Submission No 80

INQUIRY INTO CHILD PROTECTION

Organisation: Children's Court

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Children's Court of New South Wales

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The Director
General Purpose Standing Committee No. 2
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Legislative Council Inquiry into Child Protection

The Children's Court of New South Wales welcomes the opportunity to make a submission to the Legislative Council Inquiry into Child Protection in New South Wales.

Firstly, by way of general background I will provide some information on the role and composition of the Children's Court. The submission will then present the Children's Court's perspective on some of the specific issues raised in the terms of reference. I will then go on to provide some more general observations on the statutory child protection system and how that system intersects with other aspects of the Court's jurisdiction.

The Children's Court of NSW

The Children's Court is one of the oldest children's courts in the world. The NSW Parliament has long recognised the need to treat children differently from adults and this principle was first recognised under the *Juvenile Offender Act* (14 Vic No 11) 1850. Legislation dealing with the welfare and protection of children followed and as these laws were applied the link between child welfare, education and juvenile crime was undeniable, not only as to cause but also in so far as the laws of the times sought to provide solutions. These developments laid the groundwork for the establishment of a Children's Court in 1905 consisting of "special magistrates".

The modern Children's Court is a separate Court of Record established under the *Children's Court Act* 1987 exercising jurisdiction principally in respect of child protection matters and in respect of youth (juvenile) crime in New South Wales. The Children's Court also has jurisdiction with respect to apprehended violence orders where the defendant is under the age of 18 years and compulsory schooling orders.

The Children's Court of NSW is composed of a President, being a District Court Judge, and specialist Children's Magistrates specifically appointed under that Act. Currently

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there are 15 specialist Children's Magistrates based at various locations across NSW including Parramatta, Lismore, Broadmeadow, Woy Woy, Glebe (Bidura), Campbelltown, and Port Kembla. Children's Magistrates also conduct regular circuits that cover the mid-north coast, the Hunter region, the near western district, and the Riverina.

In other parts of NSW, the jurisdiction is exercised by Local Court Magistrates sitting as the Children's Court.

The importance of a specialist jurisdiction to deal with children in the justice system will be addressed further below.

The amount and allocation of funding and resources to the Department of Family and Community Services (FACs) and non-government organisations (NGOs) for the provision of services for children at risk of harm and children in out of home care

The Children's Court is not in a position to comment on whether the amount and allocation of funding and resources to FACs and the NGO sector is sufficient except to say that funding issues are raised in the Children's Court as an explanation as to why a particular option, that might appear to be in the best interests of a child, is not supported.

The Court accepts that funding is never limitless. Nevertheless, the importance of providing ongoing targeted financial support to children who have been involved in the statutory child protection system cannot be overstated. Children who have been removed from their parents are not average children. They have inevitably experienced trauma, whether as a result of their treatment prior to the involvement of FACs or as a result of removal from their family and their placement with alternate carers. This is not only the case for children placed in out of home care but also for children who are the subject of a guardianship order.

However, this issue should not only be examined in terms of resourcing alone but also in terms of the culture of agencies charged with responsibility for caring for children, particularly for children placed in out of home care.

The Children's Court has responsibility for approving the permanency plan for children who are subject to an application for a care order under the *Children and Young Persons (Care and Protection) Act* 1998 (the Care Act). As part of that process the Court must consider a care plan prepared by the Secretary for FACs under section 78 of the Care Act where the Secretary seeks to remove a child from his or her parents. The care plan must make provision for the allocation of parental responsibility, the kind of placement proposed, the arrangements for contact between the child and family members or other persons connected with the child, the agency designated to supervise the placement in out of home care (if relevant) and the services that need to be provided to the child or young person. The care plan is to be made as far as possible with the agreement of the parents of the child. A great deal of time, effort and negotiation between the parties goes into preparing

a care plan with a view to addressing not only the short term issues for the child but also the foreseeable longer term issues.

Whilst the Children's Court understands that the care plan is not a static document and the arrangements for the child will often need to be confirmed after the Children's Court proceedings have finalised, some officers of the Court have observed that some NGOs seem to take a very narrow view of their role in case managing children. This view seems to be limited to supporting a child in a placement whereas the Court takes the view that the best interests of a child in the long term are served if the child is also supported to maintain positive relationships with his or her culture and family, where possible. For example, a plan that would include play therapy for a child and their mother might be supported by the parties and the Court because establishing a more positive relationship between a child and their mother would be seen as in the best long term interests of the child notwithstanding that the child could not live with the mother. However, an NGO may not support this approach because the NGO might see this as supporting the mother rather than the child.

Anecdotally, the Children's Court has heard that some NGOs do not adhere to the care plan and will apply their own policies/values to the case management of the child. These policies may be inflexible and inconsistent with the view of the Court as to what was thought to be in the best interests of a particular child. For example, an NGO may disregard the contact arrangements that were agreed to between the parties in the development of a care plan. The Children's Court is well aware of the complexities of contact arrangements for children in care and would prefer to see these arrangements resolved outside a court environment where possible. However, the Children's Court would also like to see NGOs approach these issues on a case by case basis weighing up both the long term and short term benefits with any practical challenges and risks to the child rather than through the application of rigid policies.

The Secretary for FACs is the party in the Children's Court proceedings yet in reality the Secretary at times appears to be hamstrung by the policies of a divergent group of NGOs.

Young people disengaging from care, "the cross-over kids" and the importance of universal support systems to address the intergenerational child protection cycle

Ongoing support is particularly critical as children who have been affected by trauma as a result of child protection issues move into their teen years. We know intuitively that this is a time when children try to make sense of themselves, their place within their family and within society more broadly.

Unfortunately, too often the Children's Court sees children who have been involved in the statutory child protection system cross over into the Children's Court's criminal jurisdiction during these years. Often these children have disengaged from

the formal care arrangements and have 'self-placed' with family or are 'couch surfing' with friends. Often they have also disengaged from school.

There is an unequivocal correlation between a history of care and protection interventions and future criminal offending. The nexus between care and crime has been persuasively articulated by a number of respected commentators:

"In her paper, "*The link between child maltreatment and adolescent offending: systems neglect of adolescents*",[1] distinguished Developmental Psychologist, Dr Judy Cashmore AO, states that the link between child maltreatment (abuse and neglect) and adolescent offending is well established and that there is now "significant evidence"that the *timing* of this maltreatment matters."

"It is essential that young people at risk of becoming 'life course' offenders are identified early in their life course by the use of sound assessment tools and that there is a co-ordinated agency intervention. A "silo" approach with limited information sharing between agencies such as education, health, social welfare care and protection and police will prevent early identification."[2]

It has been pleasing to observe that in recent years the Children's Court has seen greater involvement of FACs or NGO caseworkers when children in out of home care are involved in the criminal justice system. In particular, the involvement of FACs in the Youth Koori Court pilot at Parramatta Children's Court has been critical to ensuring that children who have disengaged from care have access to supports to address issues that are fundamental to reducing the risk of re-offending, such as access to stable housing.

The Children's Court submits that there needs to be a greater investment in universal supports for the prevention, early intervention, diversion and rehabilitation of children and young persons involved in the justice system.[3] It may be of interest to the Inquiry to know, for example, that there is no residential youth drug and alcohol rehabilitation facility in Western Sydney. Funding for programs such as this, and like Youth on Track, is essential in addressing the cycle of disadvantage.

Early intervention

The Children's Court submits that early intervention should be encouraged, properly supported and utilised to the fullest extent. If removal of children from their parents

[1] Published in *Family Matters*, Australian Institute of Family Studies, 2011 Issue No. 89 at p. 31
[2] See 'Cross-Over Kids' – childhood and adolescent abuse and neglect and childhood offending' a paper by originally presented by Judge Mark Marien, former President of the Children's Court of NSW at the South Pacific Conference of Youth and Children's Courts Annual Meeting 25-27 July 2011, Vanuatu (and updated for the Third Annual Juvenile Justice Summit 27 March 2012, Melbourne.
[3] See the article published in The Judicial Review "*Emerging Developments in Juvenile Justice: the use of intervention, diversion and rehabilitation to break the cycle and prevent juvenile offending*" in Vol 12 No 4, March 2016 at p. 145.

can be avoided, through early intervention, then all options aimed at facilitating such intervention must be promoted and attempted in a genuine and proper manner.

The legislative reforms to the Care Act that commenced on 29 October 2014 created an increased focus on early intervention and dispute resolution. The reforms highlighted the importance of capacity building between Community Services, parents, carers, children and young people.

To facilitate early intervention, provisions were introduced in the amendments to ensure that alternative dispute resolution mechanisms are utilised to their fullest extent: Part 2 *Children and Young Persons (Care and Protection) Act* 1998.

Significantly, provisions regarding Parent Responsibility Contracts (PRCs) in s 38A were amended to remove the presumption that a child is in need of care and protection if the contract is breached. Additionally, expectant parents were included to enable contracts to be made between Community Services and either or both expectant parents whose unborn child was the subject of pre-natal orders under s 25.

A second key reform in the early intervention arena was the Parent Capacity Order: s 91A – I. An order may be made that requires 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", at any time, including prior to removal.

Unfortunately, the Court has not seen any significant increase in the use of these options in casework.

The introduction of the Compulsory Schooling Order scheme following the Wood Special Inquiry into Child Protection in 2008 was also seen as an opportunity to intervene early to identify and prevent child abuse and to ensure that children do not fall through the cracks of either child protection or education systems. However, the Children's Court's believes that the Department of Education has taken an overly litigious approach to Compulsory Schooling Orders. The Children's Court is of the view that a more therapeutic, less adversarial scheme is required, which operates in tandem with other agencies.

In addition to these options, the Children's Court recommends that the Inquiry look closely at other options for early intervention, including programs in New Zealand, but in particular the Family Drug Court in Victoria.

Overrepresentation of Aboriginal and Torres Strait Islander children in the Children's Court

Aboriginals and Torres Strait Islanders are over-represented in the justice system. In the Children's Court, this over-representation is manifested in both the juvenile

crime jurisdiction and in the care and protection jurisdiction. Aboriginal children are similarly over-represented in detention centres. The Children's Court is proactively taking what steps it can to excite discussion and thought surrounding ways and means by which it can assist in the amelioration of this tragic reality.

In its crime jurisdiction a Youth Koori Court has been established.

In its care jurisdiction, the Court has increased its focus on cultural awareness and planning.

Research has established that culture is a central factor in the socialisation of children and young people. 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.

In my decision in *The Director-General of DFaCS (NSW) and Gail and Grace* [2013] NSWChC 4 I said at [95]:

"I wish to place on record that this Court is increasingly frustrated by the lack of cultural knowledge and awareness displayed by some caseworkers and practitioners in their presentation of matters before it. The time has come for a more enlightened approach and a heightened attention to the necessary detail required, which may require specific training and education by the agencies and organisations involved."

A new care plan template will shortly be rolled out within FACs that will focus attention on the development of appropriate cultural plans for Aboriginal and Torres Strait Islander children but it will be necessary for NGOs and carers to commit to implementing the plans if children are to benefit from this process.

The Court considers that it is critical to raise this issue until comprehensive cultural planning is embedded at all levels of the care and protection process. The Children's Court submits that caseworkers and legal practitioners will benefit from increased training and professional development in this area.

Need for Specialist Children's Magistrates and legal practitioners

The Children's Court is in a unique position to observe children who move through the child protection system and into the criminal justice system and then back into the child protection system as parents. Often they have also missed out on a sound education and Aboriginal or Torres Strait Islander children are significantly overrepresented in this group.

To break this cycle we need professionals in all systems to understand the linkages and to work co-operatively to identify the needs for each individual child. This is also the case for judicial officers and legal practitioners working in the Children's Court

jurisdiction whether in the criminal jurisdiction or the care and protection jurisdiction.

The Children's Court submits that it should be sufficiently resourced and have sufficient autonomy to provide specialist Children's Magistrates to service the jurisdiction conferred by Children and *Young Person's (Care and Protection) Act* 1998 across the totality of the state. Sufficient specialist legal practitioners should also be available across the state and the remuneration offered needs to be sufficient to attract and retain talented and committed professionals.

Decision making in the Court is guided by both law and current, established theory, particularly with respect to therapeutic jurisprudence and developmental theories.

A generic advantage of specialisation is seen to be improved quality of decision-making. Experts are likely to make more knowledge-informed decisions than generalists, and are less likely to make significant errors of judgment. Other claimed advantages are greater uniformity in decision-making and better case management.[4]

The Court believes that there is inherent value in applying expert knowledge and experience consistently across the state.

Conclusion

I look forward to the outcome of the Inquiry. I hope some of the matters I have raised will be of assistance in the discussions and deliberations to be undertaken. At the end of the day, I am sure that we all share the common goal of advancing the interests of children and safeguarding their safety, welfare and well-being.

Yours faithfully,

Judge Peter Johnstone
President, Children's Court of New South Wales

[4] Professor Patrick Parkinson, 'Specialist Prosecution Units and Courts: A review of the literature', research conducted for the Royal Commission into Institutional Responses to child sexual abuse' March 2016