

MEMORANDUM

OF UNDERSTANDING

BETWEEN THE

FAMILY COURT OF AUSTRALIA

AND

THE NSW DEPARTMENT OF

COMMUNITY SERVICES

Introduction

- 1.1.1 This Memorandum of Understanding has been established to facilitate contact between the NSW Department of Community Services (DoCS) and the Family Court of Australia (FCoA) in order to ensure that a child's or young person's needs for protection are met.
- 1.1.2 This Memorandum represents the present understanding between DoCS and FCoA about how each will deal with contacts from the other, in general terms, in cases where children and young people are the subject of proceedings before FCoA and issues about the safety welfare and wellbeing of those children and young people arise in those proceedings. More detailed procedures will be contained in a protocol to be developed by a Working Party established under this Memorandum of Understanding. That protocol will provide practical guidance to staff of DoCS and FCoA about procedures, to assist cooperation and improve decision-making.
- 1.1.3 In this Memorandum of Understanding, generally the phrase "child or young person" is used when referring to a person under the age of 18 years. The *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ("the *Care and Protection Act*") uses the terms "child" and "young person". It defines a "child" to be a person under 16 years, and a "young person" to be a person who is aged 16 or 17 years.
- 1.1.4 The *Family Law Act 1975 (Cth)* ("the *Family Law Act*") uses the term "child" and deals with parental responsibility for a child who is not yet 18 years. It provides that a parenting order cannot be made, or stops being in force, once a child turns 18 years, or if the child marries or lives in a de facto relationship. If the term child is used in relation to the *Family Law Act* or FCoA, it means a person under 18 years.
- 1.1.5 Providing protection for a child or a young person is a matter of paramount concern where allegations of child abuse or neglect are made, regardless of any disadvantage this may cause to an adult. DoCS is the mandated agency to investigate reports that a child or young person is at risk of harm, including reports made to it by officers of FCoA or parties in cases which are before it.¹

¹ S 23 of the *Care and Protection Act* lists 5 circumstances, the presence of one or a number of them in relation to a child about whom current concerns exist, establishes he/she is at risk of harm for the purposes of the *Care and Protection Act*.

2. **Principles**

2.1.1 The *Family Law Act* and the *Care and Protection Act* both contain provisions about the principles to be applied by decision-makers when decisions need to be made about children and young people under either Act.

2.1.2 Both Acts recognise:

- that the safety, welfare and wellbeing of children and young people should be the paramount consideration of the decision-maker;
- the important role parents have to play in the upbringing of their children, and that as far as possible the relationship between children and young people and their parents should not be interrupted;
- the importance to the child or young person of such things as the child's or young person's culture, lifestyle and identity;
- the need for the child or young person to maintain as far as possible contact with significant persons (including the parents and siblings), which will then assist the child's or young person's future development and stability;
- that as far as possible agreement should be reached about plans for the child's or young person's future parenting, and that agreement dispute resolution processes can assist the parties reach such agreement.

2.1.3 Both Acts also recognise specific needs of Aboriginal and Torres Strait Islander children and young people and their families.

2.1.4 The *Family Law Act* provides that, in determining what is in the child's best interests,² the court must take into account a number of matters, including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples and Torres Strait Islanders.³

2.1.5 The objects and principles in Chapter 2 give guidance and direction in the administration of the *Care and Protection Act*. One of the principles states that a child or young person's name, identity, language, cultural and religious ties be preserved as far as possible when he or she is temporarily or permanently deprived of his or her family environment.⁴

2.1.6 The *Care and Protection Act* also provides that Aboriginal and Torres Strait Islander people⁵ are to participate in the care and protection of their children

² S 68F (2) (f) of the *Family Law Act*.

³ By the operation of s68F (4) of the *Family Law Act* "Aboriginal peoples" means the peoples of the Aboriginal race of Australia. "Torres Strait Islanders" means the descendants of the indigenous inhabitants of the Torres Strait Islanders.

⁴ S 9(c) of the *Care and Protection Act*.

⁵ By the operation of s 5 of the *Care and Protection Act* "Aboriginal" has same meaning as "Aboriginal" in the *Aboriginal Land Rights Act 1983* and "Aboriginal and Torres Strait Islander" means people indigenous to Australia and the Torres Strait Islands. Subs (5) (2) also allows the Children's Court to determine that a child or young person is an Aboriginal for the

and young people with as much self-determination as possible.⁶

2.1.7 Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity to participate in decisions concerning the placement of their children and young people and in other significant decisions.⁷

2.1.8 The *Care and Protection Act* sets out placement principles for Aboriginal and Torres Strait Islander children and young people, which includes a general hierarchical order for placement.⁸

3. The Family Court of Australia

3.1 Jurisdiction

3.1.1 Under the *Family Law Act* FCoA has jurisdiction to make orders concerning parental responsibility for and in relation to the welfare of children and young people. Parental responsibility includes the persons with whom a child or young person lives or has contact, and matters in relation to the day to day and long term care, welfare and development of the child or young person.

3.1.2 FCoA is required to regard the best interests of the child or young person as the paramount consideration in determining parental responsibility questions other than maintenance. In determining what is in the child's or young person's best interests, FCoA must consider a number of matters. These include the need to protect the child or young person from physical or psychological harm and any family violence involving the child or young person, or a member of the child's or young person's family.⁹

3.2 Limitations to Jurisdiction

3.2.1 FCoA's jurisdiction is limited¹⁰ in that it must not make an order in relation to a child or young person who is under the care¹¹ of a person under a child welfare law unless:

- (i) the order is expressed to come into effect when the child or young person ceases to be under that care; or
- (ii) the order is made in proceedings relating to the child or young person in respect of the institution or continuation of which the written consent of the Minister.¹²

purposes of the *Care and Protection Act* if the Children's court is satisfied that the child or young person is of Aboriginal descent.

⁶ S 11 of the *Care and Protection Act*.

⁷ S 12 of the *Care and Protection Act*.

⁸ S 13 of the *Care and Protection Act*.

⁹ S68F of the *Family Law Act*

¹⁰ By s 69ZK of the *Family Law Act*.

¹¹ However that term may be described.

¹² In NSW, the 'child welfare officer' under the Family Law Act with power to consent is the Minister for Community Services. Where the relevant child welfare law is the Guardianship Act, e.g. for young persons with a disability under a guardianship order, then the relevant child welfare officer is the Minister for Disability.

3.2.2 FCoA may adjourn any proceedings before it that relate to the child or young person, where it appears to FCoA that a State court proposes to make an order. This is also an option when a State welfare officer takes other action which has the effect of placing the child or young person under the care (however described) of a person under a child welfare law.

4. The New South Wales Department of Community Services.

4.1.1 The NSW Department of Community Services (DoCS) has statutory responsibility under the *Care and Protection Act* for, amongst other things, child protection services for children and young people in NSW¹³.

4.1.2 DoCS is authorised to accept reports¹⁴ of a child or young person at risk of harm and is responsible for any investigation or assessment of the allegation. In some cases, if the allegation involves a staff member or others (like carers) engaged to provide services to children, the Ombudsman may become involved in the investigation.¹⁵

4.1.3 The Director-General has the power to make such investigations or assessments as considered necessary to determine if a child or young person is at risk of harm. This includes a decision to take no further action if, on the basis of the information provided, the Director-General considers that there is insufficient reason to believe that the child or young person is at risk of harm.¹⁶

4.1.4 If DoCS forms the opinion, on reasonable grounds, that a child or young person is in need of care and protection it must take whatever action is necessary to safeguard or promote the safety, welfare and well-being and to reduce the level of risk to the child or young person.¹⁷

4.1.5 The action that DoCS might take includes: providing or arranging for support services; developing, in consultation with the parents, a care plan; ensuring the protection of the child or young person by exercising the Director-General's emergency protection powers; or seeking appropriate orders from the Children's Court.¹⁸

4.1.6 In deciding the appropriate response to a report in a situation of immediate risk, DoCS must have special regard to three principles. The primary principle is that the immediate safety, welfare and wellbeing of the child or young

¹³ S4 provides that the Act applies to children and young people who (a) ordinarily live in NSW, (b) do not ordinarily live in NSW but are present in NSW, or (c) are subject to an event or circumstances occurring in NSW that give rise to a report under the Act.

¹⁴ Reports are information provided under ss23, 25 or 27 of the *Care and Protection Act* by a person who suspects on reasonable grounds that there are current concerns for a child or young person, or a class of children or young people, due to risk of harm from abuse or neglect. or under ss 120 or 121 that a child or young person is homeless.

¹⁵ S 33 of the *Care and Protection Act* and ss 25C and 25D of the *Ombudsman Act 1974*.

¹⁶ SS 30 and 35 of the *Care and Protection Act*.

¹⁷ S 34 (1) of the *Care and Protection Act*.

¹⁸ S34 (2) of the *Care and Protection Act*.

person¹⁹ must be given paramount consideration. The other principles operate subject to this over-riding consideration.²⁰

4.1.7 The second principle is any action taken must be appropriate to the age of the child or young person, any disability the child or young person or his or her family members have, and the circumstances, language, religion and cultural background of the family.²¹ The third principle is removal of the child or young person from his or her usual caregiver may occur only where it is necessary to protect the child or young person from the risk of serious harm.²²

4.1.8 Whilst these three principles have particular prominence in situations of immediate risk, the general principles of the Act²³ still need to be kept in mind, including:

- The principle of pursuing the least intrusive intervention in the life of the child or young person and his or her family;
- The principle of participation of the child or young person in decisions that have a significant impact on his or her life; and
- Permanency planning, especially for children of tender years.

5. The role of other agencies in the protection of children and young people in NSW

5.1.1 In deciding what action to take to promote and safeguard the safety, welfare and wellbeing of a child or young person, DoCS may request a government department or agency or a non-government agency in receipt of government funding to provide services.²⁴

5.1.2 Once requested to do so, the department or agency must use its best endeavours to comply. The Children's Court can also make orders directing a person or an organisation to provide support services for a child or young person subject to the consent of the person or organisation.²⁵

5.1.3 To assist agencies in taking coordinated action in the protection of children and young people, the NSW Premier has issued *Interagency Guidelines for Child Protection Intervention* ("the *Interagency Guidelines*"). The *Interagency Guidelines* have also been given legislative recognition under the *Care and Protection Act*.²⁶

¹⁹ This includes consideration of any other children in their usual residential setting.

²⁰ S 36 (1)(a) *Care and Protection Act*.

²¹ S36 (1)(b) *Care and Protection Act*.

²² S36 (1)(c) of the *Care and Protection Act*.

²³ Ss 9 and 10 of the *Care and Protection Act*.

²⁴ S 17 of the *Care and Protection Act*

²⁵ S 18 of the *Care and Protection Act*.

²⁶ S 16 (2) and (3) of the *Care and Protection Act*.

5.1.4 For general information about other NSW agencies that share responsibilities with DoCS in this area, the *Interagency Guidelines* should also be consulted.

6 The NSW Children's Court

6.1.1 The NSW Children's Court is empowered to hear and determine care applications. When it finds a child or young person in need of care and protection, it may make a number of orders.

6.1.2 The range includes:

- (i) An emergency care and protection order.²⁷
- (ii) An assessment order.²⁸
- (iii) Interim orders²⁹ and interim care orders.³⁰
- (iv) An order accepting an undertaking from a person having parental responsibility.³¹
- (v) An order for the provision of support services³² or to attend a therapeutic or treatment program.³³
- (vi) An order for supervision or for contact³⁴
- (vii) An order allocating parental responsibility for the child or young person, or specific aspects of parental responsibility.³⁵
- (viii) An order providing for compulsory assistance.³⁶

7. Disclosure of information by DoCS and FCoA

7.1 Principles

7.1.1 FCoA or DoCS may only disclose information where the law permits the disclosure. This Memorandum itself does not authorise the disclosure of information, but rather seeks to establish agreed procedures to ensure the exchange of information in appropriate cases where disclosure is otherwise lawful.

7.1.2 For FCoA, the paramount consideration of the best interests of the child or young person and statutory requirements of privacy and the security of

²⁷ S 46 of the *Care and Protection Act*.

²⁸ SS 52-56 of the *Care and Protection Act*.

²⁹ S 70 of the *Care and Protection Act*.

³⁰ S 69 of the *Care and Protection Act*.

³¹ S 73 of the *Care and Protection Act*.

³² S 74 of the *Care and Protection Act*.

³³ S 75 of the *Care and Protection Act*.

³⁴ SS 76 and 86 of the *Care and Protection Act*

³⁵ S 79 of the *Care and Protection Act*.

³⁶ SS 123-133 of the *Care and Protection Act*. At the time of signing this protocol, these sections are still to come into operation.

personal information will underpin any exchange of information between FCoA and DoCS. For DoCS, the safety, welfare and well being of the child or young person must be the paramount consideration.

- 7.1.3 Both FCoA and DoCS accept that the welfare and protection of children and young people at risk is better secured by a free flow of relevant information between them, where permitted by law. Similarly, courts are in a better position to make appropriate orders if they are fully aware of proceedings in other jurisdictions.

7.2 Laws governing disclosure of information by DoCS

- 7.2.1 The *Care and Protection Act* makes it an offence to disclose information obtained in connection with its administration or execution except in any one of the following circumstances:

- “(a) with the consent of the person from whom the information was obtained;
- (b) in connection with the administration or execution of the Act;
- (c) for the purposes of any legal proceedings arising under the Act;
- (d) in accordance with a requirement imposed by the *Ombudsman Act 1974*;
- (e) with other lawful excuse”.³⁷

- 7.2.2 The disclosure of information to prescribed bodies in specific circumstances is authorised in s 248 of the *Care and Protection Act*. Prescribed bodies include the Police Service, government departments, public authorities, schools, TAFE establishments, public health organisations, private hospitals or bodies prescribed by the regulations.

- 7.2.3 The *Children and Young Persons (Care and Protection) Regulation 2000* (“the *Regulation*”) includes as prescribed bodies a designated agency,³⁸ a licensee of a children’s service³⁹, a private adoption agency, FCoA and Centrelink. This makes it clear DoCS can disclose information about a particular child or young person⁴⁰ to FCoA.

- 7.2.4 The *Privacy and Personal Information Protection Act 1998* (NSW) came into force on 1 July 2000. It introduced a set of privacy standards for most of the NSW public sector. Personal information is protected by 12 information protection principles, subject to statutory exemptions. A *Privacy Code of Practice* if approved by the Privacy Commissioner, will allow those principles to be further modified in limited circumstances.

- 7.2.5 Principle 2 restricts the collection of personal information other than directly from the client unless it is authorised to do so, such as in accordance with s 248,⁴¹ s 254 and the *Regulation*. A further relevant exemption operates to restrict principle 2 if compliance might detrimentally affect or prevent the

³⁷ S254 of the *Care and Protection Act*.

³⁸ S 139 defines this term and it includes an organisation that arranges out-of home care.

³⁹ See Chapter 12 of the *Care and Protection Act*.

⁴⁰ This includes a class of children or young persons.

⁴¹ Including those bodies included in s 248(6) (f) by clause 42 of the *Regulation*.

proper exercise of the Director-General's investigative functions under the *Care and Protection Act*.

- 7.2.6 Principle 10 restricts the use of personal information for any purpose other than that for which it was collected without the consent of the client or its use is necessary for the health or well being of the client. Relevant exemptions apply as above for principle 2.
- 7.2.7 Principle 11 prevents the disclosure of personal information unless directly related to the reason it was collected, the client would not object or the information is of a kind normally disclosed or the disclosure was necessary to protect the health or well being of the client. Relevant exemptions apply as above for principle 2.
- 7.2.8 Besides these laws, it is also recognised that restrictions may be placed on disclosure of information because of confidentiality requirements (for example, information concerning confidential counselling or alternative dispute resolution actions) or matters where it is not in the public interest for disclosure to occur at that time (for example, where a claim of public interest immunity might be raised if the material were the subject of a subpoena).

7.3 Laws governing disclosure of information by FCoA

- 7.3.1 The *Privacy Act 1988* (Cth) prohibits the disclosure of personal information held by FCoA except in limited circumstances. One of those circumstances is where the disclosure is required or authorised by or under law.
- 7.3.2 When a notification is made under either s 67Z or 67ZA of the *Family Law Act*, s 67ZA(6) of the Act authorises such disclosures of other information as the notifier reasonably believes is necessary to enable DoCS to properly manage the matter the subject of the notification.
- 7.3.3 The Family Law Rules ⁴²prohibit a person searching the records of FCoA relating to proceedings or matters under the *Family Law Act*. Documents forming part of those records cannot be inspected unless the person is a party, an intervener to the proceedings, or has been granted leave of the Court or a Registrar to do so.
- 7.3.4 A person must demonstrate a "proper interest" before being granted leave to search records or inspect documents. Unless the written consent of each party to the proceedings has been obtained, a request for leave to search records or inspect documents would need to be in writing accompanied by evidence demonstrating a "proper interest". In some cases, FCoA would require the request and supporting documentation to be served on each party to the proceedings. The parties to the proceedings would have to be given a reasonable time to object, if they wished, to leave being granted.

⁴² Order 5 rule 6.

7.3.5 It is also recognised that some information held by the court may not be disclosed, for example information relating to confidential counselling or alternative dispute resolution actions.⁴³

8 Reports of Risk of Harm from FCoA to DoCS

8.1.1 During the course of Family Court proceedings, information may be sent to DoCS by the Court indicating a child may be at risk of being abused⁴⁴ or ill treated⁴⁵ or exposed or subjected to behaviour which psychologically harms the child⁴⁶.

8.2 Request from Family Court that the Director-General intervene in proceedings.

8.2.1 S 91B of the *Family Law Act* provides that in proceedings which affect or may affect the welfare of a child, FCoA may request the intervention of the Director-General of DoCS.⁴⁷

8.2.2 Where FCoA makes a request under s 91B, FCoA Registry will promptly notify DoCS by forwarding to the DoCS Helpline a copy of any orders, reasons for judgment (if available) and, where appropriate relevant affidavit material, and will include information about the next date the matter is listed. If an order is made pursuant to s91B, then Director-General may upon application to the Registrar search and take copies of the documents on the Court file.

8.2.3 It is recognised that requests for intervention under s91B are made by judicial officers of the Court and are therefore an indication that the court requires some involvement by DoCS in the proceedings to assist the Court in addressing the issues of concern about the child or young person who is the subject of the proceedings.

8.2.4 DoCS will deal with a request for intervention as a report that a child or young person is at risk of harm under the provisions of the *Care and Protection Act*.

On receipt of a request for intervention from the Court, DoCS will:

⁴³ S62(f) Family Law Act

⁴⁴ The Family Law Act (s 60D) defines "abuse" for the purposes of that Act to mean:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory where the act in question occurred; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object, and where there is unequal power in the relationship between the child and the relevant person.

⁴⁵ The Family Law Act does not define "ill treatment".

⁴⁶ The Family Law Act does not define "behaviour which psychologically harms the child" or "psychological harm".

⁴⁷ This provides the Family Court a procedure by which it may promptly bring a particular case to the attention of the Director-General of DoCS for consideration and assistance.

- (i) Obtain as much background or other information as possible, from the Court
- (ii) analyse the information in accordance with the *Care and Protection Act* and the relevant DoCS procedures for assessing and investigating reports of risk of harm, giving due recognition to a request under section 91B having been made following an assessment by the Court; and
- (iii) will give written advice to the Court of any action DoCS has taken or intends to take.

8.2.5 FCoA notes that DoCS will usually require a minimum of 28 days from the receipt of the report or request for intervention to prepare its response. If a response is required by a certain date and further time is needed, DoCS will advise the Court in writing accordingly. If intervention is not proposed and care proceedings are not to be commenced, DoCS will advise of the reasons for the decision to not intervene and also advise whether it has any other information in relation to the child or any of the parties to the proceedings relevant to its investigative functions under the *Care and Protection Act*

8.3 Notice of allegations of child abuse made by a party in Family Court proceedings.

8.3.1 Under s 67Z of the *Family Law Act*, where a party to proceedings alleges that a child to whom those proceedings relate has been abused or is at risk of being abused:

- (i) that person must file a notice in a prescribed form in the Court;⁴⁸ and
- (ii) the Court must, as soon as practicable, notify DoCS.

8.3.2 When filed at the court, the next hearing date is written on the cover sheet of the form. Court staff provide sealed copies of the form to the party filing the notice for service on other party(s) and on the alleged abuser (if not a party to the proceedings); and

8.3.3 The Registry Manager or his/her nominee forwards to the DoCS Helpline a copy of the form with a pro-forma letter.

8.4 Mandatory reporting⁴⁹ by Family Court personnel.

8.4.1 Where a member of FCoA personnel⁵⁰ in the course of carrying out his or her duties has reasonable grounds for suspecting that a child has been abused,

⁴⁸ Form 66

⁴⁹ S67ZA of the *Family Law Act* refers to reports as “notifications”.

⁵⁰ The *Family Law Act* (s 60D) defines a member of court personnel to mean:

- (a) a court counsellor; or
- (b) a court mediator; or
- (c) an approved arbitrator; or
- (d) a welfare officer; or
- (e) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
- (f) the Registrar or a Deputy Registrar of the Family Court of Western Australia.

or is at risk of being abused, that member must, as soon as practicable, report to DoCS his or her suspicion and the basis for the suspicion.

- 8.4.2 Where a member of the court personnel makes a report under the *Family Law Act*, he or she will make that report in writing to the DoCS Helpline. In cases of urgency, the report will be made by telephone followed up with a written report as soon as practicable. The DoCS Helpline will also be informed of the next date, if any, that the matter is listed before the Court.

8.5 Discretionary reporting by court personnel.

- 8.5.1 Under s 67ZA(3) of the Family Law Act, where a member of FCoA personnel in the course of carrying out his or her duties has reasonable grounds for suspecting that a child has been ill treated, or is at risk of being ill treated, or has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child, that member may report to DoCS his or her suspicion and the basis of the suspicion.

- 8.5.2 Where a member of the court personnel makes a mandatory or discretionary report under the *Family Law Act*, he or she will make that report in writing to the DoCS Helpline.

8.6. Action by DoCS following a notice of allegations by a party or a mandatory or discretionary report from FCoA

- 8.6.1 DoCS will deal with a report from FCoA as a report that a child or young person is at risk of harm under the provisions of the *Care and Protection Act*.

- 8.6.2 On receipt of a report from the FCoA, a party to proceedings in the FCoA, or a report from court personnel, DoCS will make such investigations and assessments as DoCS considers necessary to determine whether the child or young person is currently at risk of harm.⁵¹

- 8.6.3 During any investigation and assessment by DoCS, the Court will provide DoCS with information about any orders made in proceedings concerning the child and if any Court proceedings concerning the child have concluded.⁵²

9. The overlap of Federal and State jurisdiction in relation to children and young people

9.1 Principles

- 9.1.1 There is an overlap of the federal and state jurisdictions in relation to children and young people. This overlap raises a number of difficult legal issues where proceedings may be or are commenced in both the Children's Court and FCoA.

⁵¹ S.30 of the Care and Protection Act.

⁵² This can be by order or by withdrawal or discontinuance of proceedings.

9.1.2 In dealing with these issues, it is necessary to recognise:

- (i) the specialised nature and separate jurisdictions of FCoA and Children's Court;
- (ii) that DoCS has statutory responsibilities which may involve, or result in the involvement of both FCoA and the Children's Court;
- (iii) that multiple hearings over prolonged periods of time in separate jurisdictions can be harmful to the child or young person and should where possible be minimised;
- (iv) those parents have a right to have their disputes resolved expeditiously, efficiently and where possible within a single jurisdiction;
- (v) that neither the Children's Court nor FCoA should be used as a de facto court of appeal one from the other.

9.2 Choice of jurisdiction by DoCS.

9.2.1 When deciding in which court the matter should most appropriately proceed, it should be assumed that the nature of the individual case would determine the appropriate jurisdiction and consideration.

9.2.2 Amongst a variety of issues, consideration can be given to matters such as:

- (i) whether DoCS has current protective concerns for the safety, welfare or well-being of the child or young person;
- (ii) whether these protective concerns can be sufficiently addressed by a change in residence, contact or special issues orders, without the need for ongoing involvement by DoCS;
- (iii) if the court has appointed, or intends to appoint, a Child Representative in the proceedings, the need for DoCS to also be a party, taking into account the issues raised in the proceedings concerning the safety welfare and well-being of the child or young person;
- (iv) whether there is an appropriate parent or carer prepared to file a Family Court application to establish or vary residence, contact or special issues orders;
- (v) which court is likely to provide the most timely and effective solution to secure the safety, welfare and well-being of the child or young person and which order of which court will take precedence;
- (vi) which court has jurisdiction to make orders most likely to be supported by the parties, including the child or young person and their family.

9.2.3 DoCS reserves the right to choose the jurisdiction in which protective concerns are determined, guided by the principles enunciated above. If DoCS forms the view that FCoA is the appropriate jurisdiction to decide matters of a protective nature, it may choose not to become a party but to give evidence in support of one or another party, or the child's representative, if appointed. DoCS notes FCoA's preference that DoCS elects to intervene when requested by Order pursuant to s91B to do so.

- 9.2.4 DoCS' decision will be based on the level of concern including those concerns raised in FCoA proceedings, the preparedness of the other parties' legal representative to call DoCS' evidence, and a recognition that DoCS as a witness as opposed to being a party has no right of appeal against the orders made.
- 9.2.5 If, during the course of the proceedings in FCoA and as a result of new information, DoCS assesses that the child is at significant risk, and that none of the parties will protect the child or that the safety, welfare and well-being of the child will be best secured by an order of the Children's Court, DoCS may initiate proceedings in the Children's Court.
- 9.2.6 When requested by FCoA to intervene, and DoCS decides instead (based on the reasons set out in 9.2.5) to initiate proceedings in the Children's Court, it will inform FCoA at the earliest opportunity of its intentions.
- 9.2.7 If, as a party to Family Court proceedings, DoCS is dissatisfied with the outcome of the proceedings and considers the child or young person to be at significant continuing risk DoCS may appeal FCoA orders.
- 9.2.8 If, following the conclusion of Family Court proceedings, fresh concerns are raised about the safety, welfare or well-being of a child or young person, DoCS will determine whether the concerns are best addressed through care proceedings in the Children's Court or by bringing further proceedings in FCoA.
- 9.2.9 Where there have been previous proceedings in FCoA or proceedings are current in FCoA, DoCS will ensure, to the extent that it is aware, that this information is communicated to the Children's Court.

10. Protocol

- 10.1 FCoA and DoCS have agreed to establish a Protocol to provide practical guidance to staff of DoCS and FCoA about procedures, to assist cooperation and improve decision-making.
- 10.2 The Protocol will include a process for the ongoing review and possible amendment of the Protocol, to take into account
- initiatives that are being considered or may be agreed between FCoA and DoCS (such as the Magellan Project - which is a project about the management of family law cases where allegations of serious sexual or physical abuse are made in the context of family law proceedings); and
 - the impact of Commonwealth and State legislation or other laws relating to the safety, welfare and wellbeing of children and young people.
- 10.3 The Protocol will be read subject to this Memorandum.

11. Review

11.1 This Memorandum may be reviewed at any time by the agreement of both FCoA and DoCS and in any event within 5 years of the date of this Memorandum.

Date:

Director-General
NSW Department of Community Services

Chief Justice
Family Court of Australia