSW Bureau of Crime Statistics and Research, August 2024.

* NSW Bureau of Crime Statistics and Research.

What do I need to know about representing children?

C Akthar* and R Carty†

Abstract ..... [12-9700]

[12-9700] Abstract

Last reviewed: March 2025

A guide to representing children facing criminal charges for duty lawyers. This paper is intended to cover the fundamental ways in which appearing for defendants in the Children's Court differs from appearing in the Local Court, and offer a guide for practitioners in how to approach matters in the Children's Court. It is not designed to cover each topic practitioners need to know, but rather as a roadmap, to give practitioners a sense of what issues are useful to keep in mind, and some practical advice.

C Akthar and R Carty, "What do I need to know about representing children?", 2nd ed, Legal Aid NSW, 2022.

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Checklist for judicial officers — disabilities and communication disorders

Overview ..... [12-9800]

[12-9800] Overview

The "Checklist for judicial officers — disabilities and communication disorders" has been developed by Rukiya Stein, Accredited Witness Intermediary, Independent Communication Intermediary.

Review of the operation of doli incapax in NSW for children under 14

G Bellew and J Loy

Abstract ..... [12-9900]

[12-9900] Abstract

This review evaluates the operation of the presumption of *doli incapax* for children under 14. It includes reference to various diversionary schemes, including under the *Young Offenders Act 1997* and the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, as well as community based intervention programs to ensure diversion away from the criminal justice system results in reduced recidivism. The review contains various recommendations on broadening the available pathways for police and the courts to engage with children aged 10–13 who have committed an offence, with a stronger focus on behavioural and case management. The authors generally find that the presumption of *doli incapax* alone does not reduce serious or persistent offending, and requires support from targeted therapeutic mechanisms to produce effective outcomes.

G Bellew and J Loy, *Review of the operation of doli incapax in NSW for children under 14*, 2025.

Apprehended violence orders

Practice and procedure ..... [13-1000]

Practice notes ..... [13-1020]

Legislation ..... [13-1040]

[13-1000] Practice and procedure

Last reviewed: May 2023

For information on apprehended violence orders involving children, see *Local Court Bench Book* at **[24-000]**ff.

[13-1020] Practice notes

Last reviewed: May 2023

Practice Note 8: Apprehended domestic and personal violence proceedings in the Children's Court

Practice Note commenced 7 May 2012.

[13-1040] Legislation

Last reviewed: May 2023

Crimes (Domestic and Personal Violence) Act 2007

Children — apprehended domestic violence orders (Part 4) — application for making of apprehended domestic violence order by the court (s 15) — court may make apprehended domestic violence order (s 16) — matters to be considered by the court (s 17) — apprehended personal violence orders (Part 5) — application for making of apprehended personal violence order by the court (s 18) — court may make apprehended personal violence order (s 19) — matters to be considered by the court (s 20) — referral of matters to mediation (s 21) — content and effect of apprehended violence orders (Part 8) — additional measures for support and protection of children and others in proceedings (Part 9) — apprehended violence — proceedings to be held in the absence of the public if defendant is under the age of 18 years (s 58)

Compulsory schooling orders

Practice and procedure ..... [14-1000]
Relevant legislative provisions
Practice notes ..... [14-1020]
Legislation ..... [14-1040]

[14-1000] Practice and procedure

Rachel Dart, SIC — Care & Protection, 13 October 2010, revised August 2012.

On 1 January 2010 amendments to the *Education Act 1990*[1] commenced, enabling the Department of Education and Communities to apply to the Children's Court for compulsory schooling orders in circumstances where a child of compulsory school-age is not receiving compulsory schooling.

Relevant legislative provisions

Compulsory school-age (s 21B)

- Of or above the age of 6 and below the minimum school-age.
- "Minimum school-age" is the completion of year 10 or 17 years (whichever occurs first). However, a child who has completed year 10 but is not yet 17 years old is of compulsory school-age unless the child participates, on a full-time basis in:
  - Approved education or training;[2]
  - If the child is of or above the age of 15 years — paid work or a combination of approved education or training and paid work.

Duty of parents (s 22)

It is the duty of a parent[3] to cause a child of compulsory school-age to be:

- enrolled at, and to attend, school; or
- be registered for home schooling and receive instruction in accordance with the conditions to which the registration is subject.

Conferences to deal with unsatisfactory school attendance (s 22C)

The Children's Court may order a conference of all relevant parties if a child is not receiving compulsory schooling.[4]

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1 As amended by the *Education Amendment (School Attendance) Act 2009*.
2 Defined by s 21B(6) as participation in a higher education course, a vocational education training (VET) course, and apprenticeship or traineeship or any other education and training approved of by the Minister.
3 Defined as including a guardian or other person having the custody or care of a child: s 3.
4 The Secretary of the Department of Education and Communities may also direct that such a conference occur at any time before or after such proceedings: s 22C(1)(b).

The primary purpose of the conference is to ensure that a child is provided with compulsory schooling and the conference may:

(a) identify and resolve any issues in dispute, and

(b) identify any services directed to the child or family which will assist the child to attend school, and

(c) formulate undertakings and orders for consideration by the Children's Court.

Parties are entitled to be legally represented at the conference.

Anything said or done or any document prepared in relation to the conference (other than the undertakings arising from the conference) are not admissible in any proceedings before any court or other body other than in care proceedings.[5]

Compulsory schooling orders (s 22D)

A compulsory schooling order may be made by the Children's Court on the application of the Secretary of the Department of Education and Communities.

That order may require a parent to cause a child to receive compulsory schooling in accordance with the terms of that order.

Such order may be directed against a child who is aged 12 years and above in circumstances where the Children's Court is satisfied that:

- the child is living independently from his or her parents or
- the parents are unable, because of the child's disobedience, to cause the child to receive compulsory schooling.

A compulsory schooling order may be made as both an interim and final order and may be revoked on the application of the Secretary of the Department of Education and Communities or any other party.

When making a compulsory schooling order (or when dismissing an application or revoking such an order), the court may:

(a) accept written undertakings from a parent, and from any other participant to the conference; and

(b) may recommend that a relevant institution[6] provide services to the child or their family in order to assist the child to receive compulsory schooling.

Such orders cease to have effect at the end of the period specified in the order or when the child ceased to be of compulsory school-age, whichever occurs first.

Penalties

It is a criminal offence for a parent of a child of compulsory school-age to fail to cause a child to be enrolled and to attend school (s 23). Such prosecutions are commended by the Department of Education and Communities in the Local Court.

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5 Under Ch 5 *Children and Young Persons (Care and Protection) Act 1998*.

6 Defined meaning a government department or other public authority (whether Commonwealth, State or Territory), including a government school or registered non-government school, any registered vocational training organisation and any non-government organisation that is in receipt of government funding: s 3.

If a parent has been found guilty of an offence under s 23 in circumstances where there is a compulsory education order in place, the maximum penalty is increased to 100 penalty units (currently $11,000).

In the case of a child above the age of 15 fails to comply with the order without reasonable excuse, the child is guilty of an offence and the maximum penalty which may be imposed is 1 penalty unit ($110) with no conviction recorded.

The Act does not prescribe any penalty in the case of a child aged between 12 and 15 who fails to comply with a compulsory schooling order.

Procedure

When a child's school attendance falls below 80% (equivalent to non-attendance exceeding two days missed per fortnight), departmental practice is that a school may refer the child to a field officer who will then work with the child and family over a period of 10 weeks with the aim of improving school attendance.

If the child's school attendance does not reach an acceptable level after that 10 week period, the matter must be referred for legal action.

Proceedings for a compulsory education order are commenced in the Children's Court by way of an application accompanied by a written report, which is personally served on the respondent by either the sheriff or a process server.

On the first return date of the application, the Department of Education and Communities will generally seek that the matter be referred to a confidential conference.[7]An interim compulsory schooling order will often also be sought on the first return date.

The conference is convened by internal departmental personnel (usually a former school counsellor or equivalent).

The matter will return to court following the conference, with a view to a final compulsory schooling order being made. When making the final compulsory schooling order the court may accept written undertakings from a parent, and from any other participant in a compulsory conference.[8]

In making a final compulsory schooling order, the court may specify the period that the order is to remain in force. If no period is specified, the order remains in force until the child ceases to be of compulsory school-age.[9]

[14-1020] Practice notes

Practice Note 7: Legal representation for children and young persons in proceedings for compulsory schooling orders

Practice Note 7 commenced 27 February 2012.

[14-1040] Legislation

Education Act 1990.

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7 Section 22C(1)(a).
8 Section 22D(7)(a).
9 Section 22D(8) states that a compulsory schooling order (unless revoked by the Children's Court) ceases to have effect at the end of the period specified during the order or when the child ceases to be of compulsory school-age.

Youth Koori Court

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[15-1000] NSW Youth Koori Court and Winha-nga-nha list, Dubbo*

Last reviewed: June 2024

Part A: Youth Koori Courts in Parramatta, Surry Hills and Dubbo Children's Courts

Consultations began with relevant stakeholders in late 2013 to assess the feasibility of establishing a Youth Koori Court in NSW.

A cross-section of both legal and non-legal stakeholders was invited to participate in a broad consultation group. The stakeholders represented in the consultation group included representatives from the judiciary, the Aboriginal Legal Service (ALS), Children's Legal Service (Legal Aid), Police prosecutions, Aboriginal Services Division, Juvenile Justice, Justice Health, Children's Court Assistance Scheme, service providers and the Children's Court Executive.

As a result of this consultation process, the Youth Koori Court commenced on 6 February 2015. It did so without government funding, with the court and all agencies agreeing to participate within existing resources. Elders sat in the Youth Koori Court at Parramatta on a voluntary basis until 2019.

In 2018 the Youth Koori Court received significant funding from the NSW Government. This enabled the employment of key people, including the Youth Koori Court Liaison Officer and the Youth Koori Court Casework Coordinator. The funding also provided for payment to Elders/Community Panel Members and provided for the expansion of the Youth Koori Court to Surry Hills Children's Court. This court commenced operation on 6 February 2019.

* This is a paper presented by Magistrate Susan Duncombe originally presented at the Second National Indigenous Forum, 28 February 2024, Brisbane and the Orana District Law Society conference 8 and 9 March 2024, Dubbo.

The consultation process with the Dubbo community recommenced in 2022. A working party was established and the process of establishing the Youth Koori Court in its first regional location, Dubbo, began. The Youth Koori Court in Dubbo had its first sitting on 24 March 2023.

Legislative framework and mediation principles

The YKC was developed with the support of the then President of the Children's Court, Judge Peter Johnstone, using existing resources and without the need for legislative amendment. Specific consideration was given to s 6 *Children (Criminal Proceedings) Act 1987* which provides that in all proceedings dealing with young people, the Children's Court must exercise its functions having regard to the principles contained therein (emphasis added):

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, **a right to be heard, and a right to participate**, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, **require guidance and assistance**,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be **assisted with their reintegration into the community so as to sustain family and community ties**,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Section 33 of the *Children (Criminal Proceedings) Act 1987* provides the penalties that apply for young people in the Children's Court. Significantly, s 33(1)(c2) provides:

(c2) it may make an order adjourning proceedings against the person to a specified date (not later than 12 months from the date of the finding of guilt) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act 2013*):

  (i) for the purpose of assessing the person's capacity and prospects for rehabilitation,

  (ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place,

  (iii) for any other purpose the Children's Court considers appropriate in the circumstances.

The process that has been developed involves an application of the law, including a deferred sentence under s 33(1)(c2), as well as an understanding of and respect for Aboriginal culture. It also involves the use of principles and practices of mediation which are employed in a conference process to identify issues of concern for the young person, identify ways in which those concerns can be addressed and develop an Action and Support Plan which provides a focus for the young person over 6 to 12 months prior to sentence. The young person is asked

to identify programs that may enable him or her to reduce the risks of further offending. Just as important, relevant agencies and support people commit to supporting the Young Person to achieve his or her goals. The young person has his or her actions taken into account on sentence, which will be imposed by the judicial officer sitting alone after considering submissions from the defence and prosecution in the normal course and, where appropriate, a report on the young person's progress prepared by Youth Justice or other agency having supervisory or other support responsibilities for the young person during the period of the adjournment. All sentencing options remain available to the Court.

The Youth Koori Court Model

1.Goals and objectives

Having regard to the general aims of the Youth Koori Court the specific measurable goals and objectives that it seeks to address are:

(a) Increase Aboriginal community, including Aboriginal young people's confidence, in the criminal justice system in NSW.

(b) Reduce the risk factors impacting on the recidivism of Aboriginal young people in NSW.

(c) Reduce the rate of non-appearances by young Aboriginal offenders in the court process in NSW.

(d) Reduce the rate of breaches of bail by Aboriginal young people in NSW.

(e) Increase compliance with court orders by Aboriginal young people in NSW.

The Youth Koori Court seeks to achieve these aims by:

(a) Allowing Aboriginal and Torres Strait Islander community involvement in the court process,

(b) Providing low volume case management mechanisms that will facilitate greater understanding of and participation in the court process by the young person,

(c) Identifying relevant risk factors that may impact on the young person's continued involvement with the criminal justice system, and

(d) Monitoring appropriate therapeutic interventions to address these risk factors.

2. The Model for the operation of the Youth Koori Court

A diagrammatic representation of the model is annexed at Annexure A.

2.1 Eligibility criteria

To be referred to the Youth Koori Court (YKC), a young person must satisfy the following criteria.

(a) Have indicated that he or she will plead guilty to the offence or have the offence proven after hearing.

(b) Must be descended from an Aboriginal person or Torres Strait Islander, identify as an Aboriginal person or Torres Strait Islander and must be accepted as such by the relevant community.

(c) Be charged with an offence within the jurisdiction of the Children's Court to hear and summarily determine the outcome.

(d) Be referred from specified courts.

(e) At a minimum, be highly likely to be sentenced to an order which would involve Juvenile Justice supervision with priority being given to those young people likely to receive a supervised probation order or a detention order.

(f) Be 10 to 17 years of age, at the time of the alleged commission of the offence(s) and under 19 years of age when proceedings commenced.

(g) Be willing to participate.

A referral to the Youth Koori Court can only be made on the application of the young person.

Where the young person has entered a plea of guilty, or indicated an intention to plead guilty, the presiding judicial officer will refer the case to the Youth Koori Court if satisfied that the eligibility criteria are met.

Where the young person has had his or her offence proven after a hearing the presiding judicial officer **may** refer the young person to the Youth Koori Court for sentence, if satisfied that the eligibility criteria are met, or proceed to sentence in the usual manner.

Where a case is referred to the Youth Koori Court following a hearing, a transcript of the judgment is to be ordered and/or an agreed statement of facts is to be filed.

2.2 Suitability assessment

The suitability of the young person for inclusion is assessed by reference to the screening tool and the following:

(a) The availability of services in the area of the young person's residence and suitable to the young person's needs must be taken into account.

(b) The strength of the young person's commitment to the requirements of the YKC.

(c) The capacity of the YKC, including the number of current matters before the YKC, to accept the young person into the program.

(d) The availability of suitable Elders/respected persons after consideration of the young person's cultural heritage and identity.

(e) Those charged with sexual offences may not be eligible for the process. The suitability assessment will involve assessment of the nature of the offence and the likely impact on the victim and/or family of the inclusion of the young person into the YKC process.

(f) Priority for inclusion in the program will be given to those young people who are, in the opinion of the magistrate, likely to receive a custodial sentence for the offence or offences currently before the Court.

An Initial assessment screening tool has been developed. This tool assists in identifying the background, needs and supports necessary for the young person. The assessment tool is used to assist the Koori Court magistrate to determine if the young person is suitable for inclusion in the program.

If the young person is not suitable, the magistrate will refer the young person back for mention and/or sentence in the Children's Court and for case management in the usual way. The YKC magistrate may order a background report (Juvenile Justice report) and adjourn the matter for sentence in the Children's Court in the usual six-week time frame.

If the young person is suitable (including assessment of the capacity of the YKC to accept the referral), the magistrate will formally accept the young person into the program and refer the young person to a conference, usually within 2 weeks.

A bail review is conducted. Bail conditions are set to maximise the young person's likely compliance with the conditions while at the same time ensuring that any bail concerns are appropriately addressed.

2.3 Conference

The Conference is attended by the young person and his or her parent(s) (including where appropriate a representative from DCJ), Elder(s)/respected person(s), a Youth Justice representative, the young person's lawyer (ALS/CLS), a civil lawyer from Legal Aid, a representative from Justice Health (where appropriate), the Youth Koori Court casework coordinator and a representative from any other relevant service providers as identified as a result of information obtained in the screening tool.

Prior to the Conference an Action and Support Plan ("Plan") has been prepared in draft following meetings with the young person, ALS and the casework coordinator. This Plan is targeted to the particular needs/ interests of the young person; accepted by the young person and service providers as workable and potentially gives consideration to addressing the harm to the victim(s)/society suffered as a result of the crime(s) committed by the young person. The model is not, however, a restorative justice model. It is a therapeutic justice model, with emphasis being placed on the changes and supports necessary to address the criminogenic needs of the young people involved.

The judicial officer, sitting in the YKC with two Elders/respected persons, may approve the Plan (with or without amendment), following which the young person will commence work in accordance with the Plan. The plan is subject to revisions as required throughout the YKC process.

2.4 Plan commencement

With supports, the young person will commence a program or programs designed to:

(a) address the reasons the young person has engaged in crime

(b) reinforce cultural connections and knowledge (and pride)

(c) enable the young person to engage in education and/or employment

(d) enable the young person to find stable accommodation

(e) address any health (including mental health) concerns

(f) address any alcohol or drug issues.

2.5 Mentions/monitoring

The young person attends the YKC for regular mentions. Sometimes this is at fortnightly intervals because of the high needs of a young person. This can later be monthly mentions. At each mention an updated Plan is prepared and discussed with the young person. Amendments to the Plan are discussed and/or approved.

2.6 Sentence

A sentence of the young person will be scheduled 6 to 12 months after the approval of the Plan. A report from Youth Justice or the Lead Agency will be submitted to the Court, the prosecutor and the young person and his/her solicitor. Prior to formal submissions in Court a review and sentencing conversation will take place with the young person in front of the Elders/respected persons and the magistrate and any support persons.

Formal submissions will then be made on sentence by the prosecution and the defence lawyer.

The magistrate will adjourn briefly to consider the submissions and prepare the sentence.

The magistrate alone has responsibility for the sentence, taking into account all submissions and the performance by the young person in the Youth Koori Court. The sentence will be delivered by the magistrate, robed, from the bench.

2.7 Recognition, acknowledgement and rewards

The participation by the young person in the Youth Koori Court and the programs identified in the Plan will be acknowledged by the Elders and the magistrate after the sentence.

Rewards and incentives have been donated to the YKC. Such rewards include football tickets, football jerseys, hand woven baskets, certificates of achievement and signed footballs.

2.8 The YKC courtroom

The YKC sits in a courtroom in which artworks designed by young people in custody at each of the juvenile justice centres in NSW have been hung. In Dubbo, the artwork has been produced by four young people under the guidance of Aunty Narelle Boys. The works are on permanent loan to the YKC. The judicial officer sits with the Elders/respected persons around a table with the young person, his or her family or supporters, the prosecutor, the legal representative for the young person, a civil lawyer from Legal Aid, the Youth Koori Court casework coordinator and representatives from agencies, including Youth Justice, which may be in a position to offer some support to the young person. The judicial officer is not robed until the point of sentence or for release applications.

Evaluation of the Youth Koori Court (YKC): Inside Policy, 6 June 2022

The Key Findings of this comprehensive report were:

> This evaluation reveals overwhelming support for the YKC from its staff and stakeholders, as well as participants and their families. This strong support is based on the perception and experience that the YKC achieves better outcomes for Aboriginal young people and for the criminal justice system, compared to the standard Children's Court process. This perception and experience of benefit is supported by the review of court files, appearance recordings, court observations, the cost-benefit analysis undertaken and BOCSAR's statistical analysis of the impact of the YKC on youth justice outcomes.

What is the YKC achieving?

- The YKC is achieving its short-term outcomes of identifying participant needs and risk factors for offending relating to housing (home), health, employment, education and skills, safety and social/cultural outcomes.
- The YKC is also successful in empowering participants and the Aboriginal community through the process.
- For participants, the YKC is contributing to the achievement of intermediate outcomes in the areas of:
  - Empowerment through a high-level of engagement in the process and resulting in increasing trust in the system
  - Social and cultural through reconnection to and engagement with cultural supports
  - Safety through the reduced likelihood of reoffending and participants being 40 per cent less likely to be sentenced to a Juvenile Control Order (JCO).

- Due to a lack of data and information, the evaluation could not determine if intermediate outcomes at the participant levels were being achieved in the areas of housing (home), education and skills, employment and health.
- The YKC is operating as it was intended and is being implemented in accordance with is documented procedures.
- Prior to COVID-19, referrals, acceptances and graduations had increased year-on- year, with the current graduation rate being 60 percent. A closer examination of withdrawals and discharges may be required to improve the graduation rate.
- Stakeholders of the YKC act in accordance with their roles and responsibilities.
- Participants have a clear supported journey through the process which involves regular engagement with their legal practitioner, caseworker and support services.
- The YKC as it currently operates returns $2 for every $1 invested.
- Expanding the YKC to one additional site would result in a benefit-cost ratio of 2:1; and estimated direct economic impact to the NSW economy of $2.1 million and an estimated indirect impact of $1.6 million.

What factors and conditions enable the YKC's achievements?

- Operating as a sentencing court is an important precondition for success.
- Other successful factors, practices and conditions which contribute to the YKC achieving its objectives and outcomes include:
  - CPMs and Aboriginal staff
  - Focus on culture
  - Participant-centricity
  - Team-work and relationships
  - Commitment to the YKC process and its objectives
  - Pre-conferencing
  - Physical layout of the court.

What can be improved?

Attention should be paid to improving the following aspects of the YKC:

- Reporting by external support services to the court
- Increasing the range of Aboriginal support services
- Strengthening the focus on providing a diverse range of cultural support options and increasing Aboriginal staff representation.
- Supporting young people post-graduation.
- Improving record keeping.
- Improving information sharing.
- Focusing on the retention of staff to ensure a continuity of understanding of the YKC's intent, processes and practices as well as support for the participants.

- Formalising governance and oversight of the YKC process (as opposed to each participants' journey).
- Increasing operating costs to fund currently unfunded critical services.

Part B: The Winha-nga-nha list Dubbo

On 25 October 2019 Professor Megan Davis reported to the NSW Government on the results of her review into the Aboriginal Out of Home care system in NSW. This report, known as the *Family is Culture Report*, contained 125 recommendations.

The last recommendation is in the following terms:

> The NSW Government should, in consultation with the Children's Court of NSW and other relevant stakeholders, such as the NSW Child, Family and Community Peak Aboriginal Corporation (AbSec) and the Aboriginal Legal Service, design and implement a pilot project establishing a dedicated court list for proceedings under the Children and Youth Persons (Care and Protection) Act 1998 (NSW) involving Aboriginal children.

In response to this recommendation, the NSW Children's Court convened a working party in 2022. That working party involved stakeholders from all relevant agencies and organisations involved in the child protection system involving Aboriginal families in NSW. Elders also participated in the working party.

Extensive consultations were also held with the Dubbo community. Aunty Margaret provided the court with a name for the new list. Winha-nga-nha means to "know, think, remember". A fact sheet prepared by the Court is annexed at Annexure B.

The Winha-nga-nha list first sat in Dubbo on 7 September 2024. It is the first such court in NSW.

The Court	Comment
1.1 Flags	The Court will display Aboriginal and Torres Strait Islander flags.
1.2 Acknowledgement of county	The Court may begin with a welcome to country or an acknowledgement which is delivered by an Elder or respected person (if present) and/or by the magistrate.
1.3 Robes	The judicial officer may not be robed during the Conversations list. The judicial officer may be robed for formal findings and orders.
1.4 Informality	The court will sit informally except for formal orders and findings. All parties, lawyers, caseworkers, Elders/respected people and the magistrate will sit around the bar table.
1.5 Artworks	The court may display Aboriginal artworks.
1.6 Aboriginal staff	The Court may utilise the services of an Aboriginal Liaison officer. That court officer will contact the parties in the week preceding the listing date to establish a point of contact and to answer any administrative questions the party may have. The Court may also welcome the support from an Aboriginal person to act as a non-legal advocate for the families.
2. Court process	

The Court	Comment
Elders	During the consultation process it became clear that Elders should not be formally included in the process. However, should a party request support from an Elder, the Court has developed a panel of Elders who have offered to assist on a voluntary basis. The family will be invited to bring an Elder/respected person of their own choosing rather than a panel arranged by the court.
2.1 Directions list: **9.30 am – 10.00 am**	This may involve short mentions where the parties can be excused. This may include directions after the release of a clinic assessment and/or directions which are of an administrative nature. Any matters involving non-Aboriginal families will also be included in the Directions list until such time as a separate listing day can be accommodated for such matters.
2.2 Conversations list	Each matter will be allocated a time of no less than 20 minutes. Matters will be allocated in blocks of "Not before 10, Not before 12 and Not before 2".
2.3 First mention **2.3(a) Pre-filing actions**	The magistrate will begin the conversation about pre-filing intervention, including addressing the requirements of ss 9A and 63 of the Care Act, addressing "active efforts". • have possible kinship placements been identified before or after removal? • has there been an FGC? • has there been discussion about referral of parents for supports? • were the parents given an opportunity to speak to a lawyer when issues were first identified? • was the possibility of a Parent Capacity Order explored as an alternative to removal? • was the possibility of a Parent Responsibility Contract considered? • is there evidence of active efforts to take alternative action? • is a genogram available? If not, directions for its filing to be made. Process of involving family/community in the preparation of the genogram to be discussed. • are birth certificate(s) available? If not, clarify the names and dates of birth of the child(ren). Begin the process of obtaining the birth certificate(s) at the earliest opportunity.
2.3(b) **Summary of proposed plan**	Directions in relation to the Summary of Proposed Plan to be made. A new template of the Summary of Proposed Plan has been developed for use in the Winha-nga-nha list. Parent(s)' responses to the Application to be filed prior to establishment (unless this is conceded at the first mention).
3. Establishment	This may proceed at an earlier stage where parties have had access to legal advice prior to filing. A non-legal Advocate may explain this concept to the parties in the presence of the lawyer for each party but outside the courtroom.
4. Dispute Resolution conference(s) (DRCs)	These should be used to the maximum extent possible. Legal Aid funding is available for more than one DRC and for an extended time.

The Court	Comment
5. Care plans, cultural plans and responses to both	A template for a cultural plan has been developed in conjunction with Aunty Deb Swan (GMAR).
6. Final orders	The Court will make efforts to ensure that family and community supports are present where a final order is made in a case where restoration is not possible.
7. Alternatives to care applications	It was anticipated that there may be an increase in the use of applications for Parent Capacity Orders and Parent Responsibility Contracts to increase early engagement with families and improve access to services to reduce risk of removal. To date this has not occurred.

Conclusion

The Youth Koori Court and the Winha-nga-nha list each have the potential to make a very real difference to Aboriginal families in NSW. It is hoped that the programs will be expanded to other locations, including other areas in rural NSW where there is a real need to address the high crime and incarceration rates among Aboriginal people in general and young people in particular and to address the disproportionate numbers of Aboriginal families involved in the care and protection system.

I acknowledge the significant contribution to the success of these programs from all people who have worked during the consultation and implementation phases of each program. This work is not easy. It requires hard work, dedication and resilience.

I look forward to the next phase of our work. It is challenging, rewarding, heart breaking, emotional, exhausting and exhilarating.

Magistrate Sue Duncombe

February/March 2024

Annexure A — YKC model

Annexure B — Winha-nga-nha fact sheet

[15-1020] Youth Koori Court[1]

The Children's Court began trialling the Youth Koori Court (YKC) in February 2015 at Parramatta Children's Court.

We created this pilot in response to the devastating over-representation of Aboriginal young people in the justice system.

The YKC was established within existing resources and without the need for legislative change.

The YKC uses a deferred sentencing model: s 33(1)(c2) of the *Children (Criminal Proceedings) Act 1987* (CCPA). The process that has been developed for the YKC involves an application of the deferred sentencing model as well as an understanding of and respect for Aboriginal culture.

1 This extract is from "Early intervention, diversion and rehabilitation from the perspective of the Children's Court of NSW" by Judge Peter Johnstone, President of the Children's Court of NSW, at [110]–[126]. The paper was originally presented for the 6th Annual Juvenile Justice Summit, Friday, 5 May 2017, Sydney. This extract has been updated to include more recent changes. The pilot program is also discussed in an article by S Duncombe, "NSW Youth Koori Court Pilot Program commences" (2015) 27 *JOB* 11.

Mediation principles and practices are employed in a conference process to identify issues of concern for the young person, identify ways in which those concerns can be addressed, and develop an Action and Support Plan for the young person to focus on for six to twelve months prior to sentence.

The legislative scheme applicable to the YKC is consistent with the general principles informing the work of the Children's Court.

Specifically, the provisions in s 6 of the CCPA state:

> (a) That children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, *a right to be heard, and a right to participate,* in the processes that lead to decisions that affect them,
>
> (b) That children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, *require guidance and assistance*,
>
> ...
>
> (c) That it is desirable that children who commit offences be *assisted with their reintegration into the community so as to sustain family and community ties*,
>
> ...
>
> [Emphasis added.]

The direct participation of the young person is required as referrals to the YKC can only be made on the application of the young person. It is a voluntary process and relies upon genuine commitment and ownership by the young person.

The culturally competent component of the YKC is demonstrated in many ways, including through the set-up of the court room itself. The YKC sits in a court room with artworks prepared by young people in custody at each of the juvenile justice centres in NSW.

Notably, the full suite of sentencing options is available to the judicial officer.

The YKC has been sitting since 6 February 2015 and we celebrated the two-year milestone in February [2017], with all of the stakeholders involved, including some young people who had successfully completed the YKC process. We were delighted to receive a visit from Senator Pat Dodson on the day, who sat as a respected person in the YKC, and shared some words of encouragement and wisdom with one of our young participants.

From February 2015 to December 2016, the YKC had 52 referrals and 48 of those young people were sentenced. In [May] 2017, we have 11 young people continuing or referred, and two have been sentenced so far this year. [As at June 2018, 92 young people have been referred to the YKC program.]

A formal process evaluation has been conducted by Western Sydney University with positive results, see **[15-1080]**.

Anecdotally, many young people have become genuinely engaged in the process, and, given the participatory nature of the process, many young people have developed a strong sense of accountability for their actions.

With the assistance of the Children's Court Assistance Scheme, five of the YKC participants have been able to obtain permanent housing, which is a significant achievement.

Although the YKC was successfully established within existing resources, funding is needed in order to achieve excellence in the program, and also to expand the program. Funding was

recently announced by the Attorney General, Mark Speakman SC, and the Treasurer, Dominic Perrottet, to enable the expansion of the YKC to Surry Hills. The funding will commence on 1 July 2018 and will allow the courts to operate for a further three years.

Note: In 2023, YKC expanded to Dubbo.

Communities such as those in Redfern, Glebe, and La Perouse have been consulted on the possibility of expanding the YKC and are eager to see the expansion of the YKC to their communities.

[15-1040] NSW Youth Koori Court pilot program commences

The practice, procedures, aims and objectives of the Youth Koori Court are summarised in S Duncombe, "NSW Youth Koori Court Pilot Program commences" (2015) 27 *JOB* 11.

See also a Fact Sheet by the Department of Justice, accessed 13 April 2023.

[15-1060] Expansion of the NSW Youth Koori Court program

In May 2018, the NSW Government funded the expansion of the Youth Koori Court to Surry Hills. The sittings of the Youth Koori Court at Surry Hills commenced on 6 February 2019. This article, at S Duncombe, "Expansion of the NSW Youth Koori Court program" (2018) 30 *JOB* 48, gives a brief summary.

Sittings of the Youth Koori Court commenced at Dubbo in March 2023.

[15-1080] Youth Koori Court review of Parramatta Pilot Project

See "Youth Koori Court — review of Parramatta Pilot Project", prepared by M Williams, D Tait, L Crabtree and M Meher, of Western Sydney University.

[15-1100] Practice Note 11: Youth Koori Court

Last reviewed: May 2023

Practice Note 11: Youth Koori Court issued 16 January 2015, amended 5 March 2015, 1 February 2019 and further amended 17 March 2023.

[15-1120] Trauma-informed approach of the NSW Youth Koori Court

An article by S Duncombe, "The trauma-informed approach of the NSW Youth Koori Court" (2020) 32(3) *JOB* 21.

[15-1140] Thirty years on from the Royal Commission, what can judicial officers do?

An article by S Norrish, "Thirty years on from the Royal Commission, what can judicial officers do?" (2021) 33(3) *JOB* 29.

[15-1160] Impact of the NSW Youth Koori Court on sentencing and re-offending outcomes

An article by E Ooi and S Rahman, "The impact of the NSW Youth Koori Court on sentencing and re-offending outcomes" *Crime and Justice Bulletin* No CJB248, April 2022 suggests an association between participation in the YKC and reduced risk of imprisonment, without any adverse impact on re-offending rates.

[15-1180] Youth Koori Court expanded under $20m Indigenous justice package

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Children's participation: a look towards the future

P Johnstone*

Introduction ..... [17-1000]

The tension between an independent legal representative and a direct legal representative

Strengthening the role of the independent legal representative through participatory advocacy

Promising initiatives for enhancing child participation in the future

Conclusion

[17-1000] Introduction

This paper has been prepared for the Child Representation Conference on Saturday 5 March 2015 at the Novotel Wollongong Northbeach.[1]

I am conscious not to be unduly repetitive of the issues that have been presented by my colleagues. Accordingly, I have approached this paper by viewing the issue of children's participation through the lens of an Independent Legal Representative (ILR).

This paper will explore the important role played by Independent Legal Representatives (ILRs) in the Children's Court, including the challenges implicit in their work and ways to strengthen the performance of their role by undertaking *participatory advocacy*. I will conclude by canvassing promising initiatives for enhancing child participation in the future.

Firstly I wish to acknowledge the traditional owners of the land on which we meet, the Wadi Wadi people of the Dharawal nation and pay my respects to their Elders past and present.

4. Harnessing the participation of children and young people is fraught with challenges, particularly where children and young people have experienced disempowerment, maltreatment and historical disadvantage.

Part of the complexity of the ILR's role lies in balancing the safety, welfare and well-being of the child against the need to provide the child with the opportunity to freely participate in the decisions that affect him/her. This intricate balancing act requires significant skill on the part of the advocate.

The discourse and research in this area has not yet developed or settled to the extent that we will see a legislative change with respect to child representation. As you are all aware, child representation is a vexed issue. Until we can confidently incorporate alternate child representation schemes into legislation, we must work to promote and harness the participation options that are available.

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* President of the Children's Court of NSW; the paper was first presented for the Child Representation Conference on 5 March 2016.

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

My intention in presenting this paper is explorative, not determinative. I have arrived at this topic in response to criticisms levelled at the ILR model and/or solicitors' interpretation of what it means to be an ILR. The core question this paper seeks to unpack is: *how can ILRs enhance their role by undertaking participatory advocacy*.

I will investigate the tension between the ILR model and the Direct Legal Representative (DLR) model and will undertake a jurisdictional analysis. I will then highlight the skills that advocates can draw upon to improve their representation of children. I will conclude by canvassing some initiatives that appear to hold promise for the future of child representation.

The tension between an independent legal representative and a direct legal representative

The concept that 'children should be seen and not heard' has become redundant as society has developed an appreciation of the value that children and young people can add when they are empowered to participate.

However, empowerment is subject to one important qualification – the paramountcy principle. Where participation does not accord with the child or young person's safety, welfare and well-being, the latter will prevail.

Thomas argues that:

> Rights should reflect children's developing competence, offering them protection as long as they need it combined with empowerment as soon as they are ready for it, with restrictions on their freedom and autonomy only where these can be justified in terms of maximising their future choices.[2]

This qualification has been enshrined in Art 12 of the United Nations Convention on the Rights of the Child (UNCROC). While I recognise that you are all familiar with this provision, I will include it for completeness:

> 1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, *either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*.[3] [My emphasis.]

As you can see, the participation principle in Art 12, is qualified by ss 8 and 9 of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act). The Care Act clarifies that a young person's participation in decision making is subject to ensuring their safety, welfare and well-being.[4]

The Care Act also outlines the responsibilities the Secretary owes to the child to facilitate the child's participation in decisions made under the Act. This includes a responsibility to provide,

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2 N Thomas, "Children's Rights: Policy into practice", *Centre for Children and Young People Background Briefing Series no 4*, Centre for Children and Young People, Southern Cross University.

3 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Treaty Series, vol 1577 at Art 12.

4 *Children and Young Persons (Care and Protection) Act 1998*, s 9(1).

inter alia, information about the matter, tailored to the child's communication needs and level of understanding; the opportunity to express his or her views freely and the opportunity to respond to decisions made under the Act.[5]

In addition, the Act requires that:

> due regard must be had to the age and developmental capacity of the child or young person.[6]

The Independent Legal Representative (ILR) or "best interests" model is consistent with the need to consider the child's views whilst maintaining an overarching commitment to safeguarding the child's interests. The ILR will consult with the child, but their overriding duty is to the Court, to act in accordance with the safety, welfare and well-being of the child.[7]

The Direct Legal Representative (DLR) model requires that a DLR may be appointed for any child at the age of 12 or over who is capable of giving instructions. The DLR must then advocate as instructed by the child.[8]

Many have argued that the qualification on children's right to participate is limiting and fails to privilege the valuable perspectives and knowledge that children can offer. Ross argues that the best interests principle:

> … is embedded in welfare discourse that conceives of children as incompetent, dependent and vulnerable victims who are in need of protection by the legal apparatus of the state. "Best interests" is fundamentally about expert, adult interpretations of what is best for children.[9]

The jurisdictional analysis that follows highlights the ways in which Australian jurisdictions have balanced providing the child with agency, whilst protecting their safety, welfare and well-being.

In the Australian Capital Territory and South Australia children and young people are primarily represented in accordance with the DLR model.[10] However, in South Australia an ILR approach applies if a child is not capable of providing proper instructions to their solicitor.[11]

In Western Australia, a child will be represented on a DLR basis[12] unless the child is not capable of giving proper instructions or where a child does not wish to give his/her solicitor instructions.

In these circumstances, an ILR model will apply.[13] In addition, a judicial discretion applies as to whether a child should be represented by an ILR.[14]

Interestingly, Queensland, the Northern Territory and Tasmania appear to have the most similar model to an ILR insofar as solicitors must present the child's views and wishes to the Court, if possible, but the best interests approach applies regardless of any instructions from the child.[15]

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5 ibid, s 10.
6 ibid, s 10(2).
7 ibid, ss 99–99D.
8 ibid.
9 N Ross, "Images of Children: Agency, Art 12 and Models for Legal Representation" (2005) 19 *AJFL* 94 at 96.
10 *Court Procedures Act 2004* (ACT), s 74E; *Children's Protection Act 1993* (SA), s 48(1).
11 *Children's Protection Act 1993* (SA): s 48(2).
12 *Children and Community Services Act 2004* (WA): s 148(4).
13 ibid, s 148(4).
14 ibid, s 148(2).
15 *Child Protection Act 1999* (Qld), s 110(5); *Care and Protection of Children Act 2007* (NT), s 143A(1) and 143B(1)(b); *Children, Young Persons and Their Families Act 1997* (Tas), s 59.

In Tasmania, an additional qualification is added, providing that a care application cannot be decided by the Court unless the child is legally represented or the Court is satisfied that the child has made an informed and independent decision not to be represented.[16]

In Victoria, a solicitor acting for a client must act in accordance with any instructions or wishes expressed by the child, so far as it is practicable to do so *having regard to the maturity of the child* (my emphasis).[17] Significantly, where a child is not considered mature enough to give instructions, the court has the power to adjourn the case to enable legal representation to be obtained, but only if there are exceptional circumstances in the best interests of the child.[18]

The variety of approaches taken in Australian jurisdictions highlights the challenges implicit in defining an age, stage and methodical way of striking a balance between securing a child's safety, welfare and well being while also facilitating their participation.

In *RCB (as litigation guardian of EKV, CEV, CIV and LRC) v The Honourable Justice Forrest*, the High Court articulated this complexity as a practical issue:

> Determination of an application for a return order and, in particular, determination of any issues about the strength of a child's objection to return and the maturity of that child will affect the child's interests. Deciding issues about strength of objection and maturity of the child in a way that is procedurally fair to all who are interests in or affected by their decision — the parents, the child or children concerned and the Central Authority — presents an essentially practical issue. How is the court to be sufficiently and fairly apprised of what the child concerned wants, how strongly that view is held and how mature the child is?[19]

The challenge of ensuring that you are sufficiently and fairly apprised of what a child wants, how strongly that view is held and how mature the child is, is one that ILRs must grapple with on a daily basis. The next section will canvass some of the skills ILRs can draw upon in order to ensure that they foster a child's participation.

Strengthening the role of the independent legal representative through participatory advocacy

In my view, providing children with a voice and choice to participate is critical to the performance of my role as a Judicial Officer. Therefore, I consider that advocating for participation acts as an important protective factor against "ivory tower" decision making. I have coined this term "participatory advocacy".

Many of the children and young people who come before this Court have been denied a voice through a range of traumatic circumstances associated with, and dominated by, adults. Successful application of the participation principles recognises the voice of the child as valid and valuable.

Stasiulis advises:

> Rather than view children as "pre-citizens" or as silent, invisible, passive objects of parental and/or state control … children are cast as full human beings, invested with agency, integrity and decision making capacities.[20]

16 *Children, Young Persons and Their Families Act 1997* (Tas), s 59(1).
17 *Children, Youth and Families Act 2005* (Vic), s 524(9).
18 ibid, s 524(4).
19 *R CB (as litigation guardian of EKV, CEV, CIV and LRV) v The Honourable Justice Forrest* (2012) 247 CLR 304 at [44], French CJ, Hayne, Crennan, Kiefel and Bell JJ.
20 D Stasiulis, "The active child citizen: lessons from Canadian policy and the Children's movement" (2002) 6(4) *Citizenship Studies* 507 at 508.

The question thus becomes how can practitioners engage children and encourage their participation when undertaking the role of ILR? The answer is simple. Trauma-informed communication.

Children and young people experience and perceive the world differently to adults and are generally able to communicate their needs, views and wishes when adults adopt appropriate methods of communication.

Principle D6 of the "Representation principles for children's lawyers" provides you with a clear indication of what is required when communicating with children.[21]

The commentary includes a list of "Basic rules for practitioners". This is a useful resource and one you should consider as a guide to the way you communicate with children.

I intend to supplement the guidance provided in Principle D6 with the knowledge I gained during my attendance at the "Speaking Their Language: Young People and the Courtroom" conference at the Judicial College of Victoria.[22] I was particularly struck by the research presented by Karen Hogan, on the impact of trauma, and the session by Professor Pamela Snow, on the oral language skills of children and young people.

We see children and young people on a daily basis, and recognise the impact trauma can have on young persons' ability to articulate themselves and their ability to regulate their behaviours.

While it is important to understand the impact of language in the criminal jurisdiction, for example how to make a child witness feel at ease, in the care jurisdiction, the impact of language and its correlation with trauma is an important factor to understand and to add to your knowledge of the effects of abuse and neglect. What follows in this section, is my summary of the research presented.

Karen Hogan, the Director at the Gatehouse Centre of the Royal Children's Hospital in Victoria explained that a history of trauma can lead to a wide variety of difficulties and challenges for children and young people. She explained that negative relational experiences at an early age can have a significant impact on the child or young person's socialisation. Ms Hogan made the following assertion, which I consider to be particularly poignant:

> Children do well if they can. But trauma seriously impacts the opportunity for children to learn HOW to do well.[23]

Ms Hogan's presentation was structured according to the effects that different types of abuse can have on a child. Her research showed that the effects of child abuse and family violence result in trauma that affects cortisol levels and neural development, impacting the structural and functional development of the brain and resulting in behavioural ramifications.[24]

These behavioural ramifications can be classified either as internalising behaviours or externalising behaviours. Internalising behaviours include fears or phobias, anxiety, obsessiveness and control; depression, lack of hope, withdrawal; self-harm and identity

21 The Law Society of NSW, "Representation principles for children's lawyers", 4th edn, 2014.

22 Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 19 and 20 October 2015.

23 K Hogan, "The impact of trauma", paper presented to the Judicial College Of Victoria conference, Speaking their language: young people and the courtroom, 19 October 2015.

24 ibid.

confusion. Externalising behaviours include aggression, poor concentration, hyper vigilance, acting out and risk taking behaviours, sexualised behaviours/sexual risk taking and destructive behaviours.[25]

Ms Hogan concluded by outlining the long term impacts of child abuse and family violence, especially where: the abuse is not recognised and stopped; the child/young person's experience is not validated; the child/young person is not assisted to feel safe, understand and manage their emotional experience; explore their loss and create a positive future.

Implicit in Ms Hogan's research and observations is the conclusion that trauma can significantly affect a child/young person's ability to identify and articulate abuse, which can leave the child/young person with unresolved issues and affect their long term health and development.

It follows then, that communication is a vital part of preserving the safety, welfare and well-being of the child. In Professor Pamela Snow's presentation, she described the different factors that can impact upon a child or young person's language development. Importantly, she stated that:

> We have evolved a special facility for oral language, such that it is innate **BUT** it is highly vulnerable to a range of developmental conditions eg hearing impairment, intellectual disability, autism spectrum disorders, brain injury and it is highly sensitive to environmental exposure.[26]

Professor Snow's presentation explained that articulating feelings is a "higher-order" communication skill which draws upon a range of cognitive, psychological and social factors. Importantly, she spoke of "Alexithymia" which means "having a lack of words for emotions". She explained that this was typically associated with autism spectrum disorders but may also occur in children who have either witnessed or been victims of trauma.[27]

A noteworthy aspect of Professor Snow's presentation was her reference to a 1995 study by Hart and Risley.[28] This study examined the link between language exposure and children of parents on welfare benefits, working class parents and professional parents

Hart and Risley's study examined children (aged 3) and found that:

- Children of parents on welfare benefits experienced 616 words per hour
- Children of working class parents experienced 1251 words per hour, and
- Children of professional parents experienced 2153 words per hour.

Further, Hart and Risley conducted a longitudinal follow-up and examined these children at ages 9 and 10.

This longitudinal study showed strong links between language exposure at age 3 and academic outcomes later in life.

Professor Snow also identified a number of "red flags" that may indicate communication difficulties.

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25 ibid.

26 Professor P Snow, "Oral language competence: implications for the legal interface", paper presented for the Judicial College Of Victoria conference, Speaking their language: young people and the courtroom, 20 October 2015.

27 ibid.

28 B Hart and T Risley, *Meaningful differences in the everyday experiences of young American children*, Paul H Brookes Publishing, 1995.

These are: a diagnosed developmental disability, special school attendance, academic under-achievement, teacher, parent, or employer concern, social/peer level interpersonal difficulties, restlessness, avoidance and poor eye-contact, overly acquiescent style, "yep, nup, dunno, maybe, whatever" responses and a history of either internalising or externalising mental health problems.

The research by Ms Hogan and Professor Snow show that there is a link between trauma and communication. It is important for ILRs to keep this guidance in mind when meeting the child.

In addition to the communication style enunciated in the representation principles, a general understanding of cognitive and language development will bolster an ILRs ability to engage in participatory advocacy.

This includes an understanding of cognitive and language skills from early childhood through to adolescence.

I will not examine the detail of these skills, but will draw your attention to cognitive and language acquisition skills that I consider to be particularly important for an ILR to have an awareness of the following.

Early childhood (3–6 years)

(a) **Words and language:**

- Confuse the meaning of prepositions ie before, after, behind
- Interpret words literally and very narrowly or very broadly ie a child may understand that 'touching' only happens with a person's hand and deny being touched because another body part was used
- Expect sentences to take the sequence subject-verb-object. Passive voice can be confusing, as are embedded phrases (use two separate questions instead) ie "Did the man chase you?" and "Was he wearing a red coat?" rather than "Was the man who chased you wearing a red coat?"
- Might be able to use specific words but may not understand the concepts behind them.

(b) **Cognitive:**

- Cannot self regulate emotions of understand comprehension. They will not be able to understand a question or when they need a break
- Young children can only focus on one thing at a time. If a question contains two parts, they will only be able to focus on one part.[29]

Middle years (7–10 years)

(a) **Words and language:**

- Will learn an additional 5000 words during these years but will not always understand their meanings
- During this stage, children develop the ability to think about more than one idea at a time, however lack the linguistic skills to put all of the parts of a complex sentence together

29 Victoria Department of Justice and Regulation (prepared by the Child Witness Service), Factsheet, "Early childhood (3–6 years)", 2015.

- Understand generalisations and can give more than one meaning to a word ie a person's "house" can be an apartment, and that you can "touch" something with a part of your body other than your hand.

(b) **Cognitive:**

- Developing logical thinking so they can reason and solve problems. They can also predict events and understand some consequences. They employ these logical operations before they can identify or understand them
- Continue to have difficulty self-regulating emotion and monitoring comprehension, particularly under stress.[30]

It is also vital for ILRs to understand the powerful role Authorised Clinicians (ACs) play in empowering children. ACs are in a position to either directly or indirectly facilitate the child or young person's participation. They do this by creating child friendly environments within which to conduct their assessments and communicate in plain English with the child or young person. For example, they might ask the child if they have a message to send to the "big boss" of the Court.

ILRs can draw upon the professional expertise of ACs by taking into account the ways ACs have facilitated indirect participation of the child through their analyses and observations of attachment styles and non-verbal cues. Depending on the observations, a child may be indirectly communicating to the AC that they have an anxious or insecure attachment or if they are internalising or externalising behaviours.

An ACs ability to understand the nature and quality of a child's behaviours and attachments, by using a trauma-informed approach, is a way of hearing the child's voice and facilitating the child's participation. ILRs can draw upon knowledge of developmental and social sciences and the specialised expertise of ACs to ensure that they are facilitating a child's participation without giving direct instructions.

Promising initiatives for enhancing child participation in the future

As we gather more and more knowledge about children, and develop greater consistency in child-centred, trauma-informed approaches across Australia, we may be able to implement some of the changes Kylie Beckhouse cites in her study of child representation schemes.[31]

My view is that any approach to child representation must be holistic and collaborative. I do not propose that practitioners become social workers, however, there is opportunity for a multi-agency approach of the kind Kylie speaks of.

Tobin, in his discussion of taking a rights-based approach (in reference to Art 12 of UNCROC) bolsters this view:

> In terms of practical steps, the first stage of a human rights-based approach must be to undertake an evaluation and identification of children's needs by reference to their rights.
>
> This inquiry has to be linked to identification of various factors — social, cultural, economic, geographic, political, environmental and personal — that undermine the realisation of these

30 Victoria Department of Justice and Regulation (prepared by the Child Witness Service), Factsheet, "Middle Years (7–10 years)", 2015.

31 K Beckhouse, "To investigate legal representation schemes for children in the US, Canada and the UK — administration, delivery and innovation", Winston Churchill Memorial Trust of Australia, 2014.

> rights. The collection of such data must then be used to develop a comprehensive strategy using all necessary measures — legislative, administrative, economic, educational and other social measures — to build the capacity of the people responsible for the realisation of children's rights and the elimination or minimisation of the various structural, social and institutional factors that have impeded this objective.[32]

I wish to direct you to an exciting initiative for promoting active participation in the criminal justice system. The NSW Government is piloting the use of witness intermediaries in child sexual assault matters in the District Court.

Witness intermediaries bridge the communication gap between counsel and child witnesses. Intermediaries are independent and owe their duty to the Court, acting in a similar capacity to interpreters by facilitating communication between the witness and counsel.

Intermediaries can also play a part in providing advice or communication aids to assist counsel and the Court to ensure the use of tailored and appropriate communication.

Intermediaries are a powerful resource in empowering the participation of children and young people. As Plotnikoff and Woolfson state:

> Intermediaries are a great untold "good news" story of the criminal justice system.[33]

While witness intermediaries are used and being piloted in the criminal justice system, they may play a role in care and protection matters in the future. The Court will be eager to read the evaluation of the pilot at its conclusion.

There is capacity for a representation scheme to more effectively balance the need to support the participation of the child with an approach consistent with the safety, welfare and well-being of the child.

Conclusion

The role of the ILR is critical to ensuring that the participation principles of the Act are adhered to. ILRs can do this, while preserving the safety, welfare and well-being of the child, by using participatory advocacy. The future is bright and with scientific, psychiatric and sociological advancements, we will no doubt see further discussion of alternative schemes.

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32 J Tobin, "The development of children's rights" in G Monahan and L Young (eds) *Children and the Law in Australia*, 2008, Lexis Nexis Australia, pp 23–53.

33 J Plotnikoff and R Woolfson (with a foreword by Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales), *Intermediaries in the criminal justice system: improving communication for vulnerable witnesses and defendants*, University of Bristol, Policy Press, UK, 2015 at p 304.

Children's Court update 2016

P Johnstone*

Introduction ..... [17-2000]

Part one: the care and protection jurisdiction of the Children's Court

Unexplained injuries

Cultural planning for Aboriginal children and young people

The impact of trauma and the importance of language in the socialisation of a child

Recent case law in care and protection

Part two: the criminal jurisdiction of the Children's Court

Diversion

Brain science and its relevance to children and young people

Ameliorating communication with children and young people

Recent case law in youth crime

Conclusion

[17-2000] Introduction

This paper has been prepared for the 2016 Local Court Southern Regional Conference, and is to be presented to country Magistrates at Kiama on 2 March 2016.[1]

First, I wish to acknowledge the traditional occupiers of the land on which we meet and pay my respects to their Elders past and present.

The purpose of this paper is to alert Local Court Magistrates to recent developments affecting the exercise of the Children's Court jurisdiction. The paper will build on similar previous presentations and is designed to be a reference resource that may be used to assist you when hearing matters involving children.

This paper will be presented in two main parts consistent with the bifurcated jurisdiction of the Children's Court. The first part will deal with the Court's care and protection jurisdiction and

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* President of the Children's Court of NSW, District Court Annual Conference 2016, Wollongong, Wednesday 29 March 2016.

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

will be divided into three sub-parts that will conclude by traversing some recent significant case law. It follows then, that the second part will deal with the Court's criminal jurisdiction, divided into three sub-parts, which will conclude with an analysis of some recent relevant case law.

I have structured the paper in this way for editorial purposes. However, I wish to make it clear that whilst the Children's Court mainly exercises jurisdiction in two discrete areas that are distinguished by jurisprudence, this is not representative of the practicality and reality of the Children's Court.

As President of the Children's Court for over three years now, I have observed that there is an unequivocal correlation between a history of care and protection interventions and future criminal offending. This nexus between care and crime has been persuasively articulated by a number of respected commentators, including Dr Judith Cashmore.[2]

This tragic reality is one of a multitude of issues that have had a significant impact upon me and a reality that I have no doubt you have all been exposed to in the various locations within which you preside.

I continue to be astounded by the complexity of the issues that arise in this jurisdiction. The social disadvantage facing the children and young people, and their families, who have their lives characterised by decisions made by this Court, is a profound reminder of the need for continuing legal education and the need to work together as members of the Judicial community to address the ongoing issues needing to be addressed.

Accordingly, one conclusion I have arrived at is that as Judicial Officers we cannot view the issues in the Children's Court jurisdiction through a strictly legal lens.

We must also view these issues in the context of the disadvantage and disempowerment that have defined the lives of generations of families who come before the Court.

As Judicial Officers, we have a social responsibility to perform our roles consistent with the administration of justice. But this is a particularly special jurisdiction that is imbued with the practice of therapeutic jurisprudence and restorative justice.

I hope, therefore, too impress upon you that the specialised nature of work relating to children and young people must be safeguarded and respected both in theory and practice.

I am an advocate, therefore, for the expansion of the specialist nature of the jurisdiction across as much of the state as might be achieved over time.

The expansion contemplated is reflective of an enlightened view of an accessible and tailored justice system. It recognises the inherent value in applying consistent approaches across the whole State. There is also an added familiarity with the practices and procedures applied and with the nuances of decision making, through regular exposure to the relevant legislation and the applicable case law.

The Children's Court of NSW has been provided with two additional Children's Court Magistrates. In addition to a new Children's Magistrate based in Lismore, presiding over the Northern Rivers Circuit, there is also a new Magistrate, based at Parramatta, who is presiding over the new Hunter Circuit. Children's Court Magistrates now hear something like 90% of

2 See also Judge M Marien, "'Cross-over kids' – childhood and adolescent abuse and neglect and childhood offending", paper originally presented at the South Pacific Conference of Youth and Children's Courts Annual Meeting, 25-27 July 2011, Vanuatu (and updated for the Third National Juvenile Justice Summit 2012, 27 March 2012, Melbourne).

care cases in the State. The coverage for criminal matters remains, however, at about 60%. That is where you, the Local Court Magistrates exercising Children's Court jurisdiction, play such a hugely important role.

I view these forums as an important means by which the needs of Judicial Officers exercising this jurisdiction can be properly ventilated. Any discourse that facilitates collaboration, capacity building and information exchange is a discourse that is worth supporting.

Part one: the care and protection jurisdiction of the Children's Court

In the introductory portion of this paper I reflected upon the complexity of the Children's Court jurisdiction. The jurisdiction is fraught with numerous challenges.

I do not have the time to traverse and clarify all of the complexities, so I have identified three current important issues to discuss this year, and three recent cases to review. These cover the following topics:

(a) Unexplained injuries

(b) Cultural planning, with a particular focus on Aboriginal children

(c) The impact of trauma and the importance of language in the socialisation of children

(d) Interim orders; Joinder and the Aboriginal Placement Principles.

Unexplained injuries

Sadly, matters involving unexplained injuries are matters we frequently have to deal with as Judicial Officers exercising Children's Court jurisdiction. This is not just due to the high incidence of such cases, it is a result of the historical and intergenerational disadvantage that characterises the lives of many of the parents/caregivers with matters before this Court.

As I illustrated earlier, we cannot administer the law blindly, we must train our minds to assess the law by reference to its social context. This exercise is particularly critical in matters involving unexplained injuries.

Matters involving unexplained injuries to a child provoke significant challenges for Judicial Officers when making decisions consistent with the safety, welfare and well-being of the child. It is well established in research and amongst the medical profession that unexplained injuries, such as "shaken baby syndrome", arise out of circumstances that are generally consistent with the parent or caregiver's own disadvantage. For example, an inability to communicate or manage frustration, poor parental role models, youth, lack of support and lack of education.

Perhaps these are some of the social reasons that make unexplained injury cases so challenging for Judicial Officers. The complexity of such cases is compounded by the fact that the Court is not dealing with absolutes. In cases of drug use or neglect, the Court can more clearly establish that either the parent was using drugs or was not, or left alone in an unkempt environment with no food, or not. With unexplained injuries, there are a greater range of intervening factors that could potentially exculpate the suspected perpetrator.[3]

An additional area that may be confounding is that Care proceedings inquiring into unexplained injuries are not undertaken in accordance with the criminal standard to establish that a parent/caregiver's actions caused the injury to the child. Care proceedings do not revolve

3 S Herridge, "Non-accidental injury in care proceedings — a digest for practitioners", [2009] CLN 6 at p 11.

around the apportionment of guilt. The Judicial Officer must therefore be resolute in ensuring that the focus of the proceedings is directed toward the safety, welfare and well-being of the child.

Lord Nicholls articulates this tension in the matter of *O & N* stating:

> Whether or not an alleged event occurred in the past raises a question of proof. In truth, the event either happened or not. That is not so with a future forecast.
>
> The future has not happened, and future human conduct is never certain. But in practice, the past is often as uncertain as the future. The Judge cannot know for certain what happened and can only assess the degree of likelihood that something happened. The same is true of the future. The decision maker has to assess the degree of likelihood that an inherently uncertain event will occur.[4]

The High Court decision of *M v M* (1988) 166 CLR 69 enunciated the appropriate test to undertake in order to assess future risk of harm to the child. It was there held that in all decisions affecting children, the proper test to be applied when administering the paramount consideration of the safety, welfare and well-being of the child is that of "unacceptable risk" to the child.[5] The High Court said that in applying the unacceptable risk of harm test it is necessary to determine firstly whether a risk of harm exists and, secondly, the magnitude of that risk.

Whether there is an unacceptable risk of harm to the child is to be assessed from the accumulation of factors proved according to the relevant civil standard.[6]

In *Director-General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250, His Honour Justice Sackville stated:

> [67] The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 104(2) of the *Evidence Act*. **It was not appropriate to find that the Director-General had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was highly improbable.** To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father. [Emphasis added.]
>
> [68] As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at 171, statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

The test in *M v M* is the most instructive guide to your decision making in matters of unexplained injury. A positive finding of an allegation of harm having been caused to a child should only be made where the Court is so satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw*. Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned. Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. If, on the balance

4 *In re O & N (minors) (FC) In re B (minors)* (2002) (FC) [2003] UKHL 18 at [12].
5 *M v M* (1988) 166 CLR 69 at [25].
6 *Johnson v Page* [2007] FamCA 1235.

of probabilities, you are satisfied that a risk of harm exists, and that the magnitude of that harm would require intervention, you would then examine what might be done to ameliorate that risk, for example, the nature and extent of parental contact, including any need for supervision.[7]

Cultural planning for Aboriginal children and young people

In my view, culture is central to the identity formation and socialisation of children and young people. It carries a young person through their formative years and provides a sense of belonging in the world. If a child is removed from their parents, culture remains important — whether the child is at an age in which they are cognisant of this process or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.

I appreciate that I have raised this issue at previous conferences, but it is important that I continue to do so until comprehensive cultural planning is embedded at all levels of the care and protection process. While I have witnessed some improvements during my tenure at the Children's Court, I am not yet satisfied that there has been a widespread application and appreciation of this need.

As you are aware, the *Care Act* is to be administered under the "paramountcy principle", that is, that the safety welfare and well-being of the child is paramount: s 9(1). In addition to this paramountcy principle, the *Care Act* sets out other particular principles to be applied in the administration of the *Care Act*: s 9(2).

One of these principles is that account must be taken of concepts such as culture, language, identity and community.

Since my last address at the Regional Conference in 2014, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focussed cultural planning for Aboriginal children and young people.

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

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

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

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

(b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,

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7 Justice S Austin, "The enigma of unacceptable risk", paper presented at the 2015 Hunter Valley Family Law Conference, 31 July 2015, Hunter Valley NSW.

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

(d) a suitable person approved by the Secretary after consultation with:

(i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

(ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

Before it can make a final Care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7).

Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:

(a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement: s 9(2)(e),

(b) meet the needs of the child: s 78A(1)(b), and

(c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).

Culture is a critical element in the assessment of what is in a child's best interests and a critical consideration in assuring the safety, welfare and wellbeing of a child. It is critical that decision makers in child protection matters are provided with sufficient information to be able to appreciate the distinct role culture plays in the identity formation and socialisation of each child.

The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.

Aboriginal cultural identity centres on an appreciation of the significance of culture, land/country, historical exclusion in decision-making and reconnection with family.

I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children.

As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]:

> The Aboriginal and Torres Strait Islander Principles are in the *Care Act 1998* for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.

I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate

casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.

The impact of trauma and the importance of language in the socialisation of a child

The impetus for this topic arose from my attendance at the "Speaking their language: young people and the courtroom" conference at the Judicial College of Victoria.[8] I was particularly struck by the research presented by Karen Hogan, on the impact of trauma, and the session by Professor Pamela Snow, on the oral language skills of children and young people.

We see children and young people on a daily basis, and recognise the impact trauma can have on young persons' ability to articulate themselves and their ability to regulate their behaviours.

While it is important to understand the impact of language in the criminal jurisdiction, for example how to make a child witness feel at ease, in the care jurisdiction, the impact of language and its correlation with trauma is an important factor to understand and to add to your knowledge of the effects of abuse and neglect. What follows in this section, is my summary of the research presented.

Karen Hogan, the Director at the Gatehouse Centre of the Royal Children's Hospital in Victoria explained that a history of trauma can lead to a wide variety of difficulties and challenges for children and young people. She explained that negative relational experiences at an early age can have a significant impact on the child or young person's socialisation.

Ms Hogan made the following assertion, which I consider to be particularly poignant:

> Children do well if they can. But trauma seriously impacts the opportunity for children to learn HOW to do well.[9]

Ms Hogan's presentation was structured according to the effects that different types of abuse can have on a child. Her research showed that the effects of child abuse and family violence result in trauma that affects cortisol levels and neural development, impacting the structural and functional development of the brain and resulting in behavioural ramifications.[10]

These behavioural ramifications can be classified either as internalising behaviours or externalising behaviours. Internalising behaviours include fears or phobias, anxiety, obsessiveness and control; depression, lack of hope, withdrawal; self-harm and identity confusion. Externalising behaviours include aggression, poor concentration, hyper vigilance, acting out and risk taking behaviours, sexualised behaviours/sexual risk taking and destructive behaviours.[11]

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8 Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 19–20 October 2015.

9 K Hogan, "The impact of trauma", paper presented at the Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 19 October 2015.

10 ibid.

11 ibid.

Ms Hogan concluded by outlining the long term impacts of child abuse and family violence, especially where: the abuse is not recognised and stopped; the child/young person's experience is not validated; the child/young person is not assisted to feel safe, understand and manage their emotional experience; explore their loss and create a positive future.

Implicit in Ms Hogan's research and observations is the conclusion that trauma can significantly affect a child/young person's ability to identify and articulate abuse, which can leave the child/young person with unresolved issues and affect their long term health and development.

It follows then, that communication is a vital part of preserving the safety, welfare and well-being of the child. In Professor Pamela Snow's presentation, she described the different factors that can impact upon a child or young person's language development. Importantly, she stated that:

> We have evolved a special facility for oral language, such that it is innate **BUT** it is highly vulnerable to a range of developmental conditions eg hearing impairment, intellectual disability, autism spectrum disorders, brain injury and it is highly sensitive to environmental exposure.[12]

Professor Snow's presentation explained that articulating feelings is a 'higher-order' communication skill which draws upon a range of cognitive, psychological and social factors. Importantly, she spoke of "Alexithymia" which means "having a lack of words for emotions". She explained that this was typically associated with autism spectrum disorders but may also occur in children who have either witnessed or been victims of trauma.[13]

A noteworthy aspect of Professor Snow's presentation was her reference to a 1995 study by Hart and Risley. This study examined the link between language exposure and children of parents on welfare benefits, working class parents and professional parents.

Hart and Risley's study examined children (aged 3) and found that:

- Children of parents on welfare benefits experienced 616 words per hour
- Children of working class parents experienced 1251 words per hour and
- Children of professional parents experienced 2153 words per hour.

Further, Hart and Risley conducted a longitudinal follow-up and examined these children at ages 9 and 10. This longitudinal study showed strong links between language exposure at age 3 and academic outcomes later in life.

Professor Snow also identified a number of "red flags" that may indicate communication difficulties.

These are: a diagnosed developmental disability, special school attendance, academic under-achievement, teacher, parent, or employer concern, social/peer level interpersonal difficulties, restlessness, avoidance and poor eye-contact, overly acquiescent style, "yep, nup, dunno, maybe, whatever" responses and a history of either internalising or externalising mental health problems.

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12 Professor P Snow, "Oral language competence: implications for the legal interface", paper presented at the Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 20 October 2015.

13 ibid.

At the conclusion of her presentation, Professor Snow quoted a statement made in 2007 by the Former Chair of the UK Youth Justice Board, Rod Morgan:

> It may be too much to say that if we reformed our schools, we would have no need for prisons. But if we better engaged our children and young people in education we would almost certainly have less need of prisons. Effective crime prevention has arguably more to do with education than sentencing policy.[14]

This quote exemplifies the cross-over between care and crime. The research by Ms Hogan and Professor Snow show that there is a link between trauma and communication.

Recent case law in care and protection

Joinder of parties

In proceedings under the Care Act, the parties will generally comprise the Secretary of the department, the child or children, the parent(s), the step-parent(s), and the legal representative(s), being the Independent Legal Representative for children under 12, or the Direct Legal Representative for children 12 and over, up to the age of 18.

Other persons having a genuine concern for the safety, welfare and well-being of the child(ren) may be given leave to appear in the proceedings, or be legally represented, and examine and cross-examine witnesses.[15]

Others who might be significantly impacted by a decision of the Children's Court, not being parties to the proceedings, are to be given "an opportunity to be heard on the matter of significant impact".[16] Historically, such persons were generally not made parties, but could present an affidavit. They could not, however, cross-examine or call witnesses of their own.

There has been something of a change in approach on this topic in recent times, partly driven by the transfer of casework to the NGO sector, but also as a result of some recent pronouncements by superior courts. The Court is now increasingly receptive to joinder applications and more likely to make orders than in the past.

In *Re June (No 2)* [2013] NSWSC 1111 (hereinafter referred to as *Re June*), McDougall J clarified the distinction between ss 87 and 98(3) of the *Care Act*:[17]

> [186] The second point to note is that the opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)). Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses at least generally.
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> [187] However, if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then in a particular case, the opportunity to be heard may extend to permitting cross-examination in that particular point.

The more recent decision in *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701, provides further clarification.

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14 ibid n 12.
15 *Children and Young Persons (Care and Protection) Act 1998*: s 98(3).
16 *Children and Young Persons (Care and Protection) Act 1998*: s 87(1).
17 *Re June (No 2)* [2013] NSWSC 1111 at [186]–[187].

During case management, the Children's Magistrate had refused the application of the grandparents to be joined as a party. At the hearing, which came before me at the Children's Court at Woy Woy,[18] I gave the grandparents an extensive opportunity to be heard, under s 87(1).

In the de novo appeal to the Supreme Court, the grandparents renewed their application for joinder and the matter was considered by Justice Slattery.

The significant aspect of Slattery J's decision was his distillation of the distinction between the opportunity to be heard under s 87(1) and the granting of leave to appear under s 98(3):

> [33] … In s 87(1) the threshold is one to ensure that non-parties who may suffer adverse impacts from Care Act orders will receive procedural fairness before such orders are made. The focus is on "impact on a person".[19]
>
> [34] But the threshold for s 98(3) is more child-centred. The s 98(3) right is only available to a person who in the Court's opinion "has a genuine concern for the safety, welfare and well-being of the child". It is perhaps because the s 98(3) threshold is more altruistic than that under s 87 that the *Care Act* can afford a wider scope to participate to those who receive a grant of s 98(3) leave. Persons meeting s 98(3) leave will sometimes be, as the great grandparents are in this case, people who can by their participation fill an evidentiary gap in the proceedings that it may be in the best interests of that child to see filled in the proceedings. In my view that is the case here.[20]

Accordingly, Slattery J granted the grandparents leave on terms under s 98(3). The grandparents were only granted leave to cross-examine and adduce evidence about their own suitability as alternative carers for the children.

Finally, I wish to remind you of a decision by Magistrate Schurr delivered in 2003 in which an NGO, Anglicare, was joined as a party to Care proceedings: *In the matter of "Pamela"* [2003] CLN 3. In that matter, the Department of Community Services (as it was then designated) sought an order from the Court revoking the leave of Anglicare to appear as a party. The Secretary argued that the NGO had insufficient interest in the proceedings and that it was probable that the positions taken by the parties would be duplicated.

Magistrate Schurr outlined Anglicare's involvement in proceedings as follows:

> In late 1998 the Department of Community Services delegated to Anglicare the role of foster care agency, a role it continues to date. Anglicare does not exercise any powers of parental responsibility for this child, and these powers remain with the Minister. Anglicare workers do, however, supervise the foster carers, coordinate access by the birth family and liaise with the Department of Community Services through case conferences.[21]

Anglicare had originally sought leave to be joined as a party to argue for an "independent assessment of the child and family members". Anglicare argued that once leave was granted there was no limit on their role in the proceedings.

The Department argued that leave should only be granted to those persons with rights, powers and duties relating to children, by reference to the objects in s 8(a) of the *Care Act*. It was argued that Anglicare had neither parental responsibility nor the day to day care of the child and could not be granted leave.

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18 *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.
19 *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701 at [33].
20 ibid at [34].
21 *In the matter of "Pamela"* [2003] CLN 3 at p 4.

Magistrate Schurr concluded that Anglicare's involvement with the child was sufficient to bring it within the scope of s 98(3).

Interim orders

The next matter I will deal with is the topic of interim orders, and to remind you all of the decision of Blewitt ChM in *Re Mary* [2014] NSWChC 7. In this matter, Blewitt ChM considered the decision of Rein J in *Re Timothy* [2010] NSWSC 524 in relation to interim orders.

Specifically, Blewitt ChM considered whether the Children's Court could rescind or vary an interim order allocating parental responsibility without the need for an application to be made under s 90 of the *Care Act*.

Blewitt ChM concluded that interim orders allocating parental responsibility can be amended without the need for a s 90 application.

Whilst a party is not precluded from making a s 90 application, it is not an essential requirement:

> In the absence of express provisions in the *Care Act* that require the application of the provisions of s 90 to vary an existing interim order, and having regard to the inconclusive remarks of Rein J in *Re Timothy*, I find that the Court does have the power to entertain an oral application for varying of an existing interim order without the need for the moving party to file an application pursuant to s 90.[22]

What this means, in practical terms, is that the Children's Court will be less likely in the future to make time limited orders for the allocation of parental responsibility to the Minister.

The Aboriginal and Torres Strait Islander Child Placement Principles

Consistent with my determination to ensure that application of the Aboriginal and Torres Strait Islander Child Placement Principles becomes an automatic, comprehensive process, it is apt that I discuss relevant case law to further emphasise this point.

The Aboriginal and Torres Strait Islander Child Placement Principles represent a legislative recognition of the tremendous care, attention, thought and consideration required when making decisions to assure the safety, welfare and well-being of an Aboriginal or Torres Strait Islander child.

Justice Muirhead described the discrete needs of Aboriginal children and young people in the matter of *Jabaltjari v Hammersley*:

> The young Aboriginal is a child who requires tremendous care and attention, much thought, much consideration.[23]

As I mentioned above, the rationale behind these principles is to provide guidance with respect to preserving Aboriginal children's connection to their family, community, culture, history and identity. As the Commission for Children and Young People confirm:

> The Aboriginal Child Placement Principle is based on the value that every Aboriginal child has the right to be raised within their own culture and community. It recognises the critical importance of cultural identity and connectedness to development and wellbeing: Aboriginal children and young people do better if they remain connected to their culture, community and country.[24]

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22 *Re Mary* [2014] NSWChC 7 at [33].

23 *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 98.

24 Commission for Children and Young People, *Inquiry into compliance with the intent of the Aboriginal Child Placement Principle (ACPP) in Victoria*, 2015, at p 7.

It follows, that application of these principles must not be superficial. In the decision of *Drake v Drake* [2014] FCCA 2950, Judge Sexton stated that the Department:

> … adduces no evidence of the Children having the opportunity to enjoy their Aboriginal culture in more than a superficial way.[25]

Judge Sexton went on to state that the Department had not complied with the Aboriginal Child Placement Principles when the children were removed and placed in out-of-home care. Significantly, Judge Sexton stated:

> While the Department says it understands the importance of the Children remaining connected to their Aboriginal culture and their right to enjoy that culture, I find no basis to conclude that the Children's needs in this regard will be met if they remain in out-of-home care. For example, in the Department's Safety Assessment Reports of November 2013 and February 2014, the section "cultural identity" was marked "not applicable" for each Child, an entry Ms C was unable to explain. On the Department's proposal, I find it unlikely that the Children would have the opportunity to enjoy their culture or to participate in activities with others who share that culture. The authorities, as set out below, confirm Mr R's view that the Department's proposal in relation to connecting the Children to their culture does not meet the legislative requirements.[26]

What the Department had proposed in this matter was that the children would attend the Aboriginal Medical Service, that the Department would make carers aware of events of Aboriginal and Torres Strait Islander cultural significance and that the children had been provided with Aboriginal stories and activity books.[27]

Notably, Judge Sexton cited the following case law to elucidate the importance of addressing the cultural needs of Aboriginal children and young people. Judge Sexton cited the Full Court decision of *In the Marriage of B and R* (1995) FLC 92-636 at 82-396:

> It is not just that Aboriginal children should be encouraged to learn about their culture, and to take pride in it in a manner in which other children might be so encouraged. What this issue directs our minds to is the particular problems and difficulties confronted throughout Australian history, and at the present time, by Aboriginal Australians in mainstream Australian society. The history of Aboriginal Australians is a unique one, as is their current position in Australian life …[28]

Judge Sexton went on to cite the matter of *Hort v Verran* [2009] FamCAFC 214 where the Full Court stated at [106]:[29]

> In *Davis & Davis & Anor* (2008) 38 Fam LR 671; [2007] FamCA 1149 Young J said:
>
> 77. In *B & F* [1998] FamCA 239, Moore J considered the scope and meaning of the term "connection". At 29–30 her Honour stated:
>
> > As I see it, the requirement to maintain a connection to their lifestyle, culture and traditions involves an active view of the child's need to participate in the lifestyle, culture and traditions of the community to which they belong. This need, in my opinion, **goes beyond a child being simply provided with information and knowledge about their heritage but encompasses an active experience of their lifestyle, culture and traditions. This can only come from spending time with family members and community. Through**

25 *Drake v Drake* [2014] FCCA 2950 at [187].
26 ibid at [191].
27 ibid at [189].
28 ibid n 23 at [192].
29 ibid at [195].

> **participation in the everyday lifestyle of family and community the child comes to know their place within the community, to know who they are and what their obligations are and by that means gain their identity and sense of belonging**.
>
> [Emphasis added.]

Judge Sexton concluded that the children be restored to the care of their grandmother.[30] Her decision and reasons provide context for the need to apply the Aboriginal Child Placement Principles and that any care plans produced *must* appropriately and adequately address the cultural needs of the children.

Part two: the criminal jurisdiction of the Children's Court

I now turn to address you on issues pertinent to the criminal jurisdiction of this Court. As I prefaced above, given the complexities of this jurisdiction, I am unable to address you on all of the present issues confronting the Children's Court. However, I have selected some important current issues to discuss and I review some recent case law.

The topics highlighted are:

(a) Diversion

(b) Brain science

(c) Communicating with children and young people

(d) Doli incapax and special considerations for sentencing children.

Before I commence my discussion of these topics I would like to remind you of the accommodation requirements prescribed by s 28 of the *Bail Act 2013*, which requires that accommodation is a pre-condition of release for a child or young person. In other words, the child or young person cannot be released until suitable accommodation is provided.

Section 28(5) provides that the Court may direct "any officer of a Division of the Government Service" to provide information about the action being taken to obtain or secure suitable accommodation for the child. Clause 31 of the *Bail Regulation 2014* provides that this information may be provided in writing or orally at court, and must address where the accused person will reside.

If the accommodation requirement is imposed, s 28(4) requires the Court to re-list the matter at least every 2 days until suitable accommodation is secured.

Diversion

I now turn to a discussion of diversion. One of the most effective ways of reducing juvenile offending is to begin prevention efforts as early as possible and to intervene aggressively with those who are already offending. Loeber, Farrington and Petechuk capture diversionary strategies as follows:

> Of all known interventions to reduce juvenile delinquency, preventative interventions that focus on child delinquency will probably take the largest "bite" out of crime … "The earlier the better" is a key theme in establishing interventions to prevent child delinquency, whether these interventions focus on the individual child, the home and family, or the school and community.[31]

30 ibid at [238].

31 R Loeber, DP Farrington and D Petechuk, "Child delinquency: early intervention and prevention", Child Delinquency Bulletin Series, US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2003, Washington DC at p 9.

Further, as Delfabbro and Day point out:

> Attempting to develop interventions once young people have well established police records, incomplete schooling, and/or problematic peer groups, is likely to be very difficult.[32]

While research is useful and provides an important foundation for any dialogue about diversion, in my view, it is anecdotally incontrovertible that diversion is a critical pathway for young people. It may be a more resource intensive pathway, but by adequately addressing a child or young person's criminogenic needs, it has the potential to completely alter the course of a young person's life.

The acute need for diversion is emphasised by Bargen:

> … much more attention needs to be paid to deciding how to conceptualise and respond to young people in trouble with the law, and to their families, communities and victims, and how to listen and respond to what these people tell us about their lives and their aspirations. We can and should be able to create a humane system that is committed to the diversion of young people wherever possible and appropriate in line with international human rights norms and practice, and one which recognises the human right of young people in trouble with the law to be treated with dignity and respect and to be provided with conditions in which they can grow and flourish into happy, contributing and well-rounded adults — surely our responsibility as adults, and an aspiration we must have for *all* our children.[33]

I am guided by the responsibility and aspiration that Bargen refers to and will continue to advocate for the use of diversionary options. I will therefore traverse ground that some of you have heard before, as I believe that the more we hear about diversion, the more likely we are to activate its use. And importantly, the more diversion is used, the less we will see at risk young people appearing before the Court.

The *Young Offenders Act 1997* is a statutory embodiment of early intervention and offers three alternative options for dealing with young offenders. These options are: warnings, cautions and Youth Justice Conferences (YJC's). I will not cover the details of warnings and cautions as they are fairly self-explanatory. However, I will provide a brief exposition of YJC's and how this option brings the individual child, family and community together to prevent future offending.

At a YJC, a young offender is with his or her family, and is brought face to face with the victim and the victim's support person, to hear about the harm caused by their offending and to take accountability for their actions.

At the conference, the participants agree on a suitable outcome. The outcome may include an apology, reasonable reparation to the victim and steps to reintegrate the young person into the community.

A YJC is a valuable alternative to court as it is not an impersonal or exclusive process where the young person and the victim are adversaries. Rather, responsibility for dealing with the young offender is partially transferred from the State to the young person, their family, the victim and the wider community.

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32 P Delfabbro and D Day, *Programs for anti-social minority youth in Australia and New Zealand — a literature review*, report prepared for the Centre for the Evaluation of Social Services, Stockholm, Sweden, 2003 at p 47.

33 J Bargen, "Embedding diversion and limiting the use of bail in NSW: a consideration of the issues related to achieving and embedding diversion into juvenile justice practices", (2010) 21(3) *Current Issues in Criminal Justice* 467 at 477.

In New Zealand, a similar option to YJC's exists, entitled Family Group Conferences (FGC's). The statutory process of FGCs is similar to that of YJC's, however, the process allows for responses tailored to specific cultural needs to allow for stronger engagement with the process.

In NSW, the Department of Justice has the Youth on Track Scheme which employs a multi-agency approach, with the involvement of the Department of Education and Communities, the Department of Family and Community Services, the Department of Health and NSW Police, in addition to non-government organisations (NGOs).

Using this collaborative approach, services on the ground – such as Police and schools — identify "at risk" youth and refer them to the Youth on Track program. An NGO case manager is allocated responsibility for working with the young person to address criminogenic factors in their lives and to provide access to specialist services and ongoing support to the young person.

In my view, we must continue to improve diversionary processes, and we must continue to educate ourselves about what works.

Research has shown that there is a link between decision-making and memory.

Many children and young people who engage in offending behaviour have experienced traumas that activate their memory, resulting in a response that impacts upon their ability to make appropriate, considered decisions.[34] However, just as harm and trauma accumulate over time, so does a child's capacity to change in response to treatment.[35]

Consequently, while environmental factors such as parents, carers and teachers can aid development, environmental factors also have the ability to facilitate change and successful development. It is essential, therefore, that our response to offending behaviour combines therapeutic interventions with traditional criminal justice approaches.

As Professor Kenneth Nunn so aptly put it:

> Containment without treatment is custodial futility without any progress except maturation and chance encounters. Treatment without containment is powerless without any capacity to prevent flight away from help. Treatment and containment without education is recovery without skills to live in the real world.[36]

It is at this stage that I note the provisions under the *Mental Health (Forensic Provisions) Act 1990*. These provisions enable Magistrates to divert mentally disordered young people from the criminal justice system: ss 32 and 33.

Magistrates undertake a balancing exercise when deciding whether making use of this mechanism will produce better outcomes for the young person and the community.[37]

This therapeutic response allows the Children's Court to dismiss the charges and discharge the young person into the care of a responsible person or on the condition that they obtain a mental health assessment or treatment. However, the lack of follow-up that could empower

34 K Nunn, "Decision-making in out-of-home care children who offend", presented at the Children's Court magistrates section 16 conference, November 2013.

35 K Nunn, "Bad, mad and sad: rethinking the human condition in childhood with special relevance to moral development" (2011) 47 *Journal of Paediatrics and Child Health* 624 at 625.

36 ibid n 32.

37 *Director of Public Prosecutions v El Mawas* (2006) 66 NSWLR 93 at [79].

Magistrates with the ability to receive a report as to the young person's compliance with treatment, coupled with the lack of access to services, increases the reluctance of Magistrates to use this provision.

The legislative scheme applicable to the Children's Court enables considerable flexibility in sentencing. Specifically, the provisions in s 6(a), (b) and (f) of the *Children (Criminal Proceedings) Act 1987*:

> (a) That children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, *a right to be heard* and *a right to participate*, in the processes that lead to decisions that affect them.
>
> (b) That children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, *require guidance and assistance*.
>
> …
>
> (f) That it is desirable that children who commit offences be *assisted with their reintegration into the community so as to sustain family and community ties*.
>
> [Emphasis added.]

In the Children's Court, the *Children (Criminal Proceedings) Act 1987* provides the penalties applicable: s 33. Specifically, s 33(1)(c2):

> The Children's Court … "may make an order adjourning proceedings…to a specified date (not later than 12 months from the date of the finding of guilt) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the Bail Act 2013":
>
> (i) for the purpose of assessing the person's capacity and prospects for rehabilitation,
>
> (ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place,
>
> (iii) for any other purpose the Children's Court considers appropriate in the circumstances.

The deferred sentencing model is one that I encourage Children's Magistrates to utilise.

Where possible, the Children's Court seeks to divert a child away from a custodial sentence, and involves the young person in a consultative and participatory process that includes the relevant stakeholders. Issues of concern are identified for the young person. Methods of addressing these issues are then incorporated into an Action and Support Plan for the young person.

The young person then has his/her actions taken into account on sentence and after hearing submissions the Judicial Officer will consider this information and impose an appropriate sentence. Notably, a full suite of sentencing options are available to the Judicial Officer.

Another promising initiative in the Youth Justice arena is the development of a joint protocol to address the criminalisation of children and young people in out-of-home care (OOHC). In the 1999 Community Services Commission publication "The drift of children in care into the criminal justice system: turning victims into criminals", the following circumstances were identified as leading to police intervention for children in OOHC:

- Problematic behaviour that would be a disciplinary matter in a family home could lead to criminal charges in group homes. Staff would call police after incidents such as malicious damage and assault and an altercation would take place which then resulted in additional charges of resisting arrest, assaulting police and offensive language.
- When a child's placement broke down, the Department of Family and Community Services sometimes put out a warrant for a child resulting in their apprehension and detention.

- Incidents were reported where children in care would be returned to a residential facility under bail conditions after a court hearing. These bail conditions could involve keeping to a curfew or staying within a particular facility. If a child breached these conditions, it was possible staff would report the breaches to the police which could then result in detention.
- Carers were sometimes required to make a statement to the police in order to lodge a claim for victim's compensation, which operated as an incentive for them to contact police in matters of physical aggression and assault.
- Many services had explicit policies about using police as a "natural consequence" and a substitute for imposing their own disciplinary action.
- The staff of some funded services were reportedly simply "not up to it" and as a result sought assistance from the police to deal with the behaviour of the young person.[38]

Further, 46% of all legal aid high service users had spent time in OOHC.[39] The imposition of criminal charges on children and young people who would have been, but for their placement in OOHC, dealt with in the family home is unreasonable and unfair. It victimises children and young people who have already suffered sufficiently to warrant their removal from their parents/carers.

Additionally, policing children and young people in their private lives may perpetuate a cycle of negative labelling. By calling the police every time a young person displays challenging behaviours, young people may begin to see themselves as inherently bad. As Cuneen and White observe:

> … if you tell someone sufficiently often that they are "bad" or "stupid" or "crazy" that person may start to believe the label and to act out the stereotypical behaviour associated with it.[40]

I am pleased to report that the Children's Court, Legal Aid and the Deputy Ombudsman, Steve Kinmond, have collaborated to engage the NGO sector and the NSW Police Service to develop a protocol designed to reduce the contact of young people in residential OOHC with Police and the criminal justice system.

The protocol has two objectives. First, to reduce the incidence of police being called as a result of incidents in residential OOHC, to ensure that police will only be called in appropriate circumstances, and not in cases of "trivial" offending or breaching house rules.

The second objective of the protocol is to encourage police, when they are called, to view arrest as a last resort, and to consider other options such as cautions and warnings, or if it is necessary to take a more serious step, to proceed by way of a future CAN, rather than placing the young person in detention.

Already we are seeing a reduction in remand rates in the various Juvenile Justice Detention centres.

I am interested to see how this protocol will affect the decriminalisation of children in OOHC over the next year.

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38 Community Services Commission, *The drift of children in care into the criminal justice system: turning victims into criminals*, 1996, at pp 16–20; *Wards and juvenile justice*, 1999.

39 P van de Zandt and T Webb, *High service users at Legal Aid NSW: profiling the 50 highest users of legal aid services*, Legal Aid NSW, 2013.

40 C Cuneen and R White, *Juvenile justice: youth and crime in Australia*, chapter 2 on "Theories of juvenile offending", 2 edn, Oxford University Press, 2002, pp 32–61 at p 46.

As you are all aware from your own practical experience and the information I have presented above, there is no easy panacea for the problem of young offending. Its causes are often inextricably linked to disadvantage and are thus embedded, intergenerational and complex. However, as I have illustrated, early intervention, diversion and rehabilitation are critical if we are serious in attempting to break the cycle of disadvantage.

Brain science and its relevance to children and young people

The need to safeguard the rehabilitation of children and young people is internationally recognised in the United Nations Convention on the Rights of the Child (CROC). Article 40.4 highlights that looking after children in need is a multifactorial process, stating:

> A variety of dispositions, such as care; guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.[41]

Similarly, the Beijing Rules provide a full list of considerations at rule 18.1 and state that:

> A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible.[42]

In NSW the importance of rehabilitation for children and young people is embodied in s 6 of the *Children (Criminal Proceedings) Act 1987*:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions, and wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

In *R v GDP* (1991) 53 A Crim R 112 at 116, Mathews J (Gleeson CJ and Samuels JA agreeing) adopted comments by Yeldham J in *R v Wilcox* (unrep, 15/8/79, NSWSC):

> In the case of a youthful offender … considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation.

41 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations.

42 UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"): resolution adopted by the General Assembly, 29 November 1985.

In *R v TVC* [2002] NSWCCA 325 at [13], Sperling J cited Wood J in *R v Hoai Vinh Tran* [1999] NSWCCA 109:

> In coming to that conclusion his Honour made reference to the well-known principle that when courts are required to sentence a young offender considerations of punishment and general deterrence should in general be regarded as subordinate to the need to foster the offender's rehabilitation … That is a sensible principle to which full effect should be given in appropriate cases. It can have particular relevance where an offender is assessed as being at the cross roads between a life of criminality and a law abiding existence.

In addition to international legal principle, legislation and case law, children and young people also have the benefit of science — neurobiology — to explain their different legal status.

The research available through the field of neurobiology has piqued my interest, particularly developmental neurobiology.

This research has been undertaken over the years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.[43]

Johnson, Blum and Giedd explain executive function as:

> … a set of supervisory cognitive skills needed for goal-directed behaviour, including planning, response inhibition, working memory and attention. Poor executive function leads to difficulty with planning, attention, using feedback and mental inflexibility, all of which could undermine judgment and decision making.[44]

Put simply, according to brain science, a young person is unable to make any rational choice, let alone the rational choice to commit a criminal act. If we take this science at its highest level, it would be remiss to argue that the focus should not be on rehabilitation.

The developmental neurobiology of young people is compounded by intergenerational disadvantage and trauma associated with maltreatment and neglect.

I draw your attention to this research, not to suggest that the findings from neurobiology research exculpate all young offenders from criminal responsibility. Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of offender.

Ameliorating communication with children and young people

Understanding the factors impacting upon brain development can have many negative implications. One such implication is that this misunderstanding results in a failure to properly communicate with young people.

An understanding of the discrete cognitive processes that differentiate young people from adults is critical to effective communication.

Ensuring that young people understand the legal implications of their offending behaviour may also combat against a distrust with, and disconnection from, the criminal justice system.

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43 EC McGuish et al, "Psychopathic traits and offending trajectories from early adolescence", 2014 (42(1)) *Journal of Criminal Justice* pp 66–76.

44 SB Johnson, RW Blum and JN Giedd, "Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy", 2009 (45(3)) *Journal of Adolescent Health* pp 216–221 at p 218.

Understanding that adolescence is a stage fraught with conflict is persuasively captured by Muncie, who states:

> Unlike the nouns "child" and "adult" which refer to definite periods of life, the period identified as "youth" is more nebulous and is normative because it conjures up troubling and emotive images.[45]

This amorphous period of life for all young people is further problematised by the disadvantage suffered by most of the children and young people appearing before the Children's Court.

The *2009 NSW Young People in Custody Health Survey* found that:

- 46% had a possible intellectual disability or borderline intellectual disability
- 18% had mild to moderate hearing loss
- 66% reported being drunk at least weekly in the year prior to being in custody
- 65% had used an illicit drug at least weekly in the year prior to custody.[46]

Further, as you are all aware, many of the young people appearing before the Children's Court in the Care jurisdiction, frequently come before the Court in its Criminal jurisdiction later in life.

Dr Judith Cashmore, an eminent psychologist and researcher, has found an established link between childhood maltreatment and adolescent offending.[47]

Dr Cashmore's research correlates with the research I spoke to in the care section of this paper, regarding trauma and brain development. Her research showed that a number of factors may constitute childhood maltreatment and, consequently, brain development. These factors included: parenting issues, nutrition, health, social interactions and conflict. Additionally, the impact these factors have on brain development may be compounded by instability in the creation of developmental attachments through numerous OOHC placements.[48]

Given that the research shows links between brain development, trauma and criminal offending, it comes as no surprise that communication with children and young people is a discrete area of study in and of itself.

At the "Speaking their language conference", referred to above, Judge Sexton, of the Victorian County Court provided an informative paper on communicating with children and young people.[49]

Judge Sexton stated:

> Children are not "little adults". They cannot be questioned over an extended period, as adults might be. Responsive answers might be obtained for a time, but after that, there are real issues about the veracity and accuracy of the answers. Challenging a child witness in cross examination is difficult.[50]

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45 G Muncie, *Youth and Crime*, 3rd edn, Sage, 2009, at p 4.

46 D Indig et al, *2009 NSW young people in custody health survey: full report*, Justice Health and Juvenile Justice, 2011.

47 J Cashmore, *The link between child maltreatment and adolescent offending: systems of neglect of adolescents*, Australian Institute of Family Studies, Family Matters No 89, 2011.

48 ibid.

49 Judge M Sexton, "Communicating with children and young people", paper presented at the Judicial College of Victoria conference, *Speaking their language: young people and the courtroom*, 19 October 2015.

50 ibid at p 1.

Judge Sexton has identified problems associated with gratuitous concurrence — agreeing or disagreeing to a proposition because the person being questioned thinks that is what the questioner wants to hear — when asking questions of children and young people, particularly those who have been exposed to trauma. In addition, she acknowledges:

> Often adolescents are considered capable of communicating in an adult way, but if they have been subjected to trauma in their lives, there may be an underlying disability which means they are really functioning at the level of an under 12 year old, but will be too embarrassed to admit to not understanding.[51]

Following a general discussion of the requirements for questioning child witnesses, determining competence and disallowing improper questions under the Victorian equivalent of the *Evidence Act 1995*,[52]Judge Sexton referred to a 1988 study analysing the transcript of the cross examination of child witnesses. Judge Sexton drew particular attention to 10 aspects from this study which can impact upon a child witness's ability to communicate in Court.[53] What follows is an abridged version of the 10 aspects referred to in Judge Sexton's paper.

Language

Language used must be appropriate to the age and culture of the child. Some specific words and concepts are only acquired at certain ages. For example, the distinction between "before" and "after" may only be mastered at age 7; between "come" and "go" and "bring" and "take" at between 7 and 8 years of age and between "ask" and "tell" between 7 and 10 years of age.

Next, children's conceptualisation of time, frequency and ordering of events is gradually acquired. It is therefore necessary to provide concrete anchor points, using times or events that are relevant to the child, such as a birthday or having a broken arm.[54]

Structure of questions

It is important for child witnesses that they have some idea of the topic or direction of the questions. So the use of "signposting" is helpful. For example: "I want to ask you some questions about your father". Next, for very young children, there should only be one "step" per question. Children under 12 have problems when the questions ask more than one thing at a time. A 5-year-old child cannot deal with more than three brief chunks of information.[55]

Length of questions

A useful "rule of thumb" is the number of words in a question should be equal to the age of the child eg 5 years old = 5 words.[56]

Use of negatives

Generally, children do not understand questions put in the negative until around 11 or 12 years old. Tag questions such as "He didn't do it, did he?" while appearing to the adult mind simple on

51 ibid at p 4.
52 *Evidence Act 2008* (Vic).
53 Sexton above n 49 at p 6 citing M Brennan and R Brennan, *Strange language: child victim witnesses under cross examination* (Wagga Wagga: CSU Literacy Studies Network, 1988). As noted in fn 282, AIJA Bench book for children giving evidence in Australian courts, 2015, pp 71–4.
54 Above n 49 at pp 7-8.
55 ibid at pp 8–9.
56 ibid at p 10.

the face of it, apparently requires at least seven cognitive operations to answer.[57] If the answer to the question "He didn't do it, did he?" is "no", that could mean that it is not right to say he didn't do it, but would generally be taken by the adult listener to be the opposite. The question could be easily rephrased as "Did he really do it?"[58]

Cossins states that for example, to answer yes to a negative question does not necessarily mean that the child agrees with the statement — it may mean that the child does not have the capacity to refute it.[59]

Repetitive questioning

Research has shown that repetitive questioning only decreases accuracy, it does not increase it.[60] Young children (to age 10) find persistent questioning very demoralising, particularly when they have previously indicated that they do not know the answer. Young children tend to assume that if the same question is repeated, the original answer must have been incorrect. Additionally, repetitive questioning may cause the child to believe that if the adult says something different to the child's belief, adults know everything, so they must be right. That is why it is important for the Judicial Officer to reinforce, each time a suggestion is put, that they should agree if they believe what is said is true, and disagree if it is not true.[61]

Voice and body language

Children, particularly those with language or cognitive difficulties, find it difficult to pick up on visual cues. Procedures designed to make giving evidence easier, such as the use of CCTV, do assist to reduce stress by preventing the child from seeing the defendant, but may also provide opportunities for miscommunication, and counsel may unintentionally appear to the child as intimidating when viewed through a TV screen.

Also, asking questions in a rapid fire manner may lead to a child eventually offering a random response to stop the questioning, and the response may therefore be unreliable.[62]

Previous versions or other potential inconsistencies

Even adult witnesses find questioning on past versions confusing. For a child witness, there is a potential problem with focussing on trivial inconsistencies and presenting them as indicators of unreliability and lack of truthfulness in the child witness.

The belief that a cross-examiner has uncovered a dishonest and inconsistent witness could, in the case of a child witness, actually mean that cross-examination has produced a confused and/or psychologically stressed child. Importantly, it is known that children may provide different, but nonetheless accurate details about the same event on different occasions of questioning (known as staggered or staged disclosure). So there may be genuine and reliable, yet different, memories in answer to the same questions out of court and in cross-examination.[63]

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57 ibid at p 10 citing A G Walker, *Handbook on questioning children: a linguistic perspective*, 2nd edn, American Bar Association (ABA) Centre on Children and the Law, p 10. As noted in fn 210 of the AIJA Bench book for children giving evidence in Australian courts, 2015.

58 ibid n 49 at p 11.

59 ibid citing A Cossins, "Cross-examination in child sexual assault trials: evidentiary safeguard or an opportunity to confuse?" [2009] *MULR* 3.

60 ibid citing K J Saywitz, "Developmental underpinnings of children's testimony", in HL Westcott, GM Davies and R Bull (eds), *Children's testimony: a handbook of psychological research and forensic practice*, Wiley, 2002, p 8.

61 ibid n 49 pp 11–12.

62 ibid p 12.

63 ibid at p 13.

Ambiguous questions

While tricky for any witness to respond to, ambiguous questions may be even trickier for children.[64]

Questions which challenge the child's version

Child witnesses find it very difficult being challenged. They expect to come to court and tell their story to the Judge. Instead of a free-flowing narrative, which is the form considered in the literature most likely to be accurate, children find firstly that they are not speaking directly to the Judge about their story; secondly, they can only say things in answer to questions by lawyers, questions that leave out the opportunity to say things they remember but emphasise details that adults think are important.

The challenge is made even more traumatic when the language used is aggressive.[65]

Demanding precise recollection of seemingly obscure facts

A child may feel obliged to answer these questions when they do not actually remember, in the belief that an adult would not be asking the questions if an answer was not expected.[66]

Following a discussion of the types of questions that may confound a child witness, Judge Sexton accepts that it is part of the Judicial Officer's role and responsibility to intervene when an improper question is asked and cites former Chief Justice of the Supreme Court of NSW, Spigelman CJ in *R v TA* (2003) 57 NSWLR 444 who affirmed that the protective role of the Judicial Officer toward a witness is "perfectly consistent with the requirements of a fair trial".[67]

In her conclusion, Judge Sexton states that apart from recognising the impropriety of questions, there are other ways where a Judicial Officer can work with Counsel to avoid the need for intervention. Judge Sexton emphasises her support for the use of the witness intermediary scheme in England and Wales, she cites the case of *R v Lubemba* [2014] EWCA Crim 2064 at [38]–[45].

> It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and all the significant inconsistencies without intimidating or distressing a witness.[68]

I support the witness intermediary scheme and any other model utilised to facilitate the effective co-operation and communication of children and young people. Intermediaries are a distinctly valuable resource that have the potential to revolutionise the adversarial system of criminal justice. As Plotnikoff and Woolfson state: "Intermediaries are the great untold 'good news' story of the criminal justice system".[69]

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64 ibid at p 14.
65 ibid at p 14.
66 ibid at p 15.
67 *R v TA* (2003) 57 NSWLR 444 per Spigelman CJ at 446.
68 Above n 49 at p 21.
69 J Plotnikoff and R Woolfson, *Intermediaries in the criminal justice system: improving communication for vulnerable witnesses and defendants*, (with a foreword by Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales), University of Bristol, Police Press, 2015, at p 304.

The Children's Court's submission to the NSW Government on the use of a witness intermediary scheme in NSW advocated that additional support was required in order to communicate effectively and ensure an inclusive and engaging process for children and young people.

Witness intermediaries bridge the communication gap between counsel and child witnesses. Intermediaries are independent and owe their duty to the Court, acting in a similar capacity to interpreters by facilitating communication between the witness and counsel. Intermediaries can also play a part in providing advice or utilising creative communication aids to assist counsel and the Court to ensure tailored, appropriate communication, avoid the risk of re-traumatisation or systems abuse and facilitate the fair and transparent administration of justice.

The witness intermediary concept will be piloted in child sexual assault matters in the District Court.

It will be exciting to evaluate the pilot and view the outcomes for improving communication for children and young people in court proceedings. I hope that I will be able to report on it further in the 2017 Regional Conferences.

Recent case law in youth crime

Doli incapax — application of an objective or subjective test

In the matter of *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520, there was no issue as to the relevant facts. It was agreed that RH did commit an aggravated break and enter, the circumstances of aggravation being that he was in company with his cousin S at the time of the offence.

RH was aged 12 at the time of the offence. The only issue in the appeal was whether the evidence before his Honour was sufficient to rebut the presumption of doli incapax in favour of RH.

Hoeben CJ at CL found that the Magistrate had wrongly applied an objective test to the question of the young person's capacity, by basing his assessment of the child's capacity according to that of a "normal 12 year old".[70]

Hoeben CJ at CL stated:

> It was common ground that the relevant test was a subjective one and concerned the state of mind of the particular minor. It could not be applied on the basis of what a normal child of 12 would have known or thought.[71]

Hoeben CJ at CL went on to consider whether by reference to the evidence as a whole, it was still open to his Honour to find that the presumption had been rebutted.[72]

He endorsed the view of Hodgson JA in *BP v R: SW v R* [2006] NSWCCA 172, "there should not be a narrow view taken on what are circumstances of the offence that can operate as evidence".[73]

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70 *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520 at [23].
71 ibid at [22].
72 ibid at [25].
73 *BP v R; SW v R* [2006] NSWCCA 172 at [30].

Hodgson JA in *BP v R; SW v R* found that:

> For example, in the present case, assuming the jury accepted LD's evidence that she was crying and screaming and struggling and asking BP to stop, these would in my opinion be factors that could support the inference that BP knew that what he was doing was causing great distress to another human being and as such was seriously wrong ...[74]

In *RH v Director of Public Prosecutions (NSW)*, Hoeben CJ at CL found the evidence sufficient to establish beyond a reasonable doubt that doli incapax had been rebutted. Evidence included: that RH had used a jemmy to break into the station, which required some planning; and that particular words were used by RH when describing to his cousin what he had done.

RH appealed to the NSW Court of Appeal in the matter of *RH v Director of Public Prosecutions (NSW)* (2014) 244 A Crim R 221, on the basis of error. The NSWCA upheld the appeal although the court was not unanimous as to the orders that should be made. The basis for the error was that after deciding that there was sufficient evidence before the court to rebut the presumption of doli incapax, Hoeben CJ at CL erred by applying s 55(1)(c) of the *Crimes (Appeal and Review) Act 2001* (NSW) to dismiss the appeal.

McColl JA, determined that the court should set aside the conviction and remit the matter to the Local Court for redetermination in accordance with the court's orders.

Basten JA at [43] approved Hoeben CJ at CL's finding that the children's magistrate had erred, by applying an objective and not a subjective test:

> On an appeal limited to a question of law the findings as to error dictated the outcome, unless it could be said that, applying the correct test, there was only one conclusion open to the magistrate. The Chief Judge did not reach that conclusion, nor could he have done so on the material before him. Accordingly, the only course open was to set aside the conviction. The fact that it was open on the evidence for the Magistrate to conclude beyond reasonable doubt that the applicant had criminal capacity merely meant that the matter could be remitted for further hearing, rather than the charge being dismissed. It would have been open to the Chief Judge to set aside the decision and remit it pursuant to s 55(1)(b); that course was not taken.[75]

Accordingly, the appeal was allowed. However, given that 4 years had passed since the commission of the crime, Basten JA held that:[76]

> In these circumstances, the administration of justice would not be served by returning the matter to the Local Court with an invitation to the parties to re litigate the issue, nor would it be sensible to invite the magistrate to re-decide the case, more than two years after he had heard the evidence and four years after the conduct occurred.

Doli incapax — where several counts and presumption is rebutted on an earlier count

In the matter of *RP v R* (2015) 90 NSWLR 234, the Court of Criminal Appeal considered whether rebutting the presumption on an earlier count would take effect to rebut the presumption for later counts.

The facts are summarised below.

The applicant stood trial at Wagga Wagga District Court on an indictment containing four counts of sexual assault alleged to have been committed upon his younger brother TP.

74 ibid at [30].
75 *RH v Director of Public Prosecutions (NSW)* [2014] NSWCA 305 at [43].
76 ibid at [44].

The applicant pleaded not guilty to all counts on the indictment. The sole issue at trial was doli incapax. The applicant was aged between 11 years 6 months and 12 years 3 months at the time of the offending.

It was accepted by counsel appearing for the applicant that if the trial Judge found that the presumption of doli incapax had been rebutted beyond reasonable doubt by the Crown in relation to count 2, this would mean that the presumption had also been rebutted beyond reasonable doubt in relation to counts 2, 3 and 4 as it was accepted that they occurred later in time. It was also accepted that the only issue for determination was that of doli incapax.

The applicant sought leave to appeal in NSWCCA on the grounds that:

> **Ground 1**: the trial Judge erred in finding that he was satisfied that the evidence of circumstances surrounding the commission of count 2 established beyond reasonable doubt that the accused knew that what he was doing was seriously wrong and that no other rational inference arose;
>
> **Ground 2**: the verdicts in counts 3 and 4 are also unreasonable;
>
> **Ground 3**: the trial Judge erred in finding that "as a matter of logic" the accused must be guilty of counts 3 and 4.

The decision by Davies J is instructive, as he considered what approach should be taken when dealing with a ground relating to unreasonable verdicts (as in Grounds 1 and 2).

Justice Davies also considers the issue of doli incapax (Ground 3). My discussion of this case will centre on Ground 3. Davies J cites the trial Judge's reasons for finding that the presumption of doli incapax was rebutted as follows:[77]

> It is clear that the accused knew that the Complainant did not want to engage in the relevant act even before it occurred, that he used force upon the Complainant to commit it, and that he put his hand over the Complainant's mouth in an obvious attempt to stop him calling out, no doubt to avoid detection.
>
> During the act the Complainant was also crying and in pain and was trying to tell the accused to stop despite his mouth being covered, but the accused would not and persisted in the act for some time. I am satisfied beyond reasonable doubt by the obvious close proximity of the accused to the Complainant during the act that he was aware that what he was doing was causing great distress to another human being but nevertheless continued the act for a significant period, further, the accused only ceased the assault when an adult arrived back home at the residence. He then told the Complainant not to say anything. In my view the accused is obviously extremely concerned that his conduct would be discovered.
>
> **These facts establish much more than a belief in the accused that what he was doing was naughty or mischievous. They establish clearly, and in my view beyond reasonable doubt, that the accused knew at the time that the act he was committing upon the Complainant was seriously wrong as understood.** [Emphasis added.]

As I foreshadowed above, the critical issue for consideration in this matter was Ground 3: using the finding for count 2 in respect of counts 3 and 4. In the trial Judge's judgment, having found the presumption had been rebutted in respect of Count 2 (above), the trial Judge said:[78]

> It follows from Ms Mendes' concession and as a matter of logic that the accused must also be guilty of counts 3 and 4 and I accordingly find him guilty of such counts.

77 *RP v R* (2015) 90 NSWLR 234 at [56].
78 ibid at [73].

The concession was:[79]

> MENDES ... The submission is this, that if your Honour found that count 2 was made out beyond reasonable doubt, then it would flow from that decision that verdicts of guilty would be entered with respect to counts 3 and 4.

And again,[80]

> MENDES ... if your Honour was satisfied beyond reasonable doubt with respect to count 2 at some later stage, there would be a flow on effect.

The reasoning was as follows:[81]

> The enquiry on each count is whether the Applicant knew that the act charged was seriously wrong. In relation to count 3 the act charged was the same as charged in relation to count 2. Although surrounding circumstances such as the Complainant crying or being forcibly thrown down, or having his mouth covered by the Applicant's hand all contributed to the conclusion that the presumption was rebutted, the absence of those circumstances in count 3 does not have effect that the Applicant did not know that the act charged in count 3 was not seriously wrong. Although it is the Applicant's state of mind which must be examined it could not rationally be inferred that because the act was carried out less forcefully or with less resistance from the Complainant the Applicant's state of mind which must be examined it could not rationally be inferred that because the act was carried out less forcefully or with less resistance from the Complainant the Applicant could have believed that it was not seriously wrong in the light of what he had done in relation to count 2. The surrounding circumstances in relation to count 2 demonstrated that the Applicant knew that the act charged was seriously wrong. When he committed the same act in relation to count 3 the absence of a number of the accompanying circumstances does not detract from his knowledge that the act itself was seriously wrong.

Justice Davies separates Counts 2 and 3 from Count 4:[82]

> [79] The position with count 4 is completely different. The same act was not involved. There was no direct touching of genitals. The evidence was that there was apparently no resistance from the Complainant until after about five minutes when he said that he was getting sick of what the Applicant was doing. At that point the Applicant stopped. It would not be unreasonable to infer that the Applicant might have thought that the Complainant consented to what he was doing. At that point the Applicant stopped. It would not be unreasonable to infer that the Applicant might have thought that the Complainant consented to what he was doing. That consent was only relevant to the issue of whether the Applicant thought that what he was doing was seriously wrong. It is difficult to see how what had earlier taken place, that is, the acts involved in counts 2 and 3 could throw any light on a conclusion about whether the Applicant thought what he did in respect to count 4 was seriously wrong.
>
> [80] It was not open to the Trial Judge to find that the presumption had been rebutted in respect of count 4. The determination of guilt was unreasonable and the verdict should be set aside.[83]

Considerations when sentencing young offenders

In the matter of *R v MF* [2014] NSWDC 136, Haesler J articulates the relevant law to consider when sentencing children and young people. It is implicit in this judgment that sentencing children and young people is a fraught issue. I strongly encourage you to read this decision, as it brings to the fore critical issues relevant to exercising Children's Court jurisdiction.

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79 ibid at [74].
80 ibid at [75].
81 ibid at [78].
82 ibid at [79].
83 ibid at [80].

In this matter, MF was convicted of causing grievous bodily harm with intent to cause grievous bodily harm. The Director accepted that M (MF's uncle) coerced the young person MF to pour a flammable liquid over Ms K and set her on fire. His Honour considered the relevant sentencing principles under the heading "youth and immaturity".[84]

Significantly, Haesler J stated:[85]

> In recent years the focus has shifted from doing what is in the best interests of the child, to imposing on children adult penalties for what the courts regard as adult crimes. Two themes have emerged: one recognises the strong community interest in the rehabilitation of an immature young man whose criminal behaviour is not well formed; the other stresses the protective function of the court, particularly where the offending is objectively very serious.

His Honour went on to state that the tension between the need to rehabilitate young offenders, with holding them accountable for their crimes in an "adult" way, is highlighted in the matter of *R v Pham & Ly* (1991) 55 A Crim R 128:[86]

> … A court must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime ... must be kept ... in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes ...

His Honour made the point that even for crimes that fall into the category of objectively serious offences, sentencing young people harshly according to the protective aspects of sentencing will often have a greater adverse impact on the community in the long term, than rehabilitating the young person. He cited[87] with approval the New Zealand Court of Appeal decision in *Slade v The Queen* [2005] NZCA 19 which refers to a psychologists report that was accepted by the NZCA and referred to in *R v Elliott and Blessington* (2006) 68 NSWLR 1 at [127]:[88]

> [43] It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices, even without clear coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.

Haesler J also referred to the remarks of Allen J in *R v Webster* (unrep, 15/7/91, NSWCCA), (the murder of a teenage girl by a young man):[89]

> The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime. There are other considerations as well — principally

84 *R v MF* [2014] NSWDC 136 at [52]–[61].
85 ibid at [54].
86 ibid at [55] citing *R v Pham & Ly* (1991) 55 A Crim R 128.
87 ibid at [56].
88 ibid at [56].
89 ibid at [58].

> although by no means only, the deterrence of others ... and the rehabilitation of the offender. The community have a real interest in rehabilitation. The interest is to no small extent relates to its own protection ... The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, is high.

Ultimately, his Honour weighed MF's youth, vulnerability, background, assistance to authorities against the extreme harm done to Ms K and decided that given the circumstances, no sentence other than full-time imprisonment is available. His Honour convicted MF and sentenced him to a non-parole period of 3 years with a head sentence of 6 years.[90]

His Honour summarised his reasons as follows:[91]

> While many factors raised in mitigation overlap I have taken care not to double count them. Here also, many of the purposes of sentencing point in differing directions. While the need to promote MF's rehabilitation and recognise his youth, remorse and assistance are compelling, he must also be held accountable for his actions. What he did must be denounced and the harm, the terrible harm, done to Ms K properly recognised.

Conclusion

The Children's Court is committed to the needs of children, young people and families and, as President, I am dedicated to education and improvement. I hope that you are able to use this paper as a reference resource and, as a corollary, that this paper enables you to have a more detailed understanding of this complex jurisdiction. My hope is that it will empower you with enthusiasm to learn more.

90 ibid at [69].
91 ibid at [73].

Children's Court: driving a paradigm shift

P Johnstone*

Introduction ..... [17-3000]

Part 1: amendments to the CDPV Act

Part 2: reformed cultural care planning

[17-3000] Introduction

This paper has been prepared for the Legal Aid Care and Protection Conference 2016, the general topic of which is "Challenging Complacency". My paper is to be presented to attendees on Friday, 12 August 2016. The topic I will be addressing today is titled "The Children's Court: driving a paradigm shift".[1]

First, I wish to acknowledge the traditional custodians of the land on which we meet today, the Gadigal people of the Eora Nation, and pay my respects to their Elders past and present.

Thank you for inviting me to speak at such an important forum. As professionals working within this jurisdiction, it is particularly important that we safeguard the integrity of justice in all of its processes and ensure that we challenge complacency in all of its iterations.

These are complex times, calling for comprehensive change. The Royal Commission into Institutional Responses to Child Sexual Abuse is in its final stages and is due to hand down its recommendations in 2017. Earlier this year, we received the benefit of the recommendations and report of the Victorian Royal Commission into Family Violence and, the Northern Territory Government has just established a Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory, which may extend to a national Royal Commission.

The establishment of these Royal Commissions represents the public interest inherent in placing children and young people's safety, welfare and well-being at the forefront of government and community consciousness.

Family violence and the over-representation of Aboriginal and Torres Strait Islander children and young people in the care and protection and criminal justice systems are not diametrically divergent issues. They are linked by the trifecta of social, cultural and economic disadvantage that characterise some of the most trying and confronting issues of our time. Inaction entrenches and perpetuates disadvantage. We must challenge complacency, break down this trifecta and drive cultural change by implementing practical and achievable strategies.

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* President of the Children's Court of NSW; the paper was first presented for the Legal Aid Care and Protection Conference 2016 on 12 August 2016.

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

Empowerment or lack thereof, is another area where family violence and the over-representation of Aboriginal children and young people in the care and crime jurisdictions, converge. Empowerment plays a vital part in providing vulnerable people with the voice, and the platform, to meaningfully participate and engage in the decisions that affect their lives. Disempowerment silences and oppresses, and creates apathetic complacency amongst the communities it has infected.

Therefore, as professionals working within two areas that are so interconnected, we are charged with the task of addressing both the nature and effects of complacency. The two strategies I will be discussing today are concerned with ameliorating these causative elements of complacency.

Accordingly, this paper will be structured in two parts, directed at addressing these issues.

Part 1 will provide an update on the key amendments to the *Crimes (Domestic and Personal Violence) Act 2007* (CDPV Act), concerning children and young people, and the associated project of improving the accessibility of justice through the simplified wording of standard orders. Part 2 will explore the reform of cultural care planning, including the introduction of a comprehensive cultural care plan template. Ms Penny Hood, Director of Innovation, Co-design and Implementation at the Department of Family and Community Services (DFaCS), will discuss the roll-out of these reforms within DFaCS and provide advice on the implications of this transition.

Part 1: amendments to the CDPV Act

I appreciate that you are all familiar with the context leading up to the amendments to the CDPV Act and you are no doubt aware of the devastating impacts of family violence. Despite this, I am still minded to direct some of this discussion to the context and impetus for the reforms, for the benefit of both completeness and to remind ourselves of the need to stay alert to this issue.

The Royal Commission into Family Violence (Victoria) was established on Sunday, 22 February 2015. It provided its report and recommendations to the Victorian Government on Tuesday, 29 March 2016, and was tabled in Parliament on Wednesday, 30 March 2016.[2]

From the perspective of the loss and harm experienced over a number of generations, as a result of family violence, the Royal Commission was long overdue. Its establishment came in the wake of a number of family violence related tragedies, reflecting enhanced public awareness of the nature and extent of family violence and recognising that existing responses to family violence were not adequately addressing the problem.[3]

In her statement to the Royal Commission, Rosie Batty eloquently summed up the need for change:[4]

> I think changing the culture is about raising awareness in the public domain to such a level that what we learn can't be unlearnt, and what we know can't be unknown. I think it is imperative to raise this issue to the point where everyone knows it's an issue, everyone knows the statistics and everyone understands the different forms of family violence.

2 Royal Commission into Family Violence (Victoria), *Report and Recommendations,* No 132 Session 2014–16, March 2016.

3 See also ALRC and NSWLRC, *Family violence — a national legal response* (the Joint Commission Family Violence Report), ALRC Report 114 (Final report), NSWLRC Report 128 (Final report), 2010; Legislative Council Standing Committee on Social Issues, *Domestic violence trends and issues in NSW*, 2012.

4 Statement of Batty, 6 August 2015 at [22] in n 2, Vol 1 at p 13.

The terms of reference specifically addressed the need to challenge a culture of complacency by safeguarding the interests of children and young people affected by family violence, and tailoring outcomes to Aboriginal and Torres Strait Islander children and young people.[5]

Whilst my interest in the reform to the CDPV Act is concerned with its broader application and implications, for the purposes of my brief discussion of the reforms today, I will focus on the specific changes relevant to the intersection of family violence with the care and protection jurisdiction of the Children's Court.

The Royal Commission recognised the prolific and extensive effects of family violence, part of which involved focussed attention on the discrete needs of children and young people:[6]

> Family violence can have serious effects on children and young people but they do not always receive necessary support. There is insufficient focus on their needs and on therapeutic and other interventions they may require to mitigate the effects of the violence. Although children are remarkably resilient, and many who experience violence and abuse go on to lead full and productive lives, there are many who will need counselling and/or other support to overcome the impacts of the abuse, which may otherwise render them vulnerable to becoming a victim of family violence as an adult, or using violence themselves. If we do not provide this support, the effects of family violence suffered by children may be carried on to the next generation.

In addition, the Royal Commission noted the short-term and long-term consequences of children and young people experiencing family violence, such as: behavioural and mental health problems, disrupted schooling, homelessness, poverty and intergenerational family violence.[7] From the Children's Court's perspective, it is often these consequences that result in children and young people "crossing-over" into the criminal jurisdiction.

However, children and young people are often silent victims of family violence, falling through the cracks of the ambit of many service providers, traditionally focussed upon supporting women.[8]

The Royal Commission noted that:[9]

> The negative effects of family violence can be particularly profound for children, who can carry into adulthood the burden of being victimised themselves or witnessing violence in their home.

However, the Royal Commission emphasised the importance of ensuring that labelling is avoided, stating that:[10]

> We know, too, that family violence victims — including children — demonstrate enormous resilience in the face of great adversity. Many of these survivors go on to live full and happy lives, develop healthy relationships and use their experience to help others.

Significant to the reforms, the Royal Commission also stated that:[11]

> There should be no onus on victims of family violence to manage risk; it is the unacceptable nature of perpetrators' behaviour that should be the focus of attention.

Turning now to the specific reforms from the perspective of the Children's Court. The reforms to the CDPV Act, contained in the *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016* received assent on the 28 June 2016, [relevantly commenced on 3 December 2016]

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5 See n 2, Vol 1, Appendix A at p 206–8.
6 See n 2, Vol 1 at p 8.
7 See n 2, Vol 1 at p 22.
8 See n 2, Vol 1 at p 23.
9 See n 2, Vol 1 at p 17.
10 ibid.
11 See n 2, Vol 1 at p 23.

and include a range of amendments to the CDPV Act.[12] I will only be referring to those that have specific implications for the Children's Court, however, I advise that you familiarise yourself with the amended Act for completeness.[13]

First, a new s 40A was introduced to empower the Children's Court with jurisdiction to make an ADVO in care and protection proceedings. These amendments will allow the Children's Court to make an ADVO with the child the subject of care proceedings to be named as the protected person, as well as that child's siblings and any adult affected by the same circumstances.[14]

The amendments also extend the jurisdiction of the Children's Court to vary or revoke any existing ADVO, on the application of a party, or on its own motion, where care proceedings are before the court and where the circumstances justify the making of the order. The Secretary of the DFaCS and the Commissioner of Police will be notified and given the right of appearance before the Children's Court. The Children's Court was empowered with this jurisdiction in order to avoid concurrent proceedings arising from similar facts or circumstances.[15]

An additional measure to protect children and young people was introduced with a new s 41A, which operates to prohibit the defendant in an application for an ADVO from personally cross-examining a child. This amendment is consistent with the Local Court Practice Note for Domestic and Personal Violence Proceedings, which states that a child cannot be cross-examined by an unrepresented defendant and may only be questioned by a person appointed by the Court who is an Australian legal practitioner or other suitable person.[16]

A related amendment to s 40 allows evidence admitted in the District or Supreme Court in the hearing of a serious charge to be subsequently admitted in the Local Court or Children's Court in a related ADVO application, where the ADVO is remitted back to that court for final determination.[17]

The introduction of s 41A and the amendment to s 40 is consistent with a trauma-informed approach and the need to put mechanisms in place to ensure that victims are not exposed to additional trauma and distress by having to give their evidence more than once. This is particularly critical for children and young people.

Amendments will also made to s 72 to ensure that the Commissioner of Police is notified of any application made to vary or revoke a police-initiated order. Importantly, the amendments also require that, where a person applies to vary/revoke a police-initiated AVO, and one of the protected persons is a child, the application requires leave of the court before such an application can be heard.[18] This ensures that safeguards are embedded to protect children and adult victims from intimidation and coercion to consent to applications for variations and revocations.

Finally, s 48 of the CDPV Act was amended to clarify the requirements with respect to ADVOs to protect children. The amendments made clear that the requirement for police to

12 *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1.
13 *Crimes (Domestic and Personal Violence) Act 2007*.
14 *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[21].
15 ibid.
16 *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[22]; Local Court Practice Note for Domestic and Personal Violence Proceedings (No 2 of 2012) at para 8.1.
17 *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[20].
18 *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[27]. Also note that s 72(5)–(8) of the CDPV Act has been repealed so that a defendant can no longer apply for a revocation of an ADVO even though the order has expired.

appear on behalf of the child applies only where the child is the sole person for whom protection is sought. This change is critical as it ensures that women and men with or without children can make an application for an ADVO in the same way, and overcomes the existing reluctance of some communities to involve police. This will ensure that children are protected, despite the existence of any historical distrust of police.

These reforms have supplemented work undertaken by the Department of Justice and the Department of Premier and Cabinet to improve the accessibility of language used in AVOs, and as a result, to improve understanding of, and compliance with, these orders. These newly worded AVOs have been termed "Plain English AVOs" or PEAVOs and s 36 of the CDPV Act was replaced and s 50 was amended.[19]

Improving the understanding and accessibility of AVOs by using tailored, simple language and removing complex legal language is critical in the Children's Court jurisdiction and is consistent with work the court has undertaken, in its criminal jurisdiction, through its "Explaining legal terms to children" quick reference guide.[20]

These reforms represent an important shift in the siloed application of practice and procedure and will hopefully operate to drive cultural change in the family violence sphere.

Part 2: reformed cultural care planning

The Children's Court has been collaborating with relevant agencies to drive cultural change on a number of levels, one of which is cultural care planning for both culturally and linguistically diverse children and Aboriginal and Torres Strait Islander children. The focus of my discussion will be on the impetus for these reforms with specific reference to Aboriginal and Torres Strait Islander cultural care planning.

Throughout my time as President of the Children's Court, I have acted as a staunch advocate for change regarding the over-representation of Aboriginal and Torres Strait Islander children and young people in the care and protection jurisdiction of this court. In order to address this issue, I have steadfastly supported comprehensive and tailored cultural care planning for Aboriginal and Torres Strait Islander children.

I do not suggest that cultural care planning is a panacea to this irrefutable and complex issue. However, I submit that adequate, appropriate and comprehensive cultural care planning can act as a step toward challenging complacency and driving a paradigm shift.

In order to arrive at this view, I have undertaken a great deal of research, both experiential and formal, to establish the nexus between cultural identity and socialisation. Aronson Fontes has conducted extensive research into culture and child protection and synthesises the role of culture as follows:[21]

> ... culture defines what is natural and expected in a given group. We all participate in multiple cultures: ethnic, national and professional, among others. We carry our cultures with us at all times and they have an impact on how we view and relate to people from our own and other cultures.

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19 *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[17] and [25].

20 "Explaining legal terms to children" quick reference guide at www.childrenscourt.justice.nsw.gov.au/Documents/EXPLAINING%20LEGAL%20TERMS%20TO%20CHILDREN_QRG%20v0.4.pdf, accessed 29 June 2017.

21 L Aronson Fontes, *Child abuse and culture: working with diverse families*, Guildford Press, 2005, p 4.

In relation to Aboriginal children and young people, a range of Aboriginal and Torres Strait Islander organisations have highlighted that connection to family, culture and community are central to the safety, welfare and well-being of Aboriginal young people.[22] As Libesman states:[23]

> Cultural care is about being part of a family, community, extended network, knowing where you belong, and knowing what the difference is between two different nations.

The *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) also places culture as a critical consideration in decision-making for both non-Aboriginal and Aboriginal children and young people.[24] For Aboriginal children and young people, the Aboriginal and Torres Strait Islander child placement principles make clear that the identity and socialisation needs of Aboriginal and Torres Strait Islander children and young people will be met most successfully in placements that foster Aboriginal culture and identity.[25]

It is clear that a fundamental understanding and positive association with Aboriginal cultural identity can manifest in positive life-course outcomes and that:[26]

> [Aboriginal children] do better in terms of their emotional, physical and psychological wellbeing if they have a strong connection to cultural identity.

A positive characterisation of Aboriginality can act as a protective factor in ensuring that culture is used constructively, rather than destructively. Cultural competence in this context is about challenging labels that associate Aboriginality with antisocial behaviour.

Ms Eileen Cummings, Chair of the Northern Territory Stolen Generation Aboriginal Corporation succinctly captures this challenge:[27]

> Children have always been loved and respected and nurtured and taught in the Aboriginal way. It is important that these values and systems are encouraged and that Aboriginal people are empowered to ensure the systems are once again taught to their children to bring back pride and dignity to the Aboriginal people and communities. Too often the focus is wholly on the negative, not the positive, of Aboriginal child rearing and the Aboriginal practices which give young people their identity, their values, their role and their purposes in life.

Whilst all children and young people in care require a range of supports to address trauma and abuse, there is an additional need for Aboriginal and Torres Strait Islander children to be provided with cultural support through tailored counselling and collaboration, to assist in maintaining links to their family and culture.

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22 T Libesman, *Cultural care for Aboriginal and Torres Strait Islander children in out of home care — Report 2011,* Secretariat of National Aboriginal and Islander Child Care, 2011, pp 11–14.

23 ibid, p 11.

24 *Children and Young Persons (Care and Protection) Act 1998*, Ch 2, Pts 1 and 2.

25 *Children and Young Persons (Care and Protection) Act 1998*, s 13.

26 Commission for Children and Young People, Victoria, *In the child's best interests: inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, 2015, p 13.

27 E Cummings, Chair, Northern Territory Stolen Generations Aboriginal Corporation, *Committee Hansard*, Darwin, 2 April 2015, p 28, referred to in Australian Senate, Community Affairs References Committee, *Out of home care*, 2015, Chapter 8, pp 220–1.

Ms Megan Mitchell, National Children's Commissioner, stated that it is necessary to collaborate and engage with Aboriginal communities in order to drive a paradigm shift and improve outcomes for children and young people:[28]

> That includes things like improving the number of Aboriginal people that are in child-protection and home-care workforce so that you can have effective engagement with families so that they become part of the solution and so that they are driving and owning the problem and the solution. If we keep disempowering these communities and families, we will just create more of the same intergenerational disadvantage.

Using this research as my foundation, I have formed the view that culture is central to the identity formation and socialisation of children and young people.

Culture carries a young person through their formative years and provides a sense of belonging in this world. If a child is removed from their parents, culture remains important — whether the child is at an age when they are cognisant of this process or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.

Hence, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focussed cultural planning for Aboriginal children and young people.

As you are aware, the Care Act is to be administered under the "paramountcy principle", that is, that the safety, welfare and well-being of the child or young person is paramount: s 9(1). In addition to this paramountcy principle, the Care Act sets out other particular principles to be applied in its administration: s 9(2).

One of these principles is that account must be taken of concepts such as culture, language, identity and community.

It is a principle to be applied in the administration of the Care Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible: s 11(1).

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

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

(a) a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or

(b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or

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28 M Mitchell, National Children's Commissioner, *Committee Hansard*, Sydney, 18 February 2015, pp 5–6, referred to in Australian Senate, Community Affairs References Committee, *Out of home care*, p 219.

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

(d) a suitable person approved by the Secretary after consultation with:

(i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

(ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

Before it can make a final care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7)(a).

Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:

(a) have regard, in particular, to the principles set out in, inter alia, s 9(2)(e), that if a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement: s 78A(1)(a), and

(b) meet the needs of the child or young person: s 78A(1)(b), and

(c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).

The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.

I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]–[95]:

> The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons.
>
> They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.

I am happy to report that in the past year a template for a cultural action planning section in the care plan has been developed by the Children's Court, in conjunction with DFaCS, the Aboriginal Child, Family and Community Care State Secretariat (NSW), the Aboriginal Legal Service (NSW/ACT) and Legal Aid NSW. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, put in place fully developed plans for the child to be educated and fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.

I now hand over to Ms Penny Hood, Director of Innovation, Co-design and Implementation at the DFaCS, to detail the roll-out of the redesigned cultural care plan template to caseworkers and the work the DFaCS is undertaking to ensure that cultural planning becomes a core and mandatory part of caseworker activity.

Care appeals from the Children's Court

P Johnstone*

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* President of the Children's Court of NSW, District Court Annual Conference 2016, Wollongong, Wednesday 29 March 2016.

[17-4000] Introduction

Proceedings relating to the care and protection of children and young persons in NSW, including first instance matters before the Children's Court, and appeals from the Children's Court, are public law proceedings, governed, both substantively and procedurally, by the *Children and Young Persons (Care and Protection) Act 1998* (the *Care Act*).

Care proceedings[1] involve discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection. The rules of evidence do not apply, the proceedings are non-adversarial and they are required to be conducted with as little formality and legal technicality and form as the circumstances permit.

The purpose of the paper is to provide those Judges who will be hearing appeals from decisions of Children's Court Magistrates with an overview of the key concepts in the Act, particular aspects of the care jurisdiction, and procedural considerations on appeal, including the use of Children's Registrars for Dispute Resolution Conferences and the use of expert clinical evidence from the Children's Court Clinic.

The Care Act

The guiding principles

Decisions in care proceedings, at first instance and on appeal, are to be made consistently with the objects, provisions and principles provided for in the *Care Act*, and where appropriate, the United Nations Convention on the Rights of the Child 1989 (CROC).[2]

The Act contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department's powers and responsibilities begin and end as opposed to those of the court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the court.[3] I will be concentrating, in this paper, on the judicial aspects of the legislation.

The objects of the *Care Act*, are to provide:[4]

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

(a1) recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and

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

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1 *Children and Young Persons (Care and Protection) Act 1998*: s 60.
2 *Re Tracey* (2011) 80 NSWLR 261; *Re Henry; JL v Secretary, DFaCS* [2015] NSWCA 89 at [208]ff.
3 Report of the Special Commission of Inquiry into Child Protection Services in NSW, November 2008 (the "Wood Report"), Volume 2 at 11.2.
4 *Children and Young Persons (Care and Protection) Act 1998*, s 8.

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

The *Care Act* sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear in other parts of the Act.

First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

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

It is now well settled law that the proper test to be applied is that of "unacceptable risk" to the child: *M v M* (1988) 166 CLR 69 at [25]. That case dealt with past sexual abuse of a child but the principles there set out apply to other forms of harm,[5] such as physical and emotional harm. A positive finding of an allegation of harm having been caused to a child should only be made where the court is so satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336. Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned.[6]

The Secretary will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250 at [67]–[68], per Sackville AJA.

His Honour said in that decision:

> [67] The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 140(2) of the *Evidence Act 1995*. It was not appropriate to find that the Director-General had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was "highly improbable". To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father.
>
> [68] As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at 171, statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] FamCA 1235. This is an exercise in

5 *A v A* (1998) FLC 92-800.
6 *M v M* (1988) 166 CLR 69 at [26].

foresight. The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated, for example, the nature and extent of parental contact, including any need for supervision.[7] Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

Secondary to the paramount concern, the *Care Act* sets out other, particular principles to be applied in the administration of the Act. These are set out in ss 9(2), 10, 11, 12 and 13. There are also special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11, 12 and 13.

- Wherever a child is able to form his or her own view, he or she are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child's developmental capacity and the circumstances: s 9(2)(a). See also s 10.
- Account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child or young person: s 9(2)(b).
- Any action to be taken to protect the children from harm must be the least intrusive intervention in the life of the children and their family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c).
- If children are temporarily or permanently deprived of their family environment, or cannot be allowed to remain in that environment in their own best interests, they are entitled to special protection and assistance from the State, and their name, identity, language, cultural and religious ties should, as far as possible, be preserved: s 9(2)(d).
- Any out-of-home care arrangements are to be made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made: s 9(2)(e).
- Unless contrary to the child's best interests, and taking into account the wishes of the child, this will include the retention of relationships with people significant to the children: s 9(2)(f).
- If a child or young person is placed in out-of-home care, the permanent placement principles are to guide all actions and decisions made under this Act (whether by legal or administrative process) regarding permanent placement of the child or young person: s 9(2)(g).
- Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible: s 11(1).
- Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.
- Where possible, any out-of-home placement of an Aboriginal or Torres Strait Islander child is to be with a member of the extended family or kinship group.

7 Justice S Austin, "The enigma of unacceptable risk", paper presented at the 2015 Hunter Valley Family Law Conference, 31 July 2015.

- If that is not possible, the Act provides for a descending process of placement with an appropriate Aboriginal and Torres Straits Islander carer before, as a last resort, placement with a non-Aboriginal and Torres Straits Islander carer, after consultation: s 13(1).
- In determining where a child is to be placed, account is to be taken of whether the child identifies as an Aboriginal or Torres Strait Islander and the expressed wishes of the child: s 13(2).
- A permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13: s 78A(3).

The *Care Act* is not the most precise or orderly piece of legislation one could hope for. There are, however, a number of key concepts that principally occupy the exercise of the care jurisdiction, about which I will say something. They include:

- Removal of children
- The need for care and protection
- Permanent placement
- Realistic possibility of restoration
- Parental responsibility
- Out-of-home care
- Contact.

Removal of children from their parent(s) or carer(s)

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

Removal of a child into state care may be sought by seeking orders from the court: s 34(2)(d), by the obtaining of a warrant: s 233, or, where appropriate, by effecting an emergency removal: s 34(2)(c); see also ss 43 and 44.

Where a child is removed, or the care responsibility of a child is assumed, by the Secretary, he or she is then required to make a care application to the Children's Court within 3 working days and explain why the child was removed: s 45. The court may then make interim care orders: s 69. The order may be for allocation of parental responsibility pending final orders, or such other order as the court considers is required. An "interim order" is an order of a temporary or provisional nature pending the final resolution of the proceedings in which an applicant "generally speaking, does not have to satisfy the court of the merits of its claim": [77]; see also [78]–[80].[8]

The usual interim order is for the allocation of parental responsibility to the Minister until further order.[9] Such an order enables appropriate investigation and planning to be undertaken by Departmental caseworkers while the child is in a protected environment. The making of an interim order in effect puts the position of the parties in a holding pattern, without prejudice, and without any admissions.

8 *Re Jayden* [2007] NSWCA 35 per Ipp J at [71]–[74].
9 *Re Mary* [2014] NSWChC 7.

The need for care and protection

After removal or assumption of a child into care, the first phase of care proceedings is generally referred to as the establishment phase.[10]

For care proceedings to be "established" a finding is required that the child is in need of care and protection for any reason or was in need of care and protection at the time the Application commencing the proceedings was made.[11]

The significance of a finding is that it forms the basis for the making of final care orders under the *Care Act*. The proceedings then enter a second phase, sometimes referred to as the "welfare phase"[12] during which planning for the child is undertaken.

The need for "care and protection" is not conclusively defined, and the concept is at large; a finding may be made for "any reason". But the *Care Act* does specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.

(a) death or incapacity of parents

(b) acknowledgement by parents of serious difficulties in caring for a child

(c) actual or likely physical or sexual abuse or ill-treatment

(d) a child's basic physical, psychological or educational needs are not being met or are likely not to be met (other than as a result of poverty or disability)

(e) a child is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of their domestic environment

(f) a child under 14 has exhibited sexually abusive behaviours, and needs therapeutic assistance

(g) the child is subject to a care order of another state (or territory)

(h) the child is in unauthorised out-of-home care: s 171(1).

Permanent placement

Once a child has been found to be in need of care and protection the Secretary is required to undertake planning for the child's future. In most cases the Secretary will prepare a formal Care Plan that addresses the needs of the child.[13]

The Secretary is required to consider what permanent placement is required to provide a safe, nurturing, stable and secure environment for the child.[14] Permanent placement is to be made in accordance with the permanent placement principles prescribed.[15] The "hierarchy" established might be summarised as follows:

- If it is practicable and in the best interests of the child, the first preference for permanent placement is for the child to be restored to the parent(s).
- The second preference for permanent placement is guardianship of a relative, kin or other suitable person.

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10 *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [36].
11 *Children and Young Persons (Care and Protection) Act 1998*, ss 71(1) and 72(1).
12 *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [37].
13 *Children and Young Persons (Care and Protection) Act 1998*, s 3(1).
14 *Children and Young Persons (Care and Protection) Act 1998*, s 10A(1).
15 *Children and Young Persons (Care and Protection) Act 1998*, s 10A(3).

- The next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted.
- The last preference is for the child to be placed under the parental responsibility of the Minister.
- In the case of an Aboriginal or Torres Strait Islander child, if restoration, guardianship or the allocation of parental responsibility to the Minister is not practicable or in the child's best interests, the child is to be adopted.

Realistic possibility of restoration

Thus the Secretary must assess whether there is a realistic possibility of restoration of the child to the parent(s), having regard firstly to the circumstances of the child; and secondly, to the evidence, if any, that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child.[16]

The court must then decide whether to accept the assessment of the Secretary. If the court does not accept the assessment of the Secretary, it may direct the Secretary to prepare a different permanency plan: s 83(6).

The phrase "realistic possibility of restoration", therefore, involves an important threshold construct, which informs the planning that is to be undertaken in respect of any child that has been removed from parents or assumed into care and found to be in need of care and protection.

There is no definition of the phrase in the *Care Act*. However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the Supreme Court by Justice Slattery in 2011: *In the matter of Campbell* [2011] NSWSC 761. This decision has recently been cited with approval by the Court of Appeal: *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [44].

I have discussed the principles in a number of judgments including *Department of Family and Human Services (NSW) re Amanda & Tony* [2012] NSWChC 13 at [29]–[32] and *DFaCS (NSW) re Oscar* [2013] NSWChC 1 at [29]–[34], *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5 at [78], and in *DFaCS and the Youngest M Children* [2014] NSWChC 4 at [51].

The principles relating to the phrase "a realistic possibility of restoration" may be summarised as follows:

- A possibility is something less than a probability; that is, something that it is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible.
- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve.
- The possibility must be "realistic", that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". It needs to be "sensible" and "commonsensical".
- It is at the time of the determination that the court must make the assessment. It must be a realistic possibility at that time, not merely a future possibility.

16 *Children and Young Persons (Care and Protection) Act 1998*, s 83(1).

- It is going too far to read into the expression a requirement that a parent must always at the time of hearing have demonstrated participation in a program with some significant "runs on the board": *In the matter of Campbell* [2011] NSWSC 761 at [56].
- There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.
- The determination must be undertaken in the context of the totality of the *Care Act*, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm.

Permanency planning

Where the Secretary assesses that there is a realistic possibility of restoration to a parent, and the court accepts that assessment, the Secretary is to prepare a permanency plan[17] that includes a description of the minimum outcomes that need to be achieved before the child is returned to the parent, services to be provided to facilitate restoration, and a statement of the length of time during which restoration should be actively pursued.[18]

If the Secretary assesses that there is no realistic possibility of restoration to a parent, the Secretary is to prepare a permanency plan for another suitable long term placement in accordance with the permanent placement principles discussed above, as set out in s 10A of the *Care Act*.

Permanency planning means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs.[19] The court must not make a final care order unless it expressly finds that permanency planning has been appropriately and adequately addressed.[20]

The permanency plan must have regard to the principle of the need for timely arrangements, the younger the child, the greater the need for early decisions, and must avoid the instability and uncertainty that can occur through a succession of different placements or temporary care arrangements.[21]

The planning must also make provision for the allocation of parental responsibility, the kind of placement proposed, the arrangements for contact, and the services that need to be provided.[22]

A permanency plan does not need to provide details as to the exact placement in the long-term, but must be sufficiently clear and particularised so as to provide the court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future.[23]

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17 *Children and Young Persons (Care and Protection) Act 1998*, s 83(2).
18 *Children and Young Persons (Care and Protection) Act 1998*, s 84.
19 *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1).
20 *Children and Young Persons (Care and Protection) Act 1998*, s 83(7).
21 *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1).
22 *Children and Young Persons (Care and Protection) Act 1998*, s 78.
23 *Children and Young Persons (Care and Protection) Act 1998*, s 78A(2A).

If the child is an Aboriginal or Torres Straits Islander there are particular additional requirements to be addressed. The permanency planning must address how the plan has complied with the principles of participation and self-determination set out in s 13 of the *Care Act*.[24] It should also address the principle set out in s 9(2)(d) which requires that the child's identity, language and cultural ties be, as far as possible, preserved. Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child or young person is 'intrinsic' to any assessment of what is in the child's best interests.[25] It follows that the need to consider Aboriginality and ensure the participation of families and communities must be applied across all aspects of child protection decision making.

Parental responsibility

Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.[26] The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility.[27]

For example, the court can allocate complete responsibility to the Minister, or allocate only some aspects to the Minister and other aspects to the parents, or some other person. Or it might make orders for shared responsibility between the Minister and others.[28]

The specific aspects of parental responsibility that might be separately or jointly allocated are unlimited, but include residence, contact, education, religious upbringing, and medical treatment.[29]

When allocating parental responsibility, the court is required to give particular consideration to the principle of the least intrusive intervention, and be satisfied that any other order would be insufficient to meet the needs of the child.[30]

Where a person is allocated all aspects of parental responsibility, the court may make a guardianship order: see ss 79A–79C.

Out-of-home care

Where the Secretary assesses that there is no realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the court: s 83(3). The Secretary may consider whether adoption is the preferred option: s 83(4).

A long-term placement following the removal of a child which provides a safe, nurturing and secure environment may be achieved by placement with a member or members of the same kinship group as the child or young person, or placement with an authorised carer: s 3.

Out-of-home care means residential care and control provided by a person other than a parent, at a place other than the usual home: s 135.

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24 *Children and Young Persons (Care and Protection) Act 1998*, s 78A(3).
25 *Department of Human Services and K Siblings* [2013] VChC 1, per Magistrate B. Wallington at p 4.
26 *Children and Young Persons (Care and Protection) Act 1998*, s 3.
27 *Children and Young Persons (Care and Protection) Act 1998*, s 79(1).
28 *Children and Young Persons (Care and Protection) Act 1998*, s 81 (rep).
29 *Children and Young Persons (Care and Protection) Act 1998*, s 79(2).
30 *Children and Young Persons (Care and Protection) Act 1998*, s 79(3).

Decisions concerning out-of-home placement of children in need of care and protection are not decisions that the court undertakes lightly or easily. But at the end of the day, a risk assessment is required, in accordance with the principle that the safety, welfare, and well-being of the children are paramount.

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

The permanency plan will generally consist of a care plan: s 80, together with details of other matters about which the court is required to be satisfied. The care plan must make provision for certain specified matters: s 78. These are:

(a) the allocation of parental responsibility between the Minister and the parents of the child for the duration of any period of removal;

(b) the kind of placement proposed, including:

  (i) how it relates in general terms to permanency planning,

  (ii) any interim arrangements that are proposed pending permanent placement and the timetable proposed for achieving a permanent placement,

(c) the arrangements for contact between the child and his or her parents, relatives, friends and other persons connected with the child,

(d) the agency designated to supervise the placement in out-of-home care,

(e) the services that need to be provided to the child or young person.

Contact

Importantly, where there is not to be a restoration, the permanency planning must also include provision for appropriate and adequate arrangements for contact.[31]

In addition, the court may, on application, make orders in relation to contact, including orders for contact between children and their parents, relatives or other persons of significance but only for a maximum period of up to 12 months. The court may make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised.[32]

The introduction of s 86 into the *Care Act* in 2000 permitted the Children's Court, for the first time, to make contact orders beyond the life of the particular proceedings. The section does not, however, create any right or other entitlement to contact in care cases. Nor, in my view, does it create any presumption that contact should exist. Contact, although recognised in s 9(2)(f), remains subject always to the safety welfare and well-being of the child. An order under s 86 mandating contact arrangements should, therefore, only be used sparingly, in cases of demonstrated need, such as intransigence, inflexibility, or a failure to have proper regard to the needs and best interests of the child.

The issue of appropriate contact for children who have been permanently removed from the care of their parents, particularly young children, remains vexed, and there continues to be a wide range of opinion as to the value of contact.

31 *Children and Young Persons (Care and Protection) Act 1998*, ss 9(2)(f), 78(2).
32 *Children and Young Persons (Care and Protection) Act 1998*, s 86.

Perceived benefits to be derived by children from contact include developing and continuing meaningful relationships. On the other hand, contact can have an unsettling effect on a child, act as a distraction, impede attachment to new carers, and disrupt the placement.

It is generally accepted that a child benefits from some contact with the family of origin (except in extreme cases). Much depends on the level of trust and co-operation that exists between the carers and the birth family. In some cases the birth family can play a positive and supportive role. In other cases, members of the birth family can put the stability of the placement at risk. There is a strong body of opinion that contact should not interfere with a child's growing attachment to the new family. The younger the child, and the less time the child has been with the birth parents, the less the need for other than minimal contact, for identification purposes.

There are some relevant judicial pronouncements that guide the resolution of contact issues, including the decisions in *Re Liam* [2005] NSWSC 75, *George v Children's Court of NSW* [2003] NSWCA 389, and *Re Felicity; FM v Secretary, Department of Family and Community Services (No 3)* [2014] NSWCA 226 at [42].

In 2011 the Children's Court issued Contact Guidelines designed to provide assistance to Judicial Officers, practitioners and parties, which were based upon available research and the court's "accumulated expertise and experience as a specialist court" in care proceedings.

The issue of contact in care cases requires the consideration of a range of factors, having regard to the exigencies and circumstances of the particular case, both advantageous and disadvantageous, and balancing the benefits against the risks, the primary focus being on the needs and best interests of the child, and any risk of unacceptable harm: *In the matter of Helen* [2004] CLN 2.

The decision should be based on relevant, reliable and current information.

Factors include the level of attachment to the relevant member of the birth family, the degree of animosity displayed by the birth family against the carers, the level of demonstrated co-operation and engagement with the carers, and the commitment to supporting the placement, the degree of any abusive experience while in the care of the birth family and any ongoing emotional sequelae, the competing demands of the children's educational, cultural, social and sporting activities, the proposed location of the contact, the travel and other disruption involved, the quality of the contact, the safety of the children during contact, and any other risk factors associated with contact, including the potential for denigration of the carers or other undermining of the placement, and the potential for other negative persons or influences to be present at the visit.

Preferably, contact should be left to the discretion of the person having parental responsibility, taking into account the advice of any professionals retained to assist with the children and the views of all those affected, including the children themselves (having regard to their age, their level of emotional and psychosocial development, and other factors).

The regime for contact should be flexible, recognizing that circumstances change as children grow older and their emotional, social and other needs develop.

Some relevant statements in the Children's Court Guidelines are:

> For some children the benefit of contact will be primarily that they understand who they are in the context of their birth family and cultural background. Contact might also help ensure that the child has a realistic understanding of who their parent is and that the child does not idealise an unsuitable parent and develop unrealistic hopes of being reunited with the parent.

The focus must always be on the needs of the child and what is in the best interests of the child. How will the child benefit from contact with parents and siblings? Some benefit may be achieved over a long term, i.e. by providing the foundation for a relationship between the child and the parent which will develop later.

Younger children will usually need more frequent contact for a shorter duration than older children to maintain a relationship. Younger children especially should not be subjected to long travel to attend contact.

Children and carer families will have their own commitments and patterns involving such things as sport, cultural activities, spending time with friends and church attendance.

It is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than participating in carer family events. It is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing.

It is very important to see children in the context of their extended family and not just their parents. Particular attention should be paid to supporting sibling relationships. Even if extended family members are unable to care for a child it is still likely that contact will be beneficial - providing information and family and cultural identity. Existing healthy relationships should be supported even if a child is to remain in out-of-home care.

Balancing extended family contact and placement stability and normality requires careful consideration. For example, what would be usual contact with grandparents if the child were not in care?

Contact can occur in other ways than face-to-face. In some situations it will be necessary to limit or prohibit indirect contact or to ensure that it is supervised. It may also be necessary to prohibit a parent from making any reference to the child on a social networking website. Alternatively, especially if the parent is at some distance from the child, the use of electronic communication should be encouraged.

A long-term contact order may create problems as a child's circumstances change, particularly if the contact is to be relatively frequent. School, sport, cultural activities and friendship dynamics are just some of the factors which change over time. As a child gets older less frequent but longer contact may be appropriate.

The need for contact to be supervised may also change as the child and the parents' circumstances change.

Particular aspects of the care jurisdiction

Practice and procedure

Care proceedings, including appeals, are to be conducted in closed court: s 104B, and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1).

This prohibition extends to the periods before, during and after the proceedings. The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

There are exceptions, such as where a young person (i.e. a person aged 16 or 17) consents, where the Children's Court consents, or where the Minister with parental responsibility consents: s 105(3).

The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the court has a discretion to exclude the media. In my view, the discretion would only be exercised in exceptional circumstances, because the provisions of s 105 of the *Care Act* are usually sufficient protection: *R v LMW* [1999] NSWSC 1111.

Under the common law principles of open justice, the balance would lie in favour of the newspaper: *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* [1986] 5 NSWLR 465 at p 476 at G. In *AM v DoCS; Ex parte Nationwide News* [2008] NSWDC 16, I held that the common law principle of open justice is secondary to the principles in s 9(a) of the *Care Act*, in particular the paramountcy principle. In that case, I held that the newspaper, which had previously published material tending to identify the children, had not satisfied me that this sort of publication was not likely to re-occur.

I excluded the reporter from remaining in court. I went on to say:

> However, in the interests of a balancing exercise and applying the principle of open justice to the extent that it applies subject to s 9(a), I would be prepared to allow this newspaper to come back with some evidence which might convince me that it would be appropriate for me to be satisfied that, with acceptable undertakings, there could be a basis upon which I might allow its reporters to remain in court during the hearing.

Interestingly, the newspaper concerned did not take up that invitation.

Care and protection proceedings, including appeals, are not to be conducted in an adversarial manner: s 93(1).

The proceedings are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2).

In *Re Emily v Children's Court of NSW* [2006] NSWSC 1009 the Supreme Court set out the manner in which care proceedings are to be dealt with by the court.

> The learned Magistrate was required by the explicit terms of the Care Act to deal with the matter before him in the manner for which express provision is made in, relevantly, sections 93, 94 and 97 of the Care Act. It is no doubt the case that those sections, broadly expressed though they are, do not empower a Children's Court Magistrate to take some sort of free-wheeling approach to an application, proceeding in virtually complete disregard of what ordinary common-sense fairness might be thought to require in the particular case. **The (Court) is, however, both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured Court setting and statutory context.** [Emphasis added.]

The court is not bound by the rules of evidence, unless it so determines: s 93(3). Nevertheless, the court must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision-making that might appear capricious, arbitrary or without foundational material: *JL v Secretary, Department of Family and Community Services* [2015] NSWCA 88 at [148].

In *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 Meagher JA said at [79] in relation to a similar provision governing a tribunal:

> Although the Tribunal may inform itself in any way it thinks fit and is not bound by the rules of evidence, it must base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined. Thus, material which, as a matter of reason, has some probative value in that sense may be taken into account: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491-493; *The King v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott* [1933] 50 CLR 228 at 249-250, 256.

It is difficult to imagine circumstances in which a court might make such a determination that the rules of evidence should apply. The only situation that has so far occurred to me, apart from the rule as to relevance, relates to the provisions of the *Evidence Act 1995* concerning self-incrimination: s 128.

The standard of proof in care proceedings is on the balance of probabilities: s 93(4) of the *Care Act*. The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

The provisions of the *United Nations Convention on the Rights of the Child* 1989 (UNCROC) are capable of being relevant to the exercise of discretions under the *Care Act*: *Re Tracey* (2011) 80 NSWLR 261.

The circumstances in *Re Tracey* were unusual and unique. Nevertheless, it may be important to draw the parties out on the question of whether any aspect of CROC is specifically relied upon. If so, it will need to be addressed, to the extent that it raises some question for additional consideration. Otherwise, it is prudent to advert to UNCROC, in any Reasons, as not having any additional relevance. I usually add a paragraph along the following lines:

> Most, if not all, of the provisions in UNCROC have been incorporated into or are reflected in the Care Act. The parties in the present matter made no submissions based on the Convention.
>
> Nor did anything occur to me as to any provision in UNCROC such that there was some different requirement, some additional principle, or some gloss that required the Court to have particular regard to, in determining this case or in considering the permanency planning proposed, such that I was required to go beyond the Care Act and the case law interpreting it.

The Court of Appeal approved a similar statement in *Re Kerry (No 2)* [2012] NSWCA 127.

More recently, in *Re Henry; JL v Secretary, DFaCS* [2015] NSWCA 89 at [208]–[220], Justice McColl discussed the application of the Convention, confirming that its provisions are capable of being relevant in care proceedings but the circumstances in which that might occur were limited. Not all failures to refer to CROC in the context of the *Care Act* will attract relief on appeal: at [217].

Expeditious administration of proceedings

Time is of the essence for the disposal of care cases. The *Care Act* provides that all care matters are to proceed as expeditiously as possible: s 94(1). The court is required to avoid adjournments, which should only be granted where it is in the best interests of the child or there is some other cogent or substantial reason: s 94(4). The Children's Court aims to complete 90% of care cases within 9 months of commencement and 100% of cases within 12 months.

The timetable for each matter is to take account of the age and developmental needs of the child: s 94(2). Directions should be made with a view to ensuring that the timetable is kept: s 94(3). Practice Note 5 deals with case management in care proceedings. It deals with each of the stages of a care application and provides for a series of standard directions at [15.6] with prescribed times for the completion of various interlocutory processes, leading to the earliest resolution or allocation of a hearing date in contested matters.

Child legal representatives

The *Care Act* provides for the participation of a child or young person in the proceedings through their representation by either an independent legal representative (ILR) or a direct legal

representative (DLR): s 99A. An ILR will be appointed to act as the representative for a child under 12: s 99B. An ILR must consult with the child, but their duty is to act in accordance with the paramountcy principle. Whereas, a DLR may be appointed for any child at the age of 12 or over who is capable of giving proper instructions: s 99C. The DLR must then advocate as instructed by the child.

In addition to these provisions, the Law Society of New South Wales has prepared "Representation Principles for Children's Lawyers".[33] These guidelines set out a number of important duties and obligations for practitioners representing children.

I will not traverse the document in full, however I will canvass some of the principles these guidelines detail. The guidelines set out the following: a definition of who is the client; the role of the practitioner; determining whether a child has the capacity to give instructions; taking instructions and appropriate communication; duties of representation; confidentiality; conflicts of interest; access to documents and reports; interaction with third parties and ending the relationship with the child.

Importantly, Principle D6 (dealing with communication) emphasises the importance of tailored communication to practitioners. The commentary to the principles state:

> It is important that practitioners are prepared and informed before any meeting with the child. The child must always be treated with respect – this involves listening and giving the child the opportunity to express him or herself without interrupting, addressing the child by his or her name, accepting that the child is entitled to his or her own view etc.[34]

Support persons

Under s 102, a participant in proceedings before the Children's Court may, with leave of the Children's Court, be accompanied by a support person. Leave must be granted unless the support person is a witness or the court, having regard to the wishes of the child or young person, is of the view that leave should not be granted or if there is some other reason to deny the application.

However, the Children's Court can withdraw leave at any time if a support person does not comply with any directions given by the court. In addition, a support person cannot give instructions on behalf of the participant.

Examination and cross-examination

The *Care Act* provides that a Children's Magistrate may examine and cross-examine a witness in any proceedings to the extent that the Children's Magistrate considers appropriate in order to elicit information relevant to the exercise of the Children's Court's powers.[35]

The *Care Act* also provides guidance as to the nature of examination and cross-examination of witnesses.[36]

This guidance accords with the inquisitorial nature of care proceedings insofar as proceedings are required to be conducted in a non-adversarial manner, with as little formality and legal technicality and form as the circumstances permit.

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33 The Law Society of New South Wales, "Representation Principles for Children's Lawyers", 4th edition, 2014.
34 ibid at p 22.
35 *Children and Young Persons (Care and Protection) Act 1998*, s 107(1).
36 *Children and Young Persons (Care and Protection) Act 1998*, s 107.

The Act prohibits the use of offensive or scandalous questions by excusing a witness from answering a question that the court regards to be offensive, scandalous, insulting, abusive or humiliating unless the court is satisfied that it is essential to the interests of justice that the question be asked or answered.[37]

Further, oppressive or repetitive examination of a witness is prohibited unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the question to be answered.[38]

Joinder

In proceedings under the *Care Act*, the parties will generally comprise the Secretary of the Department, the child or children, the parent(s), the step-parent(s), and the legal representative, being the Independent Legal Representative for children under 12, or the Direct Legal Representative for children 12 and over, up to the age of 18.

Other persons having a genuine concern for the safety, welfare and well-being of the child(ren) may be given leave to appear in the proceedings, or be legally represented, and examine and cross-examine witnesses.[39]

Others who might be significantly impacted by a decision of the Children's Court, not being parties to the proceedings, are to be given "an opportunity to be heard on the matter of significant impact".[40] Historically, such persons were generally not made parties, but could present an affidavit. They could not, however, cross-examine or call witnesses of their own.

There has been something of a change in approach in relation to the joinder of parties to Care proceedings in recent times, partly driven by the transfer of casework to the NGO sector, but also as a result of some recent pronouncements by superior courts. The court is now increasingly receptive to joinder applications and more likely to make orders than in the past. In *Re June (No 2)* [2013] NSWSC 1111 ("Re June"), McDougall J clarified the distinction between ss 87 and 98(3) of the *Care Act*:

> The second point to note is that the opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)). Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses at least generally.
>
> However, if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then in a particular case, the opportunity to be heard may extend to permitting cross-examination in that particular point.[41]

The more recent decision in *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701, provides further clarification.

During case management, the Children's Magistrate had refused the application of the grandparents to be joined as parties. At the hearing, which came before me at the Children's Court at Woy Woy,[42] I gave the grandparents an extensive opportunity to be heard, under s 87(1).

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37 *Children and Young Persons (Care and Protection) Act 1998*, s 107(2).
38 *Children and Young Persons (Care and Protection) Act 1998*, s 107(3).
39 *Children and Young Persons (Care and Protection) Act 1998*, s 98(3).
40 *Children and Young Persons (Care and Protection) Act 1998*, s 87(3).
41 *Re June (No 2)* [2013] NSWSC 1111 at [186]–[187].
42 *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.

In the de novo appeal to the Supreme Court, the grandparents renewed their application for joinder and the matter was considered by Justice Slattery. The significant aspect of Slattery J's decision was his distillation of the distinction between the opportunity to be heard under s 87(1) and the granting of leave to appear under s 98(3):

> In section 87(1) the threshold is one to ensure that non-parties who may suffer adverse impacts from Care Act orders will receive procedural fairness before such orders are made. The focus is on "impact on a person".[43]
>
> But the threshold for s 98(3) is more child-centred.
>
> The s 98(3) right is only available to a person who in the Court's opinion "has a genuine concern for the safety, welfare and well-being of the child". It is perhaps because the s 98(3) threshold is more altruistic than that under s 87 that the Care Act can afford a wider scope to participate to those who receive a grant of s 98(3) leave. Persons meeting s 98(3) leave will sometimes be, as the great grandparents are in this case, people who can by their participation fill an evidentiary gap in the proceedings that it may be in the best interests of that child to see filled in the proceedings. In my view that is the case here.[44]

Accordingly, Slattery J granted the grandparents leave on terms under s 98(3). The grandparents were only granted leave to cross-examine and adduce evidence about their own suitability as alternative carers for the children.

Finally, I wish to draw attention to a decision by Magistrate Schurr in 2003 in which an NGO, Anglicare, was joined as a party to care proceedings: *In the matter of "Pamela"* [2003] CLN 3.

In that matter, the Department of Community Services (as it was then designated) sought an order from the court revoking the leave of Anglicare to appear as a party. The Secretary argued that the NGO had insufficient interest in the proceedings and that it was probable that the positions taken by the parties would be duplicated.

Magistrate Schurr outlined Anglicare's involvement in proceedings as follows:

> In late 1998 the Department of Community Services delegated to Anglicare the role of foster care agency, a role it continues to date. Anglicare does not exercise any powers of parental responsibility for this child, and these powers remain with the Minister. Anglicare workers do, however, supervise the foster carers, coordinate access by the birth family and liaise with the Department of Community Services through case conferences.[45]

Anglicare had originally sought leave to be joined as a party to argue for an "independent assessment of the child and family members". Anglicare argued that once leave was granted there was no limit on their role in the proceedings.

The Department argued that leave should only be granted to those persons with rights, powers and duties relating to children, by reference to the objects in s 8(a) of the *Care Act*. It was argued that Anglicare had neither parental responsibility nor the day-to-day care of the child and could not be granted leave.

Magistrate Schurr concluded that Anglicare's involvement with the child was sufficient to bring it within the scope of s 98(3).

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43 *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701 at [33].
44 ibid at [34].
45 *In the matter of "Pamela"* [2003] CLN 3 at p 4.

Rescission and variation of care orders: s 90

Peculiar to the care jurisdiction is the power to rescind or vary final care orders, at a later date.[46] This statutory power enables a review of orders without the need for an appeal, where there has been a "significant change in any relevant circumstances" since the original order.

Applications for rescission or variation of care orders require the Applicant to obtain leave.

A refusal of leave is an "order" for the purposes of s 91(1) of the *Care Act*: *S v Department of Community Services* [2002] NSWCA 151 at [53]. Refusal to grant leave may, therefore, be the subject of an appeal de novo from the Children's Court.

The former President of the Children's Court expressed the view that if, on appeal, leave is granted, the hearing of the substantive application should then be remitted to the Children's Court for hearing:[47]

> With respect to appeals against a refusal by the Children's Court to grant leave under section 90(1), in my view if the District Court upholds the appeal and grants leave it should remit the proceedings to the Children's Court to determine the substantive section 90 application. Having granted leave the District Court would not have jurisdiction to hear the substantive application as the only "order" before the court (being the subject of an appeal under section 91(1)) is the order refusing leave. Further, if the District Court proceeded to hear the substantive section 90 application following it granting leave, the unsuccessful party on the substantive application in the District Court would be deprived of a statutory right of appeal.

The *Care Act* sets out a number of additional matters that the court *must* take into account before granting leave: s 90(2A):

(a) the nature of the application, and

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

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

(d) the plans for the child, and

(e) whether the applicant has an arguable case, and

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

  (i) a report under section 82, or

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

Once leave is granted, the *Care Act* goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order that placed the child under the parental responsibility of the Minister, or that allocated specific aspects of parental responsibility from the Minister to another person: s 90(6).

The matters specified in s 90(6) are:

(a) the age of the child or young person,

(b) the wishes of the child or young person and the weight to be given to those wishes,

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46 *Children and Young Persons (Care and Protection) Act 1998*, s 90.

47 Marien M, "Care proceedings and appeals to the District Court", Judicial Commission of NSW, Annual Conference of the District Court of NSW, 28 April 2011.

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

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

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

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

In the decision by Justice Slattery *In the matter of Campbell* [2011] NSWSC 761, his Honour discussed the concepts of "a relevant circumstance" and "significant" change in a relevant circumstance in the context of an application for leave.

As to what constitutes a "relevant circumstance" Slattery J said:

> The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to a "snapshot" of events occurring between the time of the original order and the date the leave application is heard. This broader approach reflects the existing practice of the Children's Court on s 90 applications: see for example *In the matter of OM, ZM, BM and PM* [2002] CLN 4.

As to what constitutes a "significant" change in a relevant circumstance, he referred to *S v Department of Community Services (DoCS)* [2002] NSWCA 151 where the Court of Appeal held that the change must be "of sufficient significance to justify the consideration [by the court] of an application for rescission or variation of the order".

Slattery J said that there are dangers in paraphrasing the s 90(2) statutory formula for the exercise of the discretion beyond this statement of the Court of Appeal: [43]. He also made it clear that the court's discretion to grant leave is not only limited by s 90(2), but also by the requirement to take into account the list of considerations in s 90(2A). Therefore, establishing a significant change in a relevant circumstance under s 90(2) is a necessary, but not a sufficient, condition for the granting of leave.

As to the requirement of an "arguable case", Slattery J held that this does not relate to the application for leave, but relates to the case for the rescission or variation sought, taking into account the matters in s 90(6). Therefore, the matters in s 90(6) must be taken into account in determining whether the applicant for leave has an arguable case. Slattery J agreed with Judge Marien that the interpretation of "arguable case", as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is "reasonably capable of being argued" and has "some prospect of success" or "some chance of success".

These principles were considered and applied in *Kestle v The Director of the Department of Family and Community Services* [2012] NSWChC 2, in which a helpful summary of the principles to be applied in a s 90 application is set out [22]:

(i) In determining whether to grant leave the Court must first be satisfied under s 90(2) that there has been a significant change in a relevant circumstance since the Care order was made or last varied.

(ii) The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to just a "snapshot" of events occurring between the time of the original order and the date the leave application is heard.

(iii) The change that must appear should be of sufficient significance to justify the Court's consideration of an application for rescission or variation of the existing Care order: *S v Department of Community Services* [2002] NSWCA 151.

(iv) The establishment of a significant change in a relevant circumstance is a necessary but not a sufficient condition for leave to be granted. The Court retains a general discretion whether or not to grant leave.

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

(vi) The s 90(2A) mandatory considerations include that the applicant has an "arguable case" for the making of an order to rescind or vary the current orders.

(vii) An arguable case means a case "which has some prospect of success" or "has some chance of success".

(viii) In determining whether an applicant has an arguable case and whether to grant leave, the Court may need to have regard to the mandatory considerations in s 90(6).

The judgment went on to specifically consider whether leave could be granted on a specific basis.

The mother had submitted that it was not open to the court to grant leave on a discrete issue such as contact.

She submitted that once leave is granted, all issues (including restoration and contact) may be re-visited by the court at the substantive hearing.

The court did not accept this argument and held that the court has a wide discretion under s 90(1) to grant leave, referring to the decision of Mitchell CM in *Re Tina* [2002] CLN 6, and said at [53]:

> In my view, the wide discretion available to the court in granting leave under s 90(1) allows the court to also exercise a wide discretion as to the terms and conditions upon which leave is granted.
>
> Accordingly, the Court may restrict the grant of leave to a particular issue or issues. This would be appropriate, for example, where the Court determines that an applicant parent does not have an arguable case for restoration of the child to their care, but does have an arguable case on the issue of increased parental contact.

In a careful judgment in *Re Bethany* [2012] NSWChC 4 Children's Magistrate Blewitt AM applied these principles at [49]–[50].

Costs in care proceedings

Costs in care proceedings are not at large. The *Care Act* limits the power to make an order for an award of costs. Section 88 provides:

> The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify it in doing so.

Under the common law a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120; [1998] HCA 11 at [134]. Fairness dictates that the unsuccessful party typically bears the liability for costs: *Oshlack* at [67]. This means that the successful party in litigation is generally awarded costs, unless it appears to the court that some other order is appropriate, either as to the whole or some part of the costs: *Currabubula Holdings Pty Ltd and Paola Holdings Pty Ltd v State Bank of NSW* [2000] NSWSC 232.

The common law position is, however, displaced by the *Care Act*, which provides for a comprehensive statutory scheme for care proceedings in which the power of the court to award costs is circumscribed by s 88, so that costs may only be awarded where exceptional circumstances exist.

The policy basis behind the restriction on the power to award costs is self-evidently based in the notion that parties involved in care proceedings should have as full an opportunity to be heard as is reasonably possible, and should not be deterred from participating in such proceedings by adverse pecuniary consequences, the safety, welfare and well-being of the child being the paramount concern.[48]

The meaning of "exceptional circumstances" in the context of s 88 of the *Care Act*, and when they might exist, has been considered and discussed in various decisions, most notably in the judgments in *Department of Community Services v SP*[2006] NSWDC 168, *Department of Community Services v SM and MM* [2008] NSWDC 68, *XX v Nationwide News Pty Ltd* [2010] NSWDC 147 and *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

I will not review those decisions here, but it may be said that the situations in which "exceptional circumstances" might be found are not exhaustively defined or limited by them.

Some general propositions are nevertheless apt: The discretion to award costs must be exercised judicially and "according to rules of reason and justice, not according to private opinion … or even benevolence … or sympathy": *Williams v Lewer* [1974] 2 NSWLR 91 at 95, and is not to be exercised arbitrarily or capriciously, or on no grounds at all: *Oshlack*, above, at [22].

The underlying idea is of fairness, having regard to what the court considers to be the responsibility of each party for the costs incurred: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121].

The court may have regard to the particular circumstances of the case, including the evidence adduced, the conduct of the parties and the ultimate result: *Knight v Clifton* [1971] Ch 700.

The purpose of an order for costs is to compensate the person in whose favour it is made and not to punish the person against whom the order is made: *Allplastics Engineering Pty Ltd v Dornoch Ltd*[2006] NSWCA 33 at [34]; *Dr Douglass v Lawton Pty Ltd (No 2)* [2007] NSWCA 90 at [22].

Where an order for costs is made, I suggest that the order specify whether the costs are awarded on an indemnity basis, or that the costs should be quantified on the ordinary basis, as defined in s 3 of the *Civil Procedure Act 2005*.

I am also of the view that the Children's Court has the power to award a fixed sum of costs. The various provisions of the *Care Act*, including s 93(2), are sufficient to give the Children's Court the power to do so.[49]

Judicial officers have traditionally been reluctant to order the payment of specified sums of costs. Nevertheless the cases suggest a number of circumstances in which it might be appropriate to make such an order, such as the avoidance of the expense, delay and aggravation

48 *The Secretary, DFaCS (NSW) and the Knoll Children (Costs)* [2015] NSWChC 2.
49 *The Secretary, DFaCS (NSW) and the Knoll Children (Costs)* [2015] NSWChC 2.

involved in protracted litigation which might arise out of taxation (or assessment): *Sherborne Estate (No 2)*: *Vanvalen v Neaves; Gilroy v Neaves* (2005) 65 NSWLR 268 at [38]; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665; *Keen v Telstra Corp (No 2)* [2006] FCA 930 at [4].

In my view, it will generally be appropriate to make orders for specified sums of costs in care proceedings.

But, the power is to be exercised judicially: *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23 at [8]–[10]; and there must be proper factual foundation for the order: *Roberts v Rodier* [2006] NSWSC 1084 at [40]–[44], *Ventouris Enterprises Pty Ltd v DIB Group Pty Ltd (No 4)* [2011] NSWSC 720.

The court arrives at an estimate of the proper costs by examining, on the basis of particulars provided, whether the quantification is logical, fair and reasonable: *Lo Surdo v Public Trustee* [2005] NSWSC 1290 at [7]; *Roberts v Rodier* [2006] NSWSC 1084 at [40]–[44].

The courts have, however, tended to apply a discount, having regard to the "broad-brush" approach involved: *Idoport* at [13]; *Ginos Engineers Pty Ltd v Autodesk Australia Pty Ltd* (2008) 249 ALR 371; [2008] FCA 1051 at [23].

The power to award costs in the Children's Court, however, does not extend to awards of costs against non-parties, or legal practitioners.[50]

There are, however, some exceptions to this principle, which arise under the general law.

The exceptions include persons who are not parties in the strict sense, but are closely connected with the proceedings, such as nominal parties: *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 217; or "relators": *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518; or "next friends": *Palmer v Walesby* (1868) LR 3 Ch App 732; and tutors: *Yakmor v Hamdoush (No 2)* (2009) 76 NSWLR 148.

Then there are persons who appear in the proceedings for some specific limited purpose, who are in effect a party, for that limited purpose, such as someone appearing to maintain a claim for privilege: *ACP Magazines Pty Ltd v Motion* [2000] NSWSC 1169, or to obtain a costs order: *Wentworth v Wentworth* (2000) 52 NSWLR 602.

It might also be arguable that such orders may also be made against persons who are bound by an order or judgment of the court and fail to comply, or who breach an undertaking given to the court, or persons in contempt or who commit an abuse of process.

These are issues for determination in the future.

Cultural planning

The *Care Act* is to be administered under the "paramountcy principle", that is, that the safety, welfare and well-being of the child is paramount.[51] In addition to this paramountcy principle, the *Care Act* sets out other particular principles to be applied in the administration of the *Care Act*.[52]

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50 *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3; *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11.

51 *Children and Young Persons (Care and Protection) Act 1998*, s 9(1).

52 *Children and Young Persons (Care and Protection) Act 1998*, s 9(2).

One of these principles is that account must be taken of concepts such as culture, language, identity and community.[53] Additionally, it is a principle to be applied in the administration of the *Care Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible.[54]

Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under the *Care Act* that concern their children and young persons.[55]

Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home-care is prescribed.[56] In summary, the order for placement is, with:

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

(b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,

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

(d) a suitable person approved by the Secretary after consultation with:

  (i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

  (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

Before it can make a final care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed.[57]

Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security.[58] The plan must:

(a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement,[59] and

(b) meet the needs of the child,[60] and

53 *Children and Young Persons (Care and Protection) Act 1998*, s 9(2)(d).
54 *Children and Young Persons (Care and Protection) Act 1998*, s 11.
55 *Children and Young Persons (Care and Protection) Act 1998*, s 12.
56 *Children and Young Persons (Care and Protection) Act 1998*, s 13(1).
57 *Children and Young Persons (Care and Protection) Act 1998*, s 83(7).
58 *Children and Young Persons (Care and Protection) Act 1998*, s 78A.
59 *Children and Young Persons (Care and Protection) Act 1998*, s 9(2)(e).
60 *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1)(b).

(c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements.[61]

Culture is a critical element in the assessment of what is in a child's best interests and a critical consideration in assuring the safety, welfare and well-being of a child. It is vital that decision makers in child protection matters are provided with sufficient information to be able to appreciate the distinct role culture plays in the identity formation and socialisation of each child.

The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

There are various cases over recent years that address the Aboriginal and Torres Strait Islander Principles set out in the *Care Act*. These include: *Re Kerry (No 2)* [2012] NSWCA 127; *Department of Family and Community Services (NSW) re Ingrid* [2012] NSWChC 19; *RL and DJ v DoCS* [2009] CLN 3, *In the matter of Victoria & Marcus* [2010] CLN 2 at [49]; *Re Simon* [2006] NSWSC 1410;*Re Earl and Tahneisha* [2008] CLN 7 and *Shaw v Wolf* [1989] FCR 113.

I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]:

> The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters before the Children's Court.

I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

Care appeals

Procedure

A party dissatisfied with a decision of the Children's Court may appeal to the District Court: s 91(1). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly: s 91(6).

The appeal is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the order was made by the Children's Court may be given on the appeal: s 91(2). The District Court may decide to admit the transcript or any exhibit from the Children's Court hearing: s 91(3).[62]

Judges of the District Court hearing such appeals have, in addition to any functions and discretions that the District Court has, all the functions and discretions that the Children's Court has under Chapters 5 and 6 of the *Care Act* ie ss 43–109X: s 91(4).

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61 *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1)(c).

62 Marien J discusses the nature of the appeal in his 2011 paper at [4.1].

The provisions of the *Care Act* (Chapter 6) relating to procedure apply to the hearing of an appeal in the same way as they apply in the Children's Court: s 91(8).

It is important, therefore, for District Court judges hearing such appeals to understand the Act, its guiding principles, and its procedural idiosyncrasies.

The Children's Court Clinic

The Children's Court Clinic (which I will refer to in short form as the Clinic) is established under the *Children's Court Act 1987*, and is given various functions designed to provide the court with independent, expert, objective, and specialist advice and guidance.

The court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: s 53. The court may also make an order for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54.[63]

In addition, the court may make an order for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

The court is required to appoint the Clinic for the purpose of preparing assessment reports and information reports, unless it is more appropriate for some other person to be appointed. The reports are made to the court, and are not evidence tendered by a party.

It is absolutely critical, therefore, that the Clinician be, and be seen to be, completely impartial and independent of the parties.

The Clinic has limited resources. Great care should be exercised in the making of assessment orders and, if made, the purpose should be clearly identified and spelled out for the Clinician. It is important to remember that the court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course. In particular, the court must ensure that a child is not subjected to unnecessary assessment: s 56(2). In considering whether to make an assessment order, the court should have regard to whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere.

Having said that, the court can derive considerable assistance from an Assessment Report. In addition to providing independent expert opinion, the Clinician can provide a hybrid factual form of evidence not otherwise available. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, clinicians can provide the court with insights and nuances that might not otherwise come to its attention.

Thus, a Clinician can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the 'snapshot' nature of a court hearing, would not otherwise have the benefit of.

The Children's Court expects Clinicians to be aware of, apply and adhere to the provisions of the Expert Witness Code of Conduct set out at Schedule 7 of the Uniform Civil Procedure Rules 2005 (UCPR).

63 For a more detailed discussion of assessment orders see Judge Marien's 2011 paper at [5].

Alternative dispute resolution in care matters

Where intervention by Community Services is necessary, it is preferable that the intervention occurs early and at a time that allows for genuine engagement with the whole family, with a view to avoiding, wherever possible, escalation of problems into the court system. Once cases do need to come to court it remains important that the court also has processes available that will facilitate bringing the parties together with a view to them coming to a mutually acceptable resolution, that is in the best interest of the child, thereby avoiding lengthy, emotionally draining and often irrevocably divisive formal hearings.

Over the past few years, the Children's Court has initiated and entrenched alternative dispute resolution (ADR) processes, which has involved an expansion and development of the involvement of Children's Registrars in care matters. Prior to the introduction of these new initiatives the use of ADR in the Children's Court was restricted not only by the resources available, but also by an adversarial culture within the jurisdiction that favoured traditional court processes.

The ADR processes in the Children's Court are available in an appeal to the District Court.

The Dispute Resolution Conference (DRC) model has now become an integral aspect of Children's Court proceedings.

The conferences involve the use of a conciliation model. This means Children's Registrars have an advisory, as well as a facilitation role.

Conferences are now regularly conducted at the court by Children's Registrars who have legal qualifications and are also trained mediators: see s 65 of the *Care Act* and are based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children's Courts, and Lismore and Albury Local Courts.

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

The DRC process has brought about a significant shift in culture that has impacted on cases in the Children's Court more generally. The Australian Institute of Criminology (AIC) has evaluated the use of ADR in the area of care and protection, and found high levels of participation and satisfaction. Family members involved found the process to be useful, and felt they were listened to and were treated fairly. The AIC evaluation found that approximately 80% of mediations conducted have resulted in the child protection issues in dispute being narrowed or resolved.

The timing of a referral of disputed proceedings to a DRC can sometimes be important.

Like all referrals for mediation, it is a matter of judgment when to do so. Sometimes it is necessary for the issues to be sufficiently defined to make the mediation viable.

On other occasions, it is better to refer as soon as possible, even if all the relevant documentation and information is not necessarily available.

The importance of confidentiality in the DRC model was reaffirmed in *Re Anna* [2012] NSWChC 1.

In that case the father said something during the DRC that was described by the Secretary as an admission that may have been relevant to the father's capacity to be responsible for the

safety, welfare and well-being of his daughter. The Secretary sought leave to file an affidavit by a caseworker who was present at the DRC in which he refers to the alleged admission made by the father.

In rejecting the application to file the affidavit, the court said:

> A pivotal feature of alternative dispute resolution (ADR) is that, except in defined circumstances, what is said and done in the course of ADR is confidential in the sense that it cannot be admitted into evidence in court proceedings.
>
> This important protection of confidentiality encourages frank and open discussions between the parties outside the formal court process …
>
> The encouragement of frank and open discussion between the parties is particularly important in ADR in child protection cases. ADR provides parents with the opportunity to freely discuss with the Department, in a safe and confidential setting, the parenting issues of concern to the Department and, most importantly, it provides the Department with the opportunity to discuss with the parents in that setting what needs to be done by the parents to address the Department's concerns.

The court went on to say, however, that the protection is not absolute. He referred to a clause in the *Children and Young Persons (Care and Protection) Regulation 2000*. That Regulation has been superseded and the relevant clause is now Clause 19 of the *Children and Young Persons (Care and Protection) Regulation 2012*.

Clause 19 of the new Care Regulation defines "alternative dispute resolution", which includes a DRC. It goes on to provide that evidence of anything said or of any admission made, during alternative dispute resolution is not admissible in any proceedings.

Similarly, a document prepared for the purposes of, or in the course of, or as a result of, alternative dispute resolution is not admissible in evidence in any proceedings before any court, tribunal or body.

Clause 19(5) enables the disclosure of information obtained in connection with the alternative dispute resolution, but only in very limited circumstances, and only by the Children's Registrar conducting the DRC. The permissible circumstances include where the relevant persons consent, or in accordance with a requirement imposed by or under a law (other than a requirement imposed by a subpoena or other compulsory process).

In discussion of the Clause, the court made various important observations, including:

> However, the clause does not impose a general prohibition against disclosure of information obtained in connection with ADR. The clause does not, therefore, prohibit a person attending a DRC disclosing information obtained in connection with the DRC to a third party. For example, the clause does not prohibit a parent disclosing to their treating professional what was said at a DRC nor does it prohibit a lawyer who appears at a DRC as an agent disclosing to their principal what transpired at a DRC. [17]
>
> Nor does the clause prohibit a party attending a DRC using information disclosed by another party at the DRC to make independent inquiries and tender in evidence in the proceedings the result of those independent inquiries: see *Field v Commissioner for Railways for New South Wales* [1957] 99 CLR 285. [18]

The more contentious exception enabling disclosure by the Children's Registrar now appears in Clause 19(5)(c). Clause 19(5)(c) refers to:

> reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of section 23 of the Act.

I do not propose here to consider in detail today the circumstances under which a disclosure made at a DRC might be admissible pursuant to Clause 19(5)(c). That is a discussion for another day. For the moment, be aware that the power exists, but it is limited to disclosure by the person conducting the alternative dispute resolution, that is the Children's Registrar, and not the parties or others in attendance, or the caseworkers or legal practitioners involved.

Conclusion

I hope the contents of this paper have been helpful in guiding judges hearing care appeals.

Additional resources may be found at the following sites:

(a) The website of the Children's Court contains numerous resources including the Practice Notes, the Contact Guidelines and various protocols. Most important, however, is the Children's Law News site (CLN), which contains various cases and articles collected over the last decade relating to Children's Law. It contains a helpful index.

(b) There is a chapter in the *Civil Trials Bench Book* on "Child care appeals from the Children's Court" at **[5-8000]**.

(c) The Judicial Commission website contains the *Children's Court of NSW Resource Handbook*.

Finally, please feel free to ring me at any time to discuss issues of law or procedure in care matters.

Child protection legislative reforms

P Johnstone*

Introduction ..... [17-5000]

Part 1 — Parent Responsibility Contracts

Part 2 — Parent Capacity Orders

Part 3 — Contact

Part 4 — Guardianship Orders

Part 5 — Changes to permanency planning

Part 6 — Changes regarding supervision orders and prohibition orders

Part 7 — Savings, transitional and other provisions

Part 8 — Changes to court forms and practice notes

[**Currency note**: The *Child Protection Legislation Amendment Act 2014*, the amending Act under discussion in the article below, commenced upon proclamation on 29 October 2014 (LW 6 June 2014). Some provisions quoted in this article have since been amended by later legislation. Accordingly, references in the article to the reformed sections of the *Children and Young Persons (Care and Protection) Act 1998* will link to the version of the Act as at 29 October 2014 and references to "current legislation" are linked to the Act as at 4 July 2014.]

[17-5000] Introduction

This paper has been prepared for Local Court Magistrates exercising Children's Court jurisdiction in care and protection matters. The aim of this paper is to provide guidance with regards to the child protection legislative reforms commencing on 29 October 2014.[1]

It is important to note that the legislative intent behind these reforms emphasises restoration to families and, where this is not possible, the provision of certainty and stability through permanent placements. As a result, the reforms focus on early intervention, highlighting the need to work with the Department of Family and Community Services (DFaCS), parents, carers,

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* President of the Children's Court of NSW; the paper was first presented for the Local Court Magistrates on 27 October 2014.

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

children and young people to resolve disputes before they reach the Court. To facilitate early intervention, provisions have been included in the amendments to ensure alternative dispute resolution mechanisms are utilised to their fullest extent.

In this paper, I have distilled the key elements of the reforms into eight parts. It is my intention that you will read this paper alongside the marked up copy [not reproduced here] of the *Children and Young Persons (Care and Protection) Act 1998* [the Care Act], which incorporates the changes in the *Child Protection Legislation Amendment Act 2014*.

Firstly, this paper will discuss the changes regarding Parent Responsibility Contracts. The paper will then provide an outline of the nature and scope of the new Parent Capacity Orders. Thirdly, the paper will look at the reforms made in relation to Contact Orders and following this, the paper will look at the new provisions in relation to Guardianship Orders. The paper will then discuss the changes to permanency planning, Supervision Orders, Prohibition Orders and the Savings and Transitional Provisions. The conclusion of this paper will provide an overview of the processes that the Court will put in place to ensure Forms and Practice Notes are consistent with the reforms.

The main areas of reform of the Care and Protection jurisdiction are: the power to make Parent Capacity Orders to require parents to address deficiencies in parental capacity, and to make Guardianship Orders for the permanent placement of a child or young person. Additionally, the Court will be empowered to hear contact disputes where agreement has not been reached through Alternative Dispute Resolution (ADR) and consider alleged breaches of Prohibition Orders.

Part 1 — Parent Responsibility Contracts

Parent Responsibility Contracts (PRCs) exist under the current legislation: s 38A. The reforms alter the situation in relation to PRCs, removing the presumption that a child is in need of care and protection if the contract is breached and extending the applicability of PRCs to include expectant parents: s 38A(1)(b). It is anticipated that these changes will result in an increase in the use of PRCs.

Section 38A is amended by creating a new s 38A(1), which reads as follows:

> (1) A *"**parent responsibility contract**"* is either or both of the following:
>
> (a) an agreement between the Director-General and one or more primary care-givers for a child or young person that contains provisions aimed at improving the parenting skills of the primary care-givers and encouraging them to accept greater responsibility for the child or young person,
>
> (b) an agreement between the Director-General and either or both expectant parents whose unborn child is the subject of a pre-natal report under section 25 that contains provisions aimed at improving the parenting skills of the prospective parent and reducing the likelihood that the child will be at risk of significant harm after birth.

Another significant reform is that under s 38E, a breach of a PRC does not give rise to a presumption that a child is need of care and protection. Section 61A was not amended to align with this change. This means that pursuant to s 61A, a contract breach notice of a PRC will operate as a care application. FaCS have acknowledged that this is a drafting oversight and will amend s 61A in 2015. However, the Secretary will need to file an application initiating proceedings in addition to the breach notice to ensure that the Court has sufficient information to establish proceedings.

[The reformed] s 38E provides:

(1) The Director-General may file a *"**contract breach notice**"* with the Children's Court in relation to a parent responsibility contract if:

(a) a party to the contract has breached a term of the contract, and

(b) the contract authorises the Director-General to file a contract breach notice with the Children's Court for breaches of the kind committed by any party to the contract.

(2) A contract breach notice must state the following matters:

(a) the name of the party to the contract who is alleged to have breached the parent responsibility contract,

(b) each provision of the parent responsibility contract that the party to the contract is alleged to have breached,

(c) the manner in which the party to the contract is alleged to have breached the provision,

(d) the care orders that the Director-General will seek from the Children's Court in respect of the child or young person concerned,

(e) such other matters as may be prescribed by the regulations.

(3) The Director-General is to cause a copy of a contract breach notice filed with the Children's Court (along with a copy of the parent responsibility contract) to be served on each of the following persons as soon as is reasonably practicable after filing the notice:

(a) each party to the parent responsibility contract,

(b) the child or young person for whom the party breaching the contract is a primary care-giver.

(4) [Repealed]

(5) A reference in this Act to the Director-General duly filing a contract breach notice is a reference to the Director-General filing the notice in accordance with the provisions of this section.

Part 2 — Parent Capacity Orders

The reforms introduce a new jurisdiction for the Children's Court, the Parent Capacity Order (PCO). A PCO can be used as a stand-alone provision, consistent with the early intervention aims of the reforms. Additionally, a PCO can be issued during proceedings or as a result of a breach of a prohibition order.

Section 91A defines PCO as:

> *"**parent capacity order**"* means an order requiring a parent or primary care-giver of a child or young person to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills.

An application for a PCO is not an application for a care order under Ch 5, Pt 2 of the Care Act. Rather, Ch 5, Pt 3 5 set out a discrete framework for PCOs including the process for variation or revocation of a PCO and appeal provisions.

A PCO may be made on the application of the Secretary or on the initiative of the Children's Court: s 91B.

An application for a PCO can be referred to a Dispute Resolution Conference (DRC).

Section 91D(3) provides that:

> The purpose of a dispute resolution conference is to provide the parties with an opportunity to agree on action that should be taken to build or enhance the parenting skills of the parent or primary care-giver.

The threshold test as set out in s 91E is lower than the threshold test for a care application: s 72.

Firstly, there must be an identified deficiency in the parenting capacity of a parent/primary care-giver that has the potential to place the child or young person at risk of significant harm. Secondly, the Court must be satisfied that the parent/primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapeutic service.

Section 91F provides that the Court may make a PCO by consent. This function may be exercised by a Children's Registrar in relation to an application made by the Secretary under s 91B(a).

Section 91H sets out the requirements regarding variation or revocation of a PCO and s 91I provides a right of appeal, limited to a question of law.

Practice Note 10 has been issued in relation to the listing arrangements, service requirements and the conduct of DRCs as they relate to applications for stand-alone PCOs. Legal Aid has informed the Children's Court that lawyers working in early intervention strategies will generally be assigned these applications. For this reason it is preferable that, where practicable, applications for PCOs are listed on the same day as Applications for Compulsory Schooling Orders.

Part 3 — Contact

The reforms limit the Court's power to make contact orders for 12 months on the initial care application unless restoration is planned. However, the amendments create new processes for varying contact orders and making applications for contact orders following the conclusion of the initial proceedings.

Section 86(1A)–(7) provides:

> (1A) A contact order may be made by the Children's Court:
>
> (a) on application made by any party to proceedings before the Children's Court with respect to a child or young person, or
>
> (b) with leave of the Children's Court — on application made by any of the following persons who were parties to care proceedings with respect to the child or young person:
>
> (i) the Director-General,
>
> (ii) the child or young person,
>
> (iii) a person having parental responsibility for the child or young person,
>
> (iv) a person from whom parental responsibility for the child or young person has been removed,
>
> (v) any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person, or
>
> (c) with leave of the Children's Court — on application made by any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person.

(1B) The Children's Court may grant leave under subsection (1A)(b) or (c) if it appears to the Court that there has been a significant change in any relevant circumstances since a final order was made in the proceedings.

(1C) The Children's Court is not required to hear or determine an application made to it with respect to a child or young person by a person referred to in subsection (1A)(c) unless it considers the person to have a sufficient interest in the welfare of the child or young person.

(1D) Before granting leave under subsection (1A)(b) or (c), the Children's Court:

(a) must take into consideration whether the applicant for the contact order and persons to whom the contact order applies have attempted, or been ordered by the Children's Court to try to reach an agreement about contact arrangements by participating in alternative dispute resolution, and

(b) may order the applicant and those persons to attend a dispute resolution conference conducted by a Children's Registrar under section 65 or alternative dispute resolution process under section 65A.

[**Note**: Legal Aid has received specific funding to provide an alternative dispute resolution service for contact disputes. Dispute resolution services for other applications under the Care Act will ordinarily be provided by the Children's Registrars (see Practice Note 3 — paragraph 17.1).]

(1E) Subject to any order the Children's Court may make, an applicant for a contact order under subsection (1A)(b) who was a party to care proceedings must notify other persons who were parties to the proceedings of the making of the application.

Note. Section 256A sets out the circumstances in which the Children's Court may dispense with the requirement to give notice.

(1F) A contact order made under subsection (1A)(b) on application of a person who was a party to proceedings in which an earlier contact order was made that has expired may be made in the same or different terms to the expired order.

(2) The Children's Court may make an order that contact be supervised by the Director-General or a person employed in that part of the Department comprising those members of staff who are principally involved in the administration of this Act only with the Director-General's or person's consent and must not be made in relation to contact with a child or young person who is the subject of a guardianship order.

(3) An order of the kind referred to in subsection (1)(a) [this refers to 86(1)(a)] does not prevent more frequent contact with a child or young person with the consent of a person having parental responsibility for the child or young person.

(4) An order of the kind referred to in subsection (1)(b) [this refers to 86(1)(b)] may be made only with the consent of the person specified in the order and the person who is required to supervise the contact.

(5) A contact order made under this section has effect for the period specified in the order, unless the order is varied or rescinded under section 86A or 90.

(6) Despite subsection (5), if the Children's Court decides (whether by acceptance of the Director-General's assessment under section 83 or otherwise) that there is no realistic possibility of restoration of a child or young person to his or her parent, the maximum period that may be specified in a contact order made under subsection (1A) concerning the child or young person is **12 months**. [My emphasis.]

(7) Subsection (6) does not apply to a contact order made on the application of a former party to proceedings in which an earlier contact order was made that has expired.

The implications of these new contact arrangements is articulated by Roderick Best, Director of Legal Services at DFaCS:

> Where there is an application for the Court to make a contact order and the plan is for restoration then there is no limitation on the duration of the contact order however once the Court determines that there is no realistic possibility of restoration the maximum duration of an initial final contact order is 12 months. By way of contrast, contact arrangements in a care and permanency plan unsupported by an order under section 86 could be for any duration notwithstanding an absence of any plan for restoration. Again, there is greater flexibility and encouragement to proceed to put in place contact arrangements if parties proceed by way of case planning than by application for court orders. If parties are proceeding by way of plans then that shifts the emphasis away from hearings and places the emphasis on the dispute resolution processes where the plans will be buffeted and refined.[2]

Section 86A sets out the circumstances under which contact orders may be varied by agreement. The section states:

(1) A "***contact variation agreement***" is an agreement to vary the terms of a contact order in the light of a change in any relevant circumstances since the contact order was made or last varied.

(2) A contact variation agreement must:

  (a) be in writing, and

  (b) be signed and dated by those parties to the proceedings in which the contact order was made who are affected by the variation and, if the contact variation agreement is made less than 12 months after the contact order was made, the legal representative of the child or young person, and

  (c) be registered with the Children's Court by those parties within 28 days after the date on which the agreement was signed.

(3) The contact variation agreement is taken to be registered with the Children's Court when filed with the registry of the Court without the need for any order or other action by the Court.

(4) The contact variation agreement takes effect only if (and when) it is registered.

(5) The contact variation agreement has effect from the date of registration until the end of the period specified in the variation agreement.

(6) Nothing in this section prevents the variation of a contact order under section 90.

Part 4 — Guardianship Orders

With the commencement of the legislative reforms on 29 October, the Court will have the power to make a guardianship order allocating to a suitable person all aspects of parental responsibility until the child attains the age of 18 years: s 79A.

Clause 35 of the savings and transitional provisions [Sch 3] provides that on 29 October [2014], current orders allocating parental responsibility to a relative or kin will automatically transfer to guardianship orders: cl 35(1). DFaCS have indicated that carers have been given the opportunity to opt out of this automatic transfer. However, a s 90 application would need to made in these circumstances.

2 R Best, "Planning for Contact Changes", a talk presented to a joint training of care lawyers [at the Judicial Commission of NSW Children's Court of NSW Section 16 Meeting on 17 October 2014].

The characteristics of guardianship are not entirely distinct from an order allocating PR to the Minister, in that the responsibility of the guardian ends at the age of 18. In order to make a guardianship order, s 79A(3) provides that:

> (3) The Children's Court must not make a guardianship order unless it is satisfied that:
>
> (a) there is no realistic possibility of restoration of the child or young person to his or her parents, and
>
> (b) that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and
>
> (c) if the child or young person is an Aboriginal or Torres Strait Islander child or young person — permanent placement of the child or young person under the guardianship order is in accordance — with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that apply to placement of such a child or young person in statutory out-of-home care under section 13, and
>
> (d) if the child or young person is 12 or more years of age and capable of giving consent — the consent of the child or young person is given in the form and manner prescribed by the regulations.

A helpful way of looking at guardianship is to picture it on a continuum, with parental responsibility at one end and adoption at the other. Guardianship falls somewhere in between these two concepts, it ends at 18 and is thus distinct from adoption. However, it picks up some aspects of adoption, in that a child over 12 is required to consent to a guardianship order.

Section 79B provides for where applications for guardianship orders may be made (other than those orders automatically transferring over to guardianship orders on 29 October).

Section 79B(1)–(11) states:

> (1) Despite section 61(1), an application for a guardianship order may be made by the following:
>
> (a) the Director-General,
>
> (b) with the written consent of the Director-General — the designated agency responsible for supervising the placement of the child or young person,
>
> (c) with the written consent of the Director-General — a person who is an authorised carer or who has been assessed, in accordance with the regulations, by the Director-General or designated agency in relation to a child or young person to be a suitable person to be allocated all aspects of parental responsibility for the child or young person.
>
> (2) The Children's Court may order an applicant for a guardianship order to notify those persons specified by the Children's Court of the making of the application.
>
> **Note.** Section 256A sets out the circumstances in which the Children's Court may dispense with service.
>
> (3) Subject to any order the Children's Court may make, the applicant for a guardianship order is to make reasonable efforts to notify each parent of the child or young person of the making of the application for the order.
>
> (4) Each parent must be given a reasonable opportunity to obtain independent legal advice about the application and is entitled to be heard at the hearing of the matter.
>
> (5) Without limiting section 90(1A), an applicant for variation or rescission of a guardianship order made in respect of a child or young person must notify the principal officer of the

designated agency that was supervising the placement of the child or young person in out-of-home care immediately before the guardianship order was made of the making of the application.

(6) Without limiting subsection (2), an applicant for a guardianship order other than the Director-General is to notify the Director-General of the making of the application for the order on the day the application is filed and the Director-General is entitled to be a party to the proceedings.

(7) An application cannot be made under subsection (1)(c) by a person who is an authorised carer solely in his or her capacity as the principal of a designated agency.

(8) Subject to any order the Children's Court may make, an applicant for a guardianship order must present the following to the Children's Court before the order is made:

(a) copies of any written consent required to be given in relation to the applicant by subsection (1),

(b) a care plan prepared by the applicant,

(c) a copy of any report on the health, educational or social well-being of the child or young person that is available to the applicant and that is relevant to the care plan.

(9) Without limiting the information that must be contained in a care plan, it must contain information about the following:

(a) the residence of the child or young person,

(b) if the Children's Court has made any contact order under section 86 in relation to contact of the child or young person with his or her parents, relatives, friends or other persons — the arrangements for contact,

(c) the education and training of the child or young person,

(d) the religious upbringing of the child or young person,

(e) the health care of the child or young person,

(f) the resources required to provide any services that need to be provided to the child or young person and the availability of those resources,

(g) any views the child or young person has expressed about any aspect of the care plan.

(10) Other requirements and the form of care plan under this section may be prescribed by the regulations.

(11) The care plan is only enforceable to the extent to which its provisions are embodied in or approved by orders of the Children's Court.

Supporting or ancillary orders that require the involvement of the DFaCS, such as orders for supervision pursuant to s 76(1) are not available in relation to guardianship orders. However, given that guardians will still receive a payment from DFaCS pursuant to s 79C, there will be a practical connection between the guardian and DFaCS.

Whilst an application for a guardianship order may be made in relation to the initial care application, DFaCS has advised that it is more likely that an initial application will seek a time limited PR order to either the Minister or the prospective guardian and that guardianship will be identified as the permanent placement option in the care plan. Where the Court approves such an application a section 90 application would subsequently be made seeking to convert the PR order to a guardianship order.

Clause 5 of the amending regulation sets out special provisions in relation to the leave requirement in s 90 as it relates to guardianship orders. DFaCS has advised that over time they

also plan to lodge applications for guardianship in relation to a number of cases where the child is subject to a PR order to the Minister but has been in a stable placement with a relative or kin for a considerable period of time.

The practical implication is that the Court may see an increase in s 90 applications over time.

Part 5 — Changes to permanency planning

The legislative reforms introduce a hierarchy of permanency planning, entitled the "Permanent placement principles": s 10A. The intent behind these reforms are to change the focus of case planning to long term options that are more likely to offer greater stability for the child and carers.

Section 10A provides:

(1) In this Act:

"***permanent placement***" means a long-term placement following the removal of a child or young person from the care of a parent or parents pursuant to this Act that provides a safe, nurturing, stable and secure environment for the child or young person.

(2) Subject to the objects in section 8 and the principles in section 9, a child or young person who needs permanent placement is to be placed in accordance with the permanent placement principles.

(3) The "***permanent placement principles***" are as follows:

(a) if it is practicable and in the best interests of the child or young person, the first preference for permanent placement of the child or young person is for the child or young person to be restored to the care of his or her parent (within the meaning of section 83) or parents so as to preserve the family relationship,

(b) if it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a), the second preference for permanent placement of the child or young person is guardianship of a relative, kin or other suitable person,

(c) if it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a) or (b), the next preference is (except in the case of an Aboriginal or Torres Strait Islander child or young person) for the child or young person to be adopted,

(d) if it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a), (b) or (c), the last preference is for the child or young person to be placed under the parental responsibility of the Minister under this Act or any other law,

(e) if it is not practicable or in the best interests of an Aboriginal or Torres Strait Islander child or young person to be placed in accordance with paragraph (a), (b) or (d), the last preference is for the child or young person to be adopted.

By introducing a hierarchy of placement principles, including guardianship orders, and placing greater emphasis on adoption, it may be less likely that parents will concede that there is no realistic possibility of restoration. Therefore, we may see an increase in the number of contested applications that appear before us.

Additionally, it is anticipated that the identification of whether someone is Aboriginal/non-Aboriginal will play a greater part in care proceedings. This may be challenging, particularly where identification of a child's Aboriginality is not clear as it does not meet all of the requirements in s 5.

Part 6 — Changes regarding supervision orders and prohibition orders

The introduction of s 76(3A), changes the maximum period of supervision as follows:

> (3A) Despite subsection (3), the Children's Court may specify a maximum period of supervision that is longer than 12 months (but that does not exceed 24 months) if the Children's Court is satisfied that there are special circumstances that warrant the making of an order of that length and that it is appropriate to do so.

The reforms have also impacted upon orders prohibiting action (prohibition orders) pursuant to s 90A. The changes include an extension of the class of persons subject to a prohibition order. The persons subject to a prohibition order can now include "any person who is not a party to the care proceedings", in addition to a parent of a child or young person.

Further, s 90A will now also provide a mechanism to deal with a breach of a prohibition order. The amended s 90A reads as follows:

> (1) The Children's Court may, at any stage in care proceedings, make an order (a "***prohibition order***") prohibiting any person, including a parent of a child or young person or any person who is not a party to the care proceedings, in accordance with such terms as are specified in the order, from doing anything that could be done by the parent in carrying out his or her parental responsibility.
>
> (2) A party to care proceedings during which a prohibition order is made may notify the Children's Court of an alleged breach of the prohibition order.
>
> (3) The Children's Court, on being notified of an alleged breach of a prohibition order:
>
> (a) must give notice of its intention to consider the alleged breach to the person alleged to have breached the prohibition order, and
>
> (b) must give that person an opportunity to be heard concerning the allegation before it determines whether or not the order has been breached, and
>
> (c) is to determine whether or not the order has been breached, and
>
> (d) if it determined that the order has been breached — may make such orders (including a parent capacity order) as it considers appropriate in all the circumstances.
>
> (4) The person who is alleged to have breached the prohibition order is entitled to be heard, and may be legally represented, at the hearing of the matter.

Part 7 — Savings, transitional and other provisions

The amending legislation will not affect proceedings currently on foot, unless otherwise provided: s 30 of the *Interpretation Act 1987*. Notwithstanding, Sch 3 provides specific savings and transitional provisions that will apply upon the commencement of the legislation.

Pursuant to cl 32, the following provisions apply regarding parent responsibility contracts:

> (1) An amendment made to sections 38A–38E by the amending Act [*Child Protection Legislation Amendment Act 2014*] extends (except as provided by subclause (2)) to a parent responsibility contract that is in force immediately before the commencement of the amendment [29 October 2014].
>
> (2) Section 38E(4) as in force immediately before its repeal by the amending Act continues to apply to and in respect of a parent responsibility contract that is in force immediately before that repeal unless its terms are varied under sections 38A–38E as amended by the amending Act.

Pursuant to cl 33, the following provisions apply regarding contact orders:

(1) An application may be made under section 86(1A), as inserted by the amending Act [*Child Protection Legislation Amendment Act 2014*], by a party to proceedings commenced (irrespective of whether or not finally determined) before the commencement of the insertion.

(2) Section 86A, as inserted by the amending Act, extends to the variation of a contact order made before that insertion.

Under cl 34, an order allocating sole parental responsibility under s 149 [now repealed] of the Act, will continue to have effect.

Clause 35(1) provides for the automatic transition of PR orders to guardianship orders as at 29 October [2014]. Clause 35(2) provides for the continuation of financial assistance where a PR order has automatically transferred to a guardianship order and cl 35(3) provides that parties in receipt of such financial assistance are to make an annual report to the Director-General.

Clause 36 provides that any provision of Ch 8 applying to a child or young person in supported out-of-home care continues to apply as it did before the amendments took effect.

Clause 37 provides that the new s 91B(b) extends to a prohibition order breached before s 91B(b) was inserted.

Clause 38 provides that the inserted Ch 15A does not apply to alternative dispute resolutions conducted prior to the amendment, under ss 37, 65 or 114.

Clause 39 provides that the amended s 83(4) extends to a plan that has been prepared but not yet submitted to the Children's Court in accordance with s 83(3).

Part 8 — Changes to court forms and practice notes

The Children's Court is currently in the process of creating the following forms:

(i) Application for Parent Capacity Order [now Form 5]

(ii) Application for Variation or Revocation of Parent Capacity Order [now Form 6]

(iii) Parent Capacity Order

(iv) Application for Contact Orders [now Form 4]

(v) Contract Breach Notice [now Form 41]

(vi) Notification of Breach of Prohibition Order [now Form 42].

Amendments have been made to the Application Initiating Care Proceedings and the Application to Vary or Rescind a Care Order. Once finalised, the forms will be available online on the Children's Court website [now Application and Report Initiating Care Proceedings (Form 1) and Application for Rescission/Variation of Care Order (Form 3)].

The Children's Court has amended Practice Note 3: Alternative dispute resolution procedures in the Children's Court. Practice Note 10: [Parent capacity orders] has been issued in relation to stand-alone parent capacity orders.

The Children's Court is reviewing the guidelines for Children's Registrars and guidelines for registry staff.

Care and protection — articles

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Relevance of attachment theory in care proceedings

M Allerton*

Definition of attachment ..... [18-1000]

Relevance to care matters

Attachments and changes in placement

Assessments of attachments

References

Attachment theory is now generally accepted in the field of child psychology. Following considerable empirical and research validation, it has become a pivotal consideration in the field of child protection and in care and protection proceedings in courts. Under the theory, the earliest bonds formed by children with their primary caregiver/s (particularly before 4 years of age) have a tremendous impact (affecting neurological, physical, cognitive, emotional and social development), which continues throughout life. The theory is most important tenet is that an infant needs to establish a positive relationship with at least one primary caregiver for social and emotional development to occur normally, and that further relationships build on the patterns developed in these early experiences.

[18-1000] Definition of attachment

The research literature on child development defines attachment as a relationship pattern between a child and a caregiver. Attachment behaviour anticipates a response by the attachment figure(s), to tune in to the child's needs for attention, and to remove any perceived threat or discomfort. John Bowlby, who originated the theory, proposed that healthy attachment relationships provide a "secure base", allowing for the safe resolution of an infant's need for survival from danger, with the need to learn through exploration (Bowlby,1988).

Attachment behaviours are the means by which infants elicit care and protection. Children are not born attached to their caregivers, but learn how to have their needs met by their experience of being parented (Stafford and Zeanah, 2006). The attachment relationship also helps an infant or young child learn how to manage unsettling emotions. Different patterns and degrees of security of attachment to caregivers result from each individual child's adaptation to the quality of parenting he or she has received. For example, when the mother has returned after an unexpected separation, a child with a secure attachment (who has learnt to expect comfort when distressed) might cry and want to be picked up, then is comforted and able to settle. A child with an avoidant attachment style (who has learnt to expect rejection or punishment when distressed) might pretend to ignore the mother. A child with an ambivalent attachment style (for whom comforting has been unpredictable) might appear to seek relief from the parent, but resist what soothing is offered, to the point of being inconsolable. The difficulties with these "normal"

* Director Children's Court Clinic, 12 December 2012.

attachment styles will be complicated in children and infants exposed to high risk environments, where parents are the source of alarm as well as its only solution. These infants and young children, on reunion may show behaviours that appear puzzling, or "disorganised". They may, for example, withdraw and not seek comfort at all, or may seek comfort from a stranger. Such confusing behaviour might be interpreted as signs of disruptive attachment disorders.

Attachment behaviour, or what is learnt about how to elicit a response to a need for caregiving, provides a foundation for the child's later mental health, including the ability to manage emotions and impulses, socialisation, cognitive and academic abilities, and personality development.

Relevance to care matters

Awareness of the potential harm that can be inflicted by breaking attachments will influence a court's decisions relating to the following matters:

- Removal
- Safety
- Emergency placement orders
- Contact
- Restoration or long-term care
- Cultural identity
- Adoption
- Sibling placements
- Permanency planning.

Courts may need to weigh the relative risks of physical, emotional or sexual harm, whether associated with parental mental illness, learning problems, alcohol and other drug dependence, or exposure to domestic violence, against the potential harm that may result from breaking a child's attachments. The requirement for expedition in care proceedings (as stated in s 94(1) *Children and Young Persons (Care and Protection) Act 1998*) is a legislative acknowledgement of the critical importance of early secure attachments for young children. One of the reasons for reducing these risk factors (all of which may contribute to attachment problems) will be to provide a safe, nurturing, stable and secure environment that will allow for the safe development of more secure attachments.

Understanding an infant or young child's attachment patterns can indicate something of the quality of care he or she has received, and of his or her vulnerability to changes in caregivers. Decisions about maintenance of attachments during temporary and long-term placements will also have a significant impact on the child's present and future adjustment. These decisions may consider such factors as:

- Amount of time spent in the care of a parent or other caregiver
- Numbers of placements
- The quality of the relationships with parents compared to the quality of the relationships with foster carers.

Attachments and changes in placement

The breaking of a positive and secure attachment between a child and primary caregiver/s during the early years of the child's life can have a seriously detrimental effect on social and emotional development. To break an attachment is distressing, and can potentially place a child at risk. Transient effects are expected when the first change in placement occurs before 6–9 months of age. After 9–12 months of age, there will be distress, with longer-term effects of the change increasing with the child's age. From 1 to 3 years, separation is a traumatic loss and a developmental crisis. Even if the loss occurs after approximately 3–5 years of age, some persistent insecurity in new relationships is to be expected (IASA, 2012).

Children who have had secure attachments adapt to change more easily than children who have had insecure relationships with their caregivers. When the prior relationship included either abuse or neglect, affecting the quality of the child's attachments, then the change process is likely to be more difficult, ambivalent, and attenuated. Children can manage to believe that their current placement is permanent through one or two changes. With additional changes, it becomes increasingly difficult for children to form a committed relationship with the new caregiver, because their prior experience prepares them to expect disruption. This means that each successive placement is more likely to fail than previous placements. The changes are likely to be accompanied by an initial "honeymoon", followed by outbursts of uncontrolled anger, fear, or desire for comfort. The last of these is sometimes displayed as inappropriate sexualised behaviour or indiscriminate affection. Outcomes will vary, but effects of broken attachments may include mental health, behavioural, achievement and relationship problems throughout the lifespan.

Assessments of attachments

The research and clinical literature suggests different ways that attachments are to be assessed. However, it indicates that assessment should involve the integration of an understanding of a child's history and physical, social and language development, behaviour, mental health, social learning and education, with careful observations of the child with prospective caregivers. Conclusions about the child's attachment relationships will then be integrated with findings about the child's needs and the caregivers' resources. This will help to understand the child, and also the persons who have, or are seeking, parental responsibility.

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Apart from shortness, vegephobia and addiction to technology, how are children different?*

M Allerton†

Attachment ..... [18-2000]

Child development

Parenting and development

Characteristics of abusive parents and their children

A snapshot from clinic data

There is no such thing as a child, and no such thing as a parent

References

This talk focuses on what areas of child development are affected by abuse and neglect, how central the notion of attachment is to child development, and how clinicians plan assessments of what parents may offer. It integrates some of my more technical papers used to train clinicians.

Serious Question: Why are child abuse and neglect bad?

[18-2000] Attachment

An attachment relationship is the fruit of early childhood development, meaning that a child has been well cared-for, and a consistent caregiver, or a few consistent caregivers, have effectively responded to his or her needs. In well functioning families, the baby decrees what should be done and the caregiver learns to interpret and meet these needs. A "good enough" mother is sensitive and flexible in the way she studies and reacts to her baby, and intuitively learns how to supply what is required.

In this safe, predictable environment the primary caregiver can become a "secure base" for the child. The child knows the mother is there to provide security when it is required, so that he or she can then safely learn about the world through personal exploration. A baby brought up in this secure, nurturing environment learns to expect relationships to be reciprocal and direct. A signal from one person leads to a straightforward response from the other.

From this start, these children are more likely to learn that the world behaves according to intelligible principles, they will expect rewarding relationships based on assertiveness and empathy, they are comfortable with bodily contact, and will be predisposed to enjoy school and other learning activities.

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* This article is adapted from a talk given to the NSW Children's Court magistrates at a Judicial Commission s 16 Conference on 3 March 2010.

† Director Children's Court Clinic, 12 December 2012.

For a human baby, born the most vulnerable of species, it is highly dangerous to be unattended, or not responded to appropriately. Babies are built, both biologically and psychologically, to engage with, and elicit care from others. The caregivers who make them most comfortable are those who are stronger, wiser, safer and irrationally interested in their welfare. Naturally, a primary, predictable caregiver, usually in the form of a mother, often manages to fulfil these demanding occupational criteria.

Home should be the safest of places, yet we know that for some people home is the place of greatest danger. How do people manage to survive in some homes? When the mother does not respond to the baby's cues (eg eye contact, crying, physical movements), the baby has to adapt differently. Infants need to adapt to dangerous family experiences by using the "anxious" strategies of "defended" (usually seen as a "Type A insecure" or "avoidant" strategy) or "coercive" (or "Type C insecure" or "ambivalent") attachments. Crittenden (2008) regards these anxious attachment strategies as inherently adaptive, in that they protect the infant, and help unresponsive caregivers to be forced to meet these needs.

Development area	**A child needs …**	**Impact of child abuse and neglect**
Physical development (Prevention of injury, freedom from preventable illnesses and chronic conditions. Nutrition, sleep, dental care, gross and fine motor skills.)	**Physical care and safety** Consistent safety from physical and sexual abuse and from exposure to domestic violence, in placements and contact visits; also consistent hygiene, supervision, housing, food, clothing, sleep, rest, health care, continuity, routine, advocacy, etc.	Problems begin in pregnancy (see below) Children born AoD addicted Foetal Alcohol Syndrome Physical injuries Nutrition problems Growth retardation Dental care Development (see below), including coordination and motor skills Immunisations Sleep As adults: Physical symptoms[1] Vulnerability to illness[2] Dental problems
Emotional development (Ability to regulate emotion, to feel safe, develop self-efficacy)	**Empathic attention** This is at the core of the attachment relationship. The child needs someone to show interest, compassionate understanding, and to respond effectively to his or her emotional needs, feelings and thoughts.	Attachment Disorders Failure to Thrive PTSD Anxiety Depression Behaviour problems, worse cognitive and school performance[3]

1 Eg Bonomi et al, 2008.
2 Ibid.
3 Kerr, Black and Krishnakumar, 2000.

Development area	A child needs …	Impact of child abuse and neglect
	Attachment relationship This is the focus of a young child's emotional and social development, providing the core his or her affect regulation, self-knowledge, trust and capacity to learn. Children need to feel safe, to settle, to develop a sense of self, and to know that their needs will be responded to. This requires an ongoing commitment from consistent caregiver(s), who offer responsive caregiving, empathic attention, acceptance of the child as an individual, and a model for self-concept and social learning. This is also the foundation for establishing autonomy and individual identity.	As adults, greater risk of: Personality disorders[4] AoD dependence[5] Depression[6] Higher psychopathology[7] Relationship problems
Behavioural development (Impulse control, self-care skills, independent behaviour)	**Emotional and behavioural self-regulation** This involves learning how to recognise and manage impulses and feelings, how to express them appropriately, how to get needs met effectively and safely, and how to respond appropriately to others. To achieve this requires effective limit-setting and discipline.	Attention problems Impulsivity AD/HD Emotional self-regulation problems Aggression problems Oppositional defiant disorder Conduct disorder
Social development (good attachments, theory of mind, capacity to interpret and trust others, interpersonal skills, peer relations, personal identity, understanding and enhancing one's role in society)	**Role model(s)** A child learns by copying the behaviour of others, with the end result of learning how to play a constructive, independent social role and how to participate in the range of social relationships necessary for human society, from the intimate through to formal citizenship roles. This implicit, behavioural learning requires continuity of social modelling, facilitating the adoption of pro-social values, leading to a sense of meaning, belonging and cultural identity.	Speech and language development problems[8] Social problems based on difficulties with social cognition (eg ability to judge others and trust intelligently) Peer relationship problems Problems with authority figures Behaviour problems Oppositional defiant disorder Conduct disorder

4 Carr and Francis, 2009.
5 Conroy et al, 2009.
6 Bonomi et al, 2008.
7 McLewin and Muller, 2005; attachment security predicted levels of psychopathology irrespective of levels of physical maltreatment.
8 Lamont, 2010.

Development area	A child needs …	Impact of child abuse and neglect
Cognitive and cultural development (Play, language, problem-solving, reading, educational achievement, love of learning, creativity, cultural identity)	**Cultural education** One of the main tasks of childhood is to learn the wider explicit skills needed to adapt successfully to a complex modern community. These include language and communication, reading, transport, financial, health, occupational, recreational, cultural and spiritual education, leading to sense of personal identity in the context of human society and one's own meaningful values in life. Cultural educational needs and learning styles expand and widen over time from the family hearth to the wider society. They are acquired by different learning styles, from observation, stimulation/interaction, exploration/learning, socialisation, play opportunities, and formal instruction, through to participation in school, sport, cultural, workplace and spiritual milieus.	Attention problems Inability to play Problem-solving problems Lower cognitive abilities, particularly verbal reasoning Educational underachievement, particularly in relation to abstract reasoning Inhibited creativity Socioeconomic underachievement Loss of cultural identity

Early development from the abused child's perspective:[9]

(i) You will have more difficulties and complications in pregnancy.

(ii) The first abuse is usually in utero, from one of the mother's partners.

(iii) You have 2–4 times greater risk of prematurity or being underweight.

(iv) You are 10 times more likely to be delivered by Caesarean section.

(v) You are likely to be a disappointment to your mother.

(vi) The normal symbiotic relationship is missing.

(vii) Your needs are not met with alacrity and concern.

In other words, child abuse and neglect can affect every area of a child's health, development and potential. The challenge for Children's Court Clinic clinicians is to understand what are the needs and resources, and the developmental risks and strengths, for each particular child.

Child development[10]

Children who are neglected may be delayed in all areas, but it is common for them to have normal gross motor milestones, and delayed language and social development.

	Consensus	Down kiddies
Gross Motor		
Roll over	5 m	

9 Martin, 1976, p 17.

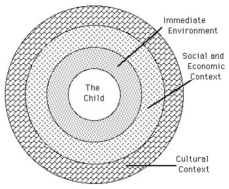
10 When I was supervising the Community Services Southern Regional Developmental Disability Psychologists, we reviewed the main resources describing developmental milestones (by Griffiths, Denver, Sheridan, Cooey and a Down Syndrome book).

	Consensus	Down kiddies
Sit alone	7(5–9) m	11 m
Crawling (creeping)	10 m	15 m
Stand alone	11 m	20 m
Walk alone	11–15 m	26 m
Run	19–24 m	
Climb stairs (crawling)	15 m	
— up alternating feet	3 yrs	
— down alternating feet	5 yrs	
Language		
Turn to mother talking	6 m	
First laugh	2–6 m	
“Dada” or “Mama”	10 m	
1st words (not imitating)	12 m	23 m
2 words together	20 (19–22) m	3 yrs
Personal-Social		
Finger feeding	9–10 m	18 m
Drink from cup	12–13 m	23 (12–32) m
Feed self with spoon	14–18 m	29 m
Dry during the day	18 m–2 yrs	
Dry at night	~ 3 yrs	
Play		
Play independently on floor	4–6 m	
“Peekaboo”	9 m	
Parallel play	21–27 m	
Cooperative play with peers	4–5 yrs	

Parenting and development

Human development is not individual, but social. Bronfenbrenner’s social-ecological model of development (1979) describes these influences as intercultural, community, organisational, and interpersonal or individual. He saw the individual, organisation, community, and culture to be nested factors, like Russian dolls. Each echelon operates fully within the next larger sphere.

FIGURE 1: A simplified version of Bronfenbrenner's social-ecological model of development.[11]



Risks to children tend to be cumulative, but attachment is the central focus. Peter Fonagy (1998) reviewed relevant developmental factors in relation to a vulnerable population of infants. He categorised risk and protective factors within early development, as linked to social inequalities:

1. **Biological factors** (attenuated by psychosocial interventions)
2. **Family and social factors** (Low SES, deprivation, family instability, single parenthood, maltreatment)
3. **The quality of parenting** (including differential sibling effects, parental psychopathology)
4. **The quality of attachment status** (attachment security correlates with SES)
5. **The influence of non-maternal care** (for children of insensitive mothers who were in low quality care).

He concluded that the relationship with the caregiver is arguably the most important mediator of the impact of social inequalities on early child development. This view is strongly supported by Schore's (2003) review of more recent research, which concluded that social stressors related to attachment or "relational" trauma, whether abuse or neglect, can lead to severe affect dysregulation and have "more negative impact upon the infant brain than assaults from the nonhuman or inanimate, physical environment" (ibid, p 237).

The social ecological model considers behaviour from the perspective of continuous interactions within nested systems, from individual, interpersonal, organisational, community, through to intercultural factors. In our child development focus these systems might be from the maternal dyad, father and sibling relationships, extended family and kinship group, family friends, school, neighbourhood, friends, church or sporting groups, work or shops, through to public services and federal elections. Over time, development occurs through widening ripples through these areas.

The family must also interact constructively with the extended family and neighbourhood, allowing the child to learn citizenship, safe behaviour and how to live independently in a human community. In a very practical sense it is important for the family to facilitate the child's independence and learning at school, to make effective use of health and medical services, and to develop constructive peer relationships.

Characteristics of abusive parents and their children

The NSW Child Deaths Committee (2000) raised specific concerns when a parent is drug-affected, particularly by methadone, and if the child is aged less than 12 months. Parental abuse of alcohol and other drugs has contributed to children's deaths from dehydration, pneumonia, bronchiolitis, toxicity, drowning and motor vehicle accidents. It is also associated with social isolation, poverty, domestic violence, parental mental illness, parental personality disorder, single parenthood with serial partners, inadequate support networks, criminal activity and involvement in drug-using networks.

11 From Purdue Calumet's School of Education website.

The Denver Group (Steele and Pollock, 1974) identified characteristics of abusive parents:

(a) Immature and dependent
(b) Socially isolated
(c) Poor self-esteem
(d) Difficulty seeking or obtaining pleasure
(e) Distorted perceptions of the child (including role reversal)
(f) Fear of spoiling the child
(g) Belief in the value of punishment
(h) Impaired ability to empathise with the child's needs and to respond appropriately.

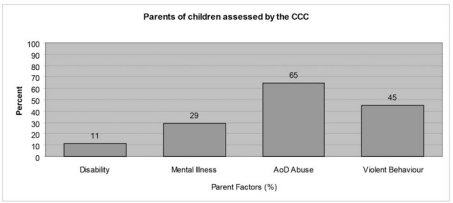
Crittenden, 1988, found:

(a) In **abusive** families, children were described as:
    (i) Difficult and acting out, or wary, compliant and inhibited.
(b) In **neglecting** families they were described as:
    (i) Very passive in infancy
    (ii) Sometimes very active when older
    (iii) Having a limited ability to attend to others
    (iv) Having "significant developmental delay".
(c) In **"abusing and neglecting families"**, children were described as:
    (i) Being out of control
    (ii) Unable to learn to manage their parents as can abused children
    (iii) Unable to safely ignore their parents (as neglected children can)
    (iv) Having numerous intellectual, physical and behavioural anomalies.

A snapshot from clinic data

A recent review [12]of some Authorised Clinicians' reported summaries of their findings found high levels of disability (broadly defined), alcohol and other drug misuse, violent behaviour problems and mental illness for the parents of the at-risk children.

FIGURE 2: Proportions of problems found in parents of children and young persons (0-18 years).



There is no such thing as a child, and no such thing as a parent

I hope this summary has shown why it is not possible to assess either a child or a parent alone. Each needs to be understood in relation to the other. My model of assessment of parenting

12 Surveys were done in relation to assessments of 1564 children, and 2051 adults (1235 parents) assessed by the Children's Court Clinic between January 2007 and July 2008.

capacity[13], from which the following information is drawn, attempts to allow the interactions between the child's needs and the parents' resources to be considered. It is based on considering the parenting dimensions that relate to these needs (Steinhauer 1991, Mrazek et al, 1995, Brennan 1996, Azar et al, 1998).

Stafford and Zeanah (2006) have summarised the essentials of parenting as involving the provision of sustenance, stimulation, support, structure and surveillance. We need to operationalise what these may mean, particularly for vulnerable children.

Assessments of parenting capacity need to reflect the fact that the majority of carers are women (Wyndham 2008). When separated fathers are assessed for parenting capacity, it is often their new partners who are expected to do the work.

(i) **Responsive caregiving and protection**

This includes the flexible yet continuous use of basic childcare skills, without which child development is seriously at risk:

- Adequate physical care, using appropriate routine skills (feeding, clothing, toileting, cleaning, bedtime) adapted to the situation at hand;
- Awareness of the particular child's developmental needs, and the ability to meet them, including child care and medical emergencies;
- Capacity to protect the child from physical danger in the home and neighbourhood, from physical or sexual abuse, and from exposure to domestic violence, and from potential danger from others in the household and the wider social network.

Drug use, mental illness, intellectual disabilities and personality disorders may limit these skills.

(ii) **Reflective function**

Donald and Jueridini (2004) have clarified recent research's emphasis on the importance of **practical parental empathy**, involving the "capacity to see the experience from the child's point of view, and to realistically appraise what might need to change for the child to thrive in their care". Steinhauer (1991) has defined this more specifically as "responsive caregiving".

Fonagy (2000) has found social cognition to be a key mediator of the impact of attachment. Parents' ability to reflect or mirror (before their child's birth), or their **reflective function** helps predict their child's attachment security (at 18 months). It enables:

- Sensitive reflection by the caregiver, allowing the child to **internalise a representation of its mental state** ("So this feeling I'm having is what Mum calls anger", etc);
- The child to feel **safe in exploring the parent's mind** to understand feelings and thoughts that account for their behaviour;
- **Play** to be facilitated, which helps a child move from a **subjective** world where internal experience and external reality are assumed to be equivalent, to a **mentalised internal world**, where subjective experiences are recognised as but a version of external reality.

Reflective function predicts the transmission of attachment styles better than parental sensitivity, genetics or behavioural modelling.

13 Allerton, 2012.

These experiences help the child develop an **intentional stance**, the ability to understand others' mental states (thoughts, beliefs, feelings, desires), to make sense of and predict their actions. The hallmark of achievement of this stance is the child's recognition that a person's behaviour may be based on a mistaken belief (3–4 years). Our social maturity, and capacity for empathy and rapport, depend on our ability to understand the mental world of another person.

(iii) **Bonding**

This typically means the parent's attachment or emotional commitment to the child:

- Emotional acceptance of the child
- Responsibility, commitment (time, energy)
- Relationship continuity
- Warmth rather than rejection/hostility (overt, covert neglect and/or abuse)
- Management of traits attributed to the child and competition for attention from partner/spouse.

A parent needs to "be there" emotionally and physically for the child, rather than absorbed solely by his or her own, a partner's, or another child's needs. Wyndham (2008) has reminded me that this can be assessed partly by the way parents speak of their children. The words they use to describe the children, (eg "a little liar", "she's manipulative"), and the tone and manner in which they speak of them reveal parental attributions, expectations and understanding of child development. It is also relevant to consider to what extent the parent sees the child as a narcissistic extension of him- or herself.

(iv) **Emotional availability**

A parent's capacity to regulate his or her own emotional tension leads to a capacity to understand and respond to the child's emotions, and to treat the child as a real, independent human entity. This can be limited by psychiatric or personality disturbance (depending on type, severity, and affected by ability to use clinical interventions). Emotional availability may be aided by supports for the parent and the management of stress from a possibly adverse environment (parent relationships, climate at home, extended family and social supports, employment, financial security). Bretherton (2000) reports a variety of studies closely linking maternal sensitivity in terms of emotional availability with attachment quality in infancy and maternal "states of mind" revealed by the AAI.

(v) **Strategic Behaviour Management**

This includes acceptance of supervisory responsibilities, knowledge of various child management strategies, and the ways of selecting, applying and adapting them appropriately for different situations with children. It will require developmentally appropriate expectations and a capacity to analyse a particular situation, including limit setting, redirection, discipline, flexibility and support for the child's autonomy.

Some of these skills can be taught, for example in 1-2-3-Magic, Triple P, Parent Effectiveness Training or Systematic Training for Effective Parenting. A parent also needs to be perceptive, sensitive and relatively consistent in using them. The child needs to be able to learn how to overcome unhelpful habits, control impulsiveness, develop assertiveness skills, negotiation, conflict resolution and other effective ways of behaving.

(vi) **Ability to transmit the community's cultural values**

One of the main roles of a parent is to help the child to learn how to relate to other people. The family is the place to learn safely how to cooperate, compete, communicate and participate in society. In helping children to learn how to participate effectively and independently in the wider culture, a parent will both consciously and implicitly train the child in how to behave, passing on practical knowledge about ethics and cultural identity. A family provides a microcosm of the wider society, with opportunities to learn and to practice these skills safely, and to receive guidance and feedback as they are being learned.

At any point in the child's life these dimensions will be specific and possibly different, and interact with the child's age, history, temperament, resources, history, handicaps, intelligence, attachment style.

(vii) **Supportive social environment**

The social ecological model (Bronfenbrenner 1979) considers behaviour from the perspective of continuous interactions within nested systems from individual, interpersonal, organisational, community, through to intercultural factors. In our child development focus these systems might be from the maternal dyad, father and sibling relationships, extended family and kinship group, family friends, school, neighbourhood, friends, church or sporting groups, work or shops, through to public services, the media and government. Parents need to facilitate their children's development in the widening ripples from family intimacy towards social complexity.

Parents need a secure and social environment supportive to their important caregiving role. Within this nurturing environment an effective parenting team may consist of two parents, or one parent and significant support person, or a wider kinship parenting group. Their role is to mobilise and coordinate resources, to share skills and to support each other in the common parenting goal. Their capacity to share the tasks and responsibilities of parenthood is reflected in the higher educational, emotional and behavioural outcomes for children in families with two parents. Single parenthood is itself a risk factor for children, compared to the consistent presence of two parents, or parenting team. Similarly, a socially isolated family may not have the back-up resources to manage emergencies, provide guidance and help, and to enrich the social ecology around the child. Such a supportive network is often referred to as scaffolding. It is important to understand the specific parental resources supported by the family's social ecology (eg back up physical care and babysitting, emotional support allowing the parents better affect management and hence emotional availability, a network that supports behaviour management and social learning), and also to consider the sustainability of this positive social ecology.

The diagram below attempts to show how a clinician may attempt to compare a child's assessed needs to the assessed resources a parent may be able to offer. It can indicate areas of strength and weakness in the parent-child relationship, suggesting possible remediation interventions, and also allow explicit thinking about whether any necessary changes are viable.

Child Needs	Normal	Vulnerable	Chronic Need	Parent Resources	Appropriate	Vulnerable	Chronic Problem
Physical Care and Safety				Responsive Caregiving and Protection			
Empathic attention				Reflective Function			
Attachment Relationship				Bonding			
Emotional and behavioural self-regulation				Emotional Availability			
				Strategic Behaviour Management			
Role model				Ability to transmit community values			
Cultural education							
Other: (describe)				Other: (describe)			

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Care proceedings and appeals* to the District Court†

M Marien SC‡

1 Introduction ..... [18-3000]

2 The objects and principles of the Care Act

3 Important legal principles under the Care Act

4 Care appeals to the District Court

5 Assessment applications and the Children's Court Clinic

6 New Alternate Dispute Resolution procedures in the Children's Court

7 Costs orders

8 Recent decision — Re Tracey [2011] NSWCA 43

9 Local Court Bench Book

[18-3000] 1 Introduction

In this paper I propose to first deal with some of the general legal principles applicable to care proceedings in the Children's Court and the District Court (with reference both to the relevant legislation and to some authorities) and then to more specifically deal with the conduct of care appeals to the District Court.

2 The objects and principles of the Care Act

Sections 8 and 9 of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) set out the objects and principles of the Act.

Section 7 provides that the objects and principles of the Act are intended:

> … to give guidance and direction in the administration of this Act. They do not create, or confer on any person, any right or entitlement enforceable at law.

Section 9(1) sets out the "paramountcy principle". The section provides:

> This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

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* An appeal or review under ss 91, 91I, 109V, 231K and 231O *Children and Young Persons (Care and Protection) Act 1998* is, if the appeal relates to a decision of the Presidential Children's Court, taken to be an appeal to (or a review by) the Supreme Court and is subject to any relevant rules of court applying to appeals to (or reviews by) the Supreme Court: cl 5 *Children's Court Regulation 2019*.

† Judge Mark Marien SC, President, Children's Court of NSW, 28 April 2011 (revised). A paper delivered at the 2011 Annual Conference of the District Court of NSW.

‡ President, Children's Court of NSW, 28 April 2011 (revised). A paper delivered at the 2011 Annual Conference of the District Court of NSW.

The paramountcy principle partly reflects Article 3 of the United Nations Convention on the Rights of the Child (1989) ("the Convention"). (Article 3 of the Convention states that the best interests of the child "shall be a primary consideration".) The paramountcy principle is to be taken into account in making all decisions and determinations under the Care Act.

Further principles for administration of the Care Act are set out in s 9(2). Of particular importance is the principle contained in s 9(2)(c) (formerly s 9(d)) which provides:

> In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be ***the least intrusive intervention*** in the life of the child or young person and his or her family ***that is consistent*** with the paramount concern to protect the child or young person from harm and promote the child's or young person's development. (Emphasis added.)

The least intrusive intervention principle was considered recently by the Court of Appeal in *Re Tracey* [2011] NSWCA 43 [(2011) 80 NSWLR 261] and **[3-1160]**. The court also considered the relevance of the Convention in care and protection proceedings as well as the requirements for a care plan under the Care Act. I shall return to this decision later in the paper.

3 Important legal principles under the Care Act

3.1 "Attachment theory" and the need for expedition in care proceedings

Attachment theory is now generally accepted in the field of child psychology. Following considerable empirical and research validation, it has become a pivotal consideration in the field of child protection and in care and protection proceedings in courts. Under the theory the earliest bonds formed by children with their primary caregiver/s (particularly before 4 years of age) have a profound impact upon the child (affecting neurological, physical, cognitive, emotional and social development), which continues throughout their life. The theory's most important tenet is that an infant needs to develop a positive relationship with at least one primary care giver for social and emotional development to occur normally, and that further relationships build on the patterns developed in these first relationships.

The following is a description of attachment theory provided Mr Mark Allerton, Clinical Psychologist, who is the Director of the Children's Court Clinic:

> Attachment behaviours are the means by which infants elicit care and even ensure their survival, and different patterns of attachment result from each individual's adaptation to the quality of care-giving he or she has received.
>
> Under the theory, the breaking of a positive and secure attachment between a child and their primary caregiver/s during the crucial early years of the child's life can have a seriously detrimental effect on the child's future social and emotional development. To break an attachment is distressing, and can potentially place a child at risk. Transient effects are expected when the first change in placement occurs before 6–9 months of age. After 9–12 months of age, there will be distress, with longer-term effects of the change increasing with the child's age. From 1 to 3 years, separation is a traumatic loss and a developmental crisis. Even if the loss occurs after approximately 3–5 years of age, some persistent loss of security in new relationships is to be expected.
>
> Children who have had secure attachments adapt to change more easily than children who have had anxious relationships. When the prior relationship included either abuse or neglect, then the change process is likely to be more difficult, ambivalent, and attenuated. Children can manage

> to believe that their current placement is permanent through one or two changes. With additional changes, it becomes increasingly difficult for children to form a committed relationship with the new caregiver, because their prior experience prepares them to expect disruption. This means that each successive placement is more likely to fail than previous placements. The changes are likely to be accompanied by an initial "honeymoon", followed by outbursts of uncontrolled anger, fear, or desire for comfort. The last of these is sometimes displayed as inappropriate sexualized behaviour. Outcomes will vary, but effects of broken attachments may include anxiety, depression, and angry rejection of others throughout the lifespan.
>
> [*This is from the (2011) Family Forensic Court Protocol generated by The International Association for the Study of Attachment (IASA). Mr Allerton is a member of the IASA.*]

The critical importance of a child forming secure positive attachments in infancy and early childhood is partly the basis for the need for permanency planning under the Care Act (see ss 78A, 83 and 84) and requires that care proceedings, particularly when relating to very young children, be determined as expeditiously (and hopefully as successfully) as possible. The need for expedition in care hearings is a key feature of the Care Act. Principle 9(2)(e) provides:

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

Further, s 94(1) provides:

> All matters before the Children's Court are to proceed ***as expeditiously as possible*** in order to minimise the effect of the proceedings on the child or young person and his or her family and to finalise decisions concerning the long-term placement of the child or young person. (Emphasis added.)

This need for expedition is reflected in the Children's Court's Time Standards which require that 90% of care cases are to be finalised within 9 months of commencement and that 100% be finalised within 12 months of commencement.

3.2 Need of care and protection — "establishment"

Section 71(1) of the Care Act provides that the court may make a care order in relation to a child or young person "if it is satisfied that the child or young person is in need of care and protection". ("Care order" is defined in s 60.) The finding that a child is in need of care and protection is sometimes referred to as "establishment". Grounds upon which a child or young person may be found to be in need of care and protection are set out in the sub-section. Those grounds are not exhaustive.

Section 72 of the Care Act provides:

> **Determination as to care and protection**
>
> (1) A care order in relation to a child or young person may be made only if the Children's Court is satisfied that the child or young person is in need of care and protection or that even though the child or young person is not then in need of care and protection:
>
> (a) the child or young person was in need of care and protection when the circumstances that gave rise to the care application occurred or existed, and

(b) the child or young person would be in need of care and protection but for the existence of arrangements for the care and protection of the child or young person made under section 49 (Care of child or young person pending care proceedings), section 69 (Interim care orders) or section 70 (Other interim orders).

(2) If the Children's Court is not so satisfied, it may make an order dismissing the proceedings.

A finding that a child or young person is in need of care and protection is not a final determination as to the rights of the parties. The finding simply gives the court jurisdiction to make certain final care orders, for example, an order allocating parental responsibility under s 79 of the Care Act. The court does not have to make that finding before it can make an interim order: see *Re Fernando and Gabriel* [2001] NSWSC 905 per Bell J at [41] and *Re Jayden* [2007] NSWCA 35 at [74]. Nor does the court have to make that finding prior to registering a care plan under s 38 of the Care Act or registering a parental responsibility contract under s 38A of the Care Act.

3.3 "Realistic possibility of restoration"

Pursuant to s 83(1) of the Care Act, if the Director-General seeks a final order for removal of a child or young person, the Director-General must assess whether there is "a realistic possibility of the child or young person being restored to his or her parents" having regard to:

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

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

Curiously, s 83 does not expressly state that the court cannot make a final order for the removal of a child or young person unless the court has determined that there is no realistic possibility of restoration. But in my view, it is a necessary implication of the section that the court must make that determination before making a final order for removal of a child from the care of his or her parents. There is, however, an express requirement in s 83(7)(b) that, prior to approving a permanency plan involving restoration, the court must find that there is a realistic possibility of restoration.

In the vast majority of contested cases, which come before the Children's Court, the central issue for determination, is whether there is a realistic possibility of restoration of the child or young person to their parents' care.

As to the meaning of "realistic possibility of restoration" see *Saunders and Morgan v Department of Community Services (NSW)* (District Court of NSW, Johnstone DCJ, 12 December 2008); [2008] CLN 10. In the course of his judgment, Judge Johnstone referred to the following passage from the submission of the former Senior Children's Magistrate Mr Scott Mitchell to The Special Commission of Inquiry into Child Protection Services in NSW (the Wood Inquiry):

> The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant "**runs on the board**". The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.

> What is required can be likened to a prima facie case where absent some unforeseen and unexpected circumstance a safe and appropriate restoration will be possible in the near future. (Emphasis added.)

In relation to this passage Judge Johnstone said at [12]–[15]:

> This passage has elements that resonate. With respect, however, to liken the determination to the concept of a prima facie case is alien to the fact that these are civil proceedings. It is also at odds with the natural meaning of the words themselves, and in my view a purposive and beneficial construction of the legislation does not require such an onerous test.
>
> There are aspects of a "possibility" that might be confidently stated as trite. First, a possibility is something less than a probability; that is, something that it is likely to happen. Secondly, a possibility is something that may or may not happen. That said, it must be something that is not impossible.
>
> The section requires, however, that the possibility be "realistic". That word is less easy to define, but clearly it was inserted to require that the possibility of restoration is real or practical. It must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". Amongst a myriad of synonyms in the various dictionaries I consulted, the most apt in the context of the section were the words "sensible" and "commonsensical".
>
> Furthermore, the determination must be undertaken in the context of the totality of the *Care Act*, in particular the objects set out in s 8 and other principles to be applied in its administration. The object import notions of safety, welfare, well-being, health, needs, a safe and nurturing environment, and the like. Section 9 and other sections set out the principles to be applied. Some that are particularly apposite to the issues in this appeal include, in summary:
>
> - The safety, welfare and well-being of the children must be the paramount consideration, paramount even over the rights of the parents: s 9(a).
> - The views of the children are to be given due weight: s 9(b), and the interests of the siblings must be taken into account: s 103.
> - Any action to be taken must be the least intrusive intervention in the life of the children and the family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(d).
> - That the children retain relationships with people of significance: s 9(g).
> - That any out-of-home care arrangements are made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement: s 9(f) and s 78A.
> - The Department bears the burden of proof on the balance of probabilities.

Later in *Re Leonard* [2009] CLN 2 Mitchell SCM said at [30]:

> It may be important to keep in mind, too, when considering "***realistic possibility of restoration***", that section 83 is cast in the present rather than the future tense. The realistic possibility needs to be shown as existing at the time of the hearing even if the appropriate time for effecting the restoration has not yet arrived. A court is unlikely to be satisfied merely because a party is about to begin or is contemplating commencing a process from which a realistic possibility of restoration might (or might not) emerge. It is for that reason that the Children's Court generally looks for "***runs on the board***" and some success, already achieved, in addressing parenting deficits. Further, even if some successes have been achieved by the parent, the Children's Court will need to assess the likely time frame in which the restoration might be effected and may need to take into account the

> viability of such a restoration given the delay and the age, level of maturity, wishes and developing attachments of the child or young person. Further, the ability to predict a viable restoration may become less and less reliable as time passes. (Emphasis added.)

3.4 Care plans and permanency planning

If the Director-General applies to the court for a final order, not being an emergency protection order, for the removal of a child or young person from the care of his or her parents, the Director-General must present a care plan to the court before final orders are made: s 78(1).

The care plan must set out the allocation of parental responsibility; the kind of placement proposed and how it relates in general terms to permanency planning; proposed arrangements for contact between the child and his or her parents, relatives, friends and other relevant persons; the services that need to be provided to the child or young person and the agency designated to supervise the placement in out-of-home care: s 78(2).

As to the form and other required contents of a care plan see cl 22 of the *Children and Young Persons (Care and Protection) Regulation 2012*.

The court cannot make a final order for the removal of a child from the care and protection of his or her parents, or, for the allocation of parental responsibility in respect of the child, unless it has considered the Director-General's care plan: s 80.

The requirement for the court to have a care plan before it does not apply to interim orders: *Re Fernando and Gabriel* [2001] NSWSC 905 at [45].

In *Re Tracey*, the Court of Appeal dealt with the requirements of a care plan. In that case the Department placed before the District Court on an appeal the same care plan that had been before the Children's Court. That care plan proposed that the child was to be placed in the long-term care of two carers. However, since the matter had been in the Children's Court, one of the two proposed carers had died and the care plan had not been revised so as to provide that the child was to be placed in the long-term care of the surviving carer only. Nor were the proposed orders for parental responsibility in the care plan amended. Giles JA said at [90]:

> As a matter of common sense, for compliance with s 80 the care plan presented to the Court must be a relevant care plan, proposing rules for the carer or carers under the Court's consideration for those roles. It would be absurd if a care plan contemplating exercise of some parental responsibility by A were sufficient for an order whereby that parental responsibility was exercised by B.

His Honour went on to say at [93]–[94]:

> The revised care plan may not have differed greatly from the 15 May 2009 care plan, but presentation of a care plan and its consideration by the Court is not a formality. The Court then decides the removal of the child or the allocation of parental responsibility with regard to a care plan apt to the current circumstances. The Court may not be obliged to give effect to the care plan (see *George v Children's Court of New South Wales* [2003] NSWCA 389 at [58]) but that does not warrant presentation or consideration of a care plan which can not be implemented. In my opinion, there was jurisdictional error in that the judge did not consider a care plan as required by s 80 of the Care Act.

The decision means that a care plan will need to be very carefully scrutinised by the court to ensure that it accurately reflects the Department's proposals with respect to allocation of parental responsibility, placement and contact arrangements. If the care plans fails to accurately reflect those proposals it may not be a valid care plan.

3.5 The meaning of "permanency planning" under the Care Act

Where the Director-General assesses that there is no realistic possibility of restoration of the child to their parents' care, the Director-General is to prepare a permanency plan for another suitable long-term placement for the child and submit it to the court for consideration: s 83(3) of the Care Act.

If the Director-General assesses that there is a realistic possibility of restoration, the Director-General is to prepare a permanency plan involving restoration and submit it to the court for consideration: s 83(2).

The court is then to decide whether it accepts the assessment of the Director-General and if the court does not accept the assessment, it may direct the Director-General to prepare a different permanency plan: s 83(5) and (6).

Section 83(7)(a) of the Care Act provides that the court must not make a final care order unless it ***expressly*** finds that "permanency planning" for the child or young person has been "appropriately and adequately addressed".

Sections 78A, 83(7A) and 84 deal with the meaning and requirements of permanency planning under the Care Act. Sections 78A(2A) and 83(7A) are recent amendments. These amendments mirror the applicable law concerning permanency planning as referred to in *Re Rhett* [2008] CLN 1 by Mitchell SCM, namely, that a permanency plan, whilst not needing to provide details as to the exact placement in the long-term of the child or young person concerned, must be:

> … sufficiently clear and particularised so as to provide the Children's Court with a reasonably clear picture as to the way in which the child's or young person's needs, welfare and well-being will be met in the foreseeable future

See further in relation to these provisions: *Re Hamilton* [2010] CLN 2 (also at **[3-1100]**).

3.6 Aboriginal and Torres Strait Islander Placement principles — s 13 of the Care Act

With respect to an Aboriginal or Torres Strait Islander child or young person who needs to be placed in statutory out-of-home care, placement principles in s 13 of the Care Act provide a general order for placement with extended family and kinship groups. The effect of the principles is that if an Aboriginal child is to be placed in statutory out-of-home care, then priority is to be given to a placement with family or kinship groups in preference to other placements. However, pursuant to s 13(1), the general order for placement is "[s]ubject to the objects in section 8 and the principles in section 9". The Aboriginal placement principles are not to be blindly implemented without regard to those objects and principles, in particular, the paramount interests of the child: see *Re Victoria and Marcus* [2010] CLN 2 at [49] [see also **[3-1000]**].

The Aboriginal placement principles only apply when the child "needs to be placed in statutory out-of-home care" as defined in ss 135 and 135A of the Care Act. Under s 135(3)(b), "out-of-home care" does not include any care provided by a "relative" unless:

(i) the Minister has parental responsibility by virtue of an order of the Children's Court, or

(ii) the child is in the care of the Director-General, or

(iii) it is provided pursuant to a supported out-of-home care arrangement under s 153.

The Regulations may prescribe what is not to be regarded as out-of-home care: (s 135(3)(c)) — see cl 28 of the *Children and Young Persons (Care and Protection) Regulation 2012* (the Regulation).

Clause 4 of the Regulation defines "related" and "relative" for the purposes of the Care Act.

As to the meaning of "Aboriginal" and "Torres Strait Islander" see s 5 of the Care Act. Under the section "Aboriginal" has the same meaning as Aboriginal person has in the *Aboriginal Land Rights Act 1983* and "Aboriginal child or young person" means a child or young person "descended" from an Aboriginal and includes a child or young person who is the subject of a determination under s 5(2).

Under the *Aboriginal Land Rights Act*, an "Aboriginal person" means a person who:

(a) is a member of the Aboriginal race of Australia, and

(b) identifies as an Aboriginal person, and

(c) is accepted by the Aboriginal community as an Aboriginal person.

Section 5(2) of the Care Act provides that despite the definition of "Aboriginal person" in the *Aboriginal Land Rights Act*, the Children's Court may determine that a child or young person is an Aboriginal for the purposes of the Care Act if the court is satisfied that that child is of Aboriginal descent.

As to the meaning of an "Aboriginal descent", see *Re Simon* [2006] NSWSC 1410 per Campbell J where it was held that "descended" refers to "linear descent". See also *Re Earl and Tahneisha* [2008] CLN 7 per Mitchell SCM where his Honour said at [13]:

> I respectfully adopt the view expressed by the Law Reform Commission of NSW [Research Report 7 (1997) — The Aboriginal Child Placement Principle] that "a 'descent' definition, such as 'a child of Aboriginal descent' is a broad definition which would include all Aboriginal child under the Principle. This would ensure that issues regarding a child's Aboriginality are considered regardless of the 'degree' of Aboriginal blood…" Accordingly, I have taken the view that, if there is sufficient evidence that the great great grandfather of Earl and Tahneisha was an Aboriginal person, they would be entitled to a finding of Aboriginal descent whatever one might say about the "degree".

In relation to the reliability of Aboriginal descent, Mitchell SCM referred to *Shaw v Wolf* [1989] 83 FCR 113 where Merkel J, when considering Aboriginality in the context of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), noted:

> it may be that community recognition, given the inadequacy of written records, will be the best evidence of proof of descent.

As to the operation of the placement principles generally see also: *RL and DJ v DoCS* [2009] CLN 3 per Garling DCJ.

3.7 Contact orders

The Wood Report found there to be significant inconsistencies across the State in the kinds of matters taken into account when making contact orders under s 86 of the Care Act. Accordingly, it was recommended that "evidence based guidelines" for contact orders be developed by the Children's Court to assist Magistrates and to achieve a greater degree of consistency in the kinds of matters taken into account when making contact orders.

The Children's Court has now developed these guidelines. The guidelines do not have the status of a Practice Note but are intended to be used purely as a guide. The guidelines seek to identify the variety of issues which may arise for consideration in making a contact order.

The guidelines are publicly available on the Children's Court website.

4 Care appeals to the District Court

Pursuant to s 91(1) of the Care Act an appeal to the District Court may be brought against an order (other than an interim order) of the Children's Court. As to the meaning of "order" for the purposes of s 91(1) see: *S v DoCS* [2002] NSWCA 151 at [52] and [53].

An appeal is to be brought within 28 days after the Children's Court order is made. The time for bringing the appeal may be extended by the District Court: UCPR r 50.3.

District Court Practice Note DC (Civil) No 5 relates to care appeals in the District Court. An information hand-out in relation to care appeals, "Information for Parties — Appeals from the Children's Court in Care Matters" is available on the District Court website.

The majority of appeals from the Children's Court to the District Court are appeals:

(i) against final orders allocating parental responsibility

(ii) against refusals by the Children's Court to grant leave under s 90(1) of the Care Act to bring an application for variation or rescission of a care order, or

(iii) against the Children's Court dismissal of a substantive application under s 90 to vary or rescind a care order.

4.1 Is an appeal a re-hearing or a hearing de novo?

Section 91(2) allows for a completely new hearing in the District Court. The sub-section refers to a "new hearing" (not a "rehearing") and provides that not only may "fresh evidence" be given on the appeal but also "additional evidence" to the evidence led in the Children's Court. The sub-section provides that the appellant may even adduce evidence on the appeal "in substitution for" the evidence led in the Children's Court. There is no requirement in s 91(2) for leave before fresh evidence or additional evidence may be adduced on the appeal.

However, when you come to s 91(3) it is a very different picture. Under this sub-section, the District Court may determine that in conducting the appeal no fresh evidence may be adduced on the appeal and that the appeal is to be conducted only upon the transcript of the proceedings in the Children's Court together with any exhibit tendered during those proceedings.

Whether a care appeal is to be conducted as a hearing de novo or a rehearing on the transcript appears to be a matter entirely within the discretion of the District Court. How then should the discretion be exercised? The District Court may take the view in a particular case that little has allegedly changed since the case was before the Children's Court and that the appeal should properly be conducted on the transcript together with any fresh evidence. However, in a case where there appears to have been a substantial change in the situation of the parents and/or the child since the case was before the Children's Court, the District Court may take the view that the appeal should properly be conducted as a completely new hearing.

However, the usual practice in the District Court is that a care appeal is conducted upon the transcript of the Children's Court hearing together with any additional evidence admitted with the court's leave. Practice Note DC (Civil) No 5 states at 2.1:

> For the efficient disposal of cases it is generally desirable to deal with appeals based on the transcript plus any new evidence. Any objection to this course should be notified to the Court well in advance of the hearing.

In relation to new evidence, cl 9 of the District Court information sheet for parties states as follows:

> If any party to an appeal wishes to rely upon fresh evidence or evidence in addition to, or in substitution for, evidence before the Children's Court, that party will be required to inform the Court at an early stage:
>
> (a) the nature of the evidence
>
> (b) to what issue it is relevant
>
> (c) why the evidence was not relied on in the Children's Court.

I would suggest that when an appeal is conducted upon the transcript from the Children's Court, the District Court is required to have regard to the reasons of the Magistrate in which findings on credibility of witnesses may be found: see *Paterson v Paterson* (1953) 89 CLR 212 at 222–4 in relation to civil appeals generally.

4.2 Functions and discretions of the District Court on a care appeal

Upon the hearing of an appeal, the District Court has, in addition to its functions and discretions that it has apart from s 91 of the Care Act (eg its functions and discretions under the *Civil Procedure Act 2005* and the UCPR) all the functions and discretions that the Children's Court has under Chapters 5 and 6 of the Care Act: s 91(4). Accordingly, an appeal hearing in the District Court is not to be conducted in an adversarial manner (s 93(1)); is to be conducted with as little formality and legal technicality and form as the circumstances of the case permit (s 93(2)); is not subject to the rules of evidence, or such of those rules as are specified by the court, are to apply to the proceedings or parts (s 93(3)). Further, the District Court may only make an order for costs under s 88 of the Act: see Costs orders below.

The decision of the District Court in respect of an appeal is deemed to be the decision of the Children's Court and is given effect accordingly: s 91(6).

In relation to Care appeals to the District Court Rules rr 50.17–50.20 of the UCPR are also relevant. On the question of costs when appeal proceedings are discontinued also see r 42.19(3) of the UCPR: see **Costs orders** at [7] below.

4.3 Disposal of appeals

On an appeal, the District Court may (subject to its functions and discretions under s 91(4)) confirm, vary or set aside the decision of the Children's Court: s 91(5).

4.4 Appeals and permanency planning

As stated earlier, the court cannot make a final care order unless it expressly finds "that permanency planning for the child or young person has been appropriately and adequately addressed": s 83(7)(a). As an appeal in the District Court is to be conducted as either a re-hearing or a hearing de novo, if the District Court makes an order either for restoration or for long-term parental responsibility to be placed with the Minister, the District Court (like the Children's Court) must expressly find that permanency planning for the child has been appropriately and adequately addressed by the Director-General before making a final care order.

Further, the court must not make an order allocating parental responsibility unless it has given "particular consideration" to the principle in s 9(2)(c) of the Care Act (the least intrusive intervention principle) and "is satisfied that any other order would be insufficient to meet the needs of the child or young person": s 79(3).

The statutory requirement that, before making a final care order, the court needs to be satisfied that permanency planning for the child has been appropriately and adequately addressed, is an important requirement as circumstances pertaining to the child, the parents or the carers may have significantly changed since the matter was before the Children's Court. If the Court is not satisfied that permanency planning has been appropriately and adequately addressed in the care plan, it should require the Director-General to prepare a revised or amended permanency plan.

4.5 Appeals in relation to applications under s 90 for variation or rescission of a care order

An application to vary or rescind an order of the Children's Court requires leave: s 90(1). A refusal of leave is an "order" for the purposes of s 91(1) of the Care Act: *S v DoCS* at [53] and accordingly, such refusal (or the granting) of leave may be the subject of a statutory appeal to the District Court.

In relation to the question of leave under s 90(1), the court may only grant leave "if it appears that there has been a significant change in any relevant circumstance since the care order was made or last varied": s 90(1A).

Before granting leave, the court must take into account the matters in s 90(2A). One of those matters is whether the applicant for leave has an "arguable case": s 90(2A)(e).

For a recent decision concerning the operation of the above provisions relating to the granting of leave under s 90(1) and the meaning of "significant change in any relevant circumstance" and "arguable case" in s 90(2A)(e) see: *Re Troy* [2010] CLN 2.

If the court grants leave, before making an order to vary or rescind a care order that places a child under the parental responsibility of the Minister, or that allocates specific aspects of parental responsibility from the Minister to another person, the court must take into consideration the matters set out in s 90(6).

4.6 Section 90 remittals to the Children's Court

With respect to appeals against a refusal by the Children's Court to grant leave under s 91(1), in my view if the District Court upholds the appeal and grants leave it should remit the proceedings to the Children's Court to determine the substantive s 90 application. Having granted leave the District Court would not have jurisdiction to hear the substantive application as the only "order" before the court (being the subject of an appeal under s 91(1)) is the order refusing leave. Further, if the District Court proceeded to hear the substantive s 90 application following it granting leave, the unsuccessful party on the substantive application in the District Court would be deprived of a statutory right of appeal.

4.7 Interim orders and s 90 – a source of new appeals to the District Court?

Section 91(1) provides that a party cannot appeal to the District Court against an interim order. However, it appears that certain decisions made by the Children's Court with respect to an interim order may be the subject of an appeal.

4.8 The legislative scheme for interim orders under the Act

Section 62 of the Care Act provides that a care order may be made as an interim order or a final order, except as provided by Ch 5 Pt 2 of the Care Act.

Section 61(1) provides that "[a] care order may be made only on the application of the Director-General, except as provided by [Ch 5]". An application for an interim order under ss 69 and 70 of the Care Act is an application for a care order: see s 60.

Section 70A provides that an interim care order should not be made unless the Children's Court is satisfied that "the making of the order is necessary, in the interests of the child or young person, and is preferable to the making of a final order or an order dismissing the proceedings".

Only the Director-General may make an application for an interim order under ss 69 or 70 of the Act: see s 61(1) and *Re Timothy* [2010] NSWSC 524 at [49], [52] and [57] per Rein J. In seeking an interim order under s 69, the Director-General must establish:

> that it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility: s 69(2).

Section 69 relates to the making of an interim order which has the effect of removing a child or young person from the person or persons who have parental responsibility: *Re Fernando and Gabriel* [2001] NSWSC 905 at [48] and *Re Timothy* at [45].

An interim order under s 69 can only be made "after a care application is made and before the application is finally determined". A "care application" is defined in s 60 to mean "an application for a care order".

In making an interim order under s 69 placing parental responsibility in the Minister the court must also consider the least intrusive intervention principle expressed in s 9(2)(c) of the Act: *Re Fernando and Gabriel* at [50].

In relation to other interim orders (ie orders other than orders which have the effect of removing a child from the care of their parents or others having parental responsibility), the power to make such order derives from s 70 rather than s 69. Section 70 does not permit the court to make orders removing children from the care of the person or persons who have parental responsibility: *Re Timothy* at [46]. Under s 70 the court may make such other interim orders "as it considers appropriate for the safety, welfare and well-being of a child or young person". Interim supervision orders (under s 76) and interim undertaking orders (under s 73) are examples of interim orders, which may be made under s 70 rather than s 69.

4.9 Can a s 90 application be brought with respect to an interim order?

In *Re Timothy*, Rein J followed *Re Elizabeth* [2007] NSWSC 729 per Palmer J and *Re Alan* (2008) 71 NSWLR 573 per Gzell J which found that an application under s 90 of the Care Act to vary or rescind an order may be brought with respect to an interim order. However, in *Re Edward* (2001) 51 NSWLR 502 at [55] Kirby J came to the view that a s 90 application can only be made with respect to a final order.

In relation to variation or rescission of an interim order under ss 69 or 70 of the Care Act, in *Re Edward* Kirby J at [52] held that such an order can be varied by the bringing of a further application under ss 69 or 70. His Honour said in this way interim orders can be varied by going outside the scheme in s 90. This view of Kirby J was expressly approved in *Re Fernando and Gabriel* by Bell J at [49]. On this issue see the paper of Robert McLachlan, "Re Alan — Do the requirements of section 90 apply to any application seeking to vary or rescind an interim order?" [2008] CLN 7. In referring to *Re Alan* and *Re Elizabeth*, Mr McLachlan states:

> It is unclear from the judgment of Re Elizabeth and Re Alan the extent to which the Court's attention was taken and their Honours minds were turned to the question of the jurisdiction for making interim care orders under the care legislation.

While the weight of authority in the Supreme Court appears to be against Kirby J in *Re Edward* on the issue whether a s 90 application can be brought with respect to an interim order, his conclusion that a s 90 application can only be brought with respect to a final order has a great deal of force and seems sensible. His Honour's view is supported by the terms of s 90.The whole scheme of s 90 requiring the granting of leave and requiring the consideration of a number of matters including the wishes of the child (s 90(6)(b)), the length of time the child has been in the care of the present caregivers (s 90(6)(c)), the strength of the child's attachments to the birth parents and the present caregivers (s 90(6)(d)) and the risk to the child of psychological harm if present care arrangements are varied or rescinded (s 90(6)(f)) clearly suggests that the section is directed towards an application to rescind or vary a final order rather than an interim order.

The Care Act does not expressly require that any of the matters in ss 90(2A) or 90(6) be taken into account by the court when making an interim order. To obtain an interim order under s 69 the Director-General must only establish that "it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility". Why then is it necessary for the multitude of matters referred to in ss 90 (2A) (re leave) and 90(6) (re the substantive application) to be taken into consideration in determining whether to vary or rescind an interim order?

The conclusion of Kirby J that s 90 does not apply to an interim order is supported by the very nature of an interim order. It has been held (in the context of interim orders made under the *Family Law Act 1975*) that at an interim hearing the court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process and ordinarily, at interim hearings, the court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties: see *Cowling v Cowling* (1998) FLC 92-801 at [18] and *Goode & Goode* [2006] FamCA 1346 at [66].

The inability of a parent to bring a s 90 application to vary or rescind an interim order which places the child under the parental responsibility of the Minister, would not disadvantage the parent. An interim order is made on the basis that it has effect until a specific time or "until further order". The parent may therefore apply to the court at any time to seek discharge of the interim order without the necessity to proceed via the cumbersome and time-consuming procedures under s 90.

The reason I raise these issues about interim orders in a paper dealing with care appeals to the District Court is because as a result of the clear finding in *Re Timothy* that only the Director-General can bring an application for an interim order, we have recently been seeing more applications in the Children's Court under s 90 brought by parents for variation or rescission of an interim order of parental responsibility to the Minister. Whilst there is no right of appeal to the District Court from an interim order, an order either refusing leave under s 90 or refusing the substantive s 90 application (after leave was granted) to vary or rescind an interim order would be an order which may be the subject of an appeal to the District Court: see *S v DoCS* at [52] and [53].

It is clearly incongruous that whilst there is no statutory right of appeal to the District Court against an interim order made by the Children's Court, there should be a statutory right of appeal with respect to an order of the Children's Court refusing an application to vary or rescind an interim order (or refusing leave to bring such an application).

I expect that in the future you may be seeing more appeals against such orders.

5 Assessment applications and the Children's Court Clinic

The Children's Court Clinic (the Clinic) is established under s 15B(1) of the *Children's Court Act 1987*. Pursuant to s 15B(2) of that Act the Clinic has the following functions:

(a) making clinical assessments of children

(b) submitting reports to courts

(c) such other functions as may be prescribed by the rules.

The Clinic is provided with further powers under s 58 of the Care Act. In the event that the court makes an assessment order under s 53 and/or s 54 of the Care Act, the court is to appoint the Clinic to prepare and submit the assessment report: s 58(1). In the event that the Clinic informs the court that it is unable to prepare the assessment report or that it is of the opinion that it is more appropriate for the assessment to be prepared by another person, the court is to appoint a person whose appointment is, so far as possible, to be agreed to by all the parties: s 58(2).

Under s 53(1) of the Care Act the court may make an order for:

(a) the physical, psychological, psychiatric or other medical examination of a child or young person, or

(b) the assessment of a child or young person,

or both.

The Clinic is not presently resourced to carry out physical examinations of children (other than by way of simple observation).

Under s 54(1) the court may order the assessment of "the capacity of a person with parental responsibility, or who is seeking parental responsibility, for a child or young person to carry out that responsibility". Such an assessment can only be carried out with the consent of the person to be assessed: s 54(2).

It is important to remember that the court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course. Section 56(1) provides that in considering whether to make an assessment order, the court is to have regard to the following:

(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 the child or young person will be outweighed by the value of the information that might be obtained,

(c) any distress already caused to the child or young person by any previous assessment undertaken for the same or another purpose,

(d) any other matter the Children's Court considers relevant.

Section 56(2) provides that:

> In making an assessment order, the Children's Court must ensure that a child or young person is not subjected to unnecessary assessment.

An assessment report submitted to the court under ss 53 and/or 54 is taken to be independent from the parties as it is a report to the Children's Court rather than evidence tendered by a party: s 59.

I will shortly be issuing a Children's Court Practice Note in relation to the Clinic to ensure it is used more effectively. In particular, the Practice Note will deal with the procedures for the making of an Assessment Application, the forwarding of documents to the Clinic following the making of an assessment order and the procedures for requesting the attendance of the Authorised Clinician at court.

5.1 Assessment applications

In ordering an assessment, the Clinic needs an assessment order with clear and unambiguous questions from the court. The Children's Court will soon issue a new form of Assessment Application. This will be a useful model to help the District Court frame the questions that the Clinic can most helpfully answer.

The proposed new Assessment Application:

(i) consolidates multiple children in a sibling group into the one application, while allowing for separate questions for individual children, if required,

(ii) outlines the reasons for making an assessment order,

(iii) includes a brief list of issues to be addressed by the clinician,

(iv) states whether a clinician with specific expertise is required,

(v) includes contact details for all children, other parties and the legal representatives, and

(vi) lists all the documents upon which the assessment is to be based, including all relevant previous clinical assessments undertaken of the child, children or family.

Clinic assessments are of greatest assistance to the court when the Clinic is asked to address specific and clear questions. Usually by the time a case has gone on appeal to the District Court, the issues which the Clinic is asked to address should be quite confined.

Problems can be encountered in preparing an assessment report when the parent is:

- in gaol,
- allegedly suffering from significant alcohol or other drug problems which are not being addressed,
- in residential treatment for drug dependence or mental illness, or
- about to give birth.

In each of these situations, a Clinic assessment may not be viable. For example, for a parent serving a lengthy sentence of imprisonment an assessment of parenting capacity would probably be of no utility. Further, it is extremely difficult (if not impossible) to carry out a proper parenting capacity assessment in the setting of a prison.

Following the making of an assessment order, all relevant documents must be sent to the Clinic as soon as possible together with the assessment order. Under the proposed Practice Note all documents upon which the assessment is to be based (which will be particularised in the Assessment Application and agreed to by all the parties) must be forwarded to the Clinic within **5 working days** from the making of the assessment order.

The documents provided to the Clinic should provide the Authorised Clinician conducting the assessment with all relevant documents pertaining to the assessment being sought (including

all prior assessments) and details of prior interventions. In addition to documents used to establish a case, other documents to be provided should include previous clinical assessments undertaken of the child, children or family (eg paediatric, psychological, psychiatric, social work assessments or reports, school reports, previous Children's Court Clinic assessments and hospital discharge summaries relevant to the terms of the Assessment Order).

Assessment reports usually take six weeks to complete from when the Clinic receives the assessment order and all the relevant documents ("the file of documents"). This may need to be extended at the request of the Clinic due to case complexity, availability of clinicians, missed appointments, etc. It is obviously undesirable for the court to have to re-list a matter due to delays in the Clinic assessments, however, these delays can be avoided if the implications of conducting an assessment are considered carefully beforehand by the parties and the court.

5.2 The Authorised Clinician attending at court

In the event that an Authorised Clinician is requested by a party or parties to attend at court for cross-examination the court should ensure, by making appropriate directions, that the Clinician is requested to appear in good time, and also that he or she is provided with any updating documents early enough (no later than **three weeks** before the hearing) to be able to properly consider them before giving evidence.

Before a care case is listed for hearing it is important that the parties ensure that the Authorised Clinician (if required for cross-examination) is available to attend on a particular day. This may be done by either enquiring through the Clinic or directly with the Clinician. When the matter is listed for hearing, the court registry is to forward to the Clinic a Notice to Authorised Clinician to Attend Court (which is to be filed by a party requesting the attendance of the Clinician).

The Clinic website <www.lawlink.nsw.gov.au/ccc> has guidelines on the kind of questions that the Clinic can most usefully answer. It also has more detailed information to help develop Assessment Orders and requests for court appearance. You may contact the Clinic through its phone and fax numbers (Ph: 8688 1530, Fax: 8688 1520), and email address: childrens_court_clinic@agd.nsw.gov.au. The Clinic Director, Mr Mark Allerton, is very happy to discuss any matters relating to assessment orders and the Clinic with a judicial officer or a practitioner. He is also happy to give presentations on the Clinic to judicial officers and practitioners.

6 New Alternate Dispute Resolution procedures in the Children's Court

In accordance with a number of Wood recommendations, the Children's Court has now implemented the greater use of alternative dispute resolution (ADR) procedures in care and protection proceedings. The Court is doing this in two ways — first, through dispute resolution conferences (DRCs) conducted by a Children's Registrar under s 65 of the Care Act, and, secondly, by the Court referring cases to external mediation pursuant to s 65A of the Care Act under a pilot being conducted at the Children's Court at Bidura. Under the pilot, cases at Bidura are referred to mediation conducted by experienced mediators from the Legal Aid Panel.

6.1 Children's Court Practice Note 3 — "Alternative Dispute Resolution Procedures in the Children's Court"

Recently issued Practice Note No 3 "Alternative Dispute Resolution Procedures in the Children's Court" establishes the model under which internal DRCs are conducted: see

[6-1020]. These procedures took effect from 7 February [2011]. The Practice Note also refers to the Bidura pilot. The Practice Note is available on the Children's Court website [and a link can be found at **[6-1020]**].

6.2 Dispute Resolution Conferences (DRCs) under s 65

The Practice Note states that DRCs are to be conducted by Children's Registrars. DRCs are scheduled to run for a minimum of two hours, and personal attendance is required by:

- all parties (except children) and their legal representative (if the party is legally represented)
- the child's legal representative
- the Community Services Caseworker, and Casework Manager.

DRCs are conducted as a conciliation process. In this sense, a DRC is a process in which the parties, with the assistance of the Children's Registrar, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. Under a conciliation model, the Children's Registrar has an advisory role, but not a determinative one, and might, for instance, express views on what the Court may consider relevant if the matter goes to a hearing. The Children's Registrar is also responsible for managing the DRC, including setting the ground rules, managing any apparent power imbalance between the participants and ensuring the participants conduct themselves appropriately.

The usual confidentiality arrangements apply to a DRC, pursuant to cl 19 of the *Children and Young Persons (Care and Protection) Regulation 2012*. Following the DRC, the Children's Registrar will report back to the Court whether agreement was reached by the parties in relation to any issues, and, if agreement has not been reached, the Children's Registrar will, in consultation with the parties, identify the issues remaining in dispute to allow the court to allocate hearing time.

Where all the parties have reached agreement, proposed consent orders will be prepared and provided to the Court at the next mention of the matter. The Court will then determine whether it is appropriate to make the consent orders which are sought taking into account the objects and principles of the Care Act as well as other relevant provisions of the Care Act. If the court declines to make the orders sought the Court will make directions for the further conduct of the matter.

6.3 External mediation pilot at Bidura Children's Court

The external mediation pilot commenced in the Bidura Children's Court on 9 September 2010. A number of external mediations have now been held dealing with a variety of care and protection issues.

Mediations, unlike DRCs, are scheduled for a minimum duration of three hours and are conducted at Legal Aid's Castlereagh St offices. Those required to attend an external mediation session are the same as those required to attend a DRC under s 65. Participants are also asked to sign a confidentiality agreement.

The Bidura Pilot will run for approximately 12 months. During this time, cases from Bidura that are suitable for mediation will go to the external mediation pilot, rather than a DRC.

6.4 Legal practitioners' training regarding new procedures

Information sessions have been held for care and protection legal practitioners throughout the State. A pod cast recording of this information is available on the Children's Court website.

Separate training has also been provided to Community Services staff.

Promotional material (including a DVD) is being developed for participants in both programs (including children and young people).

6.5 Evaluation

An external evaluation of both the new model of DRC and the external mediation pilot will be conducted, using a sample of 100 cases from each, and a control group of 100 cases that did not undergo any form of ADR. The purpose of the evaluation is to determine the costs and benefits of each model, and how they can best complement each other. Children's Magistrates and Children's Registrars will be consulted during the evaluation.

While the DRC model has only very recently commenced, the feedback from practitioners who have participated in the Bidura pilot so far has been very positive.

6.6 ADR and appeals to the District Court

As the District Court, when conducting a care appeal, has all the functions and powers of the Children's Court, the District Court may refer an appeal at any time to a DRC under s 65 of the Care Act or to external mediation under s 65A.

If the District Court wishes to refer a case to a DRC under s 65 to a Children's Registrar in the Children's Court, arrangements can be made through the Conference Co-ordinator on telephone (02) 8688 1471 or the conference assistant on telephone (02) 8688 1469.

Should the District Court wish to refer a case to external mediation under s 65A, enquiries can be made of Legal Aid as to whether it is able to refer the case to mediators on the Legal Aid panel. Alternatively, the Department may, in some circumstances, agree to funding other external mediation. For evaluation purposes, the Bidura external mediation pilot is restricted to cases referred from the Children's Court at Bidura.

7 Costs orders

Under s 88 of the Care Act, an order for costs cannot be made in care proceedings "unless there are exceptional circumstances that justify the court in doing so". The restriction on costs orders in care proceedings arises because proceedings relating to the welfare of a child are not to be regarded — at least not to be regarded for all purposes — as normal adversary litigation inter partes: *S v Minister for Youth and Community Services* (unrep, 3/4/86, NSWSC) per Powell J.

What constitutes "exceptional circumstances" for the purposes of s 88 has been considered in a number of Children's Court and District Court decisions including *Re Jackson* [2007] CLN 2; *SP v DoCS* [2006] NSWDC 168; *DoCS v SM and MM* [2008] NSWDC 68; *BS v DoCS* (unrep, 26/8/09, NSWDC); *Joy Alleyne as Independent Legal Representative for LC v Director-General DoCS* (No 2) [2009] NSWDC 171 and *XX v Nationwide News Pty Ltd* [2010] NSWDC 147.

In *SP v DoCS*, Rein DCJ upheld an appeal from the Magistrate's award of costs against the Department on the basis that he did not consider it an exceptional circumstance that a solicitor would be out of pocket because of the impecunosity of his client. After referring to a number of authorities, his Honour stated that some guidance can be gained from the cases as to the meaning of exceptional circumstances. His Honour summarised the points as follows:

His Honour goes on at [36] to identify the following types of matters which would or at least arguably might fall within the description of exceptional circumstances for the purposes of s 88 of the Care Act:

1. Cases where circumstances are found or not found to be exceptional or not all turn on their own facts and circumstances (see *Murray Publishers Pty Ltd v Valuer-General* (1994) 84 LGERA 13).
2. Unusual circumstances do not make the circumstances exceptional. A council's error, for example, in its dealings with the applicant are insufficient.
3. Even circumstances out of the ordinary or even appalling breakdowns or misunderstandings in communication do not, of themselves, amount to exceptional circumstances (see *Australian Recyclers Pty Ltd v Environment Protection Authority of NSW* (2000) 110 LGERA 171).
4. Refusal of counsel to act on recommendations of officers or advice of experts is not sufficient.
5. Acting upon a serious or fundamental error of fact, acting capriciously or deliberately attempting to frustrate or cause delay or expense to the applicant would be sufficient.

Having identified these matters as the types of matters which may constitute exceptional circumstances, his Honour said that whilst the categories of conduct are not closed, "there is a theme or flavour about these categories that I have already outlined as falling within the ambit, in my view, of section 88".

The "theme or flavour" of the categories of exceptional circumstances identified by his Honour clearly relates to the conduct of the parties and requires either deliberate improper/wrongful conduct, abuse of process or gross negligence or incompetence.

In *DoCS v SM and MM* Garling DCJ expressly approved the matters which might arguably fall within the description of exceptional circumstances as identified by Rein DCJ in *SP v DoCS*. Garling DCJ also referred to the decision of Campbell J in *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 concerning the meaning of exceptional circumstances in r 31.18 [as in force in September 2006] of the UCPR.

In *Yacoub* Campbell J referred to *San v Rumble (No 2)* [2007] NSWCA 259 and said:

> I shall state such of the conclusions as seem to me applicable in the construction of rule 31.18(4) [which related to "exceptional circumstances" in September 2006])
>
> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).
>
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] A All ER 907 (at 1268; 912–913).
>
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).

(d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: Awa *v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

Campbell J then said:

> … any decision about whether there are exceptional circumstances would need to bear in mind the explicit statement of objectives of a court in the management of litigation …

In *DoCS v SM and MM*, in awarding costs against the Department, Garling DCJ identified the following as exceptional circumstances:

- The appeal had no merit
- The Magistrate made the only reasonable order available
- There were no grounds to seek an appeal from that order nor was there additional evidence which may have caused the District Court to reach a different decision from the Magistrate.

Judge Garling found that the position the Department took on the appeal was unreasonable being a position which was not based upon the available expert evidence. Further, his Honour found that the fact that the respondent parents were not entitled to legal aid and had to pay their own legal costs as a result of the Department's appeal, was also relevant to the consideration of exceptional circumstances.

In *BS v Minister for Community Services & Ors* Robison DCJ, after referring to *DoCS v SM and MM* and *SP v DoCS*, said at [4]:

> Exceptional circumstances can and, indeed, in many cases include a broad variety of factors. There can be a difference of view as to what amounts to an exceptional circumstance. The judges of this court in those two decisions had indicated certain views about what are considered to be exceptional circumstances. At the end of the day each case needs to be determined in the context of the proceedings and the matters which were brought to the attention of the court during the course of the proceedings. Certainly a relevant matter is the conduct of the parties to proceedings of this nature.

His Honour stated at [5] that any order for costs under s 88 could only be made with respect to the appeal proceedings before the District Court (not to the proceedings in the Children's Court). In finding that exceptional circumstances existed and ordering the Department to pay the mother's legal costs, his Honour found that the Department had an "entrenched immovable view" from an early stage and rejected expert opinion which supported the mother's case even though it had no expert evidence to contradict that expert opinion. His Honour noted that while s 94 of the Care Act requires that proceedings should proceed as expeditiously as possible, the entrenched and immovable view of the Department resulted in the proceedings not proceeding expeditiously.

In *Joy Alleyne as Independent Legal Representative for LC v DG Dept Community Services* Goldring DCJ, in refusing to award costs against the Department, said at [11]:

> I do not regard the matters set out by Rein J in *SP* as an exhaustive statement of what might constitute "exceptional circumstances" for the purposes of s 88, though they give a clear indication

> of some matters that may constitute such circumstances. *BS* also indicates matters of a different type, which may give rise to such circumstances. It may be that, in some circumstances, the financial position of a party may give rise to a finding of "exceptional circumstances". It may be that the factual situation is so complex, or the Department had taken such an unreasonable position, as Robison J found in *BS v Minister for Community Services*, that either would make for exceptional circumstances. The facts of this case do not.

In *XX v Nationwide News Pty Ltd*, the defendant, The Australian newspaper, had published a number of articles concerning certain care proceedings in the Children's Court. Although the articles did not directly name the child the subject of the proceedings, there was evidence before the Children's Court that facts about the case referred to in the articles had identified the child. It was clear that the contents of the articles were likely to identify the child in breach of s 105(1) of the Care Act.

In the Children's Court the plaintiff successfully obtained a non-publication order against the newspaper defendants. However, the court refused the plaintiff's application for costs with respect to their successful application. The Children's Court found that the conduct of the newspaper did not fall within the categorises of exceptional circumstances referred to by Rein DCJ in *SP v DoCS*.

The plaintiff appealed to the District Court against the order refusing costs. Gibson DCJ held at [47] that the requirement that exceptional circumstances be established placed "a heavy burden" upon a party seeking costs in care proceedings. Her Honour re-affirmed that the list of matters set out by Rein DCJ in *SP v DoCS* is not exhaustive. In overturning the Magistrate's decision and awarding costs against the newspaper, her Honour found that its conduct did fall within the kinds of conduct referred to in *SP v DoCS* as its breach of implied undertakings as to documents obtained in the litigation process was capable of amounting to wrongful conduct, amounted to contumelious disregard to the principles of the Care Act and that it had been guilty of gross negligence in not removing articles from its website.

Her Honour declined to award indemnity costs although she stated at [59] that while there is no provision in the Care Act for awarding indemnity costs, "that does not necessarily mean that indemnity costs cannot be awarded: see, by analogy, *Vero Insurance Scriven* [2010] FMCA 352 at [45]".

7.1 Discontinuing proceedings — costs

In relation to costs orders where appeal proceedings are discontinued, r 42.19(3) of the UCPR provides that the defendant's costs in the appeal are not payable by the plaintiff unless the court finds there are "special circumstances to justify an order for their payment".

8 Recent decision — Re Tracey [2011] NSWCA 43

This is an important recent decision of the Court of Appeal relating to the operation and applicability of the "least intrusive intervention" principle contained in s 9(2)(c) of the Care Act and the applicability of the United Nations Convention on the Rights of the Child. The case also deals with the statutory requirements for a care plan under the Care Act.

In *Re Louise and Belinda* [2009] NSWSC 534 Forster J at [54] said the following with respect to the operation of the least intrusive intervention principle in s 9(2)(c) of the Care Act:

> In my opinion, the section is ambulatory. In the case of a care application made under section 60 of the Act, it has the effect of requiring the court to be reluctant to remove a child from its natural

> parents unless there is a compelling reason to do so. On the other hand, where an application is made not under section 60, but under section 90, for the rescission or variation of a care order, the sub-section has a different effect. In that case, the least intrusive form of intervention would normally mean not interfering with existing care arrangements. Needless to say, the force of the requirement imposed by section 9(d) [now s 9(2)(c)] will vary from case to case, and a court will undoubtedly have regard inter alia to the strength of the respective bonds that a child may have with his or her natural parents and his or her foster carers.

In *Re Tracey* Giles JA (with whom Spigelman CJ and Beazley JA agreed) said that this explanation by Forster J as to the operation of s 9(2)(c) was erroneous as the least intrusive intervention principle has no application when it is not necessary to take action to protect a child from harm. Giles JA said at [79] that the principle's prescription is confined "to when it is necessary to take action in order to protect a child from harm, and when taking action it is necessary the course to be followed must be one of least intrusive intervention…". Giles JA said "there must be a prospect of harm if action is not taken, and the question is then the nature of the action."

The case is also important as the Court of Appeal found (per Spigelman CJ and Beazley JA) that the trial Judge was in error in failing to take into account as a relevant consideration, in exercising her discretion under s 90, Australia's treaty obligations under the Convention. The case involved a mother who was to be deported to Cambodia following her conviction for drug offences. If the child remained in the care of the Minister the child would therefore have no contact with her mother as the child was to remain in Australia. In finding that the Judge was in error in not having regard to the Convention, Spigelman CJ referred particularly to Article 7.1 which provides, in part, that a child has a right "to be cared for by his or her parents".

Although the paramountcy principle contained in s 9(1) of the Care Act partly reflects Article 3.1 of the Convention, the decision in *Re Tracey* means that the court will be required to take into account all relevant Articles of the Convention in determining what is in the best interests of the child; in particular, Article 3.1, Article 3.2, Article 5 together with Article 9.1, Article 8(1) and Article 29.

As stated earlier in this paper, *Re Tracey* also deals with the requirements of a valid care plan for the purposes of s 80 of the Care Act.

9 Local Court Bench Book

Very useful and instructive material relating to the conduct of care proceedings may also be found in the Local Court Bench Book on the JIRS website. Go to the link "Bench Books" then ["Local Court Bench Book", followed by "Contents" then] "Children's Court" and then to "Care and Protection Jurisdiction".

Children's Court: new arrangements for dispute resolution procedures in care and protection matters

Bulletin Number 2011/0021 ..... [18-4000]

[18-4000] Bulletin Number 2011/0021

Following recommendations of the Special Commission of Inquiry into Child Protection Services, a new model of alternative dispute resolution commenced operation in the Children's Court from 7 February 2011.

Further information about the background to the changes, details on how the new model will operate generally and information about a trial of external mediation operating through Bidura Children's Court is explained in a podcast that can be accessed by following the link below:

http://infolink/lawlink/childrens_court/ll_cc.nsf/pages/CC_adr_programs#Part1

Essentially, Children's Registrars will now conduct dispute resolution conferences (DRCs) under s 65 *Children and Young Persons (Care and Protection) Act 1998* in lieu of preliminary conferences. DRCs will be conducted under a conciliation model in accordance with Practice Note 3 that was issued by the President of the Children's Court on 7 February 2011, see **[6-1000]**.

Children's Registrars are now based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children's Courts and Lismore and Wagga Wagga Local Courts.

Referrals to a DRC will be made by a Magistrate, although in some cases a Children's Registrar will direct a DRC at courts where the Children's Registrar conducts a regular call-over. Magistrates have been provided specific listing dates at locations where the Children's Registrars are based and at some other locations where there is a high demand for this service. At all other locations a date for a DRC will be arranged by the Conference Co-ordinators located at Parramatta Children's Court. It is anticipated that in the ordinary course a DRC will be conducted not less than 2 weeks after referral and within 4 weeks of referral.

The following instructions apply to registry staff once a direction for a DRC is made:

At all courts (except Parramatta Children's Court) registry staff should complete Form K — Dispute Resolution Conference Booking Form [not reproduced] and send the form to the DRC Conference Co-ordinators by:

(a) facsimile to (02) 8688 1478 or

(b) by email to Childrens_Court_Conference_Co-Ordinator@agd.nsw.gov.au

The Form K must indicate the date allocated by the Court for the DRC at courts where listing dates have been provided. Where the date of the DRC is to be arranged by the Conference Co-ordinators the Court is asked to nominate three dates that are available to the parties and their legal representatives.

The DRC Conference Co-ordinators will arrange for a Children's Registrar to be allocated the matter and will confirm the date of listing with the parties and the Registrar of the Court where the matter is listed. Information to assist parties to prepare for a DRC will then be sent to all the parties by the conference co-ordinators.

In cases where the Magistrate is of the view that an urgent DRC should be arranged registry staff should contact the Conference Co-ordinators by telephone to enquire whether an urgent conference can be arranged. The conference co-ordinators can be contacted on:

(a) (02) 8688 1471 or

(b) (02) 8688 1469

The Children's Registrar allocated the matter will contact the registry where the matter is listed to obtain access to the file. At locations where the Children's Registrar attends on a regular weekly or fortnightly basis the Children's Registrar will arrange to view the file at the registry. At other locations the Children's Registrar will request that relevant portions of the file be photocopied and sent or scanned and emailed to the Children's Registrar. Registry staff are to assist with such requests as adequate time for both the Children's Registrar and the parties to prepare for a conference is seen as essential to the success of this new model.

The Children's Registrar will then contact the parties approximately 1 week prior to the listing of the conference to check on the preparedness of the parties for the conference and to ensure that appropriate arrangements are in place to conduct the conference.

Enquiries concerning arrangements for the conduct of DRCs should be directed to the Conference Co-ordinators on the above phone numbers or the Senior Children's Registrar on (02) 8688 1465.

Contact guidelines for magistrates: background paper

T Jovanovic*

Introduction — making "contact" decisions ..... [18-5000]

Contact orders under the Children and Young Persons (Care and Protection) Act 1998

Findings of the Wood Special Commission of Inquiry into the Child Protection Services in NSW regarding contact

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* Research Associate to his Honour Judge M Marien SC, President Children's Court of NSW, July 2010.

[18-5000] Introduction — making "contact" decisions

Making a decision regarding contact is often very challenging for any magistrate, particularly where different parties strongly disagree on the nature and frequency of contact. The Court is often caught between upholding the principle that there should be a continuance of a relationship between a child in out of home care and the child's birth family, and ensuring that the safety, welfare and well-being of a child is a paramount consideration in any decision.

As Magistrate Crawford noted:

> Even if the desirability of "ongoing contact" is a matter of common ground between the parties, the translating of this principle into the specifics of a workable arrangement that can be evidenced in terms of a court order, can be a difficult task. Similarly there can be the difficulty of integrating "contact" into the broader future planning for the child. The varying interests of the child and many other persons must be taken into account if a contact order is to work satisfactorily over the longer term as this necessarily requires the co-operation of all persons involved in the process.[1]

To make matters more complicated, his Honour pointed out that:

> It is important that any decision concerning the making of a contact order be based on adequate, relevant, current and specific information. *Often such information is not available*.[2] (Emphasis added.)

The purpose of this paper is to enable magistrates to make better informed contact orders by highlighting the main functions and purposes of contact visits, outlining key arguments in favour and against contact between children in care and their family members, analysing specific issues which children in care may encounter as a result of contact and outlining factors which may inhibit contact and which magistrates will need to carefully consider if contact is to be fostered and encouraged.

Contact orders under the Children and Young Persons (Care and Protection) Act 1998

Currently the Children's Court has the power to make contact orders in accordance with s 86 of the *Children and Young Persons (Care and Protection) Act 1998* ("Care Act") which states:

1. If a child or young person is the subject of proceedings before the Children's Court, the Children's Court may, on application made by any party to the proceedings, do any one or more of the following:
   (a) make an order stipulating minimum requirements concerning the frequency and duration of contact between the child or young person and his or her parents, relatives or other persons of significance to the child or young person,
   (b) make an order that contact with a specified person be supervised,
   (c) make an order denying contact with a specified person if contact with that person is not in the best interests of the child or young person.
2. The Children's Court may make an order that contact be supervised by the Director-General or a person employed in that part of the Department comprising those members of staff who are principally involved in the administration of this Act only with the Director-General's or person's consent.

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1 Magistrate Crawford, "Considerations in Making a Contact Order", 2005(9), *Children's Law News* 3.
2 ibid.

3. An order of the kind referred to in subsection (1)(a) does not prevent more frequent contact with a child or young person with the consent of a person having parental responsibility for the child or young person.
4. An order of the kind referred to in subsection (1)(b) may be made only with the consent of the person specified in the order and the person who is required to supervise the contact.

Findings of the Wood Special Commission of Inquiry into the Child Protection Services in NSW regarding contact

Review of the Children's Court's powers under s 86

The Wood Special Commission of Inquiry into the Child Protection Services in NSW reviewed the current system of making contact orders and concluded:

> The Inquiry is of the view that, on balance, the Children's Court should retain its power to make contact orders with respect to those children and young persons about whom the Court has accepted the assessment of the Director-General that there is a realistic possibility of restoration. For all other children and young persons, that is those where the Court has accepted that there is no such possibility, the Court should have no power with respect to making orders as to contact.[3]

The NSW Government supports Commissioner Wood's recommendation. As a result, the Government presently proposes an amendment to s 86 of the Care Act limiting the Court's power to make contact orders only in cases where restoration is a realistic possibility. Until the proposed amendment comes into effect, the court will retain its power to make contact orders in both cases where restoration is and is not a realistic possibility.

Need for contact guidelines

The Inquiry was informed that there appears to be some discrepancy in the nature of contact orders made by different judicial officers. The Inquiry noted that:

> Determining the duration, frequency and supervision needs for contact between children and young persons in care and those significant to them, is a complex matter. The Inquiry is aware of the competing views in the literature concerning the benefits which may accrue to a child or young person from contact being maintained, and balancing the need for stability, the likelihood of restoration, the developmental requirements of a child or young person as well as changes in the circumstances of birth families and the quality of the contact, all within the context of the best interests of the child or young person.[4]

The Inquiry was of the view that discrepancies may arise not only as a result of unique circumstances of each care and protection case, but due to a lack of guidance regarding matters which judicial officers should consider, and the approach which they should adopt in making contact orders. As a result, the Inquiry recommended that:

> Evidence based guidelines for Magistrates should be prepared in relation to orders about contact made under s 86 of the Children and Young Persons (Care and Protection) Act 1998.[5]

A number of Children's magistrates informed the court that they experienced some difficulties when faced with the task of making contact orders, and that these difficulties could be minimised by providing them with some guidance on how to approach these orders. In these circumstances,

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3 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, 2008, at [11.227].

4 ibid at [11.199].

5 ibid, recommendation 11.6.

some form of guidelines would appear to be beneficial, both by informing magistrates of various matters which should be taken into account when making contact orders thereby leading to better informed decisions, and by ensuring consistency of the court's decisions.

Basic arguments in favour and against contact

There are a number of recurring arguments in favour and against contact. It is important to note that as the circumstances of each case are unique, these arguments do not apply across the board, and the ultimate decision regarding contact needs to be based on the particular circumstances of the case.

- Contact encourages reunification with the birth family
- Contact maintains/encourages attachment to the birth family
- Contact prevents idealisation of the birth family
- Contact maintains links and cultural identity
- Contact enhances the psychological well-being of the children in care
- Contact is a means by which the quality of the relationship between the birth family and the child can be assessed.[6]

On the other hand, the following are the most cited arguments against contact:

- Multiple attachments create confusion for children or conflict of loyalties
- The threat of harm to the child or to the new parents may undermine the placement
- Birth parents need to be helped towards closure as the best way of dealing with feelings of loss and guilt
- Demands placed on new parents adversely affect the recruitment of new adopters
- It is too risky to make such complex placements without adequate professional skills and resources which need to extend far beyond adoption
- The push for contact arises less from the evidence on benefits than from professional desires to undo the pain of separation or because they themselves feel they have failed the birth family.[7]

In addition some studies have found that contact with birth families may lead to:

- Continuation of unhealthy relationships, for example inappropriately dominant or bullying relationships, or controlling relationships.
- Undermining the child's sense of stability and continuity by deliberately or inadvertently setting different moral standards or standards of behaviour.
- Experiences lacking in endorsement of the child as a valued individual eg where little or no interest is shown in the child himself, or contact where the parent is unable to consistently sustain the prioritisation of the child's needs.
- Unreliable contact in which the child is frequently let down or feels rejected, unwanted and of little importance to the failing parent.

Where a child is continuing to attend contact even though expressing a view that he doesn't want the contact can make the child feel undermined.[8]

6 S Taplin, "Is all contact good contact?", NSW Department of Community Services, Discussion Paper, 2005, p 7.
7 ibid, p 12.
8 See Children's Magistrate Elizabeth Ellis, "Contact Orders", 2004, p 6.

Different models of contact and their influence on contact orders

Before exploring specific issues which arise in relation to contact, it is useful to consider different models of contact. These models broadly demonstrate different functions of contact visits, and broadly illustrate the approach to be taken in making contact orders, depending on the function which contact is intended to serve in a particular case.

There are four basic models of contact. Namely, the rehabilitation model, the continuity model, the disruption model and the deterrence model:

- ***Rehabilitation model***

  Here the function of contact is to facilitate the resumption of care by a parent. When rehabilitation (restoration) occurs (as is the objective of contact), the transition from care will then be less stressful for the child. Contact allows the parent to develop caring skills gradually. Contact can be used to assess the abilities of the parent and for social workers to "teach" caring skills to the parent. Contact keeps alive the possibility of the separated parent resuming full-time care. In summary, contact under this model is a means to an end.

- ***Continuity model***

  Where restoration is not an objective, contact benefits the child and parent by supplying emotional security through the continuance of that relationship. Contact can help create a sense of identity for the child. As the child grows older, such contact may provide a crucial link to the past, as well as a sense of his/her own background and root. Contact is an end in itself.

- ***Disruption model***

  This model argues that whilst contact is desirable when restoration is an objective, if it ceases to be so then continued contact with the non-caring parent creates confusion, uncertainty and disruption for the child. Stability for the child is what is important and the social parents should replace the natural parents entirely. Non-rehabilitative contact may create confusion for the child and worry in the child's mind of removal from the new carers.

- ***Deterrence model***

  This model is developed within the context of the English legislation that provides for orders "freeing" children in care for adoption. The concern that this model addresses is that potential adoptive parents will be deterred from adopting by the prospect of having to accommodate continuing contact with the natural family.

  In care proceedings both the "rehabilitation" and "continuity" models are used as a justification for the making of contact orders. The "disruption" model is sometimes used to justify the restriction or termination of contact.[9]

By adopting these models and determining which function contact visits are meant to serve in a particular case at the outset, magistrates will gain a broad idea of how frequent contact will need to be, whether any third parties will need to be involved, and whether visits need to be structured in any way. For example, if the circumstances of a case indicate that restoration is a realistic possibility, the Court will need to adopt a rehabilitation model of contact. As a result, the Court may consider making contact visits more frequent, and involving Community Services caseworkers who can teach the parent good parenting skills. If, on the other hand, there is no

9 Magistrate Crawford, above n 1, pp 8–9.

realistic possibility of restoration but the parent and child have a healthy and close relationship, the Court may adopt the continuance model and order regular, though not necessarily frequent contact. Regular visits would enable the child to maintain a sense of identity and learn about his or her history while not disrupting the child's placement through overly frequent visits.

Purposes of contact

According to the literature, contact visits between a child and his or her birth family may serve a number of specific purposes.

- Visitation can be a positive intervention for the entire family and can promote successful reunification.
- Visits reassure children that their families are alive and well and still care about them. Frequent contact with parents can reduce children's anxiety associated with separation. Other types of contact, including exchange of phone calls, cards, and letters, will also serve this purpose.
- Frequent visitation reassures parents that the agency is committed to maintaining and strengthening family relationships.
- Visits present the caseworker with a valuable opportunity to help family members identify their needs and strengths. By observing family members together, the worker can elicit important information about the quality of the parent-child relationship, as well as gain insight into the parents' developmental needs, motivation, and capacity to resume care of their children.
- Family visits can be used as interventions to achieve specific objectives. For example, foster or relative caregivers may use visits to model parenting skills and to share child management strategies. During visits, parents can practice newly acquired parenting strategies and can receive immediate, constructive feedback and coaching from the caseworker or caregiver.
- Visits may help parents understand the importance of permanency for their child. The visits can help them make a final decision regarding whether they want to diligently pursue reunification or relinquish their parental rights, thereby allowing their child to achieve permanency through another plan, such as adoption or guardianship.
- Sibling visitation allows these important relationships to be maintained, even when siblings must be placed in separate homes.
- Visitation with extended family is encouraged whenever possible. Extended family connections are important to the child's development and often serve as alternative permanency plans if reunification does not take place.[10]

Potential effects of contact on children in care

In order to make contact visits which promote the best interests of the child and support the goals of a care plan, magistrates need to be aware of the impact of contact on family reunification as well as the child's psychological wellbeing.

Family reunification

As the court will soon be limited to making contact orders only in cases where restoration is a realistic possibility, it is necessary to have regard to some of the literature which analyses the impact of contact on family reunification. In particular, a considerable amount of literature supports the notion that the greater the amount of contact between a child and his or her birth

10 Maine Department of Health and Human Services, Child and Family Services Manual, Part V.E. accessed from http://www.maine.gov/dhhs/ocfs/cw/policy/index.html?i__d__practice_model.htm on 22/03/10.

family, the stronger the likelihood that the child will return home. [11]It is important to note however, that some authors argue that while contact may be associated with reunification, it may not necessarily cause it.[12] A variety of factors quite independent of contact will shape the ultimate decision to return a child to his or her birth family. As a result, in cases where the Court has determined on the basis of the evidence before it, that restoration is a realistic possibility, the studies suggest that orders encouraging frequent contact may further assist the child's return to the family.

Birth/foster family attachment, loyalty conflict and the child's psychological wellbeing

A number of studies have noted that frequent contact can have a significant impact on the child's attachment to his or her birth family. As a result, a few studies have focused on the impact of birth family attachment on foster family attachment, and the extent to which any dual attachment produces loyalty conflict in turn causing behavioural and psychological problems for the child. The results of these studies are rather mixed. This may be in part due to different time periods over which these studies were carried out. That is, patterns of placement and contact may have been quite different twenty years ago from today. Equally, patterns may vary across countries. Further, it is difficult to compare sample sizes used in various studies. Nevertheless, these studies may be of some assistance in cases where the child is expected to return home, and should therefore be encouraged through various means including contact to retain some attachment to their birth parents, while developing an attachment to their new foster parents.

In 1990 Fanshel found that parental contact was positively related to children's negative behavioural outcomes.[13] His study concluded that children who had regular contact with their birth families had more emotional and behavioural problems both in their foster homes and as young adults.[14] Fanshel hypothesized that the reason for the children's greater disturbance may be that they come from highly dysfunctional families and that they may be drawn into their parents' stressful life events or difficulties.[15] However, as Leathers points out this hypothesis appears inconsistent with Fanshel's earlier study which found that children with more frequent parental contact had greater adjustment problems in their foster homes and weaker attachment to their new families, even after controlling for the biological mother's disturbance and capacity to function in the maternal role.[16]

Poulin's study concluded that frequency of contact fostered stronger biological family allegiance which in turn produced loyalty conflict.[17] This finding was supported by a number

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11 J Richards, "Contact — it still needs to be encouraged" (1995) 19(3) *Adoption and Fostering*, at pp 43–45; E Farmer, "Family reunification with high risk children: lessons from research" (1996) 18 *Children and Youth Services Review*, pp 403–424; P Hess, "Visiting between children in care and their families: a look at current policy", 2003, A Report for the National Resource Centre for Foster care Permanency Planning, Hunter College School of Social Work: A Service of the Children's Bureau.

12 K Wilson and I Sinclair, "Foster care: policies and practice in working with foster placements" (2003) in M Bell and K Wilson (eds), *The Practitioner's Guide to Working with Families*, Palgrave Macmillan, Basingstoke, 2003, pp 229-245; D Fanshel, *On the road to permanency*, Child Welfare League of America, New York, 1982; D Browne and A Moloney, "Contact Irregular: a qualitative analysis of the impact of visiting patterns of natural parents on foster placements" (2002) 7 *Child and Family Social Work*, 35.

13 S Leathers, "Parental visiting, conflicting allegiances and emotional and behavioural problems among foster children" (2003) 52(1) *Family Relations* 53, 54.

14 ibid.

15 ibid.

16 ibid.

17 ibid.

of later studies which also concluded that while contact is beneficial to children in short term foster placements, children in long term foster care were likely to experience loyalty conflict when visited frequently as a result of having to manage allegiances to multiple parents. The impact of loyalty conflict is not only relevant in cases where a child is placed in permanent foster care. Children who are expected to return home eventually but who remain in foster care for an extended period of time are likely to experience the same difficulties as children who are placed in permanent care but who are frequently visited by their birth parents. These findings suggest that magistrates making contact orders in cases where restoration is a realistic possibility may face the difficult task of crafting orders which encourage family reunification while at the same time limit the adverse effect that frequent contact may have on children who spend a considerable amount of time in care. On the other hand, the findings imply that in cases where there is no realistic possibility of restoration, contact should be kept to a minimum so as to prevent the child from experiencing loyalty conflict.

On the other hand Cantos et al made the following findings in relation to children in care who display behavioural difficulties in their placements and were consequently referred to therapy:

> Regular parental contact in contrast to no or irregular contact was shown to be related to the child's behavioural difficulties as reported by foster parents even when behavioural differences accounted for by the duration of the children's stay in care and the number of placements they have been in were taken into consideration. The children who were visited regularly were rated as exhibiting fewer behaviour problems, especially problems of an internalising nature (ie withdrawal, depression, anxiety) than the children who were visited irregularly or not at all.[18]

Similarly McWey and Mullis found that children who were visited more frequently and who had higher attachment to their parents had "fewer behavioural problems, were less likely to take psychiatric medication, and were less likely to be termed 'developmentally delayed' than children with lower levels of attachment".[19]

In a most recent study, Leathers made the following findings in relation to visiting and it's impact on loyalty conflict:

> Most children were not reported to have a high level of loyalty conflict … As expected, how often children had visited with their mothers was not related to the severity of their depression, anxiety, oppositional defiant behavior, or conduct problems.[20]

Leathers also noted:

> As expected, greater loyalty conflict was associated with having a strong allegiance to both a foster family and a biological mother.
>
> Strength of allegiance to a foster family also had a weak, negative correlation with strength of allegiance to a biological mother suggesting that maintaining strong relationships with both a biological mother and a foster family might be difficult for some children.[21]

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18 A Cantos, L Gries, and V Slis, "Behavioral correlates of parental visiting during family foster care" (1997) 76(2) *Child Welfare*, 309, 324.

19 L McWey and A Mullis, "Improving the lives of children in foster care: the impact of supervised visitation" (2004) 53(3) *Family Relations* 293, 298.

20 Leathers, above n 13, p 58.

21 ibid.

Differences were also found between the effects that biological mother allegiance had on foster family allegiance of boys and girls. According to the study:

> Among the subsample of girls, strong biological mother allegiance was a significant predictor of weaker foster family allegiance … Among the subsample of boys, allegiance to biological mother was a nonsignificant predictor of foster family allegiance.[22]

Aside from birth and/or foster family allegiance, foster parents' attitude to contact visits was also found to have a direct impact on children's behavioural problems. Foster parents who were opposed to, or anxious about contact, were more likely to have children with the greatest number of behavioural problems, whereas the opposite was true for foster parents who encouraged contact with the birth family.[23]

Overall the study concluded that "frequency of parental visiting is not directly related to the emotional and behavioural problems of young adolescents who have been placed in non-relative foster care longer than a year".[24] Instead loyalty conflict was directly related to biological and foster family allegiance. Specifically "children who have strong allegiances to both their foster families and their mothers are likely to experience loyalty conflict, but also that loyalty conflict might be associated with weaker foster family allegiance".[25]

In light of the above findings it is not surprising that a number of studies have noted that children who were visited frequently and who had strong attachment to their biological families had more difficulty attaching to their foster family which in turn caused placement disturbances. These findings could have significant implications for the making of contact orders where restoration is contemplated. The literature suggests that children with strong birth family allegiance are most likely to experience loyalty conflict and placement disturbances. Given that family allegiance would be encouraged when a child is expected to return home, contact visits will need to be organised in a way that seeks to minimise loyalty conflict. Literature suggests that supportive foster carers may, to some extent, help minimise these difficulties. However foster carer support is an independent factor which may be difficult, if at all possible, to influence through court-imposed contact orders. On the other hand, the literature suggests that where restoration is not a realistic possibility, it may be more appropriate to reduce or even completely cease contact between a child and his or her birth family, as the emotional disturbance and difficulty of forming attachment to the foster carers may override the benefits of contact, and may not be in the best interests of the child.

Factors which may inhibit contact

Length of stay in care

A few studies have found that the longer children stayed in care the more likely they were to experience a gradual decline in contact with their birth families.[26] Although Leathers' study noted that stronger foster family allegiance resulted in less frequent maternal visits, the studies do not make it clear whether growing attachment to the foster family or increasing barriers to contact were the cause of reduced contact.

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22 ibid.

23 D Scott, C O'Neil and A Minge, *Contact between children in out-of-home care and their birth families — Literature review*, NSW Department of Community Services, 2005, p 23.

24 Leathers, above n 13, p 59.

25 ibid, p 61.

26 Scott et al, above n 23, p 14.

This is another factor which will need to be considered when making contact orders — if restoration is a case plan goal it will be necessary to ensure that the child is not placed in care for an extended period of time which may negatively affect the child's contact with the birth family. Alternatively, contact orders may need to impose more frequent contact which could counter the effect of lengthy stay in foster care, as long as the frequency of visits does not lead to loyalty conflict.

Kinship care

A number of studies have found that kinship care encourages more contact than non-kinship care. In fact, according to Berrick et al "56% of children in kinship care received at least monthly contact visits, compared with 32% of children in non-kin care".[27] As a result contact orders for children in this type of care will need to reflect these differences.

Interestingly, despite increased contact between the child and his or her birth parents, children in kinship care tend to remain in care for longer than children in ordinary foster care. Kovalesky suggests that placing children in kinship care reduces the parents' motivation to address their substance abuse or other issues which lead to the child's removal.[28]

If the court is of the view that the child should be restored to the family, it may be necessary to impose strict contact guidelines to ensure that the child's placement with kin does not jeopardise his or her return to birth parents.

Domestic violence, sexual abuse and parental imprisonment

Where a child has been removed from his or her family as a result of physical or sexual abuse, contact visits will most likely need to be supervised in order to ensure the safety of the child. In addition, the following matters will need to be considered prior to making contact orders:

- Permanently placed children who have suffered severe maltreatment may be re-traumatised when they have contact with the maltreating parent
- Children may therefore experience the permanent carers as unable to protect them and keep them safe. This will interfere with the child's ability to develop a secure attachment with their new carers
- Severely maltreated children who feel unsafe and insecure will continue to employ extreme psychological measures of defence which may lead to a variety of aggressive, controlling and distancing behaviours. These behaviours place great strains on the carer-child relationship and increase the risk of placement breakdown
- In contact cases where children suffer re-traumatisation, the need to make the child feel safe, protected and secure becomes the priority. Contact in the medium term would therefore not be indicated. This decision does not rule out the possibility of some form of contact at a later date, but this will depend upon whether or not the child has achieved levels of resilience … that will equip them to deal with the emotional arousal that renewed contact with a once traumatising parent will initially trigger.[29]

On the other hand where a parent has been imprisoned and the reasons for the parent's imprisonment are not linked to the child's removal, contact should proceed particularly if the

27 J Duerr Berrick, "What works in kinship care" (2000), in Scott et al, above n 22, p 17.

28 A Kovalesky, "Factors affecting mother-child visiting identified by women with histories of substance abuse and child custody loss" (2001) 80(6) *Child Welfare* p 749.

29 D Howe and M Steele, "Contact in cases in which children have been traumatically abused or neglected by their birth parents" in E Neil and D Howe (eds), *Contact in adoption and permanent foster care: research, theory and practice*, British Association for Adoption & Fostering, London, 2004.

parent is excepted to be incarcerated for a short time and reunification is a case plan goal. Consideration will however need to be given to the impact of visiting a parent in prison and other physical aspects of visitation in this unique setting.[30]

Parents' psychiatric illnesses

Where the safety of the child is not an issue, the Children's Court Clinic supports ample contact with the birth parent who is suffering from a psychiatric illness. Frequent contact reassures the child that his or her parent is coping with the separation and may also alleviate any fears that the child will develop the same psychiatric issues. If the child has inherited the parent's mood or psychiatric disorder, contact can provide a forum in which the child can discuss their mental health with their parent, and gain a better understanding of how to cope with the illness or disorder. If the child has expressed a desire to have contact with the parent contact visits will help the child feel less powerless and insignificant about his or her situation.

Supervision

In order to ensure the safety and welfare of a particular child, a contact visit may need to be supervised. Where the need for supervision is evident, the court is required to make that order and is not permitted to leave the requirement for supervision to the discretion of the Director-General of Community Services.[31]

Factors which may warrant supervision

Circumstances where it may be appropriate that the contact be supervised by another person include (but are not limited to) situations where:

- there are allegations that the contact parent has a psychiatric disorder, or where a parent's emotional or mental stability may be in issue;
- there are allegations of child abuse, whether physical, sexual or psychological in nature;
- a child may be expressing strong views that they are reluctant to see the contact parent alone;
- a parent's alcohol or drug consumption may be a possible threat to a child;
- the contact parent's conduct is anti-social and there is a risk that such behaviour may impinge upon the welfare of the child;
- there is a history of the contact parent engaging in abusive behaviour;
- the child has witnessed physical or verbal abuse between the parents;
- it will help the contact parent and the child adjust to new arrangements;
- the child is very young and the contact parent needs assistance;
- the child has not seen the contact parent for a long time; and/or
- the contact parent is expected to experience some parenting difficulty.[32]

Effect of supervision on contact visits — children's experience

Children view supervised visits both positively and negatively. For example, children often viewed contact services personnel as helping them to have contact in a safe environment that

30 P Hess and K Proch, *Family visiting in out of home care: a guide to practice*, Child Welfare League of America, Washington, 1988.
31 *Re Liam* [2005] NSWSC 75 at [48].
32 Redfern Legal Centre's *Lawyers Practice Manual New South Wales* at [2.3.208].

is free from parental conflict.[33] A number of children indicated that attending contact services premises significantly decreased the incidence of domestic violence or conflict between their parents, which made them feel safer.[34] These children also stated that the presence of a contact services provider made them feel safer to be with parents who had substance abuse problems, as the providers would intervene as soon as the parent became agitated or abusive.[35] On the other hand some children expressed the view that the presence of a contact services provider felt like an invasion of their privacy and prohibited them from openly engaging with their parent both verbally and physically.[36] Further, some children expressed their frustration at the inflexibility of re-organising contact visits, which lead to them missing out on sporting or social events.[37] This view was most commonly held by older children, suggesting that the need for and nature of supervision may need to change as the child gets older, and that there should be more flexibility in contact visit arrangements. Finally some children expressed the desire for other family members who are related to the visiting parent (and who they rarely saw) to attend supervised contact visits.[38]

Who should supervise contact visits?

When making supervised contact orders, the court should consider who would be the most suitable supervisor in the particular circumstances of the case. Preference should be given to a family member or a family friend, unless there is a specific need for a Community Services caseworker or a delegate to supervise the visits. Experience shows that when a family member supervises visits, particularly if they do so in their own home, members of the child's extended family often attend these contact visits. The child consequently has contact with members of the family they rarely see when contact visits occur at Community Services premises under the supervision of a caseworker, helping the child feel more as a part of his or her family despite their removal.

Resource implications of contact

Finally, magistrates making contact orders will need to be conscious of the resource implications of their orders. While it is important that contact orders adequately address a child's needs, it is also important not to make orders which may be too burdensome on either foster carers, birth parents or Community Services. Where a child cannot be placed in close proximity to his or her birth parents the cost of travel will need to be taken into account prior to making contact orders. As the Court of Appeal clarified in *George v Children's Court of NSW* [2003] NSWCA 389, the court cannot order the Director-General of Community Services to bear the cost of travel incurred by birth parents in the course of attending contact visits.

Aboriginal and Torres Strait Islander children — need for special consideration

When making contact decisions about Aboriginal or Torres Strait Islander (ATSI) children it is important to keep in mind principles governing care and protection orders in relation to those children, which are set out in ss 11, 12, 13 and 14 of the Care Act. Namely, contact orders should, as far as possible, encourage ATSI children to maintain links with their culture.

33 G Sheehan et al, *Children's contact services: expectation and experience*, Final Report, 2005, 147.
34 Ibid.
35 Sheehan, above n 34, p 148.
36 Sheehan, above n 34, p 153.
37 Sheehan, above n 34, p 154.
38 Sheehan, above n 34, p 158.

If a child cannot be placed with an ATSI carer, special care should be taken in placing a child in a location/community where the child may form and maintain those links with the Aboriginal culture even if it's immediate carers are not Aboriginal. In addition, when making contact orders in relation to ATSI children and particularly when, for whatever reason, the child does not have regular contact with its birth parents, the Magistrate making those orders should determine whether there are any other family or kinship members with respect to whom contact orders should be made. Further, Magistrates should also be aware of special cultural events and should craft contact orders which take these events into account.

Some views on contact

Children in care

The New South Wales Community Services Commission interviewed a number of children and young people in care as part of its "Voice of Children and Young People in Foster Care" project. The Commission was informed by the children who were interviewed that:

> The majority (47) wanted more contact and connection with their family members and other significant people in their lives. The only exceptions to this were those children and young people who had been placed in long-term care at a very early age and had remained in long-term stable placements with little or no family contact since. Even amongst this group however, there were many requests for more information about their families.[39]

The Commission also found that:

> Many children and young people involved in the consultations had lost significant relationships or had these relationships seriously diminished since coming into care.[40]

In addition:

> Some children and young people had lost multiple relationships while in care. For example, one young person, aged over 13 years at the time of the consultation, who had been in DoCS care since preschool age had lost contact with a grandmother, aunt and brother who lived a short distance away, both parents who lived interstate. The young person had never seen, since entering care, several siblings who lived interstate.[41]

The importance of contact with birth family for children in care is evident from individual accounts reproduced in the report. Many of these accounts indicated strong feelings of sadness, frustration and confusion on the part of the child in care.[42] On the other hand a young person who was placed with her own brother indicated that that was the best aspect of foster care.[43]

Barnardos

Barnardos acknowledge the need for children in care to remain in contact with their birth families. Barnardos also recognise that a child's need for contact does not remain static as they get older and that there is a need to regularly review contact plans and tailor them to the child's specific needs. For example, Barnardos recognise that infants and very young children who

39 Community Services Commission, *Voices of children and young people in foster care*, Consultation Report, 2000, 84.
40 ibid.
41 ibid, p 85
42 ibid, p 84–90.
43 ibid, p 84.

have not formed a very strong attachment to their birth parents prior to removal will require less contact than children in their pre-pubescent or adolescent years. However, Barnardos also stress the need for a realistic understanding of the difficulties of finding and maintaining foster or adoptive families and the importance of encouraging the child's attachment to the new family, particularly if the child is not expected to return home. According to Barnardos' *Establishing permanency for children — the issue of contact between children in permanent foster care and their birth families* monograph:

> For children in permanent out of home care, contact must be set at a level, which does not interfere with the child or young person's growing attachment to their new family. A child's attachment to their new family and their potential for future stability can be placed at risk by too many visits. Unrealistic visitation plans can jeopardise the child's chances of permanency as it can make finding and keeping a new family extremely difficult.[44]

Where a child is expected to remain in long-term care, Barnardos place paramount importance on the child's need to form an attachment to their new family, rather than on maintaining contact with their birth family. While this position is understandable, magistrates making contact orders in cases where restoration is not a realistic possibility should still have regard to the views expressed to the Community Services Commission by children in care, including views of children who had been in long-term care at the time of the interviews, and who also indicated that they needed some contact with their birth family, at the very least for identity and information purposes.

Children's Court Clinic's experience

For children who come from families with a history of mental illnesses, and who may be predisposed to developing a similar illness, contact visits can help the child deal with his or her removal from the family, understand his or her parent's mental illness, and address, at an early stage, any inclination to develop similar thinking patterns to those of their parents.

Speaking of a child in these circumstances, a Children's Court clinician explained the importance of contact in the following way:

> It is important for children's identity formation and psychosocial adjustment to know their parents as they really are, rather than idealize or demonize them in fantasy. Only access can do this.
>
> At times contact may be emotionally fraught or disappointing to the children, which makes access visits disruptive and burdensome for foster parents who may understandably wish to minimise access.
>
> However, it should be remembered L has 2 parents and an uncle who suffer psychiatric disorders … research clearly indicates that the thinking of individuals who are prone to mood disorder is characterised by pessimism and beliefs in their own helplessness … It is very important that L does not feel helpless and hopeless in her family situation, thinking from a young age that what she wants makes no difference.
>
> Having formed an attachment to her mother, she should be helped to sustain it. Having been disappointed by her mother, she should be given every opportunity to express her anger to her mother by rejecting her. Her mother should show she is hurt but keep coming back until she is forgiven. Keeping them apart will make L feel little and powerless.[45]

44 Barnardos Monograph 50, *Establishing permanency for children — the issue of contact between children in permanent foster care and their birth families*, 2003.

45 Magistrate Ellis, above n 8, p 5.

Children's mental health professionals

Children's mental health professionals also view contact as essential to a child's development of identity and means of dealing with any experiences of loss. In particular the professionals state that:

> In our view, identity is not a static, historically based concept. We see it as a dynamic developing process, formed within the context of ongoing relationships … We think this contributes to a sense of self in terms of self-esteem and self-worth. A positive sense of identity can only be developed in a relationship that supports that identity …[46]

However, they warn that the reverse is also true:

> Contact with a parent who is unable to do those things could have the opposite effect as it maintains the child's idea of him/herself as worthless and not valued by the parent.[47]

A guide to making contact orders

Community Services' approach

Community Services suggests that the following questions should be asked when making contact orders:

1. Is the goal reunification or not?
2. How strong is the attachment or relationship between children and their birth parents?
3. Are there real risks to the safety of the child? If a child has been abused it is necessary to ensure that there is no further abuse and that contact with an abusive parent does not compromise the child's foster placement due to their perception that the foster parents cannot protect them from harm.
4. Are the children's wishes for and reactions to contact taken into account?
5. How old and at what developmental stage is the child?
6. How supportive are the foster carers?
7. Are there changes in the relationships and situations since last assessment? In long-term fostering placements it is important that contact arrangements are monitored and reviewed over time.
8. Will the contact visits involve significant traveling and disruption to the child's routines? It is important that the frequency of any birth family contact should not be such that it interferes with the child and new parents spending enough time together consolidating their position as a new family.
9. When more frequent visits are required under a reunification plan or interim orders, practical issues may need to be taken into consideration.
10. How have the birth parents reacted to contact arrangements? Decisions about continuing contact visits should consider the reliability of the parents' visiting to date and the impact of missed visits on the child.
11. Has contact with fathers and other family members been considered?

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46 R Harris and C Lindsey, "How professionals think about contact between children and their birth parents" (2002) 7 *Clinical Child Psychology and Psychiatry* 147, 153.

47 ibid.

12. Has indirect contact been considered?

13. Where are the contact visits to take place?[48]

Once the above questions have been addressed and the overall relationship between the child and his or her parent/s has been assessed it is imperative to tailor contact arrangements to suit those needs and the nature of the particular relationship. The literature suggests that any prescriptive guidelines which do not adequately take into account the multifaceted nature of a particular parent child relationship, (like the ones proposed by CS), would not be an appropriate guide to making contact orders. Instead sufficient flexibility and judicial discretion needs to be permitted in order to create the most effective contact orders.

The Children's Court's current approach

In *Re Helen* [2004] NSWLC 7 Magistrate Mitchell held that in making contact orders it is imperative to have regard to the particular circumstances of the case, and make orders which specifically address those circumstances. Magistrate Mitchell stated that the making of contact orders should be approached in the following way:

> I think the best approach in a case such as this may be for the Court to identify the range of contact arrangements which will properly answer the needs of the individual child or young person, taking into account *his or her age, developmental level, background, attachments, life experiences, personality, talents, emotional resilience, deficits and wishes*. Then, when the appropriate range or spectrum of contact arrangements has been identified, the Court should consider the *safety of the child or young person, the circumstances which brought him or her into care, the fitness and willingness of the parents to cooperate in the contact process and the degree to which the parents might support the child in the placement or act to undermine it*. Those are matters which, in some cases, may impact adversely on the viability of contact. Finally, if the details of the placement are known or can be predicted with reasonable certainty, *the Court should consider the circumstances of the placement and the needs of the foster carers*. Clearly, there may be instances where proposed foster carers may be so unreasonable and heedless of the proper needs of a child for contact with a significant attachment figure that the contact order should be made and fresh placement arrangements then be made to accommodate the contact order. That might happen when a proposed foster carer is so bitterly opposed to contact with a particular parent that he or she simply refuses to facilitate contact which the Court has decided is necessary or where a proposed foster carer has difficulty tolerating a child's contact with family members of a particular racial background or religious persuasion … (Emphasis added.)

Magistrate Mitchell further held that the scarcity of foster placements as well as agency policies should not dictate the manner in which contact orders are made, nor should they be seen as more important than the child's need for contact. His Honour specifically stated:

> Sometimes, as in the present case, it will be argued that the scarcity of viable placements and the difficulty of recruitment of foster carers should influence the Court in the type of contact orders which it should make. But, that influence should apply, firstly, only where there is compelling evidence as to the unavailability of a suitable placement capable of accommodating the child's or young person's need for contact as determined by the Court and, secondly, only where the level of contact which the proposed placement can and will support falls within that range or spectrum of contact choices which the Court can still regard as an appropriate response to the child's needs. As to the first, I doubt that the Court should be much influenced in its decisions as to contact by the existence of a policy maintained by the agencies or even by Community Services unless that

48 NSW Department of Community Services, *Making decisions about contact*, 2006.

> policy has been measured against and tailored to suit the particular contact needs of the individual child or young person, the subject of the particular proceedings. Secondly, the Court is unlikely to endorse the making a long term placement without reference to the child's or young person's contact needs as determined by the Court and it should not be assumed that those contact needs are of less than critical importance for the welfare of the child or will be met adequately by a contact regime tailored primarily to the feelings and desires of carers or potential carers or the perceived needs of the agencies.

The need for review

Once contact orders are made, they should be regularly reviewed. As Hess pointed out, contact will lose much of its treatment capacity if not "used flexibility in a carefully and continuously planned process".[49] Regular review should be left to Community Services who are best placed to monitor and review contact. However, the extent to which the Community Services will follow any prescriptions in relation to review of contact plans is questionable, particularly if the New South Wales experience mirrors that of other states. Gilbertson and Barber found that in South Australia annual case plan reviews were not conducted as frequently as prescribed by the legislation. In particular they found that "in 1998, 1999/2000 and 2000/2001, a review had been conducted within the last 12 months in [only] 47%, 40% and 48% of cases, respectively".[50] Given the importance of regularly reviewing contact plans and maintaining their flexibility, the court may need to involve itself in this aspect of contact orders as well.

Conclusion

Decisions regarding the appropriate level, nature and frequency of contact are difficult to make since their effectiveness invariably depends on the extent to which they address the particular circumstances of the case, and there can consequently be no definitive formula which applies to all cases. Nevertheless, determination of any application under s 86 of the Care Act must always begin by establishing whether contact is in the best interests of the child. As already indicated, this decision will be based on the particular characteristics of the child and the circumstances of his or her case, while some guidance can be obtained from the general arguments in favour and against contact, and the extent to which any of these arguments apply to the particular situation. Once the court is satisfied that continued contact with the parents or other family members promotes the child's best interests, the court should approach the task of crafting contact orders by determining what functions or purposes contact visits are intended to serve in the particular circumstances. The court should then consider adverse effects which contact may have on children in particular situations and moderate the frequency of contact in order to prevent these effects. The court must also be aware of the factors which may in some circumstances inhibit contact visits or affect their quality, and as far as possible tailor contact orders so as to overcome these factors. Finally, when making contact orders magistrates should have regard to the views expressed by children in care and about contact, and in particular their frequent desires to have more contact with their parents, siblings and other family members.

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49 P Hess, "Case and context" (1988) 67(4) *Child Welfare* 311.

50 See Scott et al, above n 23, p 12.

Piaget's stages of cognitive development

Piaget's chart ..... [18-6000]

[18-6000] Piaget's chart

A table of Piaget's stages of cognitive development

Sensory Motor Period (0–24 months)

Developmental Stage & Approximate Age	Characteristic Behaviour
Reflexive Stage (0–2 months)	Simple reflex activity such as grasping, sucking.
Primary Circular Reactions (2–4 months)	Reflexive behaviours occur in stereotyped repetition such as opening and closing fingers repetitively.
Secondary Circular Reactions (4–8 months)	Repetition of change actions to reproduce interesting consequences such as kicking one's feet to more a mobile suspended over the crib.
Coordination of Secondary Reactions (8–12 months)	Responses become coordinated into more complex sequences. Actions take on an "intentional" character such as the infant reaches behind a screen to obtain a hidden object.
Tertiary Circular Reactions (12–18 months)	Discovery of new ways to produce the same consequence or obtain the same goal such as the infant may pull a pillow toward him in an attempt to get a toy resting on it.
Invention of New Means Through Mental Combination (18–24 months)	Evidence of an internal representational system. Symbolizing the problem-solving sequence before actually responding. Deferred imitation.

The Preoperational Period (2–7 years)

Developmental Stage & Approximate Age	Characteristic Behaviour
Preoperational Phase (2–4 years)	Increased use of verbal representation but speech is egocentric. The beginnings of symbolic rather than simple motor play. Transductive reasoning. Can think about something without the object being present by use of language.
Intuitive Phase (4–7 years)	Speech becomes more social, less egocentric. The child has an intuitive grasp of logical concepts in some areas. However, there is still a tendency to focus attention on one aspect of an object while ignoring others. Concepts formed are crude and irreversible. Easy to believe in magical increase, decrease, disappearance. Reality not firm. Perceptions dominate judgment. In moral-ethical realm, the child is not able to show principles underlying best behaviour. Rules of a game not develop, only uses simple do's and don'ts imposed by authority.

Period of Concrete Operations (7–12 years)
Characteristic Behaviour:
Evidence for organized, logical thought. There is the ability to perform multiple classification tasks, order objects in a logical sequence, and comprehend the principle of conservation. Thinking becomes less transductive and less egocentric. The child is capable of concrete problem-solving.
Some reversibility now possible (quantities moved can be restored such as in arithmetic: 3+4 = 7 and 7-4 = 3, etc).
Class logic-finding bases to sort unlike objects into logical groups where previously it was on superficial perceived attribute such as colour. Categorical labels such as "number" or "animal" now available.

Period of Formal Operations (12 years–adulthood)
Characteristic Behaviour:
Thought becomes more abstract, incorporating the principles of formal logic. The ability to generate abstract propositions, multiple hypotheses and their possible outcomes is evident. Thinking becomes less tied to concrete reality.
Formal logical systems can be acquired. Can handle proportions, algebraic manipulation, other purely abstract processes. If a + b = x then a = x - b. If ma/ca = IQ = 1.00 then Ma = CA.
Prepositional logic, as-if and if-then steps. Can use aids such as axioms to transcend human.

Parenting capacity*

Dr T Donald† and J Jureidini‡

Introduction ..... [18-7000]

The primacy of parenting capacity

The relationship of parenting capacity to the child's parentability and available scaffolding

Practical application

Case examples

Conclusion

References

The authors describe an approach to the assessment of parenting for families in which child abuse has been established to have occurred. Neither the category of abuse nor its physical severity adequately predicts the future wellbeing or safety of an abused child. The critical variable in determining the child's future is the level of disturbance in parenting. The authors argue against the most common approach to assessments of parenting, which is to generate a non-hierarchical list of issues with the emphasis on relatively concrete and readily measurable dimensions such as social support, parental knowledge about parenting and the child's developmental status. The authors enhance the standard approach to assessment by organising it around parenting capacity. They do not attempt to operationalise parenting capacity, defining it as the parents' ability to empathically understand and give priority to their child's needs. Adequate parenting requires that the parents be able to meet the challenges posed by their particular child's temperament and development (which may be shaped by the abusive experience) and also to accept and be prepared to address their own intrinsic characteristics which impede their parenting capacity. Parenting capacity is more difficult to assess than the more concrete and commonly measured aspects of parenting, but the authors argue that its assessment should be central to child protection management decisions.

[18-7000] Introduction

Any significant abuse experienced by a child has a psychological component, and the extent of the psychological harm accompanying abuse is not always readily apparent. Child protection legislation and practice now reflect this situation by de-emphasising categorical definitions of abuse in favour of regarding children as having been abused when they are significantly harmed by parental behaviour. This changed position recognises that the degree of psychological harm is not determined by the category of abuse or the presence or severity of physical harm but by the degree of breakdown in the normal parental nurturing of that child inherent in any abuse. While it is now accepted that an evaluation of parenting is essential to decision making about child

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safety, treatment and reunification issues in confirmed cases of child abuse,[1] many clinicians find the idea of assessing parenting uncomfortable because there is no widely accepted, simple, quantitative measure.

We assert that when harm to a child is able to be attributed to parental or carer behaviour, a parenting assessment should occur. Our position is that parenting assessments are best undertaken after abuse has been confirmed. However, we acknowledge that some practitioners will use parenting assessment as part of the overall assessment process which leads to abuse confirmation. We believe that confirmation of abuse is important prior to the commencement of the parenting assessment because then the focus is clear: namely, the parents' reaction to and their level of acceptance of the harm their child has suffered as a result of their behaviour; and those aspects of the parent-child relationship (eg empathic regard for the child) central to assessment of parenting. Confirmation might be by forensic medical assessment; a child making a clear, reliable allegation of abuse by a parent/carer in the context of a forensic interview; a court finding that a child has suffered harm in the care of an individual (whether or not the parent/carer accepts that finding); or a parent/carer admitting that they have harmed their child.

Consequently, in this paper, we advocate for a parenting assessment that centres on the primacy of the parent's capacity to provide empathic, child-focused parenting. Such an approach escapes from the limitations of those parenting assessments that infer judgments about parenting from too narrow an information base (for example: microanalysis of videotaped interactions;[2] ratio of child-centred to child-directive behaviours;[3] or those that focus on specific aspects of a parent-child relationship. For instance, the Adult Attachment Interview (AAI) has been used to assess parenting,[4] and while the data generated in the course of the AAI will be useful in making judgments about parenting capacity, there is no clear relationship between attachment categories and parenting capacity. We agree with Reder and Duncan[5] that it is unwise to speak of parenting purely in terms of attachment theory.

Further, recently published systematic approaches to the assessment of parenting[6] concentrate more on factors which influence the quality of parenting rather than the prime task of parenting. The extensive checklists of positive and negative qualities of parenting provided by these approaches are broadly useful and informative, but there is no clear indication of their relative individual importance. For example, Gray[7] reports on the British Department of Health's *Framework for the assessment of children in need and their families*,[8] consisting of 20 dimensions of parenting grouped into three domains: child's developmental needs; parenting

1 P Reder and C Lucey, *Assessment of parenting: psychiatric and psychological contributions*, Routledge, London, 1995.

2 J Osofsky and K Connors, *Handbook of infant development*, J Osofsky (ed), Wiley, New York, 1979, pp 519.

3 S Jenner, "The assessment and treatment of parenting skills and deficits: within the framework of child protection" (1992) 14 *ACPP Newsletter* 228.

4 G Adshead and K Bluglass, "Attachment representations and factitious illness by proxy: relevance for assessment of parenting capacity in child maltreatment" (2001) 10 *Child Abuse Review* 398.

5 P Reder and S Duncan, "Abusive relationships, care and control conflicts and insecure attachments" (2001) 10 *Child Abuse Review* 411.

6 K Browne, "Predicting maltreatment", *Assessment of parenting: psychiatric and psychological contributions*, P Reder and C Lucey (eds), Routledge, London, 1995, pp 118; J Gray, "Framework for the assessment of children in need and their families" (2001) 6 *Child Psychology and Psychiatry Review* 4; S Azar, A Lauretti, B Loding, "The evaluation of parental fitness in termination of parental rights cases: a functional–contextual perspective" (1998) 1 *Clinical Child and Family Psychology Review* 77.

7 J Gray, ibid n 6.

8 Department of Health et al, *Framework for the assessment of children in need and their families*, The Stationery Office Ltd, 2000.

capacity; and family and environmental factors. Useful guidance is given as to how to assess each dimension and specific tools are provided to measure some parameters, but the approach does not seem likely to realise its aim to produce an "in-depth assessment that addresses the central or most important aspects of the needs of a child and the capacity of … caregivers to respond appropriately to those needs". Rather, it will result in a grouped list of factors with no indication of the relative importance of particular dimensions. In spite of the list being configured as a triangle, there is no indication as to how the different dimensions interact.

Our approach canvasses three similar domains and our definition of parenting capacity is comparable to that of the Department of Health's *Framework*.[9] However, we differ radically in the emphasis that we give to parenting capacity, our first priority in assessing parenting being specifically to assess the adequacy of the emotional relationship between parent and child. We regard other dimensions of parenting as interacting to determine parenting capacity. Only when parenting capacity is either found to be adequate or plans are developed to address its shortcomings do the dimensions of parenting as listed in the *Framework* have relevance and use in planning parenting interventions.

Azar and colleagues[10] share our reservations about existing methods of assessing parenting where children have been harmed by abuse. They note the "extreme caution" that needs to be exercised in view of the lack of a secure theoretical or empirical base for the work of parenting assessment and the potential for cultural and other bias in the assessor. They highlight the need to "link parent's individual skills/deficits with their capacity to parent a particular child" at a particular developmental phase, within a specific environmental context. But from that starting point, they adopt a very different approach to the one we advocate. It is implicit in Azar's model that parental empathy is central, but empathy is only listed by them as the second of six "social skills" desirable in a parent, while we focus explicitly on the parental capacity for empathy. Where we aim to deal with the inherent uncertainty of parenting assessment by emphasising the core issues, they take an exhaustive approach to assessment, including the use of "validated tools". In situations of statutory intervention, they aim to put as much useful information and as many alternative interpretations as possible before the judicial officer. Effectively, their approach identifies the strengths and weaknesses of assessed parents but does not specifically relate these factors to the overall performance of the parents in their care of the child they have harmed. We are not convinced that decision making in relation to parenting is enhanced merely by the provision of more and more information. On the other hand, the assessment processes that we propose in this paper are not equivalent to a "short-cut parenting assessment". Our approach builds on the currently used assessments that are utilised to form the basis of decision making for future management of children who have been harmed by their parent/carer. We propose that the information gathering which characterises many parenting assessments must be organised around an appraisal of the parent's ability to recognise and adequately provide for their child's current and anticipated needs, in the context of their level of empathic response to the level of harm experienced by their child.

The primacy of parenting capacity

Parenting assessments in the context of child abuse are of most use when abuse has been confirmed. In such situations, statutory authorities are more able to act upon the recommendations following a parenting assessment, for instance by obligating parents to

9 ibid n 8.
10 Azar et al, above, n 6.

partake in therapeutic work based on the parenting assessment or by imposing conditions on their access to their children. Potential for reunification is predicated on the absence of factors that would indicate that a child would be unsafe in the environment of care. For instance, clinical experience suggests that parenting cannot be effective when parents are severely depressed or intellectually handicapped, or subject to recurrent, uncontrolled domestic violence or incapacitating substance abuse (except in those cases where this primary issue can be resolved). Furthermore, when parents do not acknowledge that their caring is seriously compromised, it is not possible to begin the process of rectification, and the continuation of that particular parent-child relationship is untenable.[11]

The quality of parenting is reflected in an adult's ability to recognise and adequately provide for, in a developmentally and emotionally appropriate manner, a child's current and anticipated needs. Adequate parenting is flexible enough to adapt to variability in those needs, and the particular child's repertoire of responsiveness, in the context of their social environment. Therefore, while factors both in the child and in the environment shape the quality of parenting, the critical determinant of the experience for the child resides within the parent and is referred to by us as parenting capacity. We propose that misattribution of shortcomings in parenting to other causes, for example poverty or poor social supports, results in suboptimal decision making and management. We advocate an assessment process that addresses the standard three domains of parenting by the gathering of relevant information but which gives priority to parenting capacity, which is the *product* of the interaction of child, parent and environmental factors, not just a summation of separate problems. In our approach we ask:

(1) How well could these parent(s) perform the tasks required of them given optimal circumstances?

The information gained from the domain of "parental factors" gives some guidance to the areas where parenting performance might be impaired, for example a history of significant childhood abuse. Parenting capacity may indirectly refer to how people go about the parenting tasks required of them but it primarily relates to the *psychological qualities* they bring to those tasks. Therefore, the crucial concerns are:

- The parent's ability to create and sustain intimate relationships with their child within which the needs of that child can be empathically recognised and met. Being able to identify the child's needs does not guarantee adequate parenting. The parent must also be able to give priority to those needs, if necessary at the expense of meeting his/her own needs. Thus a mother might have to exclude a potentially violent partner from her house to protect her children, even if this robs her of intimacy and support. An indication of the parent's capacity for intimacy with the child can be gleaned from the quality of the intraparental relationship, particularly with regard to dependency, disharmony and levels of violence.

- The parent's awareness of the potential or actual effects of adverse relationship stresses on their child; in particular, the various forms of family violence.

- The parent's ability to avoid dangerous impulsiveness and to take responsibility for their behaviour. The ability of an individual to take responsibility for their day-to-day activities might not be tested until they become parents/carers.

11 D Jones "Treatment of the child and the family where child abuse or neglect has occurred", *The battered child*, 5th edn, M Helfer, R Kempe, R Krugman (eds), University of Chicago Press, Chicago, 1997.

These psychological qualities are relatively fixed, but not immutable. Change in parenting capacity is personal level change and therefore is unlikely to be achieved just by educational input. Someone who has undergone a significant change in parenting capacity is likely to be perceived by self and others as a changed person. While having children might expose deficiencies, we have seen cases where a woman with apparently limited parenting capacity grows through the experience of childbearing to the point that she is then able to provide good parenting.

(2) How difficult is this child to parent?

Some developmental phases are more demanding on parents than others, and some children are more difficult to parent than others. Of course, one reason a child is more difficult to parent is because harm has occurred through abusive parenting. Our assessment establishes the "parentability" of this child in this family and identifies which aspects of parentability are most amenable to modification. Like Azar,[12] we look to see if parents are able to operate in the child's "zone of proximal development", especially when increasing desire for autonomy renders their child more demanding of their tolerance and containment. Factors affecting a child's parentability are not always intrinsic to the child, for example any idiosyncratic meaning that a particular child might have to a caregiver, such as reminding the mother of her former violent partner or sexually abusive father.[13] Such meaning will alter the parentability of that child for that mother, without implying anything about the primary intrinsic qualities of the child.

(3) What is the level, nature and context of the socio-environmental structural support ("scaffolding") in which parenting is occurring?

Scaffolding includes such qualities as knowledge about practical parenting skills, as well as external factors such as the availability of family, community, professional and statutory supports. Adequate parental functioning is always at risk of being compromised when there is an inadequate parenting scaffold in place, and an important task of assessment is to establish whether parenting capacity will be significantly aided by scaffolding provisions. Giving priority to parenting capacity is not to diminish the importance of scaffolding or to suggest that the two are independent. As Azar[14] points out, the expression of parental skills can be enhanced or diminished by environmental resources. However, it must be accepted that no amount of scaffolding can correct fundamentally flawed parenting capacity. For example, someone whose parenting capacity is compromised by drinking to the point of intoxication most days, will gain little from learning practical parenting skills. However, a mother living in poverty, who has difficulty making sense of and meeting the needs of her demanding disabled child, might have her parenting capacity enhanced to acceptable levels by the provision of, for example, respite care and financial support. (See Table 1, below.)

12 Azar et al, above, n 6.

13 P Reder and S Duncan, *Assessment of parenting: psychiatric and psychological contributions*, Routledge, London, 1995.

14 Azar et al, above, n 6.

The relationship of parenting capacity to the child's parentability and available scaffolding

Carers in whom parenting capacity is potentially adequate and who are responsible for a child who is difficult to parent may not achieve their potential because of a lack of adequate scaffolding or the presence of significant environmental adversity, both factors negatively influencing the psychological quality of the parent-child relationship.

- The family of a young single mother with potentially adequate parenting capacity might need to be protected from the adverse influence of the mother's own intrusive and demanding mother,
- parenting capacity might be diminished by physical tiredness due to lack of practical support in the care of children who are difficult to parent.

Merely addressing the adverse components of each of the domains of parenting risks overlooking the primary components of parenting capacity. For instance, inadequate physical care of a child can result from such factors as a lack of economic resources or knowledge about children; or from a parent's failure to recognise or give priority to the child's psychological needs. The former should be seen as a problem of scaffolding for parenting, the latter as a problem of parenting capacity and therefore likely to be refractory to intervention by the provision of scaffolding alone. Thus, if a problem is attributed to a parenting domain deficit rather than a problem with parenting capacity, it will lead to the wrong type of intervention and expose the child to further harm. This error is most often manifest in an agency's decision to devote considerable resources to *scaffolding*, without adequately assessing how the child's psychological needs are being met. Strategies for augmenting scaffolding are more readily applied than interventions to enhance parenting capacity, and it is more comfortable to blame circumstances than to confront shortcomings in parental functioning. For example, in a case of reported neglect, finding the family's house to be dirty and lacking in food will suggest attention to scaffolding issues such as poverty and lack of social support, with the risk of overlooking harmful parenting and incorrectly concluding that the problem will be solved by the provision of further scaffolding. Parenting capacity must still be considered even when issues such as poverty are clearly present.

Because parenting capacity is not a measure of how people go about the tasks of parenting but refers to the psychological qualities they bring to those tasks, the intervention required to improve parenting capacity is not solely to provide educational input about practical aspects of parenting or disciplinary practice (these skills merely "scaffold" parenting capacity). Therapists need to address the more elusive and challenging range of issues listed above, most importantly the evidence for empathic understanding of, and giving priority to, this child's needs by the parent/carer. An attempt must be made to give parents who have harmed their child insight into their relationship and the shortcomings in their parenting capacity, particularly in their ability to anticipate, recognise and give priority to their child's needs. Thus the primary thrust of therapy where there are significant concerns about parenting capacity will centre around parental acceptance of responsibility for past acts and any damage done, resolution of previous trauma, management of the parent's own emotional feelings and their capacity to recognise and respond healthily to feelings in their children. Reder and Duncan's[15] notion of care and control conflicts can be helpful in identifying areas for intervention that may be productive in enhancing parenting capacity.

15 Reder and Duncan, above, n 5.

Table 1

Factors to be considered in assessing parenting
1 Primary domain: parenting capacity
• Capacity to form healthy, intimate relationships, as manifest by: (i) recognition of the child's needs and the ability to put them before parental needs and wants (ii) awareness of the potential effects of relationship stresses on children (iii) ability to take responsibility for personal behaviour, including the abuse (iv) capacity to avoid dangerous, impulsive acts. • Acceptance by the abusive parent of their primary responsibility for providing a safe environment for their child. • Awareness by the parent(s) of the possible effects of their own experience of being parented. • Provision of physical and emotional care appropriate to the child's developmental status
2 Modulating effects: child's parentability
• Any disability, illness or emotional disturbance either prior to, or as a result of maltreatment. • Degree to which the child's emotional state has been compromised by the maltreatment. This will be influenced by the child's preexisting wellbeing and developmental status, the nature and frequency of the abuse involved and the relationship between the child and the abuser. • Developmental age of the child at the time of the abuse. • Any idiosyncratic meaning that a particular child might have to a caregiver.
3 Modulating effects: scaffolding for parenting
• Knowledge base and parenting experience • Support that parents are able to give each other in parenting • Support or distress from extended family and other external sources • Use of alcohol and other drugs • Financial stresses • Positive and negative effects of involvement in the legal system • Relationship between parents and professionals (past and present), including readiness to accept professional help, and responses to previous professional attempts to help.

Practical application

A common thread that runs through many published approaches to parenting is the attempt to define "threshold" (above the threshold a parent is good enough, below not good enough) by the prevalence of adverse factors identified in the parent. In our experience, there is a tendency to downplay the significance of adverse factors in parenting where the child is identified as being difficult to parent. For example, when a child is diagnosed as having ADHD, we often observe tolerance of a higher number of adverse factors identified in the parenting domain in recognition of the challenge posed by the child. We have found that rather than up- or downgrading adverse factors identified in the three domains, it is more useful to incorporate them into an assessment of parenting capacity as outlined above. This allows more reliable identification of those parents whose children must be considered to remain at an unacceptable risk of experiencing further harm, independent of how challenging the child is.

Once a statutory agency has confirmed that a child has been harmed by parental behaviour, the first step of the parenting assessment is to establish the carer's initial level of acceptance of that fact and the degree of responsibility taken either for direct harm caused to the child or failure

to protect the child from some other harmful influence. The detailed discussion with parents about their harmful behaviour will provide important data about parenting capacity. We are not looking for rote expressions of remorse, but rather for statements that indicate the parents' capacity to see the experience from the child's point of view and to realistically appraise what might need to change for the child to thrive in their care.

Because a significant time has usually elapsed between the harmful events and the assessment, we explore the parent's current perception of the child and his/her needs.

Process summary

Step 1 Confirmation of harm due to abuse by a statutory agency.

Step 2 Establish carers' initial level of: acceptance that harm has occurred; plus responsibility taken for harm.

Step 3 Conduct parenting assessment that establishes *parenting capacity*.

Step 4 Elicit carers' response to the negative aspects of parenting capacity.

Step 5 Gauge the influence of the assessed parenting capacity on the carers' level of acceptance of responsibility for harm (as defined in Step 2).

Step 6 Provide a final opinion which:

- reiterates the established harm
- states the initial level of responsibility taken by the carers for the harm done
- states the assessed parenting capacity and the consequential carers' response
- states the subsequent level of responsibility taken by the carers for the harm done to the child,
- states the optimal management plan for the child(ren) and family in relation to future safety, therapeutic needs and reunification based on the assessment of parenting capacity, the level of responsibility taken by the carers and their preparedness to address the identified parenting issues.

Case examples

Case 1

A mother was seeking custody of her 7-year-old child who had been in the care of his maternal grandparents for four years after she had grossly neglected him during years of heavy drug use. By the time we saw her, she was expressing strong positive feelings towards her son, had not used illicit drugs for three years, had been pronounced well by a senior psychiatrist; furthermore, the boy presented no particular parenting challenges. Yet, in the course of our assessment, we were discouraged by the fact that the mother did not see her son's separation from his grandparents (were he to come into her care) as a potential problem for him. This observation suggested to us that, for all her other improvements, she had not learnt to recognise his emotional and developmental needs. We therefore recommended that a potentially lengthy phase of further therapy was required before reunification could proceed further.

Case 2

A young infant was admitted with a fracture dislocation of one elbow and several metaphyseal fractures. No explanation was proffered to account for the injuries, which were judged to be inflicted. A "standard parenting assessment" which surveyed the three domains (parental factors, child factors and environmental factors) failed to identify the presence of any major adverse factors in any of the domains. The parents were well educated, had good supports and the child had no handicaps. When the injuries were reviewed with the parents, the child's father was clearly distressed, seeking reassurance that the pain resulting from the fractures would not affect the baby long term. However, the mother seemed not to share his reaction, only expressing concern as to what disease the baby must have to cause such fractures. Further careful exploration failed to identify any capacity for the mother to feel what it must have been like for the baby. Thus, while the "standard assessment" did not identify any grounds for concern, we concluded from the mother's lack of empathy for the baby that her ongoing care of her infant, in the context of the unexplained inflicted injuries, would continue to expose the baby to high risk of further harm.

We do not often observe access visits or other interactions between parent and child, as we do not think parenting capacity is tested by the task of interacting positively with children during limited contact. The important requirement is that the individual can parent in adverse circumstances that are an almost inevitable part of sustained parenting. Yet it is inappropriate for a parent to have prolonged care of a child before parenting is fully assessed. Therefore, we look to other intimate relationships.

Case 3

Our concerns about one mother who had severely damaged her son were attenuated by the fact that, in the two years since the abuse, she had developed and maintained her first satisfactory intimate relationship with a man who had successfully raised two older children. Scaffolding from this relationship seemed to have facilitated her ability to make fundamental change in a way that enhanced her parenting capacity. Thus, she could now talk with a degree of depth and empathy about her new partner and his children, and about her own child and the damage that she had done to him.

We then feed back to parents our initial assessment and our appraisal of how we perceive their ability to recognise and give priority to their child's needs. We are particularly interested in their response to any deficit in parenting capacity that we have identified and whether we can help them towards a fuller acceptance of their responsibility for harm done to the child.

On the basis of this response, we then provide an opinion which clearly sets out:

1. the confirmed harm suffered by the child, the level of responsibility taken by parents and our assessment of parenting capacity
2. the parent's response to our assessment, and
3. a recommended management plan.

When parenting capacity is significantly compromised, we may recommend that reunification should not be pursued. More often, we recommend a plan that will focus on steps required to address shortcomings in parenting capacity, but will also identify any areas of the child's

parentability and/or scaffolding that require attention. The first step towards reunification will be some form of therapy, either individual or family/marital, to address the blocks to an empathic appreciation of the child's needs. Thus the focus of intervention may be: unresolved issues from the parent's own experience of being parented; mental illness in the parent; emancipation from a situation of potential domestic violence. We acknowledge that there is no approach to the treatment of damaged parents that is well supported by systematic evidence, but this should not distract from the fact that repairing such damage is essential if adequate parenting capacity is to be restored or established.

Conclusion

We believe that to develop a proper understanding of child maltreatment, and to be able to make informed management decisions, particularly in relation to child safety and levels of danger, a systematic assessment of parenting is required. The primary role of such parenting assessments should be to establish the parenting capacity of the child's carers. Parenting capacity must be the foremost determinant of the design of the therapeutic programme and of the nature of care arrangements that should continue between the child and parents. It may be the case that some less experienced practitioners will feel daunted in formulating judgments about parenting capacity in the way that we use the term. However, the expertise available in established child protection or mental health services should enable practitioners who wish to follow this approach to receive adequate training and supervision.

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Assessing parenting capacity in a child welfare context*

K Budd†

Introduction ..... [18-8000]

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Child welfare decisions are frequently complicated by incomplete or disputed facts, time deadlines, and the unpredictability of future events. In response to such challenges, psychologists or other mental health professionals are often asked to provide clinical evaluations related to parenting capabilities. The current paper describes the background and components of a clinical practice model for mental health evaluations of parents in a child welfare context and provides two case examples of the model's use. The objectives of the paper are to (a) describe recommended ingredients of clinical evaluations of parents, (b) identify what the evaluations can and cannot do, and (c) illustrate how parent evaluations can enhance caseworkers' and attorneys' understanding of issues related to case planning and disposition.

[18-8000] Introduction

As social service and legal professionals are all too aware, decision making in child welfare is laden with risk and uncertainty. Determinations are frequently complicated by incomplete

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or disputed facts, time deadlines, and the unpredictability of future events. In the face of such challenges, caseworkers and lawyers sometimes turn to psychologists or other mental health professionals to provide clinical evaluations related to parenting issues.[1]

Common referral questions in evaluations of parents focus on their cognitive, emotional, and social functioning; care-giving skills and deficits; the impact of substance abuse or mental illness on parenting ability; characteristics of the parent-child relationship; risk and protective factors in the family; and progress in response to mandated services. Parents may be referred to assist in service planning or to inform dispositional decisions such as placement, permanency goals, visitation arrangements, or termination of parental rights. At their best, parenting assessments can provide an informed, objective perspective that enhances the fairness of child welfare decisions.[2] At their worst, they can contribute inaccurate, biased, and/or irrelevant information that violates examinees' rights and/or impairs the decision-making process.

The current paper describes the background and components of a clinical practice model for mental health evaluations of parents in a child welfare context and provides two case examples of the model's use. The objectives of the paper are to (a) describe recommended ingredients of clinical evaluations of parents, (b) identify what the evaluations can and cannot do, and (c) illustrate how parent evaluations can enhance caseworkers' and attorneys' understanding of issues related to case planning and disposition. The paper focuses on evaluation of parenting capacity in cases of physical abuse, neglect, or dependency. The terms evaluation and assessment are used interchangeably.

Background and rationale

Evaluating parents in a child protection context is different from evaluation that occurs as part of clinical services such as parent training or psychotherapy, because there is a high likelihood that the evaluation will be used in legal proceedings. Many clinicians are not trained in forensic assessment (ie, assessment for a legal purpose) and, as a result, they often fail to follow forensic guidelines. For example, the Committee on Ethical Guidelines for Forensic Psychologists[3] states that the forensic evaluator should have no other relationship with the examinee, whereas in clinical practice a mental health professional sometimes serves as both evaluator and therapist for a client. Further, in forensic evaluations, clinicians are obligated to inform the subject

1 S Azar et al, "The evaluation of parental fitness in termination of parental rights cases: a functional-contextual perspective" (1998) 1 *Clinical Child and Family Psychology Review* 77; D Baerger and K Budd, "Parental competency to consent in child protection proceedings" (2003) 4(2) *Family Law Psychology Briefs*; R Barnum, "A suggested framework for forensic consultation in cases of child abuse and neglect" (1997) 25 *Journal of the American Academy of Psychiatry and the Law* 581; K Budd, "Assessing parenting competence in child protection cases: a clinical practice model" (2001) 4 *Clinical Child and Family Psychology Review* 1; K Budd and M Holdsworth, "Issues in clinical assessment of minimal parenting competence" (1996) 25 *Journal of Clinical Child Psychology* 1; L Condie, *Parenting evaluations for the court: care and protection matters*, Springer-Verlag New York Inc, New York, 2003; F Dyer, *Psychological consultation in parental rights cases*, New York Guilford Press, 1999; R Otto and J Edens, "Parenting capacity", T Grisso (ed), *Evaluating competencies: forensic assessments and instruments*, 2nd edn, Springer-Verlag US, 2003, pp 229–307.

2 American Psychological Association Committee on Professional Practice and Standards, *Guidelines for psychological evaluations in child protection matters*, American Psychological Association, Washington, DC,1998.

3 Committee on Ethical Guidelines for Forensic Psychologists, "Specialty guidelines for forensic psychology" (1991) 15 *Law and Human Behavior* 655.

of limitations on the confidentiality of information, independently corroborate information obtained from a third party, and apply a higher standard of data documentation than is typically used in clinical practice.[4]

Controversy exists as to the credibility of parent evaluations due to the methods and practices used by clinicians.[5] In response to these concerns, the American Psychological Association (APA) Committee on Professional Practice and Standards established guidelines outlining professional competencies, procedures, and ethics of desired practice in child protection cases.[6] Although other professional bodies[7] also have developed recommendations for professional evaluators, the APA guidelines are the most specific with reference to evaluations of parents. Selected provisions of the APA guidelines are listed in the first section of Table 1.

Little empirical information exists about the extent to which parent evaluations in child welfare conform to recommended guidelines. However, two studies that have investigated this topic[8] identified substantial limitations in the quality of evaluations, suggesting that clinical practice in the field has yet to reflect the recommended guidelines. In particular, Budd et al[9] found that parent evaluations frequently evidenced numerous problems: vague referral questions; a single office session with the parent, with no direct information on the child or parent-child interactions; reliance on traditional psychological instruments not directly related to parenting; limited access to or use of written records; minimal collateral information from caseworkers or therapists; failure to warn parents of the purpose and limits of confidentiality of evaluations; and overstated conclusions and recommendations.

Table 1

What to look for in a parenting capacity assessment
Does it follow APA *Guidelines for psychological evaluations in child protection matters?*[10]
• determine scope of the evaluation based on the nature of the referral questions
• inform participants about the limits of confidentiality
• use multiple methods of data gathering (eg, records, questionnaires, interviews, observations, collateral sources)
• make efforts to observe child together with parent, preferably in natural settings
• neither over interpret nor inappropriately interpret assessment data
• provide an opinion only after conducting an evaluation adequate to support conclusions

4 ibid.

5 K Budd and M Holdsworth, "Issues in clinical assessment of minimal parenting competence", above n 1; T Grisso, *Evaluating competencies: forensic assessment and instruments*, New York Plenum Press, 1986; G Melton et al, *Psychological evaluations for the courts: a handbook for mental health professionals and lawyer*s, 2nd edn, New York Guilford Press, 1997.

6 APA Committee on Professional Practice and Standards, above n 2.

7 eg, American Academy of Child and Adolescent Psychiatry, "Practice parameters for the forensic evaluation of children and adolescents who may have been physically or sexually abused" (1997) 36 *Journal of the American Academy of Child and Adolescent Psychiatry* 423.

8 K Budd et al, "Clinical assessment of parents in child protection cases: an empirical analysis" (2001) 25 *Law and Human Behavior* 93; M Morietti et al, *Final report: an empirical evaluation of parenting capacity assessments in British Columbia: toward quality assurance and evidence based practice*, Family Court Centre, Provincial Services, Ministry for Children and Family Development, British Columbia, Canada, 2003.

9 Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1.

10 APA Committee on Professional Practice and Standards, above n 2.

What to look for in a parenting capacity assessment
Do the methods and content directly address parenting? • focus evaluation on parenting characteristics and the parent-child relationship rather than general adult cognitive or personality functioning • use a functional approach, emphasising behaviour and skills in everyday performance (eg, what the parent understands, believes, knows, does, and is able to do with regard to parenting)[11] • look for evidence of minimal parenting adequacy rather than comparing parent to an optimal standard • describe parent's current strengths, rather than only weaknesses, as they relate to the parent-child relationship and meeting children's needs • identify contextual conditions (environmental, social, or historical variables) likely to positively or negatively influence parenting adequacy • describe the prognosis for remediation of problems and potential interventions to address the problems
Does it list and answer specific referral questions? • clarify what issues or questions are to be addressed regarding parental functioning, the problems or events that have given rise to the concerns, and the outcomes or options that will be affected by the findings • answer each referral question, by summarising the data and linking the findings to interpretations
Is the report thorough, clear, and understandable? • provide a chronology of assessment activities, including full names and dates of instruments administered, persons interviewed, and records reviewed • if diagnostic terms are used, explain what they mean in lay terms, the basis for the diagnosis, how the diagnostic condition is likely to impact parenting, and optimal interventions for the condition • fully disclose the limitations of the assessment and offer alternative explanations for data; in particular, consider the reliability and validity of findings when based on normative comparison groups that differ from the parent being evaluated • avoid making casual interpretations (eg, "the parent is unable to love because of her own history of deprivation") or predictions about the future (eg, "this parent will abuse again") that cannot be substantiated • avoid making specific recommendations about legal questions that are the domain of the court; instead, offer behavioural descriptions, possible explanations, directions for intervention, and future issues to assess in regard to parenting adequacy • provide the full name, professional title, degree, discipline, and licensure status of all participating evaluators

The clinical practice model described in this paper was developed by the first author and colleagues[12] in an attempt to address discrepancies between recommended and actual practice in parent evaluations. It is informed by the literature on parenting assessment,[13] as well as experiences the first author gained as part of a multi-disciplinary research and demonstration project. This project, called Clinical Evaluation and Services Initiative (CESI),[14] was established with the goal of understanding and improving how clinical information is

11 T Grisso, above n 5.

12 K Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1; K Budd and M Holdsworth, "Issues in clinical assessment of minimal parenting competence", above n 1.

13 eg, S Azar et al, "Child maltreatment and termination of parental rights: Can behavioral research help Solomon?" (1995) 26 *Behavior Therapy* 599; Barnum, above n 1; F Dyer, above n 1; Grisso, above n 5; Melton, above n 5.

14 CESI, *Report concerning reform of the clinical information system in the child protection and Juvenile Justice Department of the Circuit Court of Cook County and proposal for a redesigned Juvenile Court Clinic*, Chicago, 1999.

used in juvenile court proceedings. (In Cook County, the juvenile court includes both the child protection division, which deals with child maltreatment matters, and the juvenile justice division, which deals with juvenile offences.)

CESI began in the mid 1990s at the request of the chief judge of the court system in Cook County, IL, which encompasses much of the metropolitan area of Chicago. CESI's initial purpose was to investigate the system's acquisition and use of clinical information in Cook County's juvenile court system and recommend target areas for change.[15] Based on that knowledge, CESI devised a model for reform of that system,[16] which it piloted for 3 years. Data from parent evaluations on child protection cases completed during the pilot period[17] demonstrated timely and thorough evaluations of parents reflecting components recommended by professionals. In June 2003, the CESI model was adopted for court-wide use within a newly created Cook County Juvenile Court Clinic.[18]

Core features of a parenting capacity evaluation model

There are three core features of parental assessment in the clinical practice model described here. First, it should center on parenting. As Budd[19] stated:

> [A]ssessments should include a focus on the parent's capabilities and deficits as a parent and on the parent-child relationship. Adult qualities and characteristics need to be linked to specific aspects of parental fitness and unfitness, by showing how they pose a protective factor or risk to the child, respectively, or how they enable or prevent the parent from profiting from rehabilitative services.

Second, it should employ a functional approach, emphasising behaviours and skills in everyday performance. Grisso[20] described the term functional in reference to parenting assessment as investigating "what the caregiver understands, believes, knows, does, and is capable of doing related to childrearing". Grisso emphasised that parenting skills should be assessed with respect to individual children's needs. Functional assessment incorporates a constructive focus on identifying strengths and areas of adequate performance as opposed to only deficits.[21] In addition, it seeks to identify the contextual conditions influencing parenting and the likelihood of remediation.

A third core feature of the current model is that it applies a minimal parenting standard. Rather than comparing parents to optimal functioning, the focus is on whether parenting is adequate to meet the basic safety and emotional needs of the child(ren). This entails considering the lowest threshold of parenting skills necessary to protect a child's welfare, given the risks and protective factors present in the family. For example, maternal conditions such as low intellectual functioning or mental illness pose clear risks to parenting and child safety, yet these risks may be tempered by factors such as the child's age and functioning, a supportive

15 ibid.
16 J Scally et al, "Problems in acquisition and use of clinical information in juvenile court: one jurisdiction's response" (2001–2002) 21 *Children's Legal Rights Journal* 15.
17 K Budd, "Assessing minimal parenting competence in child welfare", paper presented at the University of California, Berkeley, Third International Symposium: Decision Making in Child Welfare, 2003; K Budd and E Felix, "Reforming the use of parental evaluations in child protection decisions", paper presented at the American Psychological Association conference, San Francisco, August 2001.
18 CESI, above n 14.
19 Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1, at 2
20 Grisso, above n 5.
21 Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1.

family network, the mother's recognition of her limitations, and her participation in intervention services. Judgments about minimal parenting competence thus need to consider the individual circumstances of the case.

Applying a minimal parenting standard is tricky, because, as several authors[22] have noted, the fields of child development, psychology, and law lack universal models or standards of minimal parenting competence. The guidelines that do exist, such as in legal statutes regarding parental unfitness as a basis for termination of parental rights, lack behavioural specificity and consistency across jurisdictions. Similarly, checklists[23] designed for social workers lack empirical evidence of reliability and validity. Nevertheless, several authors[24] recommend that clinicians strive to apply a minimal parenting standard in evaluations, given the lack of an empirical or legal basis to impose a higher criterion. The acceptability of parenting practices differs among cultural, ethnic, and economic groups,[25] and evaluators have an ethical responsibility to respect individual differences with regard to culture, access to resources, and community practices of childrearing.[26]

Steps in the assessment process

Building on the three core features of a parental capacity evaluation, the assessment process proceeds through three phases: planning the evaluation, carrying out data-gathering activities, and preparing the report. Key aspects of the process are discussed briefly below and exemplified later in two cases. Relatedly, Table 1 provides a checklist of recommended items to look for in parenting capacity assessments.[27] Child welfare and legal personnel can consider these items in requesting and critiquing mental health evaluations.

The evaluator's first step in preparing to conduct an evaluation is to clarify the assessment objectives. Budd[28] found that most evaluations of parents in their analysis failed to describe specific referral purposes, which appeared to contribute to the limited usefulness of the reports. Clinicians often receive vague referral requests (such as, "determine this mother's parenting ability" or "assess the father's cognitive and emotional functioning"), which need to be translated into specific questions in order for the evaluation to be useful. When social workers or attorneys refer cases, it is important that they describe what exactly they wish to know about the parent's functioning, the problems or events that have given rise to their concerns, and the

22 eg, S Azar and C Benjet, "A cognitive perspective on ethnicity, race, and termination of parental rights" (1994) 18 *Law and Human Behavior* 249; Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1; Budd and Holdsworth, "Issues in clinical assessment of minimal parenting competence", above n 1; Melton above n 5.

23 eg, J Barber and P Delfabbro, "The assessment of parenting in child protection cases" (2000) 10 *Research on Social Work Practice* 243.

24 eg, Azar, above n 13; K Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1; Budd and Holdsworth, "Issues in clinical assessment of minimal parenting competence", above n 1; T Jacobsen, L Miller, and K Kirkwood, "Assessing parenting competency in individuals with severe mental illness: a comprehensive service" (1997) 24 *Journal of Mental Health Administration* 189.

25 S Harkness and C Super, "Culture and parenting", M Bornstein (ed), *Handbook of parenting: biology and ecology of parenting*, vol 2, 2nd edn, N J Lawrence Erlbaum Associates, Publishers, 2002, p 253; B Kotchick and R Forehand, "Putting parenting in perspective: a discussion of the contextual factors that shape parenting practices" (2002) 11 *Journal of Child and Family Studies* 255.

26 APA Committee on Professional Practice and Standards, above n 2.

27 For further information, see K Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1.

28 ibid.

outcomes or options that will be affected by the findings.[29] It may be helpful for the clinician to speak directly with the referral agent prior to beginning the evaluation to clarify the referral questions. Once the referral questions have been determined, they form the basis for planning the scope and direction of the evaluation.

Another important aspect of planning the evaluation is the review of background records. Thorough review of existing records prior to conducting an evaluation provides the opportunity for the clinician to add to, correct, and clarify existing information as part of the assessment, rather than simply duplicate what is already known. Obtaining prior records often is difficult and time-consuming, but the efforts are worth it when clinicians use the prior records to plan their assessment and include relevant information from records (cited clearly to identify the source) into their evaluation write-up. In so doing, they can show how their evaluation converges with or diverges with previous reports and highlight discrepancies in the records.

The second phase, carrying out assessment activities, usually begins with a detailed clinical interview of the parent (or parents), which often extends over two to three sessions. The interviewer begins by clarifying the evaluation's purpose and limitations of confidentiality, and then covers areas such as the history of allegations or parenting concerns, services the family has received, current living situation, personal background, description of children and parent-child relationship, and expectations regarding outcomes.[30] Gaining the parent's cooperation is essential to a productive interview, so clinicians must be sensitive to and respectful of the parent's perspective.

Psychologists, and to a lesser extent other mental health professionals, typically administer tests or inventories as part of the assessment process. An important caveat in using psychological instruments is that, with few exceptions, they were not designed to assess parenting capability and have not been empirically tested regarding their validity in a child protection context. Thus, clinicians should select measures based on their appropriateness to the client and the referral questions; further, they should apply a conservative approach in interpreting the findings by seeking corroboration across sources.

An important and, in Budd's analysis,[31] under-utilised component of parenting capacity assessment is observation of the parent and child(ren) together. As Budd notes,[32] direct observation serves two assessment functions: it provides an index of behaviour when the parent presumably is trying to use his or her best parenting skills, and it allows the examiner to perceive a range of parent and child behaviour under different conditions. Given the diversity of problems, parent and child characteristics, and observation contexts in parenting evaluations, there is no single method or set of behaviour categories for parent-child observation. Structured observation methods, using systematic coding systems such as the Dyadic Parent-Child Interaction Coding System II[33] or the *Home observation for the measurement of the*

29 M Beyer, "What do children and families need?", American Bar Association conference, Children and the Law, Washington, DC, 1993.

30 K Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1.

31 ibid.

32 ibid.

33 DPICS II; S Eyberg, J Bessmer, K Newcomb, D Edward, and E Robinson, "Dyadic parent-child interaction coding system II: a manual", unpublished manuscript, University of Florida Department of Clinical/Health Psychology, Gainesville, 1994.

environment: administration manual,[34] can be used to record parent and child behaviours. They have advantages of focusing the evaluator on specific behaviours and allowing for comparison across observations and parents.

However, any standardised observation is limited in its applicability and requires substantial training prior to reliable use. Standardised coding often is not practical in parental capacity assessments, due to the individualised circumstances of the evaluation. For example, observations often occur at a social service agency or in a public place, include several children in the family, and vary in length, depending on prescheduled visitation arrangements. As an alternative to structured observation systems, clinicians often observe informally and record behaviours of interest. Thus, clinicians need to be well versed in child development, parenting and behavioural assessment methods, and they should select behaviours that fit with referral concerns.

Common areas of focus during parent-child interactions include how the parent structures interactions, shows understanding or misunderstanding of child's developmental level, conveys approval and disapproval of the child's behaviour, notices and attends to the child's physical needs, responds to the child's initiations, accepts child's right to express his or her own opinions, follows through with instructions or rules, and spreads attention across all children present. Budd[35] lists additional areas to observe regarding the parent's behaviour, as well as relevant areas regarding the child's behaviour. Several other writers[36] also offer detailed suggestions for parent-child observations in parenting evaluations.

In addition to information gathered from prior records, parent interviews, tests or questionnaires and observations, interviews with collateral sources are an important source of information. Caseworkers, therapists, foster parents, extended family members, the parent's partner, or other persons who know the parent and child can report on the parent's progress in services, problems and strengths. They also can confirm or disconfirm assertions by the parent. Collateral sources need to be informed of the limitation on confidentiality of the information, and parent permission should be obtained prior to contacting the sources.

The third phase of the assessment process involves integrating findings and writing the report. These are challenging tasks, entailing organisation of multiple and often mixed findings, weighing the strength of data supporting various interpretations, and deciding which aspects to include in the written report. To make the report useful to referral sources, it needs to be accurate, written in "plain English", emphasise description of findings over interpretation, and include a summary section that responds to each referral question, summarises the data used to formulate an opinion, and delineates the logical inferences that link the findings to the interpretation. Clinicians should strive for a balanced presentation by discussing parenting strengths as well as weaknesses, identifying possible precipitants and maintaining variables for parenting problems, suggesting potential interventions to address difficulties, and forthrightly addressing limitations in the assessment.

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34 B Caldwell and R Bradley, *Home observation for the measurement of the environment: administration manual*, revised edn, University of Arkansas, Little Rock, 1984.

35 K Budd, "Assessing parenting competence in child protection cases: a clinical practice model", above n 1.

36 D Hynan, "Parent-child observations in custody evaluations" (2003) 41 *Family Court Review* 214; B Schutz et al, *Solomon's sword: a practical guide to conducting child custody evaluations*, Jossey-Bass, San Francisco, 1989; D Wolfe and A McEachran, "Child physical abuse and neglect", E Mash and L Terdal (eds), *Assessment of childhood disorders*, 3rd edn, Guilford Press, New York, 1997, pp 523–568.

Professional opinions differ on whether forensic evaluators should directly respond to the legal questions (such as whether or not unsupervised visitation should be granted, or whether a parent is ready for reunification) underlying clinical referral questions. In keeping with the recommendations of Grisso[37] and Melton,[38] the current clinical practice model takes a conservative approach to this issue, in which the evaluator avoids making specific recommendations about legal questions that are the domain of the court. Instead, the evaluator offers behavioural descriptions, possible explanations, directions for intervention, and future issues to assess in regard to parenting adequacy.

What clinical evaluations of parents can and cannot do

Caseworkers and attorneys who request mental health evaluations on parents have differing reasons for referral and varying expectations about the report and its usefulness. Some referrals occur needlessly because prior evaluation reports have not been circulated or read, as a substitute for case planning, or as a "fishing expedition" with no specific questions in mind. Others occur when important gaps remain on clinical issues after review of existing information, when opinions differ on case direction, or in high profile cases for which a second opinion is desired. In the latter cases, assuming specific referral questions are clearly articulated, clinical evaluations can contribute relevant information for case planning or decision making. They do so by describing parent's functioning, explaining possible reasons for abnormal behaviour and conditions likely to influence the behaviour, assessing the potential for change, recommending interventions, and/or describing the child's functioning, needs, and risks in relation to the parent's skills and deficits.

Alternatively, evaluations are not able to measure a parent against a uniform standard, determine parenting adequacy based on indirect evidence, conclusively rule out the impact of situational variables on the assessment process, or predict future behaviour with certainty. Neither are they able to answer questions unless they have been articulated by the referral source, which underscores the importance of having the issues of concern communicated to the evaluator in advance of the assessment. Table 2 summarises these points by listing outcomes that can and cannot be expected from parental capacity evaluations.

Table 2

What parenting assessments can and cannot do
Parenting Assessments *can*:
• describe characteristics and patterns of a parent's functioning in adult and childrearing roles
• explain possible reasons for abnormal or problematic behaviour, and the potential for change
• identify person-based and environmental conditions likely to positively or negatively influence the behaviour
• describe children's functioning, needs, and risks in relation to the parent's skills and deficits
• provide directions for intervention.

37 T Grisso et al, *Evaluating competencies: forensic assessment and instruments*, 2nd edn, Springer-Verlag US, 2003.
38 Melton, above n 5.

What parenting assessments can and cannot do
Parenting Assessments *cannot*:
• compare an individual's parenting fitness to universal parenting standards
• draw conclusions about parenting adequacy based only on indirect measures
• predict parenting capacity from mental health diagnoses
• rule out the effects of situational influences (eg, time limitations, demand characteristics, current stressors, cultural issues) on the assessment process
• predict future behaviour with certainty
• answer questions not articulated by the referral source.

Case examples

The following section provides two illustrations of the clinical practice model applied with parents in the child protection system. The examples are based on actual cases, with details changed to protect confidentiality. In both cases, the evaluator was a doctoral level clinical or counseling psychologist with experience in child development, parenting, clinical assessment and forensic issues.

Ms S

Referral concerns

Three children, ages 2–9 years, of a 32-year-old single mother, Ms S, were taken into custody due to an unexplained burn on the oldest child's neck. At adjudication, the children were determined to be at substantial risk of harm and placed in non-relative foster care. Eight months later, Ms S had been complying with all services; however, concerns were raised about several aspects of the case: (a) the mother had never admitted to intentionally burning her oldest child; (b) she had a history of depression but had refused to take medication; and (c) the caseworker had concerns about the quality and focus of Ms S's therapy for depression. In addition, unsupervised visits between the mother and children were suspended after the oldest child alleged that Ms S had physically struck her during a visit. The mother was referred for evaluation to address whether she should have unsupervised day visits, given the concerns noted above.

Based on the stated issues, the referral questions were described as follows:

(1) What are the risks and protective factors in allowing Ms S to have unsupervised visits with her three children?

(2) What are Ms S's parenting strengths and weaknesses, in light of the possible return home of her three children?

(3) Ms S currently participates in individual therapy. What additional intervention or support services, if any, are recommended to improve her parenting skills?

(4) What objectives does Ms S need to address or meet in therapy to facilitate family reunification?

Assessment

Prior to seeing the parent, the evaluator reviewed the records and identified specific topics to assess. Further information was needed in order to address issues about the mother's reported history of depression, her refusal to take medication, the quality of her therapy, and concerns

about a physical alteration during a visit. As displayed in Table 3, the areas for investigation focused on the mother's ability to meet the children's needs in the dimensions of physical care, cognitive stimulation, and social/emotional responding, as well as the mother's ability to function on her own in these dimensions. The assessment process consisted of two clinical interviews with Ms S, a clinical interview with the oldest daughter (with and without her mother present), and an unstructured observation of a 90-minute visitation session between Ms S and her three children at the child welfare agency. As part of the assessment, Ms S completed measures of parenting beliefs,[39] parenting stress,[40] and psychological symptoms.[41] The clinician also conducted telephone interviews with Ms S's current and former caseworkers and with her current and former therapists.

Table 3

Case example of Ms S: areas of parent-child fit to assess
Ability to meet children's needs • Physical care (i) Mother's ability to anticipate children's basic needs (ii) Children's health, given alleged physical altercation during visit • Cognitive (i) Mother's attention to children's development • Social/emotional (i) Mother's display of emotional affection and sensitivity to each child (ii) Children's feelings toward mother, especially for oldest child (iii) Children's attempts to take parental role, given mother's history of depression
Parent's functioning • Physical care (i) Stable housing and resources (ii) Adequate substitute care when mother is working • Cognitive (i) Depressive or suicidal thoughts • Social/emotional (i) Ability to address issues of abuse in therapy (ii) Availability and use of social supports (iii) Co-operation with therapy regimen

Findings and case disposition

The assessment results and recommendations for Ms S are summarised in Table 4. The findings indicated that, despite some concerns, Ms S had a number of salient strengths as a parent and showed good potential to provide safe care of the children. The clinician offered suggestions for intervention to enhance Ms S's parenting skills, foster her emotional growth and management of her depression, as well as to provide her with social support around parenting.

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39 J Milner, *The child abuse potential inventory: manual*, 2nd edn, Dekalb, IL: Psytec Inc, 1986.

40 R Abidin, *Parenting Stress Index Professional manual,* 3rd edn, 1995, FL Psychological Assessment Resources, Inc, Odessa.

41 L Derogatis, *Brief symptom inventory: administration, scoring, and procedures manual*, Minneapolis National Computer Systems, Inc, 1993.

The clinician submitted an evaluation report to child welfare and legal professionals. Based in part on the results of the evaluation, the court granted unsupervised visits to Ms S and ordered that family therapy should continue. Six months later, the visitation schedule progressed to unsupervised overnight visits. One year later, all three children were reunified with Ms S. In this case, the evaluation report offered objective information on parenting functioning that allowed decision-makers to proceed toward preparing the family for reunification.

Table 4

Case example of Ms S: findings and recommendations
Risks and protective factors re: unsupervised day visits • Risks: mother lacks social support, is depressed at times, and has high expectations of children; oldest child is needy and competitive • Protective factors: mother shows emotional engagement, sincerity, and persistence; she demonstrates parenting skills, is attentive to all children, and has stable living and work situations
Parenting strengths and weaknesses • Strengths: excellent ability to structure, nurture, set limits, follow through, and share attention across children • Weaknesses: dependent on children for her emotional needs, has inappropriately high expectations of children
Interventions or supports recommended to improve care-giving skills • Family therapy directed at enhancing the mother's developmentally appropriate expectations and strengthening family relationships, parenting support group to increase positive social contacts, and increased visitation time with children
Objectives for mother to address or meet in individual therapy • Increase trust, recognise personal history and patterns of mental health functioning, build coping resources, manage depression and depressed affect

Mr and Ms T

Referral concerns

Ms T was a 41-year-old mother of six children; Mr T, age 29, was the father of the youngest child, aged 2 years. Ms T's legal rights to the five oldest children had been terminated due to her chronic use of cocaine. Her sixth child was born substance exposed and was placed at birth with a non-relative foster family. However, shortly after the girl's birth, Ms T decided to enter drug rehabilitation, and, at referral, she had been drug-free for over a year. Mr and Ms T attended family counseling, and they had supervised visits with their daughter every 2–4 weeks. Despite their consistent efforts to engage with her, the child remained fearful and cried during the visits, and the foster parents reported that she had nightmares and bit her foster siblings after visits. The court referred Mr and Ms T for evaluation in order to assist in deciding whether to grant unsupervised visits and in selecting a permanency goal (ie, whether to continue with the goal of returning home or move toward termination of parental rights).

The referral questions were specified as follows:

(1) Given the factors associated with termination of rights on the older children and the parents' current involvement in services, what are Mr and Ms T's current parenting skills and deficits?

(2) What services are recommended to assist in improving the parents' care-giving skills?

(3) What are the risks and protective factors in allowing unsupervised visits, and in maintaining a return-home goal, versus changing the goal to substitute care pending determination of termination of parental rights?

In this case, no referral question addressed the quality of relationship between the child and her foster parents, because there were no concerns about this relationship. Instead, the evaluation focused on the parents' caregiving capability and their daughter's responsiveness to them.

Assessment

Based on a comprehensive record review and the referral questions, the evaluator identified areas to assess, as displayed in Table 5. The topics were designed to provide information about the toddler's functioning and responsiveness to the parents as well as about Mr and Ms T's competencies in parenting and personal domains. Given Ms T's long history of substance abuse, some questions addressed her possible loss of cognitive functioning and emotional vulnerability under stress, which could impair parenting. The evaluation consisted of separate clinical interviews with Mr and Ms T and informal observation of the parents and child during a 2-hour supervised visit at their home (the setting in which they said they were the most comfortable interacting with her). When, after more than an hour into the observation, the child remained fearful and repeatedly rejected the parents' initiatives, the evaluator modeled strategies for putting the child at ease and asked the parents to try out the strategies, in order to gauge their willingness to learn new skills. The evaluation also included administration of parenting inventories.[42] In addition, the clinician completed telephone interviews with the foster mother, current and former caseworkers, the family counselor, and Ms T's substance abuse counselor.

Table 5

Case example of Mr and Ms T: areas of parent-child fit to assess
Ability to meet children's needs
• Physical care
(i) Parents' experience as primary caregivers
(ii) Child's functioning, given fear and emotional upset during and following visits
• Cognitive
(i) Parents' understanding of child development
(ii) Recognition of child's perspective
• Social/emotional
(i) Parents' display of emotional affection and sensitivity to child
(ii) Child's responsiveness to parents' initiatives

42 Milner, above n 37; S Azar et al, "Unrealistic expectations and problem-solving ability in maltreating and comparison mothers" (1984) 52 *Journal of Consulting and Clinical Psychology* 687.

Case example of Mr and Ms T: areas of parent-child fit to assess
Parents' functioning • Physical care (i) Stable housing and resources (ii) Abstinence pattern, especially for mother • Cognitive (i) Mother's memory and concentration skills given chronic substance abuse • Social/emotional (i) Ability to handle daily frustrations (ii) Availability of social supports

Findings and case disposition

As summarised in Table 6, the assessment provided evidence that the T's had some basic care-giving abilities and were sincerely invested in their daughter; however, it also revealed relationship difficulties between the parents and child that would require much greater emotional sensitivity and skillfulness on the parents' part to address. The mother persisted in trying to get her daughter to play, answer questions, or sit on her lap, despite her daughter's fearful response. The father, by contrast, withdrew from the interaction for much of the session. It is likely that an irregular visitation schedule, with gaps of up to 2 months between some visits, had contributed to the tenuous relationship. Although the parents were consistent in requesting and attending visits, changes in caseworkers and scheduling difficulties had interfered with regular visitation. The clinician recommended intensive parenting coaching during visitation sessions as a possible strategy to increase the parents' relationship skills. The evaluation also revealed that Ms T was pregnant, so the clinician recommended that family counseling be directed to helping to prepare the parents to care for their newborn, in addition to possibly being reunified with their daughter.

Table 6

Case example of Mr and Ms T: findings and recommendations
Current parenting skills and deficits • Able to play with and provide for child's basic needs • Lack knowledge to structure interactions to put child at ease; do not read and respond to child's cues; mother intrusive and father disengaged
Services recommended to improve caregiving skills • Parenting coaching in visitation sessions • Continue family counseling, focusing on expectant baby
Risks and protective factors with regard to unsupervised visits and permanency goal • Risks: emotional distress to child during visits, if unable to develop sense of comfort and safety with birth parents • Risks: discomfort with birth parents could increase child's dysregulation, sleep difficulties, etc. • Protective factor: parents proud of the mother's rehabilitation and invested in child

The evaluation report was used as one source of information at the next court hearing, where the judge decided not to grant unsupervised visits but, for the time being, to leave the permanency

goal as return to home. The child welfare agency was ordered to put the parenting coach in place and to monitor parent-child interactions during visits. Six months later, the parenting coach reported back to court that some progress had been made, but that the child was still fearful during visits and that the parent-child relationship was still strained. Based on this information, the judge changed the permanency goal from return home to substitute care pending termination of parental rights. In this case, the parenting evaluation illuminated issues of parent-child interaction in need of change and directions for intervention but, unfortunately, efforts to address the needs were not sufficient to resolve the concerns.

Conclusions

This paper suggests how parenting capacity evaluations can facilitate better decision making in child welfare cases through the provision of objective, independent, relevant and timely information. Clinical evaluations are not designed to, nor can they, replace the informed perspective of caseworkers and other ongoing service providers who interact with the family over time. Instead, as Melton commented,[43] mental health evaluators are most likely to be expert at asking the right questions so as to identify the precipitants and maintaining variables associated with parenting problems, articulate skills and behaviours in need of change, and speculate about interventions that may meet the needs of the family. To accomplish these goals, mental health evaluators need to have the requisite knowledge in child development, parenting and forensics, and be skilled in clinical assessment, including parent-child observation. Together with information from legal and social service sources, competently performed parenting evaluations can illuminate mental health issues relevant to current determinations.

Child welfare and legal professionals can influence the quality and usefulness of evaluation reports by prompting clinicians to use methods recommended in the professional literature, as outlined in Table 1. Strategies for prompting clinicians could include asking questions of potential evaluators about the methods they use in parenting evaluations, providing clinicians with background records on the family prior to the evaluation, suggesting knowledgeable informants who could serve as collateral sources during the evaluation, and offering to set up parent-child observation sessions as part of the evaluation process. Referral agents and consumers of evaluations also could prompt evaluators to use recommended methods by communicating with them after receiving parenting evaluation reports. They are in an ideal position to ask questions of clinicians when technical terms are not explained, when information is confusing or vague, or when it is unclear how the evaluator reached the stated conclusions. Evaluators rarely receive feedback about the accuracy or usefulness of their reports, yet they would benefit from knowing how the information is received by others. Based on these comments, clinicians can improve the effectiveness of their communication or address issues in need of further attention.

In addition to requesting and receiving reports from mental health evaluators, social service workers may find it useful to keep in mind aspects of the clinical practice model described here in their own interactions with parents. In particular, caseworkers have repeated opportunities to talk with parents and to observe them interacting with their children in a variety of settings. By recording these experiences in behaviourally specific progress notes, caseworkers can amass a valuable source of information for case planning and decisions. Documentation of pertinent details over time, based on actual conversations and observations, provides strong evidence at decision-making junctures.

43 Melton, above n 5.

Clinical evaluations of parents are one potentially valuable resource for coping with the inevitable risk and uncertainty surrounding child welfare determinations. The complicated issues of child welfare cases demand the best efforts that professionals can offer to help families and those who serve them.

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Updates in the Children's Court jurisdiction: 2018*

P Johnstone†

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Declining number of children in detention

Youth Koori Court

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RP v The Queen (2016) 259 CLR 641

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"How to turn a child offender into an adult criminal — in 10 easy steps"

Step 1: Leave families alone to sort themselves out: "Ignore risk and erode resiliency"

Step 2: Make the age of criminal responsibility as young as possible and get children into court as soon as possible

Step 3: Criminalise welfare issues

Step 4: Treat all young offenders as if they were the same.

Step 5: Always arrest the child if they offend, especially the first time no matter what the circumstances. Be firm and disrespectful, and always bring them to court.

Step 6: Sideline the child offender in the justice response. Ensure the child is marginalised and does not participate. Prevent any contact between the offender and the victim

Step 7: Always enter a conviction on the child's record. And make no allowance for youth at sentencing: "adult time for adult crime"

* The author acknowledges the considerable help and valuable assistance in the preparation of this paper by the Children's Court Research Associate, Elizabeth King.

† President of the Children's Court of NSW, Children's Legal Service Conference, 24 February 2018, Sydney.

Step 8: Convicted young people need a sharp shock; in praise of corrective training, boot camps, and scared straight programmes

Step 9: Segregate young offenders from their families, communities and victims. Wherever possible, aggregate them together in treatment facilities and in prison

Step 10: If all else fails, use "what works" for child offenders, but deliver it badly

[19-1000] Introduction

First, I wish to acknowledge the traditional occupiers of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to Elders past, present and future.

Secondly, I would like to acknowledge and thank the legal practitioners who appear in the Children's Court for their dedication, professionalism and integrity in the work they undertake in this jurisdiction. 2017 was a particularly busy year with many reforms, consultations and changes happening throughout the criminal and care jurisdictions.

This paper will firstly canvass some general updates in the Children's Court, as well as updates affecting the criminal jurisdiction, including some recent case law. This paper will then consider the "10 easy steps" to turn a child offender into an adult criminal, as articulated by Judge Andrew Becroft, Principal Youth Court Judge and Children's Commissioner for New Zealand, and reflect upon the key messages which can be found in this paper, and my hopes for the future.

General updates

President of the Children's Court of NSW reappointed

I was very pleased to be reappointed as the President of the Children's Court of NSW by Attorney General Mark Speakman in June last year. My new term as President began on 1 June 2017 and expires on 7 July 2021.

I look forward to another exciting and rewarding term as President.

Closure of Bidura Children's Court and opening of the new Surry Hills Children's Court

The Children's Court on Glebe Point Road known as Bidura Children's Court closed permanently on Friday 7 July 2017 and the new Surry Hills Children's Court opened on 15 January 2018, located on Albion Street, Surry Hills.

The refurbished four-court complex includes state-of-the-art AVL facilities, two conciliation rooms, witness protection rooms as well as space for support services and agencies.

The new Surry Hills Children's Court honours the solid foundations, history and heritage of the former Metropolitan Children's Court, and acknowledges the troubled history whilst incorporating new features to reflect the needs of modern court users and the specialist nature of the Children's Court jurisdiction.

It is inspiring and empowering to reflect upon and to witness the changes which have occurred since the original building opened in 1911, which are a stark reminder of the need to continually advocate for the best outcomes for the most vulnerable members of our community.

With the opening of the Surry Hills Children's Court, there have been some changes to catchments and circuits. Sutherland Children's Court will continue to sit as a Children's Court for criminal matters from St George, Sutherland and Miranda Local Area Commands.

Criminal matters from Ashfield, Burwood, Ku-ring-gai, Marrickville, North Shore and Ryde Local Area Commands have been re-directed to Surry Hills Children's Court.

Magistrate capacity and circuits

I am pleased to report that this year the Children's Court has the full complement of Children's Magistrates. Children's Magistrate Virgo commenced in January 2018 and will be responsible for the Western and Riverina circuits, and Children's Magistrate Crompton has replaced Children's Magistrate Murphy who retired in 2017. We continue to host rotating magistrates throughout the year.

The Mid-North Coast circuit has been extended to cover criminal matters at Port Macquarie as well as Kempsey. The Illawarra Children's Court has expanded to include both Moss Vale and Goulburn Children's Courts.

Children's Court magistrates hear roughly 90% of care cases in the State, up from 45% in 2011, and the coverage for criminal matters remains around 67%.

National Judicial College of Australia "Family Violence in the Court" training for the Children's Court of NSW

The specialist Children's Magistrates and Children's Registrars and myself attended an excellent training day hosted by the National Judicial College of Australia on "Family Violence in the Court Room" on 6 October 2017.

The training day involved informative presentations on the nature and impact of domestic and family violence, as well as a unique virtual reality experience, which holds some great potential as an engaging training tool.

Domestic and family violence is now recognised as a serious and widespread problem in Australia, with significant costs to the individuals who are victimised and to the community.

As judicial officers we have responsibilities such as enabling the best evidence to be given by witnesses and managing safety within the court room. This is an important area of learning for all stakeholders, and the training day was valuable in continuing to develop and enhance the specialist nature of the Children's Court in dealing with complex children and families.

The continuing relevance of brain science

It is my belief that effective strategies, programs and policy implementing the principles of early intervention, diversion and rehabilitation require an acute, comprehensive and insightful understanding of the reasons why children and young people commit crimes.

I have undertaken research over the years into this precise question, and through forums such as this which provide for collaboration and the sharing of knowledge between important stakeholders, some important insights have been discovered.

I touched on some of this brain science when I presented at the Children's Legal Service Conference in 2015, however since then I have discovered, through collaboration and

discussion with various stakeholders, an emerging wealth of knowledge in this area, which I believe should inform the policy of youth justice and detention moving forward. I am pleased to see that it has already begun to do so, and there have been some positive developments over the past five years. I will explore these developments in a later section of the paper.

In particular, I credit Judge Becroft, the Principal Youth Court Judge of New Zealand, for being one of the first judicial officers to highlight the importance of understanding brain science, and how it may assist us in meeting the need to match policy and legislation to the factual realities presented within the science.[1]

A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.[2]

We know that rational choice theory argues that young people are able to undertake a logical risk assessment in their decision-making process. Neurobiological research, on the other hand, argues that adolescent decision-making is not linear, sophisticated and predictable.

A further complication is that brain development differs depending upon a number of variables and that "neuro-scientific data are continuous and highly variable from person to person. The bounds of 'normal' development have not been well delineated."[3]

Neurobiological research to date shows that whilst adolescents may appear to function in much the same way as adults, they are not capable of the executive function that mature adults possess.

Neurobiological development will continue beyond adolescence and into a person's twenties (possibly even into some people's thirties), and different people will reach neurobiological maturity at different ages.[4]

Advances in neurobiology allow us to better understand the range of factors (biological, psychological and social) that make juvenile offenders different from adult offenders, and justify and improve the unique responses to juvenile crime.

Over the past year I have become aware of some important research which has enormous implications for the way in which the criminal justice system treats young people, and also on our understanding of the importance of early development, as the manner of this development can impact on care and protection matters as well as criminal matters.

I attended a wonderfully informative seminar series hosted by the Advocate for Children and Young People on 30 March 2017, and some fascinating insights into science and child development were shared by leaders in the field.

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1 A Becroft, "'From little things, big things grow' — emerging youth justice themes in the South Pacific", Australasian Youth Justice Conference, Changing Trajectories of Offending and Reoffending, 20–22 May 2013, Canberra.

2 E McCuish, R Corrado, P Lussier, and S Hart, "Psychopathic traits and offending trajectories from early adolescence" (2014) *Journal of Criminal Justice* 42 at 66–76.

3 S Johnson, R Blum, J Giedd, "Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy" (2009) 45(3) *Journal of Adolescent Health* 216 at 220.

4 B Midson, "Risky business: developmental neuroscience and the culpability of young killers" (2012) 19(5) *Psychiatry, Psychology and Law* 692 at 700. See also, S Gruber, D Yurgelun-Todd, "Neurobiology and the law: a role in juvenile justice" (2006) 3 *Ohio State Journal of Criminal Law* 321 at 332.

For example, Associate Professor Elisabeth Murphy described how babies are born with 25% of their brains developed, and that by age 3 they will have developed 80% of the brain for life.[5] The development of brain connections is dependent on stimulation and experiences and these experiences in the early years are crucial as they will shape the wellbeing and cognitive development of a person as they grow through to adulthood.

This research has enormous implications for the principle of early intervention. If experiences such as trauma, abuse and neglect, even within the womb, occur within the first 1000 days of life, this may lead to difficulty later in life, especially during adolescence but even during adulthood.

Dr Michael Brydon discussed a fascinating study by Professor Aaron Antonovsky, whereby it was discovered that 29% of women who had survived concentration camps as children were able to carry on and maintain good health after their traumatic experience.

Antonovsky questioned why it was that some women were not affected in the same way most others were, and it was discovered that the reason was because they had an adult or older carer with them throughout the traumatic experience.[6]

What is clear from this is that the benefits of a positive, enduring and nurturing relationship, even in situations of extreme adversity, cannot be underestimated.

Furthermore, I am deeply troubled by the important findings of a recent study conducted in Western Australia, where it was found that 89% of the young people in detention who were assessed as part of the study had at least one domain of severe neurodevelopmental impairment, and 36% were diagnosed with Fetal Alcohol Spectrum Disorder (FASD).[7]

This study shows that the majority of young people with FASD have severe impairment in the academic, attention, executive functioning and/or language domains. Severe impairment in memory, motor skills and cognition were also commonly found in young people with FASD.[8]

For the majority of these young people, FASD and severe neurodevelopmental impairment had not previously been identified.

The report clearly identifies that impairment in these domains may contribute to offending behaviours and/or difficulties in negotiating all aspects of the justice system.[9]

Whilst this particular report is limited to WA, FASD has been identified as an "issue that is not confined to a particular community or demographic; it is a disorder that crosses socio-economic, racial and education boundaries".[10]

Emerging insights from research such as this continue to highlight the vulnerability of young people and the need for there to be appropriate services available within the community to identify issues experienced by children and a clear pathway to support and wrap-around services for the child or young person and their family.

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5 G Allen, *Early intervention: the next steps*, 2011, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284086/early-intervention-next-steps2.pdf, accessed 6 April 2018.

6 A Antonovsky, *Unraveling the mysteries of health — how people manage stress and stay well*, Jossey-Bass Publishers, 1987.

7 C Bower, R Watkins, R Mutch, "Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia" (2018) 8(2) *BJM Open* 1.

8 ibid at 6.

9 ibid.

10 Australian Medical Association, "Fetal Alcohol Spectrum Disorder (FASD) — 2016", 24 August 2016, at https://ama.com.au/position-statement/fetal-alcohol-spectrum-disorder-fasd-2016, accessed 6 April 2018.

Schooling issues

Education plays a significant role in a child or young person's life, and presents a valuable opportunity for early identification of risk factors as well as interventions and diversion from problematic and offending behaviour.

It has come to my attention that roughly 40% of the children coming before the Children's Court in its criminal jurisdiction are not attending and are totally disengaged from school. Recent, informal observations at one of the Children's Courts located in Sydney indicate that the number of children in the criminal jurisdiction of the court who are not attending school is, in fact, much higher than 40%, and that the rates of non-attendance reflect a chronic and complex pattern, which is deeply troubling.

Furthermore, the Children's Court has been informed that roughly 40% of children in residential out-of-home care are not attending school.

I have been advocating for a solution to this problem, and was pleased to jointly host a roundtable discussion with the Department of Education and key stakeholders in August last year. I believe there are opportunities for justice agencies and education agencies to work together to divert children from long-term involvement with the justice system.

For example, I am hopeful that in NSW we can adopt the Victorian Education Justice Initiative whereby officers of the Department of Education are placed in the Children's Court to assist in identifying those children who are not attending school and to help support them to re-engage in school.

This promising initiative is an innovative demonstration of diversionary processes working in parallel with court processes, and would be of significant benefit to children and young people in NSW.

Updates in the criminal jurisdiction

Declining number of children in detention

The NSW Bureau of Crime Statistics and Research reported on 30 October 2017 that the juvenile detention population has decreased by roughly 29% since the peak of 405 detainees in June 2011. The number of children and young people in detention has decreased significantly over the past six years, which is in stark contrast to the adult prison population which continues to rise.

Furthermore, three juvenile detention centres have closed over the past six years due to the falling number of young people in detention. Now only six juvenile detention centres remain in NSW.

I believe it is no coincidence that this number has fallen so significantly, and that this development has not occurred in isolation. Rather, the insights we have gained from brain science have allowed us to gain a better understanding of the adolescent brain, and paved the way for better policies, practices and procedures which highlight and emphasise the fact that children are fundamentally different to adults and must be treated as such.

I am a strong advocate for the approach of Justice Reinvestment, which is an idea for rethinking the criminal justice system. Under this philosophy, the savings from the closure of three juvenile detention centres should be reinvested back into the community to provide services and supports to children and young people.

In 2016, I participated in the discourse on Justice Reinvestment in relation to the pilot project to be implemented in Cowra, and I look forward to seeing some more Justice Reinvestment programs established in regional areas.

Youth Koori Court

The Youth Koori Court (YKC) was established as a pilot in 2015 at Parramatta Children's Court and has now been operating for almost three years.

The YKC was established in response to the devastating over-representation of Aboriginal young people in the justice system.

The YKC seeks to contribute to a solution to the over-representation of Aboriginal young people through the inclusion of Elders and professionals who are Aboriginal, providing low volume case management mechanisms that will facilitate greater understanding of, and participation in, the court process by the young person, identifying relevant risk factors that may impact on the young person's continued involvement with the criminal justice system, and monitoring appropriate therapeutic interventions to address these risk factors.

The process that has been developed for the YKC involves an application of the deferred sentencing model (*Children (Criminal Proceedings) Act 1987*, s 33(1)(c2)) as well as an understanding of, and respect for, Aboriginal culture.

A formal process evaluation has been conducted by Western Sydney University, and the final report is currently before the Attorney General.

Whilst the evaluation has not yet been formally released, several positive outcomes including improved cultural connection, education and employment, accommodation, health and management of drug and alcohol use have been identified in the report.

The Children's Court was very pleased to hear the Attorney General announce in June 2017 a sum of $220,000 in funding for Marist180 to provide a casework position dedicated to assisting clients in the YKC.

I will continue to advocate for the expansion of the YKC, particularly to communities in Dubbo and Redfern.

Criminal case law

This section will provide a brief summary of some recent criminal case law.

RP v The Queen (2016) 259 CLR 641

The appellant was convicted on two counts of sexual intercourse with a child under 10 years. At the time of offending the appellant was aged approximately 11 years and 6 months, and the complainant, who was the appellant's half-brother, was approximately 6 years and 9 months. By grant of special leave, the appellant appealed to the High Court.

The High Court held that the Court of Criminal Appeal erred in finding that the appellant's convictions were not unreasonable in circumstances where there was insufficient evidence to rebut the presumption that he, as a child of 11, did not know his behaviour was seriously wrong in a moral sense. The court ordered that the convictions be quashed and entered verdicts of acquittal.

Director of Public Prosecutions (NSW) v GW [2018] NSWSC 50

This decision concerns an appeal from the DPP in relation to an order of the Local Court made at Dubbo Children's Court dismissing proceedings against the defendant for various offences following a *voir dire.*

On appeal it was held that there was an error of law due to the brevity of the reasons and the failure to explain that which rendered the conduct an impropriety or to undertake the balancing exercise required by s 138 of the *Evidence Act 1995*, which rendered the judgement inadequate.

The court ordered that the appeal be allowed in part, and that the matter be remitted to the Children's Court at Dubbo for determination.

Director of Public Prosecutions (NSW) v Saunders [2017] NSWSC 760

In this case, the respondent was charged with assault after he spat in the face of a three-month-old child. When the matter came before the Local Court, a magistrate dismissed the charge and made an order under s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* with conditions requiring the respondent to attend a "psychiatrist" but did not name any specific person or place. The DPP appealed to the Supreme Court and contended that the magistrate erred in the formulation of the conditions.

It was held on appeal that s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* requires a magistrate to nominate a particular person upon whom, or a particular place at which, the defendant is to attend for assessment of the defendant's mental health condition and/or treatment.

"How to turn a child offender into an adult criminal — in 10 easy steps"

The Principal Youth Court Judge for New Zealand, Judge Andrew Becroft, delivered a compelling and engaging paper at the Children and the Law International Conference in 2009, titled "How to turn a child offender into an adult criminal — in 10 easy steps".[11]

The paper is approached from a perspective that is "deliberately contrary to all but the most committed devil's advocate",[12] and the blatant inversion of decades of youth justice wisdom is particularly meaningful at this point in time, with the conclusion of the Royal Commission into the Protection and Detention of Children in the Northern Territory and a clear appetite for change.

It will be useful to examine these "10 easy steps" and reflect upon the current practice in NSW, with a mind to acknowledging the best practice which has been set, but also the areas in which we must continue to improve.

Step 1: Leave families alone to sort themselves out: "Ignore risk and erode resiliency"

> Since we know that parents and parenting contribute significantly as a risk factor (or a filter for other risk factors) for adolescent anti-social behaviour, it makes sense for the state and other agencies to let at-risk families get on with fostering those risks without intervention.[13]

11 A Becroft, "How to turn a child offender into an adult criminal — in 10 easy steps", Children and the Law International Conference, 7 September 2009, Tuscany, Italy.

12 ibid at 3.

13 ibid at 6.

The influence of family on a child's wellbeing and development is crucial. As I mentioned earlier, research shows that the development of brain connections is dependent on stimulation and experiences in early childhood, and will shape the wellbeing and cognitive development of a person as they continue to grow into adulthood.

Children are particularly vulnerable to experiences such as abuse and neglect, family violence, drug and alcohol abuse (including FASD), socio-economic disadvantage, disengagement from education, criminal behaviour of parents/family members and health issues. These are all recognised risk factors for criminal offending.

Families need support to overcome these issues, to break the cycle of intergenerational trauma and disadvantage, and to engage in pro-social, positive parenting.

I have become aware of a significant shift within DFaCS in the last two years, with a renewed focus on early intervention and family preservation services, including the use of some evidence-based international models known as Functional Family Therapy — Child Welfare (FFT-CW) and Multi-systemic Therapy — Child Abuse and Neglect (MST-CAN).

The introduction of these new models is part of a broad suite of reforms under "Their futures matter: a new approach", known as the Permanency Support Program.[14] It is hoped that these intensive, wrap-around family preservation services will help stem the number of children entering out-of-home care in NSW, and lead to better outcomes for vulnerable children and young people.

Interestingly, the number of children entering in out-of-home care decreased in the 2016/2017 financial year by 24% compared to the previous year.[15]

Addressing risk factors within the family may have an enormous effect on the welfare and wellbeing of a child, and may create or reinforce some protective factors against offending behaviour.

I look forward to following the outcomes of these reforms and the impact of improved supports for families in NSW.

Step 2: Make the age of criminal responsibility as young as possible and get children into court as soon as possible

> Child offenders need to face the reality of their criminal futures and learn to deal with, and be sorted out by "the system" at an early age.[16]

The features of the justice system underlying this second "step" include the principles of early intervention and diversion, which are critical pillars in an enlightened youth justice system.

In NSW the age of criminal responsibility is 10, and the rebuttable presumption of *doli incapax* applies between the ages of 10 and 14.

The Children's Court has recently expressed its support for the recommendation made by the Royal Commission into the Protection and Detention of Children in the Northern Territory, to amend legislation to provide that the age of criminal responsibility be raised to 12 years.

In a submission to the Legislative Assembly Committee on Law and Safety Inquiry into the adequacy of youth diversionary programs in NSW, the Children's Court recommended

14 NSW Government, "Their futures matter: a new approach" at www.theirfuturesmatter.nsw.gov.au, accessed 6 April 2018.

15 NSW Department of Family and Community Services, *Annual Report 2016–2017*, 2017 at p 22 at www.facs.nsw.gov.au/about_us/publications/annual-reports, accessed 6 April 2018.

16 Becroft, above n 12, at 10.

that close consideration be given to raising the age of criminal responsibility, as this would align NSW with contemporary scientific research, as well as with the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice*[17] which stipulates that the minimum age set should recognise emotional, mental and intellectual maturity.

Raising the age would also likely reduce the number of children coming before the courts at an early age which increases the risk that they will become desensitised to the court process (the "inoculation" effect),[18] reducing the effectiveness of the court process as a deterrent.

However, in order to successfully divert children from the justice system where the minimum age of criminal responsibility is 12, there must be processes, supports and services in place to identify and respond to the needs of children who are engaging in offending behaviour at a younger age. Without access to appropriate diversionary services, there is a risk that contact with the court system will simply be delayed until the child reaches the age of 12, with no positive interventions in the interim period, and no successful diversion from further offending.

There are several diversionary programs and mechanisms in NSW, which are informed by enlightened policy and practice, such as the *Young Offenders Act 1997* (YOA), which provides police with the option of a warning, caution or Youth Justice Conference (YJC).

The Children's Court has recently suggested there may be value in lowering the threshold of the requirement for an admission of guilt, to something along the lines of a "concession of wrongdoing" or to "not deny" the offence rather than an admission to the specifics of the offence.

In New Zealand the young person is required to "not deny" the offence in order to have access to a diversionary mechanism called a family group conference. The Royal Commission into the Protection and Detention of Children in the Northern Territory recently recommended that the Police General Order be amended to remove the requirement that a child or young person admit to committing an offence, and instead require that the young person "does not deny" the offence.[19]

The effectiveness of the YOA in diverting young offenders relies, to a great extent, on the awareness of police officers of this diversionary mechanism.

I have been in ongoing discussions with NSW Police with a view to ensuring that all police officers receive specialised training tailored to the unique nature of children and young people and the diversionary mechanisms available to police to divert children and young people away from long-term involvement with the criminal justice system and into support services.

The Children's Court is also supportive of the Royal Commission's recommendation that children under the age of 14 should not be ordered to serve a time of detention except in certain circumstances.[20] This would reflect practices in international jurisdictions such as Belgium, Switzerland, Finland, Scotland and England which require children under a certain age to be dealt with through a therapeutic, protective response.

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17 Adopted by General Assembly resolution 40/33 of 29 November 1985 at www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf, accessed 6 April 2018.

18 P Johnstone, "Emerging developments in juvenile justice: the use of intervention, diversion and rehabilitation to break the cycle and prevent juvenile offending" (2016) 12(4) *TJR* 456 at 464.

19 Commonwealth of Australia, *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Final Report, vol 2B, 2017, at 227 (Recommendation 25.12), at https://issuu.com/ntroyalcommission/docs/2b-final?e=31933818/55836163, accessed at 6 April 2018.

20 ibid, Recommendation 27.1.

This recommendation is supported by a growing body of evidence which shows that the incarceration of children and young people is both less effective and more expensive than community-based programs, without any decrease in risk to the community. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality.[21]

No experience is more predictive of future adult difficulty than confinement in a juvenile facility.[22]

Children who have been incarcerated are more prone to further imprisonment. Statistics from the NSW Bureau of Crime Statistics and Research (BOCSAR) show that in 2015 66.2% of young offenders exiting detention were reconvicted of another offence within the next 12 months.[23] Recidivism studies in the United States show consistently that 50% to 70% of young people released from juvenile correctional facilities are re-arrested within 2 to 3 years.[24]

Furthermore, children who have been incarcerated achieve less educationally, work less and for lower wages, fail more frequently to form enduring families and experience more chronic health problems (including addiction) than those who have not been confined.[25] Confinement all but precludes health, psychological and social development.[26]

Detention, therefore, is not the best answer to the multiple, complex and traumatic problems experienced by, and caused by, young offenders.

Rather, early intervention and diversionary mechanisms and services should be invested in and utilised to their greatest potential to ensure that children and young people receive the care and support they need to become positive and engaged members of society.[27]

Step 3: Criminalise welfare issues

> It does not matter what lies behind child offending, and it is not relevant if inadequate parental and family care and protection issues are the root cause. The starting point is that a child has offended, and has then created a victim. There must be criminal accountability for law breaking, and consequential punishment.[28]

There is a well-established link between childhood maltreatment and subsequent offending in adolescence.[29]

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21 K Richards, "What makes juvenile offenders different from adult offenders" (2011) 49 *Trends and Issues in Crime and Criminal Justice* 1.

22 M Wald and T Martinez, "Connected by 25 — improving the life chances of the country's most vulnerable 14–24 year olds", 2003, at www.hewlett.org/library/connected-by-25-improving-the-life-chances-of-the-countrys-most-vulnerable-youth/, accessed 6 April 2018.

23 NSW Bureau of Crime Statistics and Research, "Re-offending Statistics for NSW", at www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx, accessed 9 April 2018.

24 E Mulvey, "Highlights from pathways to desistance — a longitudinal study of serious adolescent offenders", Office of Juvenile Justice and Delinquency Prevention, at www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf, accessed 9 April 2018.

25 E Mulvey, "A road map for juvenile justice reform", The Annie E Casey Foundation, at www.scribd.com/document/43676341/A-Road-Map-for-Juvenile-Justice-Reform, accessed 14 May 2018.

26 M Wald and T Martinez, above n 23.

27 P Johnstone, above n 19; P Johnstone, "Early intervention, diversion and rehabilitation from the perspective of the Children's Court of NSW", paper presented at the 6th annual Juvenile Justice Summit, 5 May 2017, Sydney.

28 Becroft, above n 12.

29 J Cashmore, "The link between child maltreatment and adolescent offending", (2011) 89 *Family Matters* 1, at: https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending, accessed 9 April 2018.

Children and young people who have been in care are grossly over-represented in the criminal justice system. This phenomenon is known as the "cross-over" of children from care to crime, and characterises the lives of many children and young people that I, and my colleagues, the specialist Children's Magistrates, see on a daily basis.

One important measure which has been taken in NSW is the Joint Protocol to reduce the level of contact of young people in residential out-of-home care with the criminal justice system.[30]

The protocol recognises that children and young people exhibit challenging behaviours, particularly when they have experienced trauma, abuse or neglect, and that this behaviour should be managed within the service itself.

Responding to behaviour with criminal charges is not an appropriate response in these circumstances, and essentially ensures a child or young person crosses over from the care jurisdiction to the crime jurisdiction.

I have also been strongly advocating for a "secure welfare" power, or a power to refer a child in the criminal justice system to the care and protection system. Victorian and WA legislation provides for a power to make arrangements for the placement of a child in a secure care facility, which is sometimes necessary in extreme cases where a child or young person is putting themselves or others at risk, and requires intensive care.[31]

Similarly, the ACT has enacted legislative provisions which enable the court to refer a child in the criminal list who is in need of care and protection to the care system.[32]

Such a power could contribute to the successful diversion of a child or young person with complex needs away from the criminal justice system in NSW.

Step 4: Treat all young offenders as if they were the same.

Step 5: Always arrest the child if they offend, especially the first time no matter what the circumstances. Be firm and disrespectful, and always bring them to court.

The importance of tailored and targeted supports within the community which identify and respond to the individual needs of each child cannot be overstated.

Programs such as Youth on Track and the Family Investment Model allow for a holistic approach to a young person's criminal behaviour, with the aim of addressing criminogenic risk factors in order to successfully divert a young person away from continuing interactions with the justice system.

Furthermore, given the invariably complex causes of offending in children and young people, flexibility is critical when sentencing young offenders, as it provides Children's Magistrates with the ability to enforce tailored solutions which can address the underlying causes of a young person's offending, as well as promote rehabilitation and deliver community-focused outcomes.

I am continuing to advocate for a broader range of flexible sentencing options which could provide opportunities for intensive supervision and casework by Juvenile Justice.

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30 NSW Ombudsman, "Joint protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system" at https://d3n8a8pro7vhmx.cloudfront.net/youthaction/mailings/145/attachments/original/ Joint_protocol_to_reduce_the_contact_of_young_people_in_residential_out-of-home_care_with_-_Final.pdf?1490153506, accessed 9 April 2018.

31 *Children and Community Services Act 2004* (WA), s 88C; *Children, Youth and Families Act 2005* (Vic).

32 *Court Procedures Act 2004* (ACT), s 74K.

Step 6: Sideline the child offender in the justice response. Ensure the child is marginalised and does not participate. Prevent any contact between the offender and the victim

I am particularly supportive of Youth Justice Conferences as a diversionary option in NSW, as they facilitate cooperation between the young person and police, and foster collaboration and input from the individual offender, the victim/s, families and communities.

A Youth Justice Conference has the capacity to improve trust in the criminal justice system and there is scope within the process to reinforce cultural connections for Aboriginal and Torres Strait Islander young people.

In my view, they produce fruitful results for both the offender and the community.

Step 7: Always enter a conviction on the child's record. And make no allowance for youth at sentencing: "adult time for adult crime"

Step 8: Convicted young people need a sharp shock; in praise of corrective training, boot camps, and scared straight programmes

The specialised practices and procedures of the Children's Court reflect an enlightened judicial understanding of the issues and risks impacting on children and young people, as well as a comprehensive understanding of important legislative principles distinguishing children and young people from adult offenders.

The specialist nature of the Children's Court also operates as a safeguard to the detrimental exposure of children to the adult court environment and to adult offenders.

I am an advocate for the expansion of the specialist Children's Court across as much of NSW as might realistically be achieved, to ensure that all children and young people receive the benefit of the specialised treatment from trained professionals and diversionary programs within the Children's Court jurisdiction, and consistency of opportunity and outcomes.

Step 9: Segregate young offenders from their families, communities and victims. Wherever possible, aggregate them together in treatment facilities and in prison

Step 10: If all else fails, use "what works" for child offenders, but deliver it badly

The evidence arising from the Royal Commission into the Protection and Detention of Children has highlighted the systemic failures that can arise in the care and protection and the criminal justice system when silos are maintained and networks are broken.

Many of the findings and recommendations explore and challenge the pathway to detention, and have highlighted the need for specialist training, knowledge and experience for all practitioners and stakeholders dealing with children and young people.

It is very encouraging to see an appetite for change to a more therapeutic approach to children who need care, are not attending school or who are committing crimes. It is also pleasing to see that many of the recommendations made by the Royal Commission are already implemented and practiced in NSW.

Examining and challenging the social disadvantage and disempowerment that have defined the lives of generations of families who come before the Children's Court seems, at times, overwhelming.

However, I continue to be inspired and motivated by the resilience and courage shown by children and young people, and their capacity to change, adapt and thrive, despite the enormous challenges and difficulties they face. I hope you all find a similar sense of encouragement in the important work you undertake.

Grey matter between right and wrong: neurobiology and young offending

P Johnstone*

Introduction ..... [19-2000]

Part 1 — Moral culpability and sentencing

Part 2 — Neurobiology and adolescent development

Part 3 — Brain development and childhood maltreatment

Part 4 — Conclusion

[19-2000] Introduction

This paper has been prepared for the Children's Legal Service Annual Conference, and is to be presented to Criminal Lawyers, Children's Court practitioners and those with an interest in the crime jurisdiction of the Children's Court.[1]

The paper covers the fields of psychiatry, psychology and the criminal law. Whilst I am not an expert in psychiatry or psychology, I believe it is important for us to all develop an understanding of how these fields interconnect, influence and affect our work as practitioners.

Throughout my time at the Children's Court, I have undertaken a great deal of research into the issues and circumstances surrounding the reasons young people commit offences.

In undertaking this research the area of neurobiology, or brain development, has piqued my interest. In this paper, I will not be discussing the principle of doli incapax. I will, however, be discussing the grey area between right and wrong by reference to neurobiology — brain science.

I will first examine briefly traditional theories regarding moral culpability in sentencing. Following this, I will canvass neurobiological research regarding brain development during adolescence. Thirdly, I will discuss the connection between brain development and the young people who come before the Children's Court, many of whom have suffered significant maltreatment and neglect. I will conclude by traversing the ways you may use this information to assist you in practice.

Before embarking on that discussion, on my own behalf and on behalf of all of the specialist Children's Magistrates in the Court, I wish to sincerely acknowledge your hard work

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* President of the Children's Court of NSW for the Children's Legal Service Conference, Saturday, 11 October 2014, Rydges World Square.

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

and dedication to this challenging area of law and practice. I am continually impressed by your professionalism, passion and commitment to this jurisdiction. You are all performing a significant service to the community and your work does not go unrecognised.

Given your familiarity with this jurisdiction, I appreciate that you are all aware that children and young people process situations very differently from the way in which you and I process the same situations.

If we cast our minds back to when we were teenagers, with the benefit of hindsight and more mature insight, most of us can identify moments when we made bad decisions. While we can identify these moments and reflect upon our own experiences, it is critical that we are able to posit these experiences within the broader theoretical and scientific context by asking the simple question. Why? Why did I behave that way? Why did I think that behaviour was okay? And for some of us, "Why did I ever wear that?".

While we may never have specific clarity on any of these questions, a broader understanding of adolescent brain development may assist in understanding not only our own experience of adolescence, but the experiences of our clients.

Additionally, this research may impact upon the way you communicate and engage with your clients, and may alleviate the frustrations you experience when your clients do not understand the gravity of the consequences facing them.

This research may also assist your understanding of the best alternative justice processes and services to propose to the Court in your submissions on sentence.

Most importantly however, this research will add to our collective understanding as professionals of the children and young people in this jurisdiction and ensure that we observe and uphold the principles enunciated in s 6 of the *Children (Criminal Proceedings) Act 1987* (CCPA), the *Young Offenders Act 1997* and the United Nations Convention on the Rights of the Child.

Therefore, my primary objective in presenting this information to you is to begin a dialogue, not to present a settled thesis. The intention of this paper is to inform with a view to improving our collective understanding of young people and the ways in which they think and behave.

Part 1 — Moral culpability and sentencing

As far as sentencing is concerned, the concept of the moral culpability or individual responsibility of the offender serves as an important framework informing the sentencing process. It is an historical model of punishment, arising in some part from theories of rational choice and deterrence.[2] Whilst it is not the only theory informing sentencing, it is one theory of punishment, a consequence of which is the apportionment of blame.

The deterrence and rational choice paradigms propose that the offender is able to weigh a number of factors prior to committing a criminal offence. Specifically, that the offender is in a position to consider the legal implications of their behaviour, what the likely cost will be to victims and the community, and weigh those factors against the rewards.

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2 The link between these theories has been well established in numerous articles, including: Cornish, D, Clarke, R (eds) *The Reasoning Criminal: Rational Choice Perspectives on Offending* (1986) [Transaction Publishers, 2014 reprint]; Klepper, S, Nagin, D "The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited" (1989) 27 *Criminology* 721; Paternoster, R "Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective" (1989) 23 *Law Society Review* 7.

These paradigms assume that an offender makes an informed decision to act, having rationally deliberated the positives and negatives of their actions.

Paternoster cogently articulates this concept stating that these theories describe:

> ... the idea of a thinking, rational offender who calculates the advantages and disadvantages of offending ...[3]

The notion that young people can be expected to rationalise in the same way as adults is recognized by many members of the community. Paternoster states:

> Nevertheless, youths as well as adults can be expected to consciously weigh the expected benefits of legal and illegal courses of action, the moral significance of their infractions, and the implications of such action for important social relationships in their lives. We can expect them also to be sensitive to the opportunities for legal as well as illegal action.[4]

Rational choice models also note that when considering whether to commit an illegal act, offenders consider whether they have better alternatives.

As Clarke and Cornish assert:

> It is presumed that those with fewer satisfying alternatives will find illegal actions more appealing.[5]

The fact that some offenders may have 'fewer satisfying alternatives' links to the broader sociological reasons people commit criminal offences.

Bennett and Broe assert that theories suggesting that the commission of crime is consequent upon the choice of the offender mask the broader reasons for offending. They state:

> Thus, whilst an individual who commits a crime will most certainly be considered as a "proximate" cause of that crime (and to that extent, personally responsible) crime research also suggests there are a consistent set of risk factors, more "distal" causes, that also make significant contributions to whether or not a crime is carried out.[6]

I am certain that you are all aware of the "distal" causes Bennett and Broe refer to, including but not limited to, low socio-economic status, childhood maltreatment and drug and alcohol issues.[7] I will return to a discussion of these 'distal' causes of crime in chapter three, when I discuss the neurobiological impacts of children who have suffered maltreatment.

Whilst general sentencing theories focus upon rational choice and moral culpability, these theories are somewhat tempered by the principles enunciated in s 6 of the CCPA.

Specifically, s 6(b):

> That children who commit offences bear responsibility for their actions, but, because of their state of dependency and immaturity, require guidance and assistance.

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3 Paternoster, R "Absolute and Restrictive Deterrence in a Panel of Youth: Explaining the Onset, Persistence/Desistance and Frequency of Delinquent Offending" (1989) *Social Problems* 36(3) at p 292.

4 ibid at p 293.

5 Clarke, RV, Cornish, D "Modeling Offenders' Decisions: A Framework for Research and Policy" (1985) in Tonry, M and Morris, N (eds) *Crime and Justice, Volume 6, An Annual Review of Research*, University Chicago Press, Chicago, 1985, pp 147–185.

6 Bennett, H, Broe, GA, "Brains, biology and socio-economic disadvantage in sentencing: implications for the politics of moral culpability" (2008) 32 *Criminal Law Journal* pp 167–179 at p 168.

7 ibid at p 168.

We can infer that s 6(b) of the CCPA to some extent dilutes the paradigms of moral culpability and rational choice. The inclusion of 'immaturity' reflects an understanding of the cognitive and neurobiological processes at play when young people commit crimes.

I must emphasise that this paper is not directed to a discussion of doli incapax. I will not be discussing the age at which a child or young person is able to identify the difference between right and wrong or the controversy surrounding this issue.

However, I will be speaking to the 'immaturity' of children and young people from a neurobiological perspective. I will address this issue by reference to the brain processes associated with adolescent development.

Before moving onto the nuts and bolts of brain science, I thought it apt to refer you to Zimring's particularly articulate enunciation of the effect of this immaturity. Zimring states:

> The immaturity of an actor has a pervasive influence on a large number of subjective elements of the offense, including cognition, volition and the appreciation that behaviour such as setting a fire can produce results like the death of a person."[8]

Part 2 — Neurobiology and adolescent development

A great deal of research has been undertaken over the years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.[9]

We know that rational choice theory argues that young people are able to undertake a logical risk assessment in their decision-making process. Neurobiological research, on the other hand, argues that adolescent decision making is not linear, sophisticated and predictable.

A further complication is that brain development differs depending upon a number of variables and that "neuro-scientific data are continuous and highly variable from person to person: the bounds of 'normal' development have not been well delineated".[10]

Despite this, the neurobiological research to date shows that whilst adolescents may appear to function in much the same way as adults, they are not capable of the executive function adults possess.

Executive function of the prefrontal cortex is explained by Johnson, Blum and Giedd, as:

> ... a set of supervisory cognitive skills needed for goal-directed behaviour, including planning, response inhibition working memory and attention. Poor executive functioning leads to difficulty with planning, attention, using feedback and mental inflexibility, all of which could undermine judgment and decision making.[11]

If we liken executive function of the prefrontal cortex to a type of control centre of the brain, we can recognise that during adolescence, this control centre is under construction. As such, a young person's ability to undertake clear, logical and planned decision making prior to acting in also under construction.

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8 Zimring, FE "The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts" (1999) *Virginia Journal of Social Policy and the Law* 6 at p 437.

9 McCuish, EC, Corrado, R, Lussier, P and Hart, SD "Psychopathic traits and offending trajectories from early adolescence" (2014) *Journal of Criminal Justice* 42, pp 66–76.

10 Johnson, SB, Blum, RW, Giedd, JN "Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy" (2009) *Journal of Adolescent Health* 45(3) pp 216–221 at p 220.

11 ibid at p 218.

Neurobiological development will continue beyond adolescence and into a person's twenties and different people will reach neurobiological maturity at different ages.[12]

In simple terms, according to neurobiology, a young person is unable to make any rational choice, let alone the rational choice to commit a criminal act.

This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility. Rather, these findings indicate that there is a grey area between right and wrong when considering the moral culpability of a young offender.

Part 3 — Brain development and childhood maltreatment

A reality faced by all practitioners in this jurisdiction is that the young people we deal with are often what former President of the Children's Court, Judge Marien, described as "Cross-over Kids".[13] Specifically, young people who have been before the court in its Care jurisdiction frequently come before the Court in its Crime jurisdiction later in life.

In Judge Marien's paper he cites the work of the eminent psychologist Dr Judy Cashmore AO, who asserts that there is an established link between childhood maltreatment and subsequent offending in adolescence.[14]

It follows then, that childhood maltreatment will significantly impact upon the child or young person's brain development. The distal factors affecting brain development may be exemplified by parenting issues, nutrition, health as well as social interactions and conflict. This impact may be compounded by instability in the creation of developmental attachments through numerous out-of-home care placements, resulting in criminal offending.[15]

It is well established that children who have experienced maltreatment, particularly in cases of severe neglect or abuse, may experience developmental issues as a result. For example, Bennett and Broe describe the "stress response" by the brain catalysed by childhood maltreatment.[16]

Bennett and Broe go on to articulate the following:

> Child neglect and abuse is considered to have neurobiological effects well beyond this "stress response". These findings provide neuro-scientific evidence for the notion that parenting and childcare and education are not "soft" factors … but factors that have a direct impact upon the neurobiological development of the individual.[17]

A young person may have other cognitive impairments sustained as a result of childhood maltreatment, such as foetal alcohol syndrome, brain injury as a result of "shaken baby syndrome" or other unexplained injuries and psychological impairments.

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12 Midson, B "Risky Business: Developmental Neuroscience and the Culpability of Young Killers" (2012) *Psychiatry, Psychology and the Law* 19(5) pp 692–710 at p 700. See also Gruber, SA, Yurgelun Todd, DA "Neurobiology and the Law: A Role in Juvenile Justice" (2006) *Ohio State Journal of Criminal Law* 3, pp 321–340 at p 332.

13 "'Cross-over kids' – childhood and adolescent abuse and neglect and juvenile offending", Judge Mark Marien SC, paper presented to the National Juvenile Justice Summit, Melbourne, 26 and 27 March 2012.

14 Cashmore, J "The link between child maltreatment and adolescent offending: systems of neglect of adolescents" (2011) *Family Matters, Australian Institute of Family Studies*, Issue no 89.

15 ibid.

16 above n 6 at p 172. See also Delima, J, Vimpani, G "The neurobiological effects of childhood maltreatment: an often overlooked narrative related to the long-term effects of early childhood trauma?" (2011) *Family Matters, Australian Institute of Family Studies*, Issue no 89.

17 above n 6 at p 173.

As brain development is a fluid process, it is critical that we maintain an awareness that we are not only dealing with the developmental issues affecting adolescents generally when dealing with young offenders. We must supplement our understanding of the developmental processes affecting adolescents, with the developmental processes that affect those adolescents who can be classified as “cross-over” kids.

Part 4 — Conclusion

I appreciate the numerous pressures placed upon all of you as practitioners in this jurisdiction and again, I applaud you for your diligence. Accordingly, I can appreciate that you are all wondering what practical relevance this paper holds for all of you.

I understand that some practical issues are common to all of you as practitioners in the children’s jurisdiction. Specifically, issues relating to mental health, drugs and alcohol, rehabilitation and alternative justice procedures.

Accordingly, I submit that this paper is relevant to you for a number of practical reasons. Firstly, by providing an academic overview of the neurobiological factors contributing to adolescent behaviour, you may develop an understanding of why your client behaves in certain ways.

You may also be able to better communicate and engage with your clients by appreciating that they are less likely to understand the proceedings, process what is going on and understand the consequences.

Additionally, an understanding of the neurobiological processes affecting your clients may assist in submissions regarding mental health issues in addition to submissions on sentence. The fact that a young person’s brain is still developing makes them more likely to respond to rehabilitative and alternative justice processes.

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The role of holistic approaches in reducing the rate of recidivism for young offenders

J Ravulo*

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Social and welfare needs of young offenders

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Individual, community and organisational capacity building

Developing the skills of the individuals (economic capital)

Developing the community to promote cohesion (social capital)

Developing organisations and institutions to be responsive (cultural capital)

Conclusion

[20-1000] Introduction

I first become intrigued by how the legal system works when I came across a newspaper article in 1998 that highlighted research around sentencing disparities between Anglo Australian, Indigenous and Pacific young people.[1] It found the latter two cohorts were receiving harsher penalties, double those of their white counterparts, despite coming from similar criminal histories and backgrounds. Being a teenager myself at the time, with an Anglo-Australian mother and Fijian father, and extended family and friends involved in the youth justice system, it made me feel an array of emotions ranging from disbelief, frustration and anger. This in essence, further underpinned my growing understanding of social justice, and to question why society undertakes such treatment of people, especially its youth.

My growing interest in the youth justice system flourished through my undergraduate degree in social work. Studying at the then University of Western Sydney (now known as Western Sydney University), I came to further understand the role of systems theory, and the importance

* Associate Professor, Faculty of Social Sciences, University of Wollongong. Presented at Judicial Commission of NSW, Children's Court of NSW s 16 Conference, Friday 3rd November 2017, Sydney.

1 P Gallagher and P Poletti, *Sentencing disparity and the ethnicity of juvenile offenders*, Research Monograph No 17, Judicial Commission of NSW, 1998.

placed on creating various social systems to cater for individuals, families and communities that make up a society. But I also became more intrigued by the idea that certain systems may create further inequalities and areas of marginalisation as a result of them not catering for its people. As I further heard from lecturers on the ongoing needs across public housing communities in western Sydney, it motivated me to serve and strive to contribute (where appropriate) to promoting a more fair and just systemic response to young people involved in the youth justice system.

After successfully completing my four-year social work degree, I eagerly secured my first full-time job in 2003, working as a Post Release Support Program (PRSP) caseworker. This role was funded by NSW Juvenile Justice and contracted by Mission Australia, a non-government organisation, to work collaboratively across the Campbelltown and Liverpool local government areas. My core role was to help young people aged between 10–17 years reintegrate into their community after spending time in custody. This model was previously set up due to a trend within the Children's Court where young people were not receiving a mandated parole period after their incarceration, which limited their scope to receive support by Juvenile Justice. Despite young people having a short or extensive criminal history, my support was aimed to help clients and their families reintegrate positively into their community. However, many challenges still occurred as the model at the time only focussed on certain outcomes that were perceived to reorient the young person into forms of education, training or employment. Of course, these are important components of helping a young person, but it did not cater for the extensive social and welfare needs such families were still experiencing, and the need to move limited resources to areas that would cater for such deficits in the community.

Such work bolstered my understanding around the ongoing limitations across government departments and agencies that appeared to work in silos rather than collaboratively. For example, as I was trying to get support from local schools to enrol a client, I was trying to negotiate resources to help fund the additional means to enable them to engage, eg, uniforms, workbooks, pens etc. At the same time, I was also trying to gain other resources to help with physical health needs to support the young person and their family. Realistically, I knew this was the role I was employed to do as a case worker, however, it felt that at times, if I didn't proactively approach certain services and departments to connect with one another and to gain support and assistance, then they may have never done so. This challenge perpetuated the lack of understanding and insight certain community organisations may have around the true social and welfare needs of young offenders and their families.

My desire to create a greater insight on the need to challenge and change the way in which community-based agencies were not working together become my focal point; including the desire to understand how NSW Police, NSW Children's Court and NSW Juvenile Justice interacted to support the reduction in recidivist offending behaviour. This objective was further extended by the completion of a Master in Education degree in 2005, where I focussed on the role of engaging disengaged learners in education, followed by the start of my professional doctorate in cultural research where I aimed to further understand the development of antisocial behaviour in young offenders. My paper is focussed on exploring the various entities that make up the youth justice system, and the possible role of creating good practice approaches and opportunities for organisational capacity building.

In the first section, I will explore the social and welfare needs of young offenders, and their interactions with NSW Police, NSW Children's Court and NSW Juvenile Justice — with a view to highlight the possible incongruence that may occur due to certain practices that

further perpetuate cycles of disadvantage and marginalisation. In the second section, I will explore models of good practice within holistic intervention programs that reduce recidivists' offending behaviour. Finally, I will explore the ongoing need to develop and implement whole-of-community and whole-of-government strategies that better enhance and promote social inclusion, cohesion and cultural capital.

Social and welfare needs of young offenders

There is a growing amount of research that highlights the significant concurrence between youth who offend and their social and welfare needs.[2] An implicit need arises to create systems that effectively respond to such obligations. Rather than view youth justice as solely bringing a young person to account from a criminal lens, there is an emphasis to meet the challenging needs from a welfare perspective. Specifically, it is through an ecological, or holistic lens, that we can start to gain a better insight, understanding and room for better strategies that deter recidivist offending behaviours. Rather than see the young person through the lens of their criminogenic needs and risks, ie factors that lead to offending, systems should be better equipped to promote pro-social attitudes and behaviours that lead to inclusion and engagement.

Through my own empirical research with young offenders,[3] 10 key areas were profiled: seven around the prevalence of social and welfare needs, and the other three associated with their interaction with the youth justice system. In total, 100 young people were profiled through their involvement in case-management services provided by a large non-government agency, Mission Australia, that worked in partnership with NSW Police and NSW Juvenile Justice. The following subsection of the paper will profile the key findings from this research, which is further supported by quotes gained from young people. Such a perspective highlights the realities of working with young people with significant social and welfare needs, and the role the youth justice system should play in helping rehabilitate and deter recidivist offending behaviour, rather than perpetuate and create further tensions and strains across the community.

Significant social and welfare needs

Table 1 outlines the various social and welfare domains evident from the research undertaken across the following seven areas:

- family dynamics
- accommodation arrangements
- education levels and history
- financial circumstances
- health characteristics (including alcohol and other drugs (AOD))
- social participation (including access to identification documentation), and
- criminal history.

2 D Johns, K Williams and K Haines, "Ecological youth justice: understanding the social ecology of young people's prolific offending" (2017) 17(1) *Youth Justice* 3, at https://doi.org/10.1177/1473225416665611, accessed 6 August 2019.

3 J Ravulo, *The development of anti-social behaviour in Pacific youth*, University of Western Sydney, Sydney, 2009.

Under each domain, an array of different characteristics was further explored, providing insights into the issues, and the need to appreciate the multiple and complex needs of the young person, their family and the wider community.

Table 1: Social and Welfare needs of young offenders

Domain	Characteristic	Percentage (n=100)
Family	Regular contact with Mother	81%
	Regular contact with Father	43%
	Lives with both parents	35%
	Three or more siblings	72%
	Mother is working (any type)	37%
	Father is working (any type)	40%**
	Mother has significant AOD usage	48%
	Father has significant AOD usage	65%**
	Mother has been incarcerated	19%
	Father has been incarcerated	42%
	Mother violent in home	34%
	Father violent in home	68%
	Young person violent in home	63%
	Mother demonstrates mental health issues	44%
	Father demonstrates mental health issues	35%**
	Young person also undertakes care for siblings	37%
Accommodation	Lives with non-family member	9%
	Resides in public housing	75%
	Resides with four or more bedrooms	16%
	Resides with six or more people	45%
	Access to privately owned car	6%
	6–15 minute walk to bus station	45%
	30+ minute walk to train station	47%
	Evades train fare	72%
	Received penalty notice for fare evasion	80%
Education	Young person attained Year 10 and above	30%
	Special Education enrolment	20%
	History of school suspensions	55%

Domain	Characteristic	Percentage (n=100)
	Diagnosed learning difficulty	38%
	Diagnosed behaviour issue	35%
	Mother — below Year 10 completion	88%
	Father — below Year 10 completion	95%**
	Reading level below academic standard for age	36%
	No longer enrolled/active in education	86%
Finances	Not on Centrelink benefits (but eligible)	55%
	History of unpaid fines now under Revenue NSW	59%
	Further issues with Revenue NSW for not paying	58%
Health	History of negative AOD use	97%
	Young person consumes AOD daily	53%
	Previously convicted of offence under influence of AOD	82%
	Offence undertaken to obtain substances	29%
	Poor personal hygiene	38%
	Known mental health issues	29%
Social	Socialising with peers own age	56%
	Socialising with negative peer associates	81%
	AOD use among peers	44%
	Negative anger towards peers	61%
	Negative anger in public	63%
	Negative anger in education	72%
	Negative anger in home	75%
	Access to computer at home	14%
	Access to Internet at home	15%
	Consistently attends sport commitment	35%
	Attends Place of Worship	41%
Criminal	First offence by age 14	58%
	Sibling has been incarcerated	57%
	Serious Indictable Offence conviction	43%
	Charged with 5+ offences	37%

** Of known cases.

Many of the distinctive areas that are outlined in Table 1 reflect a lack of support and resourcing for the young person. In the family domain, a large number of parents, especially fathers, have significant issues with AOD usage. Such patterns may impact on the family environment, and can lead to similar patterns being developed with the young person. This is also evident from the large proportion of offences being committed while under the influence, with over half of this cohort consuming on a daily basis. Notions of other negative patterns is evident in the level of violence that may occur, with such behaviour also seen as a norm when overcoming conflict in the home, leading to poor interpersonal and intrapersonal communication skills.

A large proportion of participants have not completed Year 10 or above, with many also having a history of school suspension due to problematic participation or behaviour. Parental completion of high school was also low, which may impact on attitudes to educational engagement whereby lifelong learning and its many benefits are diminished. Such perspectives may have led to nearly 90% of the young people surveyed no longer attending school or participating in any form of education or training.

Limited access to public transport as evident in the accommodation domain, can lead to further issues when young people are expected to move across the community to access other resources including training and work opportunities. With only 6% of households possessing a privately registered vehicle, the need to budget funds to utilise public transport is important. However, a large majority of young people may not have ready access to such funds, and as a result, evade the fare, leading to fines and other sanctions. This is evident with nearly half of the cohort not receiving Centrelink benefits, despite being eligible, and the accumulation of unpaid fines being referred and monitored by Revenue NSW (previously known as NSW State Debt Recovery Office).

As a result of not successfully engaging with positive learning environments found in school or other parts of the community, young people may then create peer group association with other young people who are also in similar positions and possess significant social and welfare needs. This may then exacerbate other unhelpful behaviours within this cohort of friends, including negative alcohol and other drug consumption, and violence and aggression among each other, in education and their own homes.

A high proportion of young people may also have other family members with a history of offending, including parents and siblings. Over half the participants in this research committed their first offence before the age of 14. Such patterns of offending behaviour, without intervention, can lead to a further trajectory of offending, especially if encouraged among a negative peer group, which in turn may lead to offences becoming more serious in nature over time.

Interactions with youth justice system

Table 2 outlines the same participant cohort, and their interactions with the three keys areas of youth justice in NSW: the NSW Police Force, NSW Children's Court and NSW Juvenile Justice.

Table 2: Interactions with the NSW Youth Justice system

Statutory Department	Characteristic	Percentage (n=100)
NSW Police Force	Stopped at least once a week	65%
	Profiling impacts on peer association	63%
	Profiling impacts on self-esteem	64%
	Young person will actively run/hide from police	60%
	Young person will run/hide due to existing warrant	58%
	Young person required to report to police for order	63%
	Problems occur when reporting to police	77%
	Problems occur during interaction with police	83%
	Problems with police then result in further charges	34%
NSW Children's Court	History of more than 5+ court cases	35%
	More than 5+ adjournments during case	24%
	Adjournments are for 6+ weeks long	11%
	Parent present at court to support child	49%
	Young person understood court process	87%
	Attending school during court process	22%
	Re-offending during court process	44%
	Re-offending leads to a new charge	94%
	Missed court appearance during matter	28%
	Missed court due to non-parental support	25%
	Missing court resulted in a further warrant	85%
	Abide by imposed conditions	30%
	Abide by condition to report to police	77%
NSW Juvenile Justice	Mandated to attend weekly supervision	85%
	Trouble accessing transport to attend supervision	85%
	Caught public transport to attend supervision	56%
	Evaded train fare to attend supervision	63%
	Received fine for fare evasion	91%
	Supervision was perceived as helpful	39%
	Good rapport with juvenile justice worker	60%
	Conflicting appointments were made	24%

Statutory Department	Characteristic	Percentage (n=100)
	Supervision ended due to lack of compliance	37%
	Formal breach or order occurred as a result	80%

A large proportion of young offenders felt a strained relationship with NSW Police, creating a sense of us and them that further perpetuated a level of mistrust. A third of offenders who had problems through negative interactions with police received further charges as a result. This negative association only created a perceived barrier with such young people, who may see NSW Police as an unhelpful entity, rather than wanting to promote community safety. Young people also felt negatively impacted by the constraints on their ability to associate with peers, resulting in low self-esteem which impacts on the way in which they position themselves as a positive member of a community. As young people are still in the psychosocial developmental stage of forming their personal identities, negative association with systems, including law enforcement, may create an anti-social perception for the young person, who starts to then internalise and perceive their own self and broader identity within this context. As shared by one 13-year-old male:

> One of the police, they were saying rude stuff to me, and when they were hand cuffing me they squeezed my hand and stuff . . . F you and stuff . . . I don't wanna be bad and stuff, I just wanna be a normal person.[4]

Legal processes in the NSW Children's Court are, by their nature, complex. However, young offenders have noted a positive flow of communication in the court, and participate with a good level of comprehension about what is going on. Part of this approach is assisted by the compulsory need to have a parent/caregiver present during court participation. However, there were some concerns when such guardians were not present, which meant matters could not progress, and adjournments would occur. This has more of a negative impact if the young person is not granted bail. In other situations, if a young person is on some form of community-based order, almost half of such young people re-offend, which leads to a new charge before the courts. Such cyclical patterns then create further concerns as a number of young people will not be engaged with formal education, further deterring opportunities for learning and matriculation into vocational support leading to employment and other positive life outcomes.

Of the young people required to see NSW Juvenile Justice as part of their court order, a large percentage found being able to attend mandatory appointments problematic. With over half having to use public transport to access such support people, over two-thirds received a financial fine for not paying the required fare. A good level of rapport was generally built between the young person and their respective worker; however, a lower rate was scored for the perceived usefulness of supervision given. This could be based on the value such young people placed on the actual support given, or the nature of the support still being perceived within a punitive context. Where there is a lack of value on supervision by the young person and there are problems in being able to physically attend appointments due to transport and the inability to pay, this led to non-compliance, which in turn resulted in further breaches. As a result, a warrant for an arrest may ensue, further perpetuating a negative association with legal entities.

Therefore, as noted in the above two tables, the social and welfare needs of young people and the way in which they interact with the legal system needs to be considered and dealt

4 ibid.

with effectively. The lack of ability to report to police, and attend supervision and court hearings may prevent genuine assistance and support from being provided to such vulnerable and marginalised young people. Being able to counteract such problematic social issues and anti-social behaviour is needed, as discussed below.

Holistic approaches to deterring recidivist offending

Models of service delivery and provision should reflect the social and welfare needs. A holistic approach helps meet such needs, and understands and addresses criminogenic factors. Traditionally, case-management approaches have been utilised when working with young offenders especially through statutory entities like NSW Juvenile Justice. However, it is how this case-management model is established and implemented that can make the difference.

Various case-management models exist, ranging from problem solving and task centred, to post-modern, narrative and psychosocial. Under each model, one of the main goals is to re-position the client as an individual within their situation, and provide scope for the case worker to support the young person to explore the possible reasons and solutions to the issues they are experiencing. Ideally, the case worker is situated to empower the client to be self-determined, as someone — when given the opportunity — who has the ability to challenge and change their current pathway towards a more positive set of outcomes.

A good practice approach to case management is both prescriptive and descriptive. Prescriptive in the way in which various stages occur across the life of the working relationship, facilitated by the case worker in conjunction with the young person. The descriptive nature of good case management occurs where the client is able to nuance the direction by providing their own insight and aspirations. Combining a prescriptive and descriptive approach will enable specific goals to be mapped, while assisting tangible outcomes to occur.

For example, as per Table 3 below, Stage One would consist of assessment; where the case worker gains a greater insight and understanding of the client's circumstances. Stage Two includes goal-setting activities that enable the client to explore the possible solutions to the problems they are facing.

Table 3: Good practice approach to case management

Prescriptive	Descriptive	Focus
Stage One: Assessment	Information provided directly by young person, their support people, and other relevant sources	Understanding individual context and capabilities
Stage Two: Goal Setting	Young person creates specific case plan with support of worker to achieve positive outcomes	Promotion of possibilities beyond current circumstances and situation
Stage Three: Implementation	Application of case plan, with support of worker in engaging with resources	Engagement and connection with self and community
Stage Four: Review	Worker to support active reflection with young person on the progress and process of change	Creating an insight into pro-social thought, feelings and behaviours
Stage Five: Exit	Outlining possible options and access to resources beyond case-management period	Exploration of ongoing development and importance of self-determination

Descriptively, young people are the central component of the case-management process — where they are seen as collaborators and contributors. Their own perspective and narratives shape the way in which each stage is undertaken, providing a practical application and understanding to the process.

At the same time, an overarching focus is also part of the case-management process, knowing that each stage also yields a more in-depth ability to provide the young person with the opportunity to both deconstruct, and reconstruct their understanding of self and others. This is achieved by making them the focal point, enabling the case worker to facilitate the helpful relationship towards a change process that deals effectively with the social and welfare needs that perpetuate offending behaviour.

I have been involved in creating a case-management model that supports the development of young people involved in crime. Under the auspices of South West Youth Services and Mission Australia, the Youth Offender Support Programs (YOSP) were formed to develop three programs to work with NSW Police and NSW Juvenile Justice. A psychosocial case-management model was developed to address criminogenic factors, and the accompanying social and welfare needs by accessing and setting goals against 13 life domains (Table 4). Each domain represents a key area of the individual's life, while also listing key tasks or activities that could support the young person to set goals, and to implement them as part of the case-management process. The top five domains that were most utilised were:

- personal and social skills
- alcohol and others drugs
- financial
- family, and
- health.[5]

Table 4: Youth Offender Support Programs

Life Domain	**No of times domain chosen as a goal**	**Included**
Accommodation	16	Family placement and personal support
Family	16	Mediation, sibling and parental support
Education	12	School and TAFE placements
Employment and training	26	Job search, resume and accessing courses
Recreation	31	Sporting commitments and programs
Financial	16	Centrelink payments and budgeting
Health	44	Sexual, physical and mental health
Alcohol and other drugs	15	Education, harm minimisation and strategies

5 Ravulo, ibid, p 260.

Life Domain	No of times domain chosen as a goal	Included
Identification	15	Birth certificate, bank accounts and TFN
Legal and offending behaviour	37	Court appearances and supervision
Daily living	16	Hygiene workshops and resources
Personal and social skills	19	Anger and conflict management and peers
Ethnic culture	15	Connection with community and events

Other promising models include the newly formed and implemented Youth on Track, a program funded by NSW Juvenile Justice with Mission Australia, and referrals sourced by NSW Police and NSW Education. The majority of referrals are activated from NSW Police after the young person has received their second caution, or youth justice conference or charge. Over half identify as being Aboriginal or Torres Strait Islander. On entry, near to 60% of participants had a medium-high risk of offending, but on completion, scored low-medium.[6] Additional benefits include 88% of young people improving their relationship with police, including positive and no contact; and 50% have reduced their offending risk after three months of involvement.[7] The key feature of the case-management model is to address eight central criminogenic domains: antisocial behaviour and thinking, peer relations, alcohol and other drug use, education and employment, family functioning and connection to community.[8] An ongoing evaluation framework underpins the model, with a view to highlight strengths and areas of improvement.[9]

Individual, community and organisational capacity building

Overall, there is a need to enable a young person to understand their own role in the community through their participation in pro-social activities and behaviours. This also includes promoting community-based resources and capacity to deal with needs. That is, how can we expect to have resilient individuals if we do not adequately fund resources within communities and regions that support psychosocial development and achievement? This includes providing support for families to thrive, and access educational opportunities that are on par with existing educational levels.

6 NSW Justice, *Youth on Track snapshot*, Sydney, 2016 at www.youthontrack.justice.nsw.gov.au/Documents/Snapshot%20YOT%20Dec%202016.pdf, accessed 8 August 2019.

7 NSW Justice, *Youth on Track snapshot*, Sydney, 2018 at www.youthontrack.justice.nsw.gov.au, accessed 8 August 2019.

8 Cultural & Indigenous Research Centre, *Youth on Track social outcomes evaluation*, 2017 at www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf, accessed 8 August 2019.

9 NSW Bureau of Crime Statistic and Research, *Outcome evaluation of Youth on Track*, 2017 at www.youthontrack.justice.nsw.gov.au/Documents/2017_HT_Youth%20on%20track%20evaluation%20proposal.pdf, accessed 8 August 2019. See also, L Trimboli and NSW Bureau of Crime Statistic and Research, *Youth on Track randomised controlled trial: process evaluation*, Issue paper no 141, August 2019.

We also need to ensure organisations are adequately resourced and understand the work being achieved with vulnerable young people and their families. This may be achieved through the following three areas underpinned by the notion of capital as expounded by sociology theorist Pierre Bourdieu:[10]

1. developing the skills of the individuals (economic capital — talents and attributes),
2. developing the community to promote cohesion (social capital — role of community to support networking and opportunities for growth and participation), and
3. developing organisations and institutions to be responsive (cultural capital — valuing contribution and shaping the way in which capital is understood and determined).

Developing the skills of the individuals (economic capital)

The opportunity to assist an individual develop skills and other key attributes that will help them engage in education, will also foster and enhance the notion of lifelong learning. That is, we learn how to learn. If we are not providing scope to participate and attain a positive association within local primary and high schools, then it can be difficult to move into other key areas and outcomes in life. By promoting positive attitudes towards learning, employment is seen as being a productive part of wellbeing, which in turn supports economic and financial viability. However, people are not able to gain and sustain employment if they do not have the requisite skills that lead to job readiness and employment. Therefore, by promoting young offenders to meaningfully engage in education requires the additional care and support with adequate access to resources to enable such outcomes to occur. Underlying this concept of formal learning comes the opportunity for young people to potentially exercise their talents and attributes, also known as strengths, that provide a platform for skills to develop, mature and become part of the toolkit used as a productive member of society.

The need to engage young offenders in a process of effective change through holistic case-management models further supports economic capital, and the ability to use such capital in a proactive and productive manner. Other people within the young person's environment, including siblings and parents, will also contribute to the way in which attitudes are fostered. If support programs include other family members in the process of change, then a shifting in attitudes towards education, and subsequent employment can also follow.

Also, the notion of lifelong learning is not restricted to formal learning environs. It also incorporates the way in which individuals understand and learn who they are, and how they relate to self and others. Having a positive understanding of self helps an individual to further foster a positive attitude on how their thoughts, emotions and behaviours may have an impact on self and others. For example, the ability to learn from mistakes is part of having a positive attitude towards lifelong learning. You are able to further undertake decisions that are informed by the learning from previous experiences. Creating such emotional intelligence can then support the ability to be more critical in the way in which someone navigates certain life choices, and once again impacts on the creation of skills to exercise and obtain economic capital. This includes interpersonal and intrapersonal communication skills, and the way in which someone learns how to effectively communicate across various situations and circumstances.

Developing the community to promote cohesion (social capital)

Individuals make up families, and families make up communities. Within these communities certain attitudes and perspectives are formed in accordance with the allocation of resources such

10 R Moore, "Capital", In M Grenfell (ed), *Pierre Bourdieu — Key Concepts*, 2nd edn, Routledge, 2014, p 98.

as adequate housing, transport and other community-based facilities like sport and recreation, shops, schools and law enforcement. The ability to access and utilise these resources also depends on the way in which local communities value these resources.

In the context of youth offenders and their families, being able to promote scope for such individuals to be part of their local community can greatly impact on the way in which they participate and use the respective resources. The inclusion of young people in spaces that provide them with a voice to be heard, and activities that are relatable and engaging, can assist them engage with their local community. For example, the Police Citizens Youth Clubs NSW (PCYC) helps foster positive relationships between the community and police, and can be part of this approach. Various activities are offered, ranging from physical to educational; all in the context of youth participation and inclusion. New and emerging peer groups are formed and support the development of a community where young people feel valued. Helping young offenders, who may be vulnerable and marginalised due to their social and welfare needs, to actively join their local PCYCs can spur on a level of growth and participation. Such young people are also provided with the opportunity to learn new positive skills and perspectives that are reinforced by other participants. Having this sense of value can greatly assist an individual feel they are able to positively contribute to their own community, in turn creating a sense of social capital.

Community cohesion is part of this bigger process and encourages individuals and families to become more connected with the larger notion of being part of a community. At the same time, communities are empowered to be proactively involved in supporting one another to thrive, ensuring adequate resources are funded and included across a particular geographic location. Conversely, if individuals and families are not valued in their own community, then a lack of cohesion may occur, creating marginalisation and disadvantages the way in which a community operates and functions. Therefore, it is important for young offenders to feel like they do positively belong to their community, which can be impacted by the way in which they interact with schools and police.

Developing organisations and institutions to be responsive (cultural capital)

In lieu of community cohesion, the need to create organisations that interact with young offenders and their families to be responsive to their social and welfare needs is important. Various institutions, and the way in which they do things can greatly determine the outcome achieved. It is within these organisations and institutions that certain practices are undertaken, forming a culture of how employees operate. For example, the ability of police to develop appropriate skills to communicate with young people who have limited interpersonal communication skills can determine the outcome of such an interaction. If a young offender, who has had a negative experience with police previously, does not respond appropriately to police during their respective interaction, this can create further problems for both the young person and the police. Likewise, if a staff member in NSW Juvenile Justice is not aware and appreciative of the limited interpersonal communication skills of a young offender, they may perceive such youth as being non-compliant and not wanting to change.

Therefore, the need to re-shift the way in which institutions and organisations value and determine what is appropriate can have a positive impact. I believe we need to promote scope for young offenders to be better understood in the context of their significant social and welfare needs, and the way in which they may navigate and negotiate their involvement in the youth justice system. Paired with the ongoing psychosocial development of young people, I also

believe organisations and institutions have a responsibility to set a tone to create a culture where service provision and delivery meets these needs. Rather than creating a punitive space, we need to balance the approach between a welfare and justice model[11] where we strive to understand the significant social needs of the young person, while also promoting scope for them to be held accountable where and when appropriate.

This may include the development of responsive organisational policy and procedures when accessing young offenders in accordance with their social and welfare needs to encourage engagement and participation. For example, meeting young offenders in their own local community may provide a better incentive to get involved in supervision by NSW Juvenile Justice, rather than expecting them to take public transport to a location they can not financially afford to get to. Utilising other community-based resources to assist in promoting community inclusion, including local schools, can also assist in this big-picture approach. In turn, this builds a level of cultural capital, where expectations are mapped and can be met by all parties involved; without the risk of creating another level of marginalisation for young people already isolated.

Conclusion

There is a real need to promote partnership between individuals, families and communities with the organisations and institutions that work with them. Rather than working and competing against each other, including departmental silos that may exist across State government and their contracted services, we need to promote whole-of-family, whole-of-community and whole-of-government approaches that are equally underpinned by social resilience, social mobility and social inclusion.

A whole-of-family approach provides scope for individuals to be understood in the context of the family, and the various social and welfare needs that may exist within. At the same time, the ability to highlight possible capabilities and strengths that can be utilised in the change process is part of the solution. We need to understand that young offenders are part of a family/care-giving system that may require additional assistance, while at the same time providing supportive engagement with this service. Such young people and their families should also be acknowledged for their resilience, and this needs to be recognised as part of their ability to move beyond difficult situations and create further opportunities to thrive.

A whole-of-community approach provides scope for communities to see themselves as that — sharing a common unity that enables their members to operate and function in a purposeful manner. Being aware of what resources are available to help connect people to one another, while also acknowledging certain gaps and areas of improvement is part of this process. Providing young offenders with a space to be included and feel like they belong and can contribute is part of this approach. This will also promote a sense of social mobility where people can move in and across a physical space while also seeing the potential to move beyond perceived limitations whether they be physical or economic. The ability to traverse beyond their local community and across other areas of the region can also support young people to see beyond their marginality, in turn, providing new opportunities and experiences that can help enforce positive engagement and inclusion with others.

A whole-of-government approach provides scope for departments to move beyond the limitations of red tape and rhetoric. All government departments are created to undertake a

11 C Cunneen, R White and K Richards, *Juvenile justice: youth and crime in Australia*, 5th edn, Oxford University Press, 2016.

certain role and responsibility across civil society, but within each department, a governance structure is created, and a certain way of doing things occurs. The need to uphold legislative frameworks and operations that fall under a certain remit is required, but at the possible sacrifice of working collegially with other cognate departments. In turn, a barrier is created, and resources are expended with a common good in mind, but may fall short of meeting the need of the community in which they are created to service. Therefore, the need to institute connections to working with each other can be part of breaking down these barriers. This includes enhancing working relationships between all departments that have a vested interest in counteracting youth offending and crime, including Police, Education, Health, Juvenile Justice and the Children's Court. Ensuring strategic departmental plans are more inclusive of each other results in a level of social inclusion not just within the statutory agencies, but also across the wider community. Overall, a better scale of economy is enabled and an efficiency to truly meet the social and welfare needs of young offenders and their families.

Through this approach, I believe we can achieve a more holistic response to the way in which we work collaboratively in and across the community. It is my ongoing hope and professional commitment to promote the scope for society to be more aware of the realities associated with the needs of young people who commit crime, and to create a systemic response that benefits all stakeholders including government departments and its services in the desire to deter recidivist offending behaviour while promoting happy, healthy communities.

What makes juvenile offenders different from adult offenders

K Richards*

Foreword ..... [20-2000]

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References

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[20-2000] Foreword

[Adam Tomison, Director, Australian Institute of Criminology, Australia's national research and knowledge centre on crime and justice]

Responding to juvenile offending is a unique policy and practice challenge. While a substantial proportion of crime is perpetuated by juveniles, most juveniles will "grow out" of offending and adopt law-abiding lifestyles as they mature. This paper outlines the factors (biological, psychological and social) that make juvenile offenders different from adult offenders and that necessitate unique responses to juvenile crime. It is argued that a range of factors, including juveniles' lack of maturity, propensity to take risks and susceptibility to peer influence, as well as intellectual disability, mental illness and victimisation, increase juveniles' risks of contact with the criminal justice system. These factors, combined with juveniles' unique capacity to be rehabilitated, can require intensive and often expensive interventions by the juvenile justice system. Although juvenile offenders are highly diverse, and this diversity should be considered in any response to juvenile crime, a number of key strategies exist in Australia to respond effectively to juvenile crime. These are described in this paper.

Introduction

Historically, children in criminal justice proceedings were treated much the same as adults and subject to the same criminal justice processes as adults. Until the early twentieth century, children in Australia were even subjected to the same penalties as adults, including hard labour and corporal and capital punishment (Carrington & Pereira 2009).

Until the mid-nineteenth century, there was no separate category of "juvenile offender" in Western legal systems and children as young as six years of age were incarcerated in Australian prisons (Cunneen & White 2007). It is widely acknowledged today, however, both in Australia and internationally, that juveniles should be subject to a system of criminal justice that is separate from the adult system and that recognises their inexperience and immaturity. As such, juveniles are typically dealt with separately from adults and treated less harshly than their adult counterparts. The United Nations' (1985: 2) *Standard Minimum Rules for the Administration of Juvenile Justice* (the "Beijing Rules") stress the importance of nations establishing:

> a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed to meet the varying needs of juvenile offenders, while protecting their basic rights.

In each Australian jurisdiction, except Queensland, a juvenile is defined as a person aged between 10 and 17 years of age, inclusive. In Queensland, a juvenile is defined as a person aged between 10 and 16 years, inclusive. In all jurisdictions, the minimum age of criminal responsibility is 10 years. That is, children under 10 years of age cannot be held legally responsible for their actions.

How juvenile offending differs from adult offending

It is widely accepted that crime is committed disproportionately by young people. Persons aged 15 to 19 years are more likely to be processed by police for the commission of a crime than are members of any other population group.

In 2007–08, the offending rate for persons aged 15 to 19 years was four times the rate for offenders aged more than 19 years (6,387 and 1,818 per 100,000 respectively; AIC 2010). Offender rates have been consistently highest among persons aged 15 to 19 years and lowest among those aged 25 years and over.

The proportion of crime perpetrated by juveniles

This does not mean, however, that juveniles are responsible for the majority of recorded crime. On the contrary, police data indicate that juveniles (10 to 17 year olds) comprise a minority of all offenders who come into contact with the police. This is primarily because offending "peaks" in late adolescence, when young people are aged 18 to 19 years and are no longer legally defined as juveniles.

The proportion of all alleged offending that is attributed to juveniles varies across jurisdictions and is impacted by the counting measures that police in each state and territory use. The most recent data available for each jurisdiction indicate that:

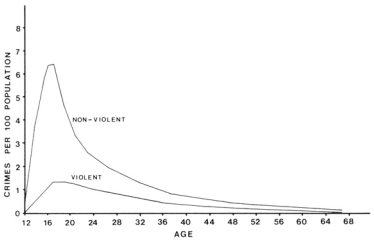
- juveniles comprised 21% of all offenders processed by Victoria Police during the 2008–09 financial year (Victoria Police 2009);
- Queensland police apprehended juveniles (10 to 17 year olds) in relation to 18% percent of all offences during the 2008–09 financial year (Queensland Police Service 2009);
- juveniles comprised 16% of all persons arrested in the Australian Capital Territory during the 2008–09 period (AFP 2009);
- 18% of all accused persons in South Australia during 2007–08 were juveniles (South Australia Police 2008);
- juveniles were apprehended in relation to 13% of offence counts in Western Australia during 2006 (Fernandez et al. 2009); and
- in the Northern Territory during 2008–09, 8% of persons apprehended by the police were juveniles (NTPF&ES 2009).

It should be acknowledged in relation to the above that the proportion of offenders comprised by juveniles varies according to offence type. This is discussed in more detail below.

Growing out of crime: the age-crime curve

Most people "grow out" of offending; graphic representations of the age-crime curve, such as that at Figure 1, show that rates of offending usually peak in late adolescence and decline in early adulthood. Although the concept of the age-crime curve has been the subject of much debate, critique and research since its emergence, the relationship between age and crime is nonetheless "one of the most generally accepted tenets of criminology" (Fagan & Western 2005: 59). This relationship has been found to hold independently of other variables (Farrington 1986).

Example of an age-crime curve[1]



1 Source: Farrington 1986.

Juvenile offending trajectories

Research consistently indicates, however, that there are a number of different offending patterns over the life course. That is, while most juveniles grow out of crime, they do so at different rates. Some individuals are more likely to desist than others; this appears to vary by gender, for example (Fagan & Western 2005). The processes motivating desistance have not been well explored and it appears that there may be multiple pathways in and out of crime (Fagan & Western 2005; Haigh 2009).

Perhaps most importantly, a small proportion of juveniles continue offending well into adulthood. A small "core" of juveniles have repeated contact with the criminal justice system and are responsible for a disproportionate amount of crime (Skardhamar 2009).

The study of Livingstone et al (2008) of a cohort of juveniles born in Queensland in 1983 or 1984 and with one or more finalised juvenile court appearances identified three primary juvenile offending trajectories:

- *early peaking–moderate offenders* showed an early onset of offending, with a peak around the age of 14 years, followed by a decline. This group comprised 21% of the cohort and was responsible for 23% of offences committed by the cohort;
- *late onset–moderate offenders*, who displayed little or no offending behaviour in their early teen years, but who had a gradual increase until the age of 16 years, comprised 68% of the cohort, but was responsible for only 44% of the cohort's offending; and
- *chronic offenders*, who demonstrated an early onset of offending with a sharp increase throughout the timeframe under study, comprised just 11% of the cohort, but were responsible for 33% of the cohort's offending (Livingstone et al 2008).

The proportion of juvenile who come into contact with the criminal justice system

Despite the strong relationship between age and offending behaviour, the majority of young people never come into formal contact with the criminal justice system. The longitudinal study by Allard et al (2010) found that of all persons born in Queensland in 1990, 14% had one or more formal contacts (caution, youth justice conference or court appearance) with the criminal justice system by the age of 17 years, although this varied substantially by Indigenous status and sex. Indigenous juveniles were 4.5 times more likely to have contact with the criminal justice system than non-Indigenous juveniles. Sixty-three per cent of Indigenous males and 28% of Indigenous females had had a contact with the criminal justice system as a juvenile, compared with 13% of non-Indigenous males and 7% of non-Indigenous females (Allard et al 2010).

The types of offences that are perpetrated by juveniles

Certain types of offences (such as graffiti, vandalism, shoplifting and fare evasion) are committed disproportionately by young people. Conversely, very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles. In addition, offences such as white collar crimes are committed infrequently by juveniles, as they are incompatible with juveniles' developmental characteristics and life circumstances.

On the whole, juveniles are more frequently apprehended by police in relation to offences against *property* than offences against the *person*. The proportion of juveniles who come into contact with the police for property crimes varies across jurisdictions, from almost one-third in New South Wales to almost two-thirds in Victoria (Richards 2009). Differences among jurisdictions can result from a variety of factors, including legislative definitions of

offences, counting measures used to record offences and recording practices, as well as genuine differences in rates of offending. Although not available for all jurisdictions, the most recent data indicate that:

- in Victoria during 2008–09, 66% of juvenile alleged offenders, compared with 46% of adult alleged offenders, recorded by police were apprehended in relation to property crime (Victoria Police 2009);
- in Queensland during the same period, property offences comprised 58% of offences for which juveniles were apprehended by police, compared with 22% of offences for which adults were apprehended (Queensland Police Service 2009); and
- in South Australia during 2007–08, property crimes comprised 46% of all crimes for which juveniles were apprehended, compared with 24% for adults (South Australia Police 2008).

Offences for which juveniles were most frequently adjudicated by the Children's Courts in Australia during 2007–08 were acts intended to cause injury (16%), theft (14%), unlawful entry with intent (12%), road traffic offences (11%) and deception (fare evasion and related offences — also 11%; ABS 2009). Combined, these offences accounted for nearly two-thirds of defendants appearing before the Children's Courts during this period (ABS 2009).

By comparison, offences for which adults were most frequently adjudicated in the Higher Courts during 2007–08 were acts intended to cause injury (23%), illicit drugs offences (18%), sexual assault (15%), robbery/extortion (11%) and unlawful entry with intent (9%; ABS 2009). Offences for which adults were most frequently adjudicated in the Magistrates Courts during 2007–08 were road traffic offences (45%), public order offences (11%), dangerous or negligent acts endangering persons (9%), acts intended to cause injury (8%), offences against justice procedures (6%), theft (5%) and illicit drugs offences (also 5%; ABS 2009).

The nature of juvenile offending

Juveniles are more likely than adults to come to the attention of police, for a variety of reasons. As Cunneen and White (2007) explain, by comparison with adults, juveniles tend to:

- be less experienced at committing offences;
- commit offences in groups;
- commit offences in public areas such as on public transport or in shopping centres; and
- commit offences close to where they live.

In addition, by comparison with adults, juveniles tend to commit offences that are:

- attention-seeking, public and gregarious; and
- episodic, unplanned and opportunistic (Cunneen & White 2007).

Some offences committed disproportionately by juveniles, such as motor vehicle theft, have high reporting rates due to insurance requirements (Cunneen & White 2007). This may result in young people coming to police attention more frequently. In addition, some behaviours (such as underage drinking) are illegal solely because of the minority status of the perpetrator. Research has demonstrated that some offence types committed disproportionately by juveniles (such as motor vehicle thefts and assaults) are the types of offences most likely to be repeated (Cottle, Lee & Heilbrun 2001).

It is also important to note that broad legislative or policy changes can disproportionately impact upon juveniles and increase their contact with the police. Farrell's (2009) analysis of police "move on" powers clearly demonstrates, for example, that the introduction of these powers has disproportionately affected particular groups of citizens, including juveniles.

Why juvenile offending differs from adult offending

It is clear that the characteristics of juvenile offending are different from those of adult offending in a variety of ways. This section summarises research literature on why this is the case.

Risk-taking and peer influence

Research on adolescent brain development demonstrates that the second decade of life is a period of rapid change, particularly in the areas of the brain associated with response inhibition, the calibration of risks and rewards and the regulation of emotions (Steinberg 2005). Two key findings have emerged from this body of research that highlight differences between juvenile and adult offenders. First, these changes often occur before juveniles develop competence in decision making:

> Changes in arousal and motivation brought on by pubertal maturation precede the development of regulatory competence in a manner that creates a disjunction between the adolescent's affective experience and his or her ability to regulate arousal and motivation (Steinberg 2005: 69–70).

This disjuncture, it has been argued, is akin to "starting an engine without yet having a skilled driver behind the wheel" (Steinberg 2005: 70; see also Romer & Hennessy 2007).

Second, in contrast with the widely held belief that adolescents feel "invincible", recent research indicates that young people do understand, and indeed sometimes overestimate, risks to themselves (Reyna & Rivers 2008). Adolescents engage in riskier behaviour than adults (such as drug and alcohol use, unsafe sexual activity, dangerous driving and/or delinquent behaviour) despite understanding the risks involved (Boyer 2006; Steinberg 2005). It appears that adolescents not only consider risks cognitively (by weighing up the potential risks and rewards of a particular act), but socially and/or emotionally (Steinberg 2005). The influence of peers can, for example, heavily impact on young people's risk-taking behaviour (Gatti, Tremblay & Vitaro 2009; Hay, Payne & Chadwick 2004; Steinberg 2005). Importantly, these factors also interact with one another:

> Not only does sensation seeking encourage attraction to exciting experiences, it also leads adolescents to seek friends with similar interests. These peers further encourage risk taking behavior (Romer & Hennessy 2007: 98–99).

It has been recognised that young people are more at risk of a range of problems conducive to offending — including mental health problems, alcohol and other drug use and peer pressure — than adults, due to their immaturity and heavy reliance on peer networks. Alcohol and drugs have also been found to act in a more potent way on juveniles than adults (LeBeau & Mozayani cited in Prichard & Payne 2005) and substance use is a strong predictor of recidivism (Cottle, Lee & Heilbrun 2001). As Haigh (2009) explains, adolescence is a time of complex physiological, psychological and social change. Progression through puberty has been shown to be associated with statistically significant changes in behaviour in both males and females and may be linked to an increase in aggression and delinquency (Najman et al 2009).

Intellectual disability and mental illness

Intellectual disabilities are more common among juveniles under the supervision of the criminal justice system than among adults under the supervision of the criminal justice system or among

the general Australian population. Three per cent of the Australian public has an intellectual disability and 1% of adults incarcerated in New South Wales prisons was found to have an IQ below 70 in a recent study (Frize, Kenny & Lennings 2008). By comparison, 17% of juveniles in detention in Australia have an IQ below 70 (Frize, Kenny & Lennings 2008; see also HREOC 2005). Frize, Kenny and Lennings' (2008) study of 800 young offenders on community-based orders in New South Wales found that the over-representation of intellectual disabilities was particularly high among Indigenous juveniles and that juveniles with an intellectual disability are at a significantly higher risk of recidivism than other juveniles.

Mental illness is also over-represented among juveniles in detention compared with those in the community. The *Young People In Custody Health Survey*, conducted in New South Wales in 2005, found that 88% of young people in custody reported symptoms consistent with a mild, moderate or severe psychiatric disorder (HREOC 2005).

Young people as crime victims

Young people are not only disproportionately the *perpetrators* of crime; they are also disproportionately the *victims* of crime (see Finkelhor et al 2009; Richards 2009). Young people aged 15 to 24 years are at a higher risk of assault than any other age group in Australia and males aged 15 to 19 years are more than twice as likely to become a victim of robbery as males aged 25 or older, and all females (AIC 2010). Statistics also show that juveniles comprise substantial proportions of victims of sexual offences. In 2007, the highest rate of recorded sexual assault in Australia was for 10 to 14 year old females, at 544 per 100,000 population (AIC 2008). For males, rates were also highest among juveniles, with 95 per 100,000 population 10 to 14 year olds reporting a sexual assault (AIC 2008).

In addition, it is important to recognise that juveniles are frequently the victims of offences committed by other juveniles. Between 1989–90 and 2007–08, almost one-third of homicide victims aged 15 to 17 years, for example, were killed by another juvenile (Richards, Dearden & Tomison forthcoming). As Daly's (2008) research demonstrates, the boundary between juvenile *offenders* and juvenile *victims* can easily become blurred. Cohorts of juvenile victims and juvenile offenders are unlikely to be entirely discrete and research consistently shows that these phenomena are interlinked.

The high rate of victimisation of juveniles is critical to consider, as it is widely acknowledged that victimisation is a pathway into offending behaviour for some young people.

The challenge of responding to juvenile crime

Preventing juveniles from having repeated contacts with the criminal justice system and intervening to support juveniles desist from crime are therefore critical policy issues. Assisting juveniles to grow out of crime — that is, to minimise juvenile recidivism and to help juveniles become "desisters" (Murray 2009) — are key policy areas for building safer communities.

Although juvenile crime is typically less serious and less costly in economic terms than adult offending (Cunneen & White 2007), juvenile offenders often require more intensive and more costly interventions than adult offenders, for a range of reasons.

Juvenile offenders have complex needs

Juvenile offenders often have more complex needs than adult offenders, as described above. Although many of these problems (substance abuse, mental illness and/or cognitive disability)

also characterise adult criminal justice populations, they can cause greater problems among young people, who are more susceptible — physically, emotionally and socially — to them. Many of these problems are compounded by juveniles' psychosocial immaturity.

Juvenile offenders require a higher duty of care

Juvenile offenders require a higher duty of care than adult offenders. For example, due to their status as legal minors, the state provides in loco parentis supervision of juveniles in detention. Incarcerated juveniles of school age are required to participate in schooling and staff-to-offender ratios are much higher in juvenile than adult custodial facilities, to enable more intensive supervision and care of juveniles. For these reasons, juvenile justice supervision can be highly resource-intensive (New Economics Foundation 2010).

Juveniles may grow out of crime

As outlined above, many juveniles grow out of crime and adopt law-abiding lifestyles as young adults. Many juveniles who have contact with the criminal justice system are therefore not "lost causes" who will continue offending over their lifetime. As juveniles are neither fully developed nor entrenched within the criminal justice system, juvenile justice interventions can impact upon them and help to foster juveniles' desistance from crime. Conversely, the potential exists for a great deal of harm to be done to juveniles if ineffective or unsuitable interventions are applied by juvenile justice authorities.

Juvenile justice interventions

A range of principles therefore underpin juvenile justice in Australia. These are designed to respond to juvenile offending in an appropriate and effective way.

The doctrine of doli incapax

The rate at which children mature varies considerably among individuals. Due to their varied developmental trajectories, children learn the difference between right and wrong — and between behaviours that are seriously wrong and those that are merely naughty or mischievous — at different ages. The legal doctrine doli incapax recognises the varying ages at which children mature. In Australia, juveniles aged 10 to 13 years inclusive are considered to be doli incapax. Doli incapax is a rebuttable legal presumption that a child is "incapable of crime" under legislation or common law. In court, the prosecution is responsible for rebutting the presumption of doli incapax and proving that the accused juvenile was able at the relevant time to adequately distinguish between right and wrong. A contested trial can only result in conviction if the prosecution successfully rebuts this presumption.

The principle of doli incapax has existed since at least the fourteenth century (Crofts 2003) and is supported by the United Nations' (1989: 12) *Convention on the Rights of the Child*, which requires signatory states to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law". There has, nonetheless, been a great deal of debate about its continued relevance (Crofts 2003; Urbas 2000) and the principle was abolished in 1998 in the United Kingdom.

Welfare and justice approaches to juvenile justice

Western juvenile justice systems are often characterised as alternating between welfare and justice models. The welfare model considers the needs of the young offender and aims to rehabilitate the juvenile. Offending behaviour is thought to stem primarily from factors outside

the juvenile's control, such as family characteristics. The justice model conceptualises offending as the result of a juvenile's free will, or choice. Offenders are seen as responsible for their actions and deserving of punishment.

In reality, the welfare and justice models are ideal types and juvenile justice systems rarely reflect purely welfare or justice models. Instead, individual elements of the juvenile justice system in Australia reflect each of these paradigms. Even specific policies such as restorative justice conferencing (see Richards forthcoming for an overview) can be underpinned by both welfare and justice principles. As noted above, juvenile justice systems are, on the whole, more welfare-oriented than adult criminal justice systems.

Reducing stigmatisation

A range of measures aim to protect the privacy and limit the stigmatisation of juveniles. Prohibitions on the naming of juvenile offenders in criminal proceedings, for example, exist in all Australian jurisdictions (Chappell & Lincoln 2009). In each jurisdiction, except the Northern Territory, juveniles' identities must not be made public, although exceptions are sometimes allowed. In the Northern Territory, the reverse is the case — juvenile offenders can be named, unless an application is made to suppress identifying information (Chappell & Lincoln 2009).

In some instances, juveniles' convictions may not be recorded. This strategy aims to avoid stigmatising juveniles and assist juveniles to "grow out" of crime rather than become entrenched in the criminal justice system. In most jurisdictions, for example, juveniles who participate in a restorative justice conference and complete the requisite actions resulting from the conference (such as apologising to the victim and/or paying restitution), do not have a conviction recorded, even though they have admitted guilt. Similarly, in some jurisdictions, a juvenile can be found guilty of an offence without being convicted. In the Australian Capital Territory during the three month period from January to March 2008, 25% of juveniles who appeared before the ACT Children's Court pleaded guilty but did not have a conviction recorded. A further 18% pleaded not guilty and did not have a conviction recorded (although no juvenile who pleaded not guilty during this period was acquitted; ACT DJCS 2008). The proportion of juveniles' convictions that were not recorded varied by offence type, from zero percent for homicide and sexual assault offences to 100% for public order offences. Although these calculations are based on very small numbers and must be interpreted cautiously, they demonstrate the principle of avoiding the stigmatisation of juveniles. It is unknown to what extent this occurs in jurisdictions other than the Australian Capital Territory (Richards 2009).

It is important to consider in this context the extent to which juveniles' psychosocial immaturity affects their pleading decisions in court. One study found that juveniles aged 15 years and younger are significantly more likely than older adolescents and adults to have compromised ability to act as competent defendants in court (Grisso et al 2003). One-third of 11 to 13 year olds and one-fifth of 14 to 15 year olds were found to be "as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial" (Grisso et al 2003: 356). This pattern of age differences was found to apply even when gender, ethnicity and socioeconomic status were controlled for and was evident among both juveniles who had had contact with the criminal justice system and those in the general community. This demonstrates that immaturity is a significant factor in shaping juveniles' competence in court, irrespective of other influences.

Related to the above discussion is the theory of labelling. Labelling theory, which emerged in the 1960s, posits that young people who are labelled "criminal" by the criminal justice system

are likely to live up to this label and become committed career criminals, rather than growing out of crime, as would normally occur. The stigmatisation engendered by the criminal justice system therefore produces a self-fulfilling prophecy — young people labelled criminals assume the identity of a criminal.

Labelling and stigmatisation are widely considered to play a role in the formation of young people's offending trajectories — whether young people persist with, or desist from, crime. Avoiding labelling and stigmatisation is therefore a key principle of juvenile justice intervention in Australia.

Addressing juveniles' criminogenic needs

Underpinned by the welfare philosophy, many juvenile justice measures in Australia and other Western countries are designed to address juveniles' criminogenic needs. Outcomes of juveniles' contacts with the police, youth justice conferencing and/or the children's courts often aim to address needs related to juveniles' drug use, mental health problems and/or educational, employment or family problems. Youth policing programs, for example, often focus on increasing juvenile offenders' engagement with education, family or leisure pursuits. Specialty courts, such as youth drug and alcohol courts (see Payne 2005 for an overview), are informed by therapeutic jurisprudence and seek to address specific needs of juvenile offenders, rather than punish juveniles for their crimes.

Although many of the measures described in this paper — including specialty courts, restorative justice conferencing and diversion — are also available for adult offenders in Australia, this is the case to a far more limited extent. Many of these approaches are differentially applied to juveniles, whose youth, inexperience and propensity to desist from crime make these strategies especially appropriate for young people. This is also demonstrated by the range of measures that have recently emerged specifically for young adult offenders, such as Victoria's dual-track system (under which 18 to 20 year old offenders can be detained in a juvenile rather than an adult correctional facility) and restorative justice measures that specifically target young adult offenders (People & Trimboli 2007). These measures further demonstrate the criminal justice system's focus on helping young people desist from crime without being "contaminated" by older, life-course persistent criminals and the importance of providing constructive interventions that will assist young people to grow out of crime and adopt law-abiding lifestyles.

Diversion of juveniles

Each of Australia's jurisdictions has legislation that emphasises the diversion of juveniles from the criminal justice system (see Table 1). Although there are variations among the jurisdictions, juveniles are often afforded the benefit of warnings, police cautions and youth justice conferences rather than being sent directly to court. As Richards (2009) shows, this is the case for about half of all juveniles formally dealt with by the police, although this proportion varies according to a number of factors, including offence type and juveniles' age, gender and Indigenous status. Even those juveniles adjudicated in the Children's Court are overwhelmingly sentenced to non-custodial penalties, such as fines, work orders and community supervision (ABS 2009).

Table 1 Main juvenile justice legislation in Australia, by jurisdiction

NSW	*Young Offenders Act* (1997)
Vic	*Children, Youth and Families Act* (2005)

Qld	*Youth Justice Act* (1992)
WA	*Young Offenders Act* (1994)
SA	*Young Offenders Act* (1993)
NT	*Youth Justice Act 2005*
ACT	*Children and Young People Act* (2008)
Tas	*Youth Justice Act* (1997)

In all jurisdictions' juvenile justice legislation, detention is considered a last resort for juveniles. This reflects the United Nations' (1989) *Convention on the Rights of the Child*.

Avoiding peer contagion

It is widely recognised that some criminal justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are "universities of crime" that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks. This may be particularly the case for juveniles, who, due to their immaturity, are especially susceptible to being influenced by their peers. As Gatti, Tremblay and Vitaro (2009: 991) argue, peer influence plays a fundamental role in orienting juveniles' behaviour and "deviant behavior is no exception". Separate juvenile and adult criminal justice systems were established, in part, because of the need to prevent juveniles being influenced by adult offenders (Gatti, Tremblay & Vitaro 2009).

Gatti, Tremblay and Vitaro's (2009) longitudinal study of 1,037 boys born in Canada who attended kindergarten in Montreal, Canada in 1984, found that intervention by the juvenile justice system greatly increased the likelihood of adult criminality among this cohort. Even when the effect of other relevant variables had been controlled for, Gatti, Tremblay and Vitaro (2009) found that contact with the juvenile justice system increased the cohort's odds of adult judicial intervention by a factor of seven. An increase in the intensity of interventions was also found to increase negative impacts later in life. The more restrictive and intensive an intervention, the greater its negative impact, with juvenile detention being found to exert the strongest criminogenic effect. Gatti, Tremblay and Vitaro (2009) therefore recommend early prevention strategies, the reduction of judicial stigma and the limitation of interventions that concentrate juvenile offenders together.

Conclusion

Juvenile offenders differ from adult offenders in a variety of ways, and as this paper has described, juveniles' offending profiles differ from adults' offending profiles. In comparison with adults, juveniles tend to be over-represented as the perpetrators of certain crimes (eg graffiti and fare evasion) and under-represented as the perpetrators of others (eg fraud, road traffic offences and crimes of serious violence).

In addition, by comparison with adults, juveniles are at increased risk of victimisation (by adults and other juveniles), stigmatisation by the criminal justice system and peer contagion. Due to their immaturity, juveniles are also at increased risk of a range of psychosocial problems (such as mental health and alcohol and other drug problems) that can lead to and/or compound offending behaviour.

Some of the key characteristics of Australia's juvenile justice systems (including a focus on welfare-oriented measures, the use of detention as a last resort, naming prohibitions and measures to address juveniles' criminogenic needs) have been developed in recognition of these important differences between adult and juvenile offenders.

It should be noted, however, that while juvenile offenders differ from adults in relation to a range of factors, juvenile offenders are a heterogeneous population themselves. Sex, age and Indigenous status, for example, play a part in shaping juveniles' offending behaviour and criminogenic needs and these characteristics should be considered when responding to juvenile crime.

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Specific deterrent effect of custodial penalties on juvenile reoffending

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Executive summary ..... [20-3000]

Introduction

Deterrence theory

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[20-3000] Executive summary

Only 10.3% of the 6,488 juveniles who appeared in the NSW Children's Court in 2007 were given a control order, yet 48% of the budget of the NSW Department of Juvenile Justice is spent keeping juvenile offenders in custody. To date, however, only two Australian studies have examined the effect of custodial sentences on juvenile reoffending.

Kraus (1974) matched each of 350 juveniles given a non-custodial sanction against a comparable offender given a custodial sanction. Juveniles were matched on year of birth, category of offence, age at time of first offence, number of previous (proven) offences, type of previous proven offence and number of previous custodial sanctions. He found lower rates of reoffending among vehicle thieves who received a custodial penalty, but higher rates of offending for those receiving custodial penalties in each other category of offence.

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* Australian Institute of Criminology (AIC) Reports, Technical and Background Paper 33.

Cain (1996) examined reconviction rates among a sample of 52,935 juveniles convicted in the NSW Children's Court between 1986 and 1994. He found that juveniles given custodial sentences were more likely to reoffend than juveniles given non-custodial sentences, but the study included no controls for prior criminal record or Indigenous status.

The Kraus (1974) and Cain (1996) studies both have limitations. Kraus (1974) was not able to control for a wide range of other factors potentially relevant to penalty choice and risk of reoffending (eg school performance, level of parental supervision, race, socioeconomic status). His methods of analysis were also relatively unsophisticated by modern standards. Cain (1996) used more sophisticated analytical methods and a much larger sample than Kraus (1974) but was similarly restricted in the range of controls he was able to use.

This study seeks to build on the work carried out by Kraus (1974) and Cain (1996) by using more sophisticated methods of analysis than Kraus (1974) and a much wider range of controls than Cain (1996). The question addressed in the study is whether, other things being equal, juveniles who receive a custodial penalty are less likely to reoffend than juveniles who receive a non-custodial custodial penalty.

The data for the current study were obtained from a longitudinal cohort study of juvenile offenders. Two groups of offenders (152 given a detention sentence, 243 given a non-custodial sentence) were interviewed at length about their family life, school performance, association with delinquent peers and substance abuse. They were then followed up to determine what proportion in each group was reconvicted of a further offence. Cox regression was used to model time to reconviction.

The study found no significant difference between juveniles given a custodial penalty and those given a non-custodial penalty in the likelihood of reconviction.

Introduction

On an average day in 2006–07, 941 young people were held in detention across Australia (AIHW 2008: 51). The costs associated with juvenile detention are very high. For example, although only 10.3% of the 6,488 juveniles who appeared in the NSW Children's Court in 2007 were given a control order, 48% of the budget of the NSW Department of Juvenile Justice is spent keeping juvenile offenders in custody (NSW Department of Juvenile Justice, personal communication 2009).

Given the high cost of juvenile detention, one would expect to find a large body of Australian research examining its potential benefits. To date, however, little research has been conducted on the effect of custodial sentences on juvenile recidivism. It is known that more than two-thirds of the young people who receive a control order from the NSW Children's Court are convicted of a further offence within two years of their custodial order. It is not known what their reconviction rate would have been had they not received a custodial penalty. This study addresses this issue.

Deterrence theory

Conventional economic theories of crime (eg Becker 1968) contend that offenders allocate their time to legitimate and illegitimate activities according to the expected returns (ie costs and benefits) from each. A number of sociologists, however, have argued that imprisonment actually increases the risk of reoffending. There are three main variants of this argument. The first contends that prison is criminogenic because it is an environment which reinforces deviant

values and which is conducive to the acquisition of new criminal skills (Clemmer 1940; Sykes 1958). The second variant contends that prison is criminogenic because it stigmatises offenders (Becker 1963; Braithwaite 1988; Lemert 1951). The third contends that prison increases the risk of reoffending because it reduces the offender's capacity (on release) to obtain income by legitimate means (Fagan & Freeman 1999).

The evidence on specific deterrence

There have been four major reviews of the evidence on deterrence over the last 10 years (Doob & Webster 2003; Nagin, Cullen & Jonson forthcoming; Villettaz, Killias & Zoder 2006) but only the Villettaz, Killias and Zoder (2006) and Nagin, Cullen and Jonson (forthcoming) reviews focus on specific deterrence.

Nagin, Cullen and Jonson (forthcoming) observed that most studies on the specific deterrent effects of custodial sanctions find these sanctions have a criminogenic effect. Nonetheless, given the many shortcomings among studies they reviewed, they concluded that "[t]he jury is still out on … [custody's] effect on re-offending" (Nagin, Cullen & Jonson forthcoming: np). Villettaz, Killias and Zoder (2006) reviewed 27 studies published between 1961 and 2002 that on the Sherman et al (1997) scale would be considered to be very reliable (ie level 4 and above). Only two obtained evidence favourable to the specific deterrent effect of imprisonment. Ten of the remainder found no effect of imprisonment, four found mixed effects of imprisonment (some statistically non-significant, some favourable to the criminogenic hypothesis) and 11 found evidence uniformly supportive of the criminogenic effect of imprisonment. Five of the studies that found either no effect or a criminogenic effect were randomised controlled trials.

Only two Australian studies have looked at the specific deterrent effect of custodial penalties on juvenile reoffending. Kraus (1974) matched each of 350 juveniles given a non-custodial sanction against a comparable offender given a custodial sanction. Juveniles were matched on year of birth, category of offence, age at time of first offence, number of previous (proven) offences, type of previous proven offence and number of previous custodial sanctions. He found lower rates of reoffending among vehicle thieves who received a custodial penalty but higher rates of offending for those receiving custodial penalties in each other category of offence. Cain (1996) examined reconviction rates among a sample of 52,935 juveniles convicted in the NSW Children's Court between 1986 and 1994. He found that juveniles given custodial sentences were more likely to reoffend than juveniles given non-custodial sentences, but the study included no controls for prior criminal record or Indigenous status.

The present study

The Kraus (1974) and Cain (1996) studies both have limitations. Kraus (1974) made a commendable effort to match juveniles receiving custodial and non-custodial sanctions, but was not able to control for a wide range of other factors potentially relevant to penalty choice and risk of reoffending (eg school performance, level of parental supervision, race, socioeconomic status). His methods of analysis were also relatively unsophisticated by modern standards. Cain (1996) used more sophisticated analytical methods and a much larger sample than Kraus (1974) but was similarly restricted in the range of controls he was able to use.

This study seeks to build on the work carried out by Kraus (1974) and Cain (1996) by using more sophisticated methods of analysis than Kraus (1974) and a much wider range of controls than Cain (1996). The question we seek to address is whether, other things being equal, juveniles who receive a custodial penalty are less likely to reoffend than juveniles who

receive a non-custodial custodial penalty. The data for the current study were obtained from a longitudinal cohort study of juvenile offenders. A sample of juvenile offenders who received custodial and non-custodial sanctions were surveyed and then followed up to determine whether, after controlling for other factors likely to influence recidivism, juvenile offenders who received control (custody) orders reoffended more quickly than juvenile offenders who received non-custodial sentences.

Survey procedure

The survey took the form of an interview using a written questionnaire comprising 95 closed-ended questions. The questionnaire was designed largely to test certain theories about the relationship between recidivism and juvenile reactions to the court process (McGrath 2009). As such, many of the questions included in the questionnaire are not of interest here. Some of the questions included in the questionnaire, however, are of interest because of their potential relevance as controls. The variables used in the present study are discussed in more detail below.

The interviews took place between 1 December 2004 and 30 June 2007 at children's courts and juvenile justice centres in New South Wales. Most interviews took 15 to 20 minutes to complete. Very few interview participants declined to answer questions, despite being given the option to do so. The end of the follow-up period for the study was 1 January 2008; six months after the last study participant was interviewed.

Response rate and subject attrition

The names and dates of birth of study participants were matched with the NSW Bureau of Crime Statistics and Research reoffending database (ROD) to determine prior criminal history for each study participant and instances of post-index offence reoffending, if any. In ROD, prior criminal history in the form of prior children's court sentences was obtained from the NSW Department of Juvenile Justice Children's Court Information System until January 2006. For further information about ROD, see Hua and Fitzgerald (2006).

Two interviewers carried out the non-custodial interviews. The response rate for one interviewer was 71%. The response rate for the second interviewer was 70%. One interviewer carried out the custodial interviews. The response rate for the custodial group was 93%. Data attrition from various sources (eg duplicate interviews, record linkage problems) resulted in the exclusion of a number of cases. The final sample comprised 395 people—152 on custodial orders at the time of the interview and 243 people on non-custodial orders at the time of the interview.

Variables

The measure of reoffending used in the present study is free time to reoffend, defined as the time between the date of the index court appearance and the date of the next proven offence (ie the next offence proved at a court appearance after the index court appearance). The term 'free' is used in this context because in measuring the time to reconviction, any time spent in custody between the end of the index sentence and the first proven offence or end of the follow-up period has been subtracted. Information on the dependent variable was obtained from ROD.

In order to isolate the effect of penalty type on juvenile recidivism, factors associated with the choice of penalty that might also influence risk of reconviction need to be controlled for. There is, unfortunately, no consensus on what these factors are. The selection of controls in this study was guided partly by the meta-analysis conducted by Cottle, Leigh and Heilbrun (2001)

and partly by exploratory analysis of the dataset used in this study. The list of factors examined in this study for potential inclusion in the multivariate analysis appears below in Table 1. The appendix shows each variable, along with the method of construction of each factor (where relevant) and the p-value from the bivariate log-rank tests conducted for time to reoffend.

Table 1 Factors examined for potential inclusion in the multivariate analysis

Gender	Parental status (sole parent vs other)
Race	Parenting style
Socioeconomic status	Level of parental supervision
Age	Association with delinquent peers
Age first contact with the law	School attendance
Prior criminal record	Substance abuse
Number of prior commitments to custody	Geographic mobility
Principal offence	Perceived certainty of arrest
Number of concurrent offences	Perceived stigmatisation
Whether a victim of abuse	Whether received a custodial sentence

Analysis

The analysis proceeded in two stages. In the first stage, bivariate (log-rank) tests were conducted to see which of the variables listed in Table 1 had an association with time to reconviction at $p<0.25$. The variables found to have a significant relationship with time to reconviction were then ranked in order of p-value from smallest to largest. In the second stage, a series of Cox regression models was constructed. In the first, time to reconviction was regressed against penalty type without controlling for any other factors (unadjusted relationship). In the second, control variables were added to the model one by one, commencing with the variable with the smallest p-value from stage one. The process continued until a control variable was reached that added nothing to the explanatory power of the model (ie its coefficient was not found to be statistically significant at $p<0.05$). That variable was then removed and the final model consisted of the custody variable and those variables found to make a significant independent contribution to time to reconviction.

Results

Fifty-two percent of the sample had a proven offence subsequent to their index sentence during the follow-up period. The mean time to reconviction (for those who were reconvicted) was 163 days (median=110 days), with a standard deviation of 178 days. Tables 2 and 3 contain descriptive statistics for variables found to have a statistically significant relationship with time to reconviction at $p<0.25$.

Table 4 shows the results of the Cox regression analysis. Two models are shown. Model A gives the unadjusted effect of penalty type on time to reconviction. Model B gives the adjusted effect of penalty type on time to reconviction, after controlling for number of prior court appearances. Surprisingly, this was the only factor among those listed in Table 1 that remained significant when included in the multivariate analysis with a variable measuring type of penalty imposed.

Table 2 Descriptive statistics for bivariate predictors of time to reconviction (continuous variables)

Variables	n	Mean	Standard deviation
Illicit drug use in the 12 months prior to the interview	393	8.5	5.3
How long (years) have you been in that situation (ie living with the same people respondent is living with now)?	214[a]	16.3	1.8

Table 3 Descriptive statistics for bivariate predictors of time to reconviction (discrete variables)

Discrete variables	n	%
Whether on custodial or non-custodial order at time of interview		
Custodial	152	38.5
Non-custodial	243	61.5
Age at first conviction		
10–13 yrs	79	20.0
14–15 yrs	170	43.0
16 yrs and over	146	37.0
Age group (at index court appearance)		
13–16 yrs	209	51.9
17 yrs	117	29.6
18 + yrs	73	18.5
Number of prior court appearances		
0	126	31.9
1 or more	269	68.10
Number of prior proven offences		
0	164	41.5
1 or more	231	58.5
Number of prior supervised orders		
0	235	59.5
1 or more	160	40.5
Number of prior custodial episodes		

a This item is restricted to people who have no other address

Discrete variables	**n**	**%**
0	335	84.8
1 or more	60	15.2
Number of concurrent offences		
1	138	35.0
2 or more	257	65.0
Offence type (using ASOC descriptions)		
Violent	171	43.3
Property	136	34.4
Other	88	22.3
Sex		
Female	69	17.5
Male	326	82.5
ATSI status		
ATSI	95	24.1
Non-ATSI	299	75.9
Missing value	1	–
Whether living with single parent		
Yes	164	59.2
No	113	40.8
Missing values	118	–
Do parents know where young person is when young person is away from home?		
Never	96	24.9
Sometimes/often/always	290	75.1
Missing values	9	–
What would parent do if caught young person taking cannabis?		
Nothing	88	22.7
Discuss/scold/punish	299	77.3
Missing values	8	–
Do parents chop and change the rules?		
Never	255	66.2
Sometimes/often/always	130	33.8

Discrete variables	**n**	**%**
Missing values	10	–
Do parents know what the young person thinks and feels?		
Never	110	28.6
Sometimes/often/always	275	71.4
Missing values	10	–
How often does young person hang out with friends who have been in trouble with the police?		
Never	66	16.8
Sometimes/often/always	328	83.2
Missing values	1	–
How many of young person's friends have shoplifted or stolen?		
None	95	24.1
One or more	299	75.9
Missing	1	–
How many of young person's friends have used illegal drugs?		
None	103	26.2
One or more	290	73.8
Missing	2	–
How many of young person's friends have been in trouble with the police?		
None	31	7.9
One or more	363	92.1
Missing	1	–
How often have you been/were you suspended at school?		
Never	63	16.0
Sometimes/often/always	330	84.0
Missing values	2	–
How often have you wagged/did you wag at school?		
Never	87	22.1
Sometimes/often/always	306	77.9
Missing value	2	
Alcohol consumption at last sitting		

Discrete variables	**n**	**%**
2–5 drinks over the maximum standard recommended amount per day	108	45.8
6 or more drinks over the maximum standard recommended amount per day	128	54.2
Missing values	159	–
Frequency of alcohol consumption over the maximum standard amount per day in the 12 months prior to the interview		
At least 1 day/week	157	39.9
2–3 days/month or less	237	60.1
Missing values	1	–
Young person's perception of their likelihood of being caught by the police if they commit crime in the future		
Very unlikely/unlikely	165	41.8
Very likely/likely	230	58.2

Table 4 Effect of custody on time to reconviction (unadjusted and adjusted estimates)

Model	**Variables**	**ß**	**SE**	**p-value**	**HR**	**95% HR CI**	
A (unadjusted)	Custody vs non-custody	0.55	0.15	<0.01	1.74	1.29	2.33
B (adjusted)	One or more prior court appearance vs none	0.61	0.16	<0.01	1.85	1.35	2.52
	Custody vs non-custody	0.29	0.16	0.08	1.33	0.97	1.84

Note: The column labeled ß shows the regression coefficient associated with each variable in each model. The column labeled "SE" shows the standard error associated with the regression coefficient. The column labeled "p-value" shows the probability of obtaining the observed value of ß by chance. p-values less than .05 indicate that the variable in question is exerting a significant effect on time to reoffend. The column labeled "HR" shows the hazard ratio associated with the variable. A hazard ratio of more than one indicates that the variable in question increases the instantaneous risk of reoffending. A hazard ratio of less than one indicates that the variable in question reduces the instantaneous risk of reoffending. The final columns show the 95 percent confidence interval around the estimated hazard ratio.

The first point to note is that the hazard ratio associated with the custody variable in Model A is 1.74, which indicates that, prior to the introduction of controls, juvenile offenders given a custodial sentence are 74% more likely to be reconvicted at any given time than those who receive a non-custodial penalty. When prior criminal record is introduced into the model (see Model B), juveniles given a custodial sanction remain more likely to be reconvicted, but the hazard ratio associated with the custody variable falls from 1.74 to 1.33 and is no longer statistically significant.

Figures 1 and 2 illustrate this effect. The X axis in each figure shows free time since the index court appearance. The Y axis shows the proportion of offenders in each group who have not yet been reconvicted of a further offence. Figure 1 shows the unadjusted difference in time to reconviction between the custody and non-custody groups. Figure 2 shows the adjusted difference. It can be seen from Figure 1 that, prior to controlling for previous court

appearances, the survival (non-reconviction) rate in the custodial group is substantially lower than the survival rate in the non-custodial group throughout the follow up period. The same pattern appears in Figure 2, but the differences between the groups are obviously much smaller.

Figure 1: Proportion not reconvicted by free time (days) since index court appearance (Model A) Custodial sentence?

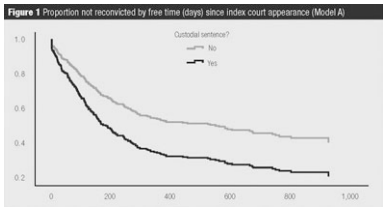
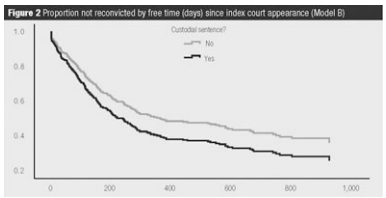


Figure 2: Proportion not reconvicted by free time (days) since index court appearance (Model B) Custodial sentence?



Conclusion

The results of this study suggest that, other things being equal, juveniles given custodial orders are no less likely to reoffend than juveniles given non-custodial orders. These results are inconsistent with the two previous Australian studies on specific deterrence, both of which found evidence that juveniles given custodial penalties are more likely to be reconvicted. The difference in findings is probably due to the fact that the present study more effectively controlled for prior criminal record.

The finding that prison exerts no specific deterrent effect is consistent with overseas evidence on the specific deterrent effect of custodial penalties reviewed earlier in this article. It is important to consider, however, that the long-term effects of custodial penalties might be quite different to their short-term effects. Fagan and Freeman (1999), for example, using data from a national panel study of 5,332 randomly selected youths, found that incarceration produced a significant negative effect on future employment prospects, even after adjusting for the simultaneous effects of race, human capital and intelligence. There have been no studies on the effect of juvenile detention on juvenile employment prospects in Australia, but Hunter and Borland (1999) examined the effect of an arrest record on Indigenous employment prospects using data from the 1994 National Aboriginal and Torres Strait Islander Survey. Controlling for age, years completed at high school, post-school qualifications, whether the respondent had difficulty speaking English, alcohol consumption and whether the respondent was a member of the "stolen generation", they found that an arrest record reduced Indigenous employment for males and females by 18.3 and 13.1 percentage points, respectively (Hunter & Borland 1999). On this basis, Hunter and Borland (1999) estimated that differences in arrest rates for Indigenous and non-Indigenous Australians might explain about 15% of the difference in levels of employment between these two groups.

These adverse effects of imprisonment on employment outcomes and the absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending suggest that

custodial penalties ought to be used very sparingly with juvenile offenders. Fortunately, a range of non-custodial programs now exist which, in the United States at least, have been shown to be very effective in reducing juvenile recidivism. In the United States, they have been found to be considerably less expensive than a custodial sentence (Aos, Miller & Drake 2006). Western Australia and New South Wales are currently trialing an intensive supervision program (ISP) known in the United States as multi-systemic therapy. The NSW Bureau of Crime Statistics and Research is currently evaluating the ISP. It will be interesting to see whether it proves as effective here as it has been in the United States (MacKenzie 2002).

Appendix

Factors examined for potential inclusion in the multivariate analysis and their relationship with time to reconviction

Variable/factor	Measure	Relationship with time to reconviction (dependent variable) p-value
Gender	Sex — Q36 of questionnaire	0.0763
Race	ATSI status Q37 of questionnaire	0.0002
Socioeconomic status	SEIFA Australian decile ranking	0.7577
	Household crowding — compute Q66 and Q67 of questionnaire	0.8639
Age	Interview date minus DOB and regrouped into three groups: 10–15 yrs; 16–17 yrs; 18 yrs and over	0.2421
Age at first contact with the law	The age at time of first proven offence (either a prior offence or a reference offence) — from ROD regrouped into three groups: 10–13 yrs; 14–15 yrs; 16 yrs and over	0.0043
Prior criminal record	Number prior court appearances — grouped into “none” and “one or more” — from ROD	<0.0001
	Number prior proven offences — grouped into “none” and “one or more” — from ROD	<0.0001
	Number prior supervision orders — grouped into “none” and “one or more” — from ROD	<0.0001
Number of prior commitments	Number prior custodial episodes—grouped into “none” and “one or more” — from ROD	0.0010
Number of concurrent offences	Number concurrent offences (including principal offence) — grouped into “one” and “two or more” — from ROD	0.0208
Type of crime at index court appearance	Offence type, created from four digit Australian Standard Offence Classification (ASOC) descriptions of offences in ROD and grouped into three groups: violence; property and other	0.0644
Victim of abuse	Q57 from questionnaire — Do your parents punish you by slapping or hitting you? — grouped into “never” and “sometimes/often/always”	0.6460

Variable/factor	Measure	Relationship with time to reconviction (dependent variable) p-value
Single parent	Compare options 1 (both parents) with options 2 and 3 (one parent) from Q43 of questionnaire — Who are you currently living with?	0.0903
Parenting	Do parents congratulate and encourage? (Q58) — grouped into “never” and “sometimes/often/always”	0.2601
	Are parent(s) aware of what their child thinks and feels? (Q61) — regrouped into “never” and “sometimes/often/always”	0.1538
	How close does young person feel to parents? (Q63) — regrouped into “not close at all” and “quite close/close/very close”	0.7784
	When parents make up rules do they explain them to young person? (Q52) — regrouped into “never” and “sometimes/often/always”	0.7083
	Does young person think that the rules that their parents make up are fair? (Q56) — regrouped into “never” and “sometimes/often/always”	0.5146
	Does young person think that their parents chop and change the rules? (Q59) — regrouped into “never” and “sometimes/often/always”	0.1423
	Do parents follow through on their rules? (Q60) — regrouped into “never” and “sometimes/often/always”	0.3275
	Do parents nag young person about little things? (Q62) — regrouped into “never” and “sometimes/often/always”	0.3306
	How well does young person get on with their mother? (Q46) — regrouped into “badly” and “okay/well/very well”	0.6740
	How well does young person get on with their father? (Q47) —regrouped into ‘badly’ and ‘okay/well/very well’	0.4438
	Does young person feel rejected by parents? (Q51) — regrouped into “never” and “sometimes/often/always”	0.6523
	What would parents do if they found out young person had destroyed or damaged property on purpose? (Q53) — regrouped into “nothing” and “discuss seriously/scold not punish/punish”	0.6140
	What would parents do if they found out young person was using cannabis? (Q54) — regrouped into “nothing” and “discuss seriously/scold not punish/punish”	<0.0001
	What would parents do if they found out young person had taken something from a store? (Q55) — regrouped into “nothing” and “discuss seriously/scold not punish/punish”	0.8782
	How well do parents get along? (Q45)—regrouped into “badly” and “okay/well/very well”	0.9970

Variable/factor	Measure	Relationship with time to reconviction (dependent variable) p-value
	Do parents argue or fight in front of young person? (Q48) — regrouped into “not at all” and “a bit/quite a bit/a lot”	0.9846
Supervision	Do parents know where young person is when young person is out of house? (Q49) — regrouped into “never” and “sometimes/often/always”	<0.0001
	Do parents know who young person is with when young person is out of house? (Q50) — regrouped into “never” and “sometimes/often/always”	0.4740
Delinquent peers	How many of young person’s friends had been in trouble with the police? — regrouped into “one” and “more than one”	0.0499
	How many of young person’s friends had shoplifted or stolen? — regrouped into “one” and “more than one”	0.1228
	How many of young person’s friends had vandalised? — regrouped into “one” and “more than one”	0.3331
	How many of young person’s friends had drunk alcohol under age? — regrouped into “one” and “more than one”	0.9624
	How many of young person’s friends had used illegal drugs? — regrouped into “one” and “more than one”	0.2197
	How often did young person hang out with friends who had been in trouble with the police? — “never” and “sometimes/often/all the time”	0.0068
	Q72/78 of questionnaire — How often do/did you wag? — grouped into “never” and “sometimes/often/always”	0.0161
School attendance	Q73/79 of questionnaire — How often have you been/were you suspended? — grouped into “never” and “sometimes/often/always”	0.2177
Substance abuse	Monthly cigarette consumption — Q89 of questionnaire	0.7188
	Yearly cigarette consumption — Q89 of questionnaire	0.2208
	Monthly illicit drug consumption — Q90, Q91, Q92, Q93 of questionnaire	0.2237
	Yearly illicit drug consumption — Q90, Q91, Q92, Q93 of questionnaire	0.0262
	Have you ever injected drugs? — Q94 of questionnaire	0.4604
	Alcohol consumption — Q85/87 of questionnaire — regrouped into “every day” and “less frequently than every day”	<0.0001
	Alcohol consumption frequency — Q86/88 of questionnaire — regrouped into “at least one day/week” and “2–3 days/month or less”	<0.0001

Variable/factor	Measure	Relationship with time to reconviction (dependent variable) p-value
Change of address	Q65 of questionnaire — How many times have you moved in your life?	0.7835
	Q44 of questionnaire — How long have you lived in that situation? (in days and excluding "whole life")	0.7708
	Q44 of questionnaire — How long have you lived in that situation? ("whole life")	0.2363
Certainty of arrest	Q2 of questionnaire — If you commit a crime in the future, how likely is it that you will be caught by the police?	0.0037
Court stigmatisation	Sum of Q22, Q23, Q24 Q25, Q28 and Q29 of questionnaire	0.5130
Custodial sentence	Identified in advance of interviews during sentencing at court (yes/no)	0.0003

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Doli incapax — the criminal responsibility of children*

M Johnston† and R Khalilizadeh‡

The age of criminal responsibility ..... [20-4000]

The test for rebutting doli incapax

RP v The Queen (2016) 259 CLR 641

The test developed from RP

The erroneous presumption of normality

Rebutting the presumption of doli incapax

Statements/admissions made by the child

Behaviour of the child before and after the act

Prior criminal history

Evidence of parents/ background

Evidence of teachers

Evidence of psychologists and psychiatrists

Concluding observations

> The wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed.[1]

Marge Simpson:	Well, I'm just relieved that Homer's safe and that you've recovered and that we can all get back to normal. If Maggie could talk I'm sure she'd apologise for shooting you.
Montgomery Burns:	I'm afraid that's insufficient. Officer, arrest the baby!
Chief Wiggum:	Hah. Yeah, right, pops. No jury in the world's going to convict a baby. Mmm ... maybe Texas.[2]
Smithers:	That Simpson's boy is looking at 180 years.

* Published at https://criminalcpd.net.au/wp-content/uploads/2022/05/Doli-incapax-The-Criminal-Responsibility-of-Children-Matthew-Johnson-Rose-Khalilizadeh.pdf, accessed 7 June 2022.

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‡ Barrister, Forbes Chambers.

1 *R (A Child) v Whitty* (1993) 66 A Crim R 462, per Harper J.

2 "Who Shot Mr Burns? Part II", *The Simpsons*, Season 7 episode 1, Disney–ABC Domestic Television, 17 September 1995.

Montgomery Burns: Thank God we live in a country so hysterical over crime that a ten-year-old child can be tried as an adult.[3]

[20-4000] The age of criminal responsibility

Last reviewed: May 2023

In NSW, s 5 of the *Children (Criminal Proceedings) Act 1987* provides that a child under the age of 10 years cannot commit an offence. This statutory presumption is irrebuttable.

The common law presumes that a child between the age of 10 and 14 years does not possess the necessary knowledge to have criminal intention, that is, the child is incapable of committing a crime due to a lack of understanding of the difference between right and wrong. This is the common law presumption of doli incapax.

The presumption of doli incapax is a presumption that can be rebutted by the prosecution calling evidence. In addition to proving the elements of the offence, the onus is on the prosecution to prove beyond reasonable doubt that the child knew that what they did was seriously wrong, as distinct from mere mischief.

The existence of the presumption of doli incapax in the common law was recently affirmed in *RP v The Queen* (2016) 259 CLR 641 (*RP*).

The defence and prosecution should consider doli incapax in all cases involving children under the age of 14.

The test for rebutting doli incapax

RP v The Queen (2016) 259 CLR 641

Following a judge-alone trial, RP was convicted of two counts of sexual intercourse with a child under the age of ten years. The accused was aged approximately 11 and a half years old at the time. The complainant was the accused's younger brother.

3 "Bart the Murderer", *The Simpsons*, Season 3 episode 4, Disney–ABC Domestic Television, 10 October 1991.

The sole issue for the trial judge's determination was whether the prosecution had rebutted the presumption that the appellant was doli incapax. The trial judge was satisfied that it was proven beyond reasonable doubt that the appellant knew his conduct was seriously wrong.

In short, the first offence occurred in circumstances where there were no adults present. The appellant grabbed the complainant, held him down, put his hand over the complainant's mouth and committed the conduct constituting the offences. The intercourse stopped when an adult returned to the house. The appellant told the complainant not to say anything. The second offence, later in time, involved similar circumstances.

There was evidence that, when the appellant was older (aged 17 or 18) that he was assessed as being in the borderline disabled range of intellectual functioning.

The trial judge, in considering the circumstances surrounding the offence, found that the presumption was rebutted in relation to the first offence and that it followed the presumption was rebutted in relation to the second.[4]

The Court of Criminal Appeal dismissed the appellant's appeal. The appellant appealed to the High Court.

The High Court (Kiefel, Bell, Gageler, Keane and Gordon JJ presiding) held that the convictions should be quashed, and verdicts of acquittal should be entered, on the ground that it was not open to conclude that the accused was proven beyond a reasonable doubt to have understood that his conduct was seriously wrong in the moral sense. In the absence of evidence with respect to the environment in which the appellant was raised or from which a conclusion could be drawn as to his moral development, it was not open to conclude that he understood his conduct to be seriously wrong, the plurality noting (per Kiefel, Bell, Keane and Gordon JJ at [9], [12]):

> [To rebut the presumption of doli incapax,] the prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was seriously wrong in a moral sense to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised.
>
> …
>
> What suffices to rebut the presumption will vary according to the nature of the allegation and the child.

The test developed from RP

A number of principles can be derived from *RP*, as follows:

- the prosecution must rebut the presumption of doli incapax as an element of the prosecution case
- proof requires that the child appreciated the moral wrongness of the alleged offence, as opposed to being aware that the conduct was merely naughty
- the evidence to prove guilt must be clear and beyond all doubt and contradiction, and
- the evidence is not mere proof that the child did the act charged, however horrifying or obviously wrong the act may be.

Each of these are dealt with, below.

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4 On appeal, the Court of Criminal Appeal said that each count needed to be separately considered, and that a finding of rebuttal in relation to one count does not necessarily result in an automatic finding in relation to later counts.

The onus on the prosecution

The prosecution bears the onus and must prove, beyond reasonable doubt, that the presumption does not apply. There is no onus on the young person to adduce evidence that the presumption applies. If at the end of the prosecution case, no evidence has been called to rebut the presumption, the prosecution has not discharged their onus and there may be no case to answer.

Proof of moral wrongness

The prosecution must prove, again beyond reasonable doubt, that the child knew that what they were doing was seriously wrong (as opposed to merely naughty or mischievous).

It cannot be presumed that a child understands that what they are doing is seriously wrong just because, for example, the complainant may appear like they are not consenting to a sexual act, or because they appear distressed.[5]

A child's acknowledgment, after the offending, that they understood that an act was seriously wrong is not proof in and of itself that the child appreciated the moral wrongness of the alleged offending. This is particularly important if the prosecution rely upon admissions by a child, at the police station, after arrest. It may be that, by that stage, the child has appreciated the serious wrongness of their actions, having been arrested and confronted with questions by a police officer, but not necessarily at the time that the alleged offences were committed.

In *BC v R* [2019] NSWCCA 111 (*BC*), the appellant had guilty verdicts returned against him (two weeks before the High Court handed down its decision in *RP*). *BC* concerned historical allegations of sexual assaults. The evidence adduced by the Crown pointed to three circumstances in the offending that were said to rebut the presumption (at [45]):

(a) the complainant was only 5 or 6 years old

(b) when the appellant heard an adult moving around the house he said "quickly, stop, stop", and

(c) The appellant said words to the effect of "you can't tell anyone what just happened or else the [complainant] would get in trouble".

The Crown did not adduce evidence as to the child's education or environment.

In applying *RP*, Leeming JA, Ierace J, and Hidden AJ held (at [50]–[51]):

> We have come to the view, contrary to that of the primary judge, that the Crown failed to adduce evidence capable of satisfying the jury to the criminal standard that the doli incapax presumption had been rebutted. We accept the applicant's submission that, in the absence of any evidence concerning the applicant's contemporaneous maturity or intelligence, the applicant's age relative to K's carries little to no weight in rebutting the presumption ...
>
> In light of the Crown's decision not to adduce evidence concerning the applicant's maturity or character, the bare fact of the applicant's age (which itself remains subject to some uncertainty) carries little weight in assessing his understanding of the degree to which his actions transgressed ordinary standards of morality.

The court accepted that the circumstances of the offending could rebut the presumption of doli incapax, but that the evidence adduced by the Crown was insufficient to do so (at [54]). The words "quickly, stop, stop" were consistent with avoiding detection from an adult and were consistent with an understanding of the appellant's actions were merely naughty or mischievous.

5 *RP* at [35].

The warning that the complainant would get into trouble was indicative of the appellant being afraid of getting into trouble himself but said little about the appellant's understanding of the moral wrongfulness of his actions.

Evidence strong and clear beyond all doubt or contradiction

The evidence the prosecution relies upon must be clear evidence that the defendant knew that his or her actions were wrong and not just naughty. If the evidence is ambiguous then it is not sufficient to rebut the presumption.

In *RP*, apart from evidence of the alleged offences themselves, the only evidence of the appellant's capacity was contained in reports addressed to the appellant's intellectual capacity when he was older (17 and 18 years), in relation to different issues. This was insufficient to rebut the presumption.

In *C v DPP*,[6] the appellant was aged 12 and was seen by police officers using a crowbar to tamper with a motorcycle in a private driveway. The appellant ran away but was caught and arrested. The appellant was initially convicted. The Magistrate inferred from the fact that he ran away that he knew that what he had done was wrong. The House of Lords held that flight from scene can as easily follow a naughty action as a wicked one. In such circumstances the House of Lords were left with no option other than to find that the presumption had not been rebutted by the prosecution evidence:[7]

> Running away is usually equivocal ... because flight from a scene can as easily follow a naughty action as a wicked one.

However, the House of Lords did go on to say that there may be a few cases where running away would indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness:[8]

> An example might be selling drugs at a street corner and fleeing at the sight of a policeman.

The evidence is not mere proof that the child did the act charged, however horrifying or obviously wrong the act may be

The act itself cannot be used as evidence to rebut doli. In *RP*, the plurality said:[9]

> No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH* suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised. [citations omitted.]

Similarly, in *DK v Maurice Rooney*[10] the defendant was 12 years old who was charged with committing an offence contrary to s 66C of the *Crimes Act 1900* (sexual intercourse of a child between the ages of 10 and 16) while in juvenile detention at Reiby. On appeal the Magistrate was held to be wrong at law when he suggested that the act of sexual intercourse, without

6 [1995] 2 All ER 43.
7 ibid at [39].
8 ibid.
9 *RP v The Queen* (2016) 259 CLR 641 at [9].
10 (unrep, 3/7/1976, NSWSC) McInerny J.

consent, was so "irretrievably wrong" and so "intrinsically bad" that the court could presume that the child should have known "that what he was doing was wrong". Justice McInerney held that the child's acts constituting the elements of the offence are not evidence of knowledge that the act was wrong. The act itself cannot be relied upon to rebut doli incapax; however, evidence may be adduced by the prosecution regarding the surrounding circumstances attending the act, the manner in which it was done, and evidence as to the nature and disposition of the child.

The erroneous presumption of normality

In attempting to rebut the presumption of doli incapax it is often argued that a "normal" child of "that" age must have known that what it was doing was seriously wrong. Thomas Crofts in his article "Rebutting the presumption of doli incapax",[11] refers to this as the so-called presumption of normality.

Crofts argues that this "presumption of normality" is erroneous ignores the requirement that the prosecution is required to bring positive proof that the child in question has the requisite knowledge. It is not sufficient to simply argue that other children of this age would have known it was seriously wrong. The prosecution must prove beyond a reasonable doubt that *this* child knew that *this* offence was seriously wrong and not just naughty. The rebuttable presumption acknowledges that children do not develop at the same rate.

In *RP*, it was noted at [12]:

> The only presumption which the law makes in the case of child defendants is that those aged under 14 are doli incapax. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.

Rebutting the presumption of doli incapax

The prosecution may rely on various forms of evidence to rebut the presumption, including:

- statements/admissions made by the child
- behaviour of the child before and after the act
- prior criminal history
- evidence of parents/home background
- evidence of teachers, and
- evidence of psychologists and psychiatrists.

Statements/admissions made by the child

An admission made by a child will often be sufficient to rebut doli incapax. Thomas Crofts[12] argues:

> It has been established that an important source of information for assessing a child's appreciation of the seriousness of the act is what the child says when interviewed by the police. This type of evidence is preferable in as far as it refers directly to a child's appreciation of the act itself and is not drawn from a general analysis of the behaviour and personality of the child.

11 T Crofts,"Rebutting the presumption of doli incapax" (1998) 62 *Journal of Criminal Law* 185 at 188.
12 ibid at 187.

The classic Australian case on point is the Victorian case of *R (a child) v Whitty*.[13] In this case a child was arrested for shoplifting and when interviewed by police regarding the offence used the words, "I stole" (the goods). It was held that the use of these words was evidence of mischievous discretion. The child's language was interpreted to indicate knowledge that the act of stealing was wrong, perhaps in contrast to the words "I took".

However, before an alleged admission could be used as evidence to rebut the presumption of doli incapax, the usual questions relating to the admissibility of such evidence must be considered. Additionally, if admitted is the admission indicative of the child's understanding *at the time of the offence*.

Despite the additional obligations placed on the prosecution to rebut doli incapax, a child is still entitled to rely on his or her right to silence. A child under 14 should be advised of the additional dangers of making a record of interview including that if the child elects to make a record of interview, the investigating police are likely to ask questions with the specific intention of rebutting doli incapax.

A child should not be put into any worse position than an adult offender and is entitled to attempt to exclude otherwise inadmissible admissions. A quick checklist includes:

(a) are the admissions caught by s 13 of the *Children (Criminal Proceedings) Act 1987*?

(b) did the child receive legal advice from the Legal Aid Youth Hotline (and/or some other source)?

(c) are the admissions admissible under Pt 3.4 of the *Evidence Act*?

(d) should the admission be excluded under ss 90, 135, 137 or s 138 of the *Evidence Act*?

(e) is the admission caught by s 281 of the *Criminal Procedure Act*?

Particular attention should be given to the circumstances surrounding the admission. For example, does it occur after arrest at a time when it is clear to the child that what they are alleged to have done was seriously wrong? Does it occur in response to leading or closed questions put to the child by police? If the admission is made in response to questioning, does the child appear to otherwise be particularly suggestible?

Another question that must be considered is, are the words attributed to the child "clear beyond all doubt or contradiction"? The alleged admissions must show that the child understood that his actions were seriously wrong and not just naughty. If the admissions are equivocal, or ambiguous, then it can be argued that the prosecution has not successfully rebutted the presumption.

In *IPH v Chief Constable of South Wales*,[14] an 11-year-old boy was convicted of criminal damage to a van. The van's windows were smashed, the paint work was scratched, and the van was pushed into a pole. The child was interviewed by police. During the interview, the child said, "Yeah, I knew I would damage the truck by pushing it into the pole". On appeal, the Divisional Court said that the admission proved that the child knew that damage would result from the action. The admission did not prove knowledge that the action was seriously wrong as opposed to mischievous or naughty.

Consideration must also be given as to whether the admissions indicate the child's understanding at the time of the alleged offence. The child's intention must be assessed at the

13 (1993) 66 A Crim R 462.
14 [1987] Crim LR 42.

time of committing the offence. Any statements given by a child after the offence may have been tainted or affected by the process. It is arguable that since being arrested, taken to a police station and placed in a dock the child has come to an appreciation that he or she has done something wrong. This understanding may not have been consistent with the child's state of mind at the time of the alleged offence.

In *AL v R* (2017) 266 A Crim R 1 (*AL*), the appellant was tried for historical sexual offences when the defendant was aged between 12 and 13 years and the complainant was aged between 4 and 5 years old. The charges were brought some 14 years after the offending took place. On appeal, the applicant submitted that the trial judge fell into error by failing to adequately address the jury on the question of doli incapax and that the evidence adduced at trial fell short of proof of the applicant's knowledge of the serious wrongness of the act charged. The applicant contended that in light of *RP* the trial judge should have directed the jury to place little or no weight on the applicant's evidence in cross-examination.

Crown: I suppose, you would have known when you were 12 or 13 that it would have been seriously wrong to put your penis into a young boy's mouth, wouldn't you?

AL: I suppose I would have, yes.

There was also evidence suggesting the appellant was a good student at school at the time of the offending.

The Court of Criminal Appeal held that on the totality of the evidence, the evidence was sufficient to prove the knowledge of serious wrongness beyond a reasonable doubt. The court stated:[15]

> Although the applicant places heavy reliance on the outcome in *RP v The Queen*, that was a case that very much turned on its own facts. We do not understand it to have changed or developed relevant principle

The court distinguished the facts of *AL* from *RP*, taking note of the evidence suggesting the appellant's good performance as a student and lack of disadvantage. The court in *AL* held that the evidence adduced from cross-examination was not inadmissible, his recollection of his contemporaneous understanding of serious wrongness was relevant and the jury could give weight to that evidence.

Behaviour of the child before and after the act

While evidence of the act itself, no matter how horrifying, cannot be relied upon, evidence of the child's behaviour before, after and going to the surrounding circumstances of the offence may be admissible.

In *KG v Firth* [2019] NTCA 5, the appellant appealed a decision of the Northern Territory Supreme Court to overturn the decision of the Youth Justice Court that the appellant lacked mental capacity to be held criminally liable under s 43AQ of the *Criminal Code* (NT). In that case, the appellant was 13 years old, he suffered significant intellectual disability, he suffered from Foetal Alcohol Spectrum Disorder, he was raised in dysfunctional and transient home environments, he suffered trauma from a young age including exposure to domestic and sexual violence.

15 *AL* at [137].

The Court of Appeal articulated the categories of evidence relevant to the question of doli incapax at [27], being:

- any admissions made by the appellant
- the nature of the alleged conduct (subject to the qualification that the presumption cannot be rebutted merely as an inference from the doing of the act)
- the circumstances surrounding the conduct, including any attempts at concealment or escape, and
- the appellant's background, including his education, upbringing, mental capacity and any previous criminal convictions.

The Court of Appeal made a number of comments clarifying *RP* including that the rebuttal of the presumption does not require, in every case, the demonstration of knowledge of wrongness in a police interview, or evidence concerning the child's social, medical and educational circumstances.[16] Significant weight will ordinarily be given to the child's psychologists views as to the ability to understanding right from wrong.[17]

Prior criminal history

In some circumstances, the prior criminal history will be admissible to rebut doli incapax. Evidence of prior convictions, cautions or youth justice conferences may be admissible to demonstrate that the child has been in contact with the criminal justice system and has been told by the police or courts that those types of actions are criminally wrong.

However, the mere presence of a criminal history is not conclusive evidence. A child who has a criminal history is not precluded from raising doli incapax as an issue at a hearing for a later offence. A prior charge of assault does not necessarily mean that a child will have an understanding of the offence of goods in custody.

The elements of the offence and the complexity of the charge should also be carefully considered. In circumstances where the prosecution relies on complicity, common purpose, or omissions, there may be scope to argue the child was not aware that he or she was committing an offence.

Finally, if evidence of this type is admitted to rebut doli incapax it may be necessary to seek to limit the use of the evidence to this purpose under s 136 *Evidence Act*.

Evidence of parents/ background

A common method of rebutting the presumption used to be for the prosecution to call evidence from parents, carers, guardians or family friends that can attest to the fact that the child knew that committing the alleged act was seriously wrong as opposed to naughty. Traditionally the evidence was directed at establishing that 'they have brought the child up well, taught the child the difference between right and wrong, and made sure the child is aware of the law.

Historically it was open for prosecutors to simply call parents without notice to give evidence on these issues. The introduction of provisions for service of the brief of evidence avoids the ambush aspect of this approach and provides practitioners to consider the evidence in advance of the hearing. If a statement has not been served before the hearing, an objection can be made to on that basis.

16 *RP* at [29].
17 ibid.

Additionally, s 18 of the *Evidence Act* provides that a parent may object to giving evidence against the child as a witness for the prosecution. The witness must take the objection and the court must satisfy itself that the person is aware of their right to object to giving evidence.

General evidence of the child's home background can be used to rebut the presumption. In *B v R* [1958] 44 Cr App R 1, a 9-year-old boy was convicted of break, enter and steal. The only evidence with respect to doli incapax was that the boy came from a respectable family and was properly brought up. The court held that the evidence of his upbringing was sufficient evidence to rebut the presumption. One of the criticisms of this approach is that a child who comes from a very poor background with limited opportunity for education, both social and formal, and with poor parental examples is more likely to avoid prosecution than a child that was brought up in a good home. However, others would argue this is the exact purpose of the presumption. It is questionable whether this case would be decided the same way since *RP*.

Each case must be approached from the subjective circumstances of the child and not the presumed normal understanding of a child of a particular age. A child who has a learning difficulty is not equal to that of a normal child. There may be cultural considerations that may also be important. For example, a child that comes from a community where there is less emphasis placed on ownership of objects may not understand that taking a bike from another child is seriously wrong. The facts and circumstances of each case, and each child, is important.

Evidence of teachers

In *C v DPP*, Lord Lowry suggested that another way to rebut doli incapax is for the prosecution to obtain evidence from a teacher who knows the child well. It is argued that teachers will have been in close contact with the child and may be in a position to provide information that assists in understanding the child's mental and moral development.

It is important to look closely at any statements from teachers. There is a world of difference between school rules and criminal liability. While a child may have an understanding of school rules it may not be appropriate to extrapolate this understanding to the wider world. Does an understanding to stay within bounds at school assist in determining whether a child understands that it is seriously wrong to sexually assault another child? The proposition that a child knows that an act is seriously wrong does not necessarily flow from what they have been taught at school.

Further, even if there is evidence that a child is taught certain things in a particular class (eg taught about consent in physical education classes), that is not in and of itself evidence that the child learnt or understood what was being taught to them. It might not even be proof that the child was necessarily present for such lessons, in the absence of school records that can establish they were.

Evidence of psychologists and psychiatrists

Evidence from psychologists and psychiatrists may assist the court on the issue of doli incapax. In *R v LMW* (unrep, 25/11/99, NSWSC) a 10-year-old was charged with manslaughter and committed to the Supreme Court for trial. Ultimately, both prosecution and defence called evidence including objective assessment of the child's cognitive capacity and an assessment by a child psychiatrist.

The decision to call evidence of this type will need to be carefully considered. The defendant obviously has the right to silence and cannot be forced to see a psychologist or psychiatrist. However, if the child had a pre-existing relationship with a psychologist or psychiatrist, it may be that there is highly relevant evidence of the psychological or developmental issues.

Alternately, the defence or prosecution may seek to obtain an assessment and report after the alleged offence. Such an approach requires the cooperation of the accused. However, practitioners should be aware that if a report is obtained by the defence, the prosecution is likely to make a request that the child also attends upon a psychiatrist or psychologist commissioned by the prosecution.

Objective testing by psychologists may give a strong indication of the child's mental and cognitive abilities at the time of testing and by extrapolation of the likely levels at the time of the alleged offence. Subjective interpretation of even standard tests may lead to inconclusive, irrelevant, and potentially prejudicial material being presented. Inevitably any assessment is conducted after the alleged offence and after the child has been charged. There is always a real risk that any subjective assessment is contaminated by the charging and court process and precludes any useful insight into the mind of the child at the time of the offence.

Concluding observations

Despite being a long and well-established legal principle, the presumption of doli incapax is not without controversy. Though some still claim it is open to abuse and should be amended[18] or abolished there is a growing campaign that the age of criminal responsibility is too low.[19]

Australia has one of the lowest ages of criminal responsibility in the world — the global average is 14 years old.[20] The United Nations Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.

On a practical level this means police have the power to arrest children from the age of 10 and makes the issue particularly relevant to the most vulnerable and disadvantaged in the criminal justice system. In Australia indigenous children are locked up at a rate 17 times the rate of non-indigenous children despite making up just 6% of the Australian population aged 10–17. Approximately 65% of the children under the age of 14 who are incarcerated in Australian detention facilities are Aboriginal or Torres Strait Islander children.

There are significant bodies of evidence to show that children between the ages of 10 and 14 are at the very early stages of development. Children aged 12 and 13 are still evolving their maturity and capacity for abstract reasoning.[21] Many children of that age are unlikely to understand the impact of their actions, or to comprehend criminal proceedings, or to understand

18 See *R v GW* [2015] NSWDC 52 per Lerve DCJ.

19 Amnesty International, "Why we need to raise the minimum age of criminal responsibility", 25 January 2022 at www.amnesty.org.au/why-we-need-to-raise-the-minimum-age-of-criminal-responsibility/, accessed 7 June 2022. See also Australian Law Reform Commission, "Seen and heard: priority for children in the legal process", *ALRC Report 84*, 19 November 1997 at www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/, accessed 7 June 2022.

20 Amnesty International, ibid.

21 Australian Human Rights Commission, "The minimum age of criminal responsibility", 2021 at https://humanrights.gov.au/sites/default/files/2020-10/australias_minimum_age_of_criminal_responsibility_-_australias_third_upr_2021.pdf, accessed 7 June 2022.

the wrongfulness of their actions, despite the evidence that the prosecution seeks to rely upon at trial or hearing. There is abundant research to show that detention has adverse effects upon individuals, and it only serves to compound various existing issues for vulnerable children.[22]

However, in the absence of any meaningful legislative change in this area, practitioners must consider issues relating to doli incapax very carefully, even in circumstances where the charges are not serious, and even in the face of a young client who wishes to get their case "over and done with".

As was stated in the Statement to the Council of Attorneys-General on raising the age:[23]

> Children belong in schools and playgrounds, connected to their families, communities and culture, not placed in handcuffs, held in watchhouses or locked away in prisons. Our submissions demonstrate that raising the age of criminal responsibility is a critical reform for every Australian state and territory to embrace. The evidence overwhelmingly shows that when children as young as 10 years of age are forced through a criminal legal process during their formative developmental phases, they suffer immense harm. This negatively impacts their health, wellbeing and futures.

22 The Royal Australasian College of Physicians, "The health and well-being of incarcerated adolescents", 2011, Sydney at www.racp.edu.au/docs/default-source/advocacy-library/the-health-and-wellbeing-on-incarcerated-adolescents.pdf, accessed 7 June 2022.

23 Raise the age, "CAG submissions", accessed 7 June 2022.

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