Submission to the Senate Inquiry (Children in Out of Home Care)

By George Potkonyak
Solicitor of six years experience in the New South Wales children care & protection jurisdiction

STATISTICS

		NUMBER OF CHILDREN IN OUT OF HOME CARE (OOHC)								
	Year	**NSW**	**Vic**	**Qld**	**WA**	**SA**	**TAS**	**ACT**	**NT**	**Total**
	2001	7,786	3,882	3,011	1,436	1,175	572	215	164	**18,241**
	2002	8,084	3,918	3,257	1,494	1,196	544	224	163	**18,880**
	2003	8,636	4,046	3,787	1,615	1,245	468	277	223	**20,297**
	2004	9,145	4,309	4,413	1,681	1,204	487	298	258	**21,795**
	2005	9,230	4,408	5,657	1,829	1,329	576	342	324	**23,695**
	2006	9,896	4,794	5,876	1,968	1,497	683	388	352	**25,454**
	2007	11,843	5,052	5,972	2,371	1,678	667	399	397	**28,379**
	2008	13,566	5,056	6,670	2,546	1,841	664	425	398	**31,166**
	2009	15,211	5,283	7,093	2,682	2,016	808	494	482	**34,069**
	2010	16,175	5,469	7,350	2,737	2,188	803	532	551	**35,805**
	2011	16,740	5,678	7,602	3,120	2,368	966	540	634	**37,648**
	2012	17,192	6,207	7,999	3,400	2,548	1,009	566	700	**39,621**
% increase since 2001		120.8	59.9	165.7	136.8	116.9	76.4	163.3	326.8	**117.2**
Population ('000)		7,381	5,713	4,638	2,497	1,668	513	382	238	**23,030**
Children in OOHC per 10,000 population		23.3	10.9	17.2	13.6	15.3	19.7	14.8	29.4	**17.2**
Source of numbers of children in OOHC: Australian Institute of Family Studies										

ABSTRACT

There is glaring inconsistency in per capita figures for the number of children in OOHC across Australia. It is highly improbable that there is such a large difference in the attitudes of parents towards their children in one State compared to another. The diversity of the figures reveals something disturbing: either the children are not adequately protected in some States or, on the other hand, significant numbers of children are being taken into OOHC in some States without a valid cause.

Before an issue of the children who are already in OOHC is addressed, there is an urgent need for a consistent approach to the child protection legislation and practices across Australia which can only be achieved by an intervention from the Commonwealth Parliament. It is unlikely that the States would be willing to refer the powers for making of laws for the care and protection of children to the Commonwealth Parliament for the reason that the main driving force behind the current high numbers of children in OOHC are private interests connected to the governments.

The Commonwealth Constitution enables the Commonwealth Parliament to incorporate international conventions into our domestic laws under its section 51(xxix): external powers. A simple legislation incorporating the Convention on the Rights of the Child, with some additional provisions would form a good starting point. Any provision of a State legislation that is inconsistent with the Commonwealth legislation for the rights of the child would be invalid.

THE DRIVING FORCE

Looking again at the statistics one will find another disturbing fact: number of children in OOHC has more than doubled between 2001 and 2012. In the Northern Territory it is more than quadrupled. As Mr Carmody, who conducted the Queensland child protection inquiry, stated: "Either parenting, in the space of 10 years, has radically deteriorated, or there's a malfunctioning of the system and more children than need be are given protective care."

The latter suggestion is exactly the conclusion of this submission based on the author's experience in the New South Wales care and protection jurisdiction.

The New South Wales care and protection legislation and practice

A newcomer to the proceedings in the New South Wales Children's Court cannot escape an impression that there is a serious "malfunctioning of the system". Everything appears to be geared to the sending of children in one direction, namely, into the OOHC, while little concern is given for the children's restoration to the care of their parents. Every case appears to be a case where the child is "in need of care and protection" and every case appears to be without "realistic possibility of restoration" of that child to the care of his or her parent(s), thus each child being sentenced to the OOHC for the rest of his or her childhood. Such findings and decision are being made by the Children's Court in a manner that puts the trial of Leo Katzenberger[1] in a favourable light.

The central piece of the legislation governing the placing of children into OOHC in New South Wales is the *Children and Young Persons (Care and Protection) Act 1998*. It is not a piece of legislation likely to win a Nobel Prize for legal literature but, if it were not for its perverted interpretation and practical application, it could provide a reasonable prevention of and protection from abuse and neglect of the children in this State. In order to illustrate the preceding statement several major points in the judicial process will be described with references to the law and its actual application in the Children's Courts.

Jurisdictional hierarchy

The Children's Court is the first point of call. Each proceeding in the Children's Court is presided over by a single Children's Magistrate. An exception is when a proceeding is allocated to the President of the Children's Court, who is in fact a District Court judge on temporary assignment to the Children's Court. The proceeding is closed to the public with only parties in the case allowed to attend with some exceptions where a close relative of the child or a support person of the parent may be allowed to attend with consent of all parties and the leave of court. There is a provision for media attendance, unless the court disallows, but it hardly, if ever, happens. The law prohibits publication of the name of the child involved in the proceedings, or any information about the proceeding that may lead to the identification of the child.

The District Court is the court to which a party dissatisfied with the final decision of the Children's Court may "appeal" that decision, as of right. The only ground of appeal required to be specified is that the party appealing is not satisfied with the final decision of the Children's Court. This provision appears to be very generous however there is a catch: the proceeding in the District Court is a new hearing; there is no review of the decision of the Children's Court for an

[1] Special Court at Nuremberg, 23 March 1942. See: http://en.wikipedia.org/wiki/Katzenberger_Trial.

alleged error of law or error of fact. Even though the evidence adduced in the Children's Court may be used as evidence in the new trial in the District Court, the parties go through the whole trial once again; it is not unusual that the trial in the District Court takes longer than the original trial in the Children's Court did. The District Court proceeding is presided over by a single judge.

The real effect of this apparently generous provision for an appeal as of right is that there is no review of the proceedings in the Children's Court since the "appeal" is in fact a new trial. Whatever went – and there is quite a lot of it – in the Children's Court is swept under the carpet and will never see the daylight.

There is a theoretical possibility to appeal to the Supreme Court from the decisions of the Children's Court for prerogative relief or for a relief under the *parens patriae* powers of the Supreme Court, however the applications for such relief are subject to the discretionary powers of a single (division) judge of the Supreme Court, with such applications infrequently made and the relief even less frequently granted. The main reason for the refusal to grant relief is the existence of the "specialist" court, such as the Children's Curt and the right to appeal to the District Court.

Even thought the "appeal" to the District Curt is in fact a trial, just as any first instance trial, there is no appeal as of right to the Court of Appeal except on the grounds of an error of law or by seeking prerogative relief.

Children's Court proceedings

Risk of harm reports. The Act empowers the Family and Community Services (FACS, formerly known as DoCS) to receive and record "risk of harm reports" about any child from mandatory reporters or from any member of public. The reports are made when the reporter believes on reasonable grounds that a child is at risk of significant harm (ROSH). The identity of the reporter is protected. Once the report is received and recorded the FACS "is to" (according to law) carry out investigations and make an assessment – if the person responsible considers that the report provides sufficient reason to believe that the child is at risk of significant harm. However, if the person responsible does not think that there is sufficient reason to believe that the child is at risk of significant harm the person does not need to carry out any investigations or to make any assessment.

If one of the risk of harm reports is considered to be serious enough (usually an arbitrary decision by a case worker) the child is removed from the place where he or she is allegedly exposed to the risk of harm (usually the parents' home) and placed into temporary foster care. When, within three working days, the matter is brought before the Children's Court by an application from FACS the application is accompanied by some supporting documentation. This documentation usually contains summary of the risk of harm reports, often going back in time for years. One will find almost without fail that most of the ROSH reports were only recorded with no investigation of any kind having been taken and no assessments made. Nevertheless all those reports become "evidence" on which FACS rely in proving that the child is a child at risk of harm.

"Establishment proceeding". One would expect that this stage of the proceedings - where the court is to establish whether the child is a child in need of care and protection – is the most critical stage where the evidence would be tested according to law. The parallel may be drawn with the criminal trial where the evidence is tested in order to establish whether the accused is guilty or not guilty. Not so in the Children's Court. About 90% of cases are decided on the "consent without

admission" by the parent(s). The "consent" is normally obtained by coercion of the parent by own (Legal Aid) lawyer or even by the pressure from other participants in the proceeding. The few cases that go to the "trial" are not much better than the "consent without admission": the magistrate allows, and often insists on, the matter to be conducted "on submissions" only, that is, the FACS lawyer reads out all the risk of harm reports, whether those were investigated and assessed or not, while the parent's lawyer tries to put some resistance knowing that it is in vain. If the parent has admitted to some of the allegations, the argument will be "your Honour, by her own admission the mother confirms the facts…" or, if the parent denies the allegations, "your Honour, the mother lacks insight into the risk of harm posed by her behaviour…".

At the end of the day, does not matter which kind of "trial" takes places, the magistrate will inevitably find that "the child is a child in need of care and protection", otherwise the magistrate might lose his or her job for exposing the government to the risk of being liable for damages for unlawful removal of the child from his or her parents. Can anyone seriously believe that FACS and the magistrates (in NSW) are 100% correct in their actions or decisions? It is too obvious, beyond reasonable doubt, that the cases have been determined even before the parties walk into the courtroom.

"Disposition proceeding". This stage of the proceedings is the equivalent to the sentencing stage in a criminal trial. It normally takes place between 9 and 18 months, sometimes even longer, from the day the child had been removed into out of home care. FACS case workers will file hundreds upon hundreds, even more than 1,000 pages of "evidence" and the poor parent, in spite of allegedly giving consent "without admission" (of any allegations) has to prove now that he or she has "addressed the issues that led to the removal of the child" from his or her care. As stated before, most of the reports (allegations) have never been investigated, the identity of the reporter is not known thus not available for cross-examination, and some of the reports are years old. Yet, the onus of proof has shifted onto the parent to prove that he or she has "addressed" the issues that even FACS had not considered to be serious (by the decision not to investigate them) and that, perhaps, never existed. It is almost certain that, under this kind of "procedural fairness" granted to the parent, he or she will not be able to prove that there is a "realistic possibility of restoration" of the child to his or her care. So the sentence will read: "Parental responsibility to the Minister until the child attains 18 years of age", in other words, the life sentence. Of course, there are some sobering exceptions but they are very rare.

"The least intrusive intervention". The Act provides that, in any action concerning the child, the principle of "the least intrusive intervention into the life of the child and his or her family" must apply. This principle is never considered at any stage of the proceedings in the Children's Court. In fact, this principle had been perverted for nearly a quarter of Century as the principle applied to the consideration of the restoration of the child to the child's parents. Only recently the principle has been correctly interpreted by a decision of the Court of Appeal but it continues to be applied in the Children's Court as usual except that it is not referred to by the title "the least intrusive intervention" but rather that the child will suffer "serious psychological harm if removed from the foster carers" and returned to the care of the natural parents.

Parental responsibility to one parent to the exclusion of the other. The statistics for NSW shows that about 58% of children in the OOHC are in "kinship care", that is, currently about 9,600 children. It is not known how many of those children are in care of one parent to the exclusion of the other, but the figure must be significant. In most of those cases the Minister does not hold any parental responsibility for the child, neither there is any involvement of FACS, yet the parents are precluded from taking their dispute to the Family Law courts.

The reason for the above is another misinterpretation of the law. The judges insist on the written consent by a State welfare officer (a FACS officer) before the matter may be taken to a Family Law court, while no officer is authorised to issue such a consent. The NSW *Commonwealth Powers (Family Law – Children) Act 1986* does not consider a child who is subject only to an order not listed in Schedule 1 of that Act as being a child who is a child under the State welfare law. In fact, the Act does not authorise anyone to issue such consent neither it requires anyone even to consider a request for such consent. As a result the parents are forced back to the Children's Court to deal with the clearly Family Law matter in a court that is unfit even to deal with matters for which it has jurisdiction.

"Rescission or variation of care orders". The parents whose children have been removed into out of home care by final orders are at liberty to apply for the variation or rescission of the care orders. The Act does not place any limit to when and how often a parent may make such application, however the parent must first obtain leave from the Children's Court in order to proceed with the application.

The first thing that the parent has to prove is that there was a "significant change in relevant circumstances" since the orders were last made. When it comes to the fist such application, the parent has to prove that the "relevant circumstances" that led to the removal of the child from his or her care have "significantly" changed since the child has been removed. Bearing in mind the manner of conducting the original "establishment" proceedings, either by "consent without admission" or "on submissions only" the parent is now faced with a task of proving that something that had not been proved, and perhaps never existed, has significantly changed.

Nevertheless, some parents manage to convince the court into granting the leave. The FACS will usually insist on an expert report at these proceedings, either the first such report or an updating report if one had been produced for the earlier trial. Of course, the FACS will insist on the "approved" clinician most of whom can be described as being "…experts… willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is coming"[2], that is, they will write what they are paid for to write.

The most frequent reason advanced by these experts against the restoration of the child to his or her parents' care is the "serious psychological harm" that the child will allegedly suffer as a consequence of disruption of the child's attachment to the carers, that is, the "least intrusive intervention" principle put on its head again but under a different title.

There are cases where the opponents to the application and the court will acknowledge that the parent has indeed shown significant changes to the relevant circumstances and had addressed the issues that led to the making of the orders subject to the application, but the restoration is not granted for the reason of insufficient time lapse to establish confidence that those changes have taken root. The parent will come back again, say, 6-12 months later, with another application only to be told that the law requires the parent to prove the significant changes to the circumstances that existed when the matter was last before the court. Since the evidence of all those changes has been before the court on last occasion, there is nothing left to be changed and therefore the court cannot grant leave. In other words, all the hard work that the parent put in addressing the issues that led to the removal of the child has been lost, the parent is a fit parent now, but unfortunately, according to this perverted interpretation of the law, the court cannot grant leave. The child's and the parent's fait has been sealed.

[2] *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, per Heydon J, at [56].

The players in the NSW care and protection system

FACS case workers

It is not an exaggeration to say that the FACS case workers are terror in the minds of the parents. They do not behave, with some exceptions, of course, as the children's care and protection officials who are there to help the parents who may have problems in caring for their children. Most of the case workers are young graduates, with no children of their own and with limited life experience, yet with a civil power and authority perhaps not witnessed since the days of certain regime of the Twentieth Century.

Reading through the paperwork prepared by case workers and filed in the courts one cannot escape conclusion that they work under some kind of incentive whereby they get rewarded in a significant way for every child that is removed from the child's parents – no matter how. The case workers take over the burden of preparing legal documents for the court, with or without assistance from the FACS legal department and, most often with little, if any, assistance from the private lawyer who is retained by FACS to represent them in the court. The summaries of the ROSH reports presented by the case workers in their affidavits will quite often be refined in order to conceal some absurd allegations that are in the original report so that the whole report is given appearance of credibility. The words chosen to be used by the case workers are also geared towards painting of the worst picture of the parent.

When the case workers (usually two of them) come to remove the child from the parent(s) they are accompanied by several Police officers who, on the request by the case workers, may act as if they were dealing with hard core criminals. The child is often literally ripped out of the mother's arms amid crying, screams and shouts that would frightened the most resilient adult. Not infrequently the parent, usually the mother, is tackled by the Police and drugged by some tranquilisers, only to wake up hours later in the mental health department of a hospital.

When it comes to dealing between the case workers and parents following the removal of the child, the case workers behaviour is most often inconsiderate, given the circumstances, commanding and most provocative. Normal reaction of a parent to such behaviour is labelled by the case workers, and their hired guns, the experts, as being a symptom of parent's "mental health issue" or "anger management problem".

Legal Aid funded lawyers

Apart from the lawyer representing FACS in the court, who is usually private lawyer paid by FACS (but sometimes FACS in house lawyer), there are lawyers representing the parents (either together or separately) and the children (one for the children under the age of 12 and one for the older children, if there are any). The children's lawyers are either employed by Legal Aid or private layers paid by the Legal Aid. Since most of the parents whose children have been removed from their care are people from the disadvantaged social group they are eligible for legal aid and thus represented by the Legal Aid funded lawyer. So, most often the whole bar table in the court consists of 3, 4 or even 5 lawyers, all funded by the government. There is hardly ever a case when the children's lawyer had not supported the FACS cause. There are quite a few private lawyers who in one case may represent FACS, in the next case the child and yet in another case the parent. One need not say one more word on this issue.

The NSW government

While Pru Goward was an opposition spokesman for the Community Services, during the NSW election campaign she promised, if elected, to reduce the number of children in out of home care by 4,000. Immediately it shows that, in her then opinion, there were too many children in out of home care who ought not to be there in the first place. The facts are that there are currently some 1,000-2,000 more children in the NSW out of home care than there were in 2011. While sitting as the Minister for the Community Services, Ms Goward managed to con the Parliament into approving full privatisation of the care and protection system in NSW. Under her management the Care and Protection Act has been amended by the introduction of the most draconian laws in the care and protection jurisdiction: a child who is not restored to the parents' care in 12 months would be offered for sale in the child adoption market! That is probably what Ms Goward had in mind when she promised to reduce number of children in out of home care; the adopted once would no longer be counted as being in OOHC. Absolutely brilliant!

However, since the departure of Ms Goward from her post the introduction of the amended legislation has been stalled and some further amendments done. It appears the matter has not been settled as yet.

It is worth mention that in the weeks leading to the privatisation of the care and protection system a couple of articles appeared in the daily press: the first one, report printed over several pages was one showing photos of children who lost their lives while in care of their parents; while the second article a day or a few days later, had reported an interview with a mother who, by her own admission, was a drug user and whose children have been removed from her care; she was portrayed as a typical parent whose child has been removed. That is far from the truth. It was quite obvious, even to the least politically educated person, that the articles were not news articles but rather political advertisements in support of the privatisation campaign. It would not be surprising that the publishing of the articles has been paid for by the government or by some of those who were to financially benefit from the privatisation.

Silent players: NGO-s - the "charities"

All the above players, most probably, or rather hopefully, unconsciously, are driving cash into the hands of the "charities" who are looking after the out of home care system in NSW (and some other States). There are several press reports about one of those charities, a home-grown organisation founded by a group of lawyers and businessmen, which experienced "phenomenal growth" since its inception in about 1995. It reportedly received in government contracts in 2009/10 about $140 million in NSW alone, mostly for the out of home care of children. This particular organisation has been subject to ICAC inquiry together with then Minister for Community Services, for allegedly having been illegitimately allocated government contract. The same organisation has been subject for questions in the South Australian Parliament, again for allegedly some shady dealing connected with the out of home care system.

In spite of the NSW law about the transparency of the government contracts, whereby information about any contract worth $150,000 or more per annum must be published, not one single contract with the NGO-s, such as the one mentioned, had been published. One can imagine how much money will flow from the government into the coffers of these "charities" after the recent transfer of the entire care and protection system into their hands. A Costigan-type inquiry into the out of home care system ("follow the money trail"), would reveal some "interesting" information.

RECOMMENDATIONS

1. Adopt the International Convention on the Rights of the Child as the Commonwealth law and supplement it with provisions in order to reflect the local conditions and to enforce uniformity of children care and protection laws throughout Australia.

2. Emphasise the prevention over intervention by, perhaps, adopting some features of the Victorian care and protection legislation (based on the statistics, it appears that Victorians are doing something right).

3. Prohibit the care and protection management from falling into or remaining in private hands. It is too obvious that the private interests will always prevail over the interests of children if the system is in private hands.

ANNEXURES (not for publication)

A. Transcript of an "establishment" proceeding in a NSW Children's Court
B. Police report
C. Press report
D. Question time (SA Parliament)
E. Press report

Sincerely, 30 October 2014
George Potkonyak