

INQUIRY INTO CHILD PROTECTION

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Inquiry into child protection

Submission

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ABSTRACT

Before considering an increased funding to the NSW child protection system as a means of improving its efficiency, it is necessary to *first* examine where and how the funds are currently being spent. In order to be able to do that, a transparent system of public control must be introduced and, if need be, enforced in order to track some two billion dollars a year that is being sunk into this ‘child protection black hole’ from which no light ever escaped.

Three ‘branches’ of the New South Wales child protection system have been identified as: Legislative, Judicial/Legal and Executive. Inefficiency in each will contribute to the inefficiency of the whole system.

The most efficient of the three branches is the legislative branch. The Care Act needs only some ‘fine tuning’; most importantly an addition to a number of its crucial provisions of a sub-section that begins with the words “to avoid doubt...”, so as to clearly express the meaning and the legislative intent of these crucial provisions and the Act as a whole. Otherwise there are only a couple of significant legislative amendments recommended by this submission.

The judicial/legal branch, instead of giving effect to the legislative intent of the Care Act, have turned its major provisions on its head. The provisions of the Act have been replaced by the practices, some of which are not only contrary to the provisions and the intention of the Act, but clearly contrary to the rule of law and are void of procedural fairness. It is incredible that in almost 17 years since the introduction of the current (1998) Care Act, there are no clearly established standards in spite of thousands upon thousands of decided cases, involving hundreds of solicitors, barristers, magistrate, judges and justices.

FaCS are throwing huge financial resources by funding their legal representatives, especially in the higher courts, such as the District Court, Supreme Court and the Court of Appeal. Without fail, FaCS are represented in these courts by the government funded Crown Solicitor *and* a barrister with years of experience. Likewise, the child is represented by a government funded solicitor and quite often by a barrister.

These barristers have managed to persuade the judges in accepting their interpretation of the law and accepting established practices. Even though, from time to time these barristers are unlucky

¹ Solicitor with nearly 8 years of experience; 35 years of experience as an engineer, in various management positions, including in defence industries; plus 7 years of experience inside, and 22 years outside, a religious cult.

by being confronted by a judge who gives the first and foremost respect to the law rather than to the person of the legal representative, their decisions are subsequently played down or outright ignored until they pass into oblivion.

The Executive branch, the caseworkers and their managers are a category in their own right. They have taken over much of the work and authority in the Children's Court that belongs to the judicial/legal branch, while at the same time neglecting their job, the child protection. They have obviously confused the child protection with the child removal from their parents. I do not blame them; it is their 'training' that needs some scrutiny.

SUMMARY OF RECOMMENDATIONS

1. To amend the *Children and Young Persons (Care and Protection) Act 1998* ("the Care Act") by an addition of a mandatory ***Fact-finding*** section as the ***first step*** in considering an application by FaCS for a care order. This amendment would remedy the current absurd practices in the Children's Court by which children are thrown into out of home care, at least for the duration of the court process (1-2 years), without ***first*** establishing the facts of the case.
2. To amend the Care Act by abolishing the appeal from the decisions of the Children's Court to the District Court by way of a new hearing as of right, and replace it by an appeal as of right ***on the grounds of error of law and/or error of fact***. On a successful appeal, the matter to be returned to the Children's Court for a new hearing, to be decided according to law; the cost of such to be borne by the State. This amendment would eventually force the Children's Court magistrates to act in accordance with the law.
3. To further strengthen the existing provisions of the Care Act so as to clarify their meaning and their intent. Number of the important provisions have been misinterpreted or completely ignored by the Children's Court, and need clarification.
4. To abolish the office of the specialist Children's Court magistrate by creating a common pool of magistrates together with the Local Court magistrates. The magistrates from the common pool to be rotated into the Children's Court duties for a duration not exceeding six months at a time. This arrangement would offer: (a) better flexibility to the planning of the workload of the magistrates in both, Local Court and Children's Court; (b) would bring fresh minds to the Children's Court; (c) would offer an opportunity to the current Children's Court magistrates to broaden their legal skills; and (d) would avoid risk of informal relationships between some lawyers and some of the long-standing Children's Court magistrates.
5. To delegate to the Police the task of the investigation of the risk of harm reports and to charge them with a duty to prepare the report of the findings of each investigation. To empower the Police to obtain identity of the person who made the risk of harm report, if the Police thinks that the report is malicious or baseless, so that the charges may be laid.

6. To remove the power from the FaCS caseworkers to issue an order for assumption of a child into care; to delegate such power to the investigating Police officer **only** if he or she finds that the child is at an **immediate risk of serious harm**. Such removal must be urgently confirmed, or otherwise, by the Children's Court and must be based on the report from the investigating Police officer. Otherwise any order for the removal of the child from his or her parents' care must be made **only** if a less intrusive intervention is not appropriate, and **only** by the Children's Court after a proper hearing according to law.
7. To make transparent the assessments of the risk of harm at every stage of the process, including the algorithms employed by the relevant software tools used by FaCS in general, and to disclose the particulars of the input provided by the caseworker in any case that comes before the court.
8. To re-train the caseworkers in the assessment of risk of harm and, most importantly, in the skills of providing and/or sourcing appropriate assistance to the parents who are found to lack parenting skills or whose conduct otherwise may pose a risk of significant harm to the child. To make sure that the caseworkers do understand that their role is not one of an undercover intelligence officer whose duty is to gather evidence against the parents.
9. The Minister is to table in the Parliament, on a monthly basis (excluding recess periods) the following **monthly** figures: (a) number of children removed into out of home care, other than into care of one parent to the exclusion of the other; (b) number of children removed from one parent into the care of the other; (c) number of children restored to the care of one or both parents; and (d) the amount of money paid to each of the NGOs who have been contracted to provide or oversee the out of home care.

INTRODUCTION

As in any other system of human endeavour there is a nice side of it and, often, an ugly one. Regrettably, in my opinion, in the NSW child protection system the ugly side outweighs the nice one by a large margin. In this submission I will be addressing the ugly side, meaning that whatever I say about any part of the system does not necessarily, and fortunately, apply to every player involved in that part of the system. I offer my apologies to those few on the nice side.

I know that some of my critics will say that I am a 'prophet of gloom and doom' and that I see only the ugly side. My answer is, if there were no significant ugly side in this system, there would be no need for any inquiry. I believe that the cries of those families, including children, who have been affected by the ugly side of the system, have gone up as a memorial of their suffering. I congratulate the Committee Members on this initiative and hope that this inquiry will not go by way of the earlier inquiries.

In order to avoid vagueness, I will try to be quite specific in my analysis and recommendations.

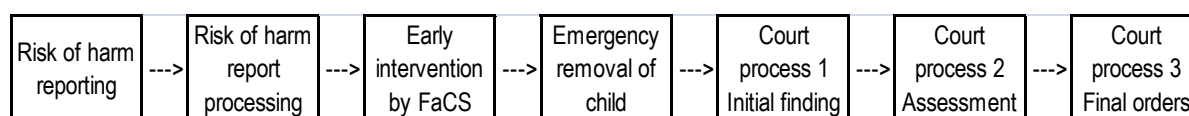
Capacity, effectiveness, adequacy and reliability of the system

Terms of reference (a) and (b)

I have identified three major areas, or ‘branches’, of the child protection system. Inefficiency in either branch of the system contributes, to a greater or lesser extent, to the large number of children in out of home care where they do not belong. I refer to these ‘branches’ as **Legislative** (acts of the Parliament), **Judicial/Legal** (magistrates, judges and lawyer) and **Executive** (Family and Community Services (“FaCS”)). I will be addressing each one separately, even though they are of necessity somewhat intertwined.

I. The Legislative Branch

1. The New South Wales child protection legislation, *Children and Young Persons (Care and Protection Act) 1998* (“the Care Act”) is the legislation that is **supposed** to be governing the child protection system in this State. As I will show in this submission, it is the interference from, and the failure of, the other two branches that render the legislative provisions inefficient. The Care Act defines a number of discrete steps, practical failure at each being capable of contributing to the inefficiency of the whole system. These discrete steps may be roughly defined as shown in the flow chart below.



2. Even though there is some room for ‘fine tuning’ of the certain provisions of the Care Act, there are no major flaws that significantly contribute to the inefficiency of the child protection system. Nevertheless, amendments are required, mostly by way of clarification of some of the legislative provisions and the legislative intent, for the reason of the often gross misinterpretation of the Care Act, as will be shown in the next part of this submission.
3. Apart from the said clarifications, there are two significant amendments to the Care Act that I recommend. The first one is to amend the provision of the Care Act that deals with the appeals (currently section 91). It should be amended so as to abolish the right to a **new hearing** in the District Court if a party is not satisfied with the outcome of the Children’s Court proceeding. That right should be replaced with the right to appeal **on the grounds of error of law and/or error of fact**.
4. The proposed amendment would force the Children’s Court to - eventually - start deciding the matters according to law and would expose the gross misinterpretation of the law that has been taking place therein. As it is, the Children’s Court decisions never see the daylight, apart from a few carefully chosen ones. This proposal will not only ensure transparency of the most secret court in the land, but will at the same time introduce badly needed consistency. In long run, combined with the other recommendations of this submission, the child protection system will do efficiently what it is supposed to do - to protect our children.

5. The second amendment that I propose is the introduction of a section that would be titled ***Facts finding***. Even though current sections 71 and 72 imply that the court – if it applied the rule of law - was to establish the facts before it establishes whether or not the child is in need of care and protection, it does not happen when it is most needed. I know that many of the readers will doubt what I just said. I am serious. Please don't ask me how it is possible for any court to make a serious finding, such as that a child is in need of care and protection and order removal of a child if the facts had not been first established according to law. We will have to ask for an answer those that will be addressed in the next part of this submission.
6. Some of the proposed “fine tuning” of the Care Act would be similar to the following examples (with reference to the sections of the Care Act as they stand now):

Section 9: should include a subsection such as, “to avoid doubt as to the priorities, refer to section 36.”

Section 23: definition of the expression “current concerns exist for the presence to a significant extent...” should include a subsection, such as, “to avoid doubt ‘current’ means within the last 6 months; ‘presence’ means at the time of assessment; ‘to a significant extent’ means to an extent of severity and seriousness of risk that cannot be sensibly ignored.”

Section 30: should include a subsection such as, “to avoid doubt, a risk of harm that had not been investigated must not be admitted into evidence in any court proceeding; a risk of harm that had been investigated must be accompanied by a report of the investigation. The person who carried out investigation and prepared the report must be available to give oral evidence if required by a party to the proceedings or by the court.”

Section 34: should include a subsection such as, “to avoid doubt, FaCS must not take any action in relation to a child except in response to a risk of significant harm report.”

Sections 53 & 54: should include a subsection such as, “to avoid doubt, information to be provided to the clinician who is asked to conduct an assessment, is to be limited ***only*** to the factual information as established pursuant to [the proposed new section titled ‘Facts finding’].”

Section 83: should include a subsection such as, “to avoid doubt, preparation of a care plan may only be directed after the facts of the case have been established pursuant to [the proposed new section titled ‘Facts finding’] and the expert report, if any available.”

7. If anyone is further interested in the legal interpretation of the Care Act, he or she may read my paper titled, *Judicial Process in the Making of a Care Order, Part I: The Rule of Law and the Balance of Probabilities Standard of Proof* (Annexure “A” to this submission). Several months ago I have distributed copies of this paper to about 100 solicitors, 20 barristers and several magistrates and judges, all of them involved in the NSW child protection jurisdiction; so far have not received a single critical comment from any of them.

II. The Judicial/Legal Branch

8. In order to show the full absurdity of the misinterpretation of the Care Act, I will have to refer to specific provisions, some of which are being routinely ignored or misinterpreted in the Children's Court. Each of the failures to apply the law as intended by the Parliament significantly contributes to the overall inefficiency of the child protection system.

Principles for administration of Act (currently sections 9 and 36 of the Care Act)

9. One of the principles of section 9 is (*emphases* supplied) "the least intrusive intervention in the life of the child or young person *and his or her family*." How much legal skill or common sense does one need to interpret this provision? This principle *obviously* applies to the decisions on the removal of the child *from his or her family*. Yet, for some 12 years (from 1999 to March 2011) this principle had been consistently applied to the decisions on the restoration of a child *to his or her family*. It was being interpreted as the "status quo" provision, until the Court of Appeal finally clarified it in *Re Tracey* [2011] NSWCA 43. Since then, only a lip services is given in the Children's Court to that provision.
10. How many children have been left in out of home care in those 12 years, on the grounds of this extremely incompetent or, worse still, deliberate, misinterpretation of this principle? I know that some of my critics will say that an allegation of a deliberate misinterpretation of legislation is a serious charge. It is. All I can say then to those who misinterpreted, or accepted the misinterpretation of, this simple legislative provision is: you ought to go back to school, whoever you are, so you can learn how to interpret the law.
11. Another, important principle of section 9 is the principle that "the safety, welfare and well-being of the child or young person are paramount". This provision is routinely being interpreted as meaning that 'if in doubt, remove the child from his or her parents'. However, the Care Act has another principle directly relevant to this issue. It is found in the current section 36. The Care Act is clear, when referring to the principles of sections 36 and 9: *the principles of section 36 have priority over the principles of section 9*.
12. Here are the principles of section 36, in short: in deciding on the *appropriate response* to a report concerning a child, number of considerations *must* be taken into account, the most important being, the *immediate safety* of the child, that the removal of the child 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*. How much wisdom and legal skill does one need in order to see that, in placing the children's interests first, the court must *first* consider other protective options before removal of the child from his or her family?
13. Has the Children's Court ever given heed to the principles of this section? Not to my knowledge, yet in nearly every decision there is a note that the court has taken into account the principles of section 9, while ignoring the principles of section 36 that are supposed to have priority over those of section 9. The then Minister for the Community Services, Lo Po,

in her second reading speech said, the removal of the child “*is a step of last resort*”. Now, in practice, it is the step of the first resort, as it will be shown later and especially in the next part of this submission.

Investigations of the risk of harm reports

14. The Care Act ***demand***s (current section 30) that a risk of harm report be investigated unless it is deemed that the information received does not show that the child is at risk of significant harm. Corollary of this provision is that the risk of harm reports that have not been investigated must not be admitted into evidence on which the court will be making its findings and decisions. Again, to my knowledge, this provision of the Care Act has been ***totally ignored*** by the Children’s Court – ***for nearly 17 years*** - yet the courts routinely accept the assessments by the FaCS caseworkers which are based on mere allegations.
15. A serious question must be asked: how many children have been condemned to out of home care based on the so-called evidence found in the risk of harm reports that had never been investigated? Based on the publicly known fact that a large percentage of the risk of harm reports had never been investigated, the numbers must be staggering.

“Establishment” proceeding in the Children’s Court

16. This step of the court process is a ‘post-mortem’ step that follows the initial removal of the child from his or her parents’ care by the, ***often arbitrary or even capricious***, decision of a caseworker and/or her manager. Following the removal, an application is filed by FaCS in the Children’s Court for a care order. Usually within a week, an interim order is made, the court placing the child under the parental responsibility of the Minister, while the child is usually placed with a temporary foster carer.
17. Then comes the “establishment” (a term not used by the Care Act but rather borrowed from the English law). One would expect that the “establishment” hearing is about the establishment of the facts of the case on which the future findings and decisions of the Children’s Court would be based. Not so in the Children’s Court of New South Wales. The magistrates will accept the “consent ***without admissions***” from the parent that the child is in need of care and protection. The parents’ lawyers will do their best to persuade the parents to consent so as to show to the caseworkers and to the court that they “have insight”.
18. I call on the fair-minded people who are reading this submission, to sit back and think about this irrational practice in the Children’s Court. As stated earlier, most of the risk of harm reports had never been investigated; there was no trial at which the allegations raised in the risk of harm reports have been tested according to law; yet the magistrate will boldly declare, without exception, that he or she is “independently satisfied, on the balance of probabilities” that the child is in need of protection on the grounds as pleaded by FaCS.

19. I asked a number of times the magistrates and the lawyers involved in the proceeding: “what is the meaning of the phrase ‘without admissions’? What it is that the parent had not admitted to?” Their answer, in chorus, was “ “; that means, a deafening silence. Why?
20. The magistrate accepted the “without admissions” statement by the parent, which may only mean denial of any wrong-doing, yet, his or her child is found to be in need of protection from that very parent. “In need of protection” from what? Isn’t it the case that, in the absence of admission by the parent, FaCS have to prove, on the balance of probabilities, that: (a) the alleged acts or omissions by the parent are true; (b) what kind of risk of harm those acts or omissions represent to the child; and (c) what protective measures are necessary to safeguard the child? Children’s Court is not interested in such ‘trivia’.
21. The court will accept the parents’ purported “insight” and the resulting ‘consent’ while, if the parents exercise their true insight and deny that the child is in need of care and protection, such denial will be rejected out of hand and held against the parents until they complete numerous courses - and crawl back humbly admitting that they really lacked the understanding until they became ‘enlightened’ by the courses that they attended. Even then, the FaCS lawyer may argue, as is often the case, that, yes, the parents have completed the courses but “have not demonstrated that they have learnt something”; or, “the parents have done all these courses for the only purpose of getting their children back.” Yes; what is wrong with that? Do you, sir/madam, have any other motive to suggest to the parents?
22. I compare the “establishment” practice in the Children’s Court with a hypothetical situation where a raw sewerage would be let into the drinking water supply; it would inevitably lead to a major outbreak of dysentery, typhoid or similar diseases, with massive casualties. That is what had happened in the New South Wales child protection system: the unproven, denied, untested, not even investigated allegations (the ‘raw sewerage’) have been allowed into court as ‘evidence’ on which the most drastic decisions since the abandonment of the capital sentences are being made. As a result, New South Wales is on top of the world in per capita number of children in out of home care (apart from Northern Territory).
23. A ‘credit’ must be given to *some* magistrates who allow the “establishment hearing” to proceed “on submissions only”. That basically means, reading of allegations (‘raw sewerage’) and presenting “submissions” by the parties’ lawyers – a watered down version of the “consent without admissions”. The decision is inevitable: the magistrate is “independently satisfied, on the balance of probabilities” that the child is in need of protection on the grounds as pleaded by FaCS.
24. So, what is the purpose of the “establishment hearing” as currently practiced? In summary: the main, if not the sole, purpose of this ‘hearing’ is that the magistrate may make a judicial decision that “the child is in need of care and protection”, thus the State is indemnified from liability arising from the (*often*) *unlawful act* of the initial removal of a child from his or her parent’s care. Here I must concede the unenviable position of the magistrates: as will be shown in the next part, the FaCS case workers remove the child – and then shift the burden

of justifying the removal on to the magistrates, who find themselves between a rock and a hard thing. No doubt, a part of the magistrates' training is the re-iteration of a threat that, if they do not grant the removal of the child from his or her parents, and something serious happens to that child, the responsible magistrate's name will be splashed all over media headlines. They are obviously not told, but it is true, that whatever happens to the child who has been removed from the parents, will never be known, so they do not have to worry.

25. The absurdity of the above practice becomes clear at the next step of the court proceeding. Having happily declared that the child is in need of care and protection, the magistrate will direct the FaCS to prepare a care plan. The care plan must address the question of whether there is a "realistic possibility of restoration" of the child to his or her parents. The major factor in answering that question is the answer to the question of whether the parents "are likely to be able to satisfactorily address the issues" that led to the removal of the child from their care, namely, those issues that had been established at the "establishment hearing". Which issues? None have been admitted by the parent and none ever proved by FaCS.
26. One can imagine now how many thousands upon thousands of children have been condemned to the out of home care (usually until each turns 18 years of age), based on – **nothing**. I am not saying that, had the matter been properly heard and determined, no child would have ever been sentenced to lengthy out of home care. No. What I am saying is that a huge number of them either did not need any intervention at all, or the intervention would be "less intrusive", that is, the children could have remained living with the parents, while the parents are addressing those problems properly identified in a competent hearing. The most drastic decision in the life of a child **must** be made according to law rather than on somebody's wet finger feeling of what is right or wrong.
27. If anyone is further interested in the application of the Care Act, as currently practiced in the Children's Court, he or she may read my paper titled, *Part II: The Rule of Thumb and the Wet Finger Standard of Proof* (Annexure "B" to this submission).

A disturbing attitude in the care and protection jurisdiction

28. It has come to my attention in early 2013 that the Children's Court magistrates "don't like" certain legal practitioner involved in the care and protection jurisdiction. It is nothing unusual in any social or professional setting, so I paid little attention to that news. However, recently, a reliable information surfaced again – twice - that, not only that it is the case that the magistrates "don't like" certain lawyer, but that the parent who retains that lawyer is not going to get his or her child back – because of the involvement of that lawyer!
29. That is a disturbing attitude and the trampling over the oath of office taken by (obviously some) magistrates, not to mention suffering of the children who are being placed in out of home care based on the magistrate's liking or disliking of a lawyer. I am flabbergasted!

30. I know the identity of a particular lawyer in question who does not mind his identity being disclosed, and I know the identities of the sources of the above information; I will disclose the identities to the Committee members and leave it in their hands.

Recommended remedy for the above ills

31. Currently, it appears, every newly appointed magistrate to the Children's Court undergoes a 'training'. Why is there a need for training of the magistrates, apart from an introduction to the peculiarities of the procedural matters? If a person is a qualified lawyer, has expressed an interest in becoming a magistrate and has been selected for that position, he or she does not need to be trained – ***at all*** – in the interpretation of the Care Act and the associated rules. He or she must be capable of reading and interpreting them without being tutored.
32. The task of the magistrates, new-comers to the Children's Court, could be made easier by the assistance of the legal representatives involved in each particular case, if it were not for the fact that nearly all legal professionals involved in this jurisdiction have gone through the 'training' of the same kind that the current magistrates have gone through. I have no solution to offer to this problem except the proposed amendments to the Care Act. It would be too difficult to 'un-teach' someone from the habits that he or she has been practicing for years, day in day out, unless the legislative interpretation and its intent is strengthened by the proposed "to avoid doubt..." clauses to the important provisions of the Care Act.
33. For the above reasons and for the reason of some lawyers eventually becoming unacceptably informal with some of the long-standing magistrates, the Children's Court proceedings should be conducted by the Local Court magistrates who would be rotated in that position for periods not exceeding six months at a time. The current Children's Court magistrates should join the common pool of the Local Court magistrates – and get some real legal experience and broaden their skills base.
34. The above arrangement would allow flexibility to those who are responsible for the staffing of both, the Local Court and the Children's Court, by shifting resources so as to evenly spread the workload. It is a well-known efficiency principle of the queuing theory.

III. The Executive

35. For the reason of his life experience, I have full confidence in the current Director-General (Secretary) of the Family and Community Services, Mr Michael Coutts-Trotter. He cannot be blamed for the gross inefficiency of the Department. The reason I am saying this is my experience where I and other people had attempted to contact the former heads of that Department, only to receive template replies, all of them containing almost identical texts apart from the addressee's name and the date of the letter, obviously from an adviser.
36. I have no proof of what I am about to say, but have come to the conclusion that the Secretary is surrounded by a number of advisers, many of whom are plants from those who

profit from the inefficiency of the system. In other words, the Secretary is surrounded by a whole stable of ‘Trojan Horses’. That has to be changed if the Department is ever to become efficient and effective in genuinely protecting children who are genuinely in need of care and protection.

Case workers and case managers

37. The first inefficiency that needs mention, and that can easily be rectified, is the fact that the case workers and case managers are spending enormous amount of time attending court proceedings and doing the work of their lawyers. These case workers and managers are not to be blamed for this inefficiency: it is the judicial/legal branch of the child protection system that is responsible for it.
38. The magistrates normally insist on the clients being present in the court in order to be able to “give instructions” to their lawyers. The case workers and/or case managers are the clients for that purpose. Why is there a need for a perpetual “giving of instructions” to a qualified, competent lawyer? Isn’t it enough to have a conference and get instructions before the hearing begins? If a need arises for some additional, unforeseen instruction in the course of the hearing, the caseworker is as close to her lawyer as his and her mobile phone is. As it happened in one case where the case worker was not present in the court, FaCS legal representative sought adjournment in order to “get instructions”. The presiding magistrate told him words to the effect: “pick up your phone and call your client”, which he did; the matter was resolved within minutes, there and then – and the children were on their way back home to their parents the very next day.
39. In another case, the case worker drove from the Eastern Suburbs to the Sydney’s north-west in order to serve her affidavit on a parent (obviously an established practice). The current Secretary, referring to another similar case, directed that a courier be engaged if the matter is urgent, or that the papers be posted in less urgent matters. Common sense.
40. One of the major administrative inefficiencies of the case workers is the way they deal with the preparation of the affidavits for the court proceedings. Again, I would point the finger of blame elsewhere rather than at the case workers; they have been pushed into it. As it already has been pointed out, most of the risk of harm reports are never investigated. If they are ever investigated, it is usually by someone other than the allocated case worker. Yet, the task of preparing the affidavits for the court proceedings falls onto the shoulders of the case worker who is allocated to the case, perhaps as recently as a few weeks before the court process began. Most of the contents of the early affidavits, the most important ones on which the early decisions are made, are the events and the circumstances about which the case worker has no direct knowledge at all. All the case worker knows is that there are documents and records in the FaCS case file that have been produced or recorded by someone else, often years earlier, yet, the caseworker “affirms” the contents of the affidavit.

41. Instead of just saying in her affidavit that it contains number of relevant annexed documents, the case worker goes into great lengths re-stating, *selectively and in her own interpretation*, what each annexed document says. There are often 100s of pages annexed to each affidavit; the case may end up with literally 2,000 – 3,000 pages of paper, much of which has little, if any, relevance to the issues in the case.
42. Each document is usually treated and named as a separate annexure, so an affidavit may contain annexures named by the whole alphabet, several times over (e.g. from A to Z, then from AA to ZZ and again from AAA to ZZZ). Someone has to stamp each of these annexures, write the name of the deponent, the date of the affirmation, and sign it. Yet, the pages of the annexures are not numbered, and when it comes to the cross-examination and submissions in the court proceeding, it becomes an absolute waste of everybody's time by trying to pinpoint the evidence to which the cross-examination or submission refers.
43. Almost invariably, the affidavit prepared by the case worker is not checked or even seen by her lawyer until it is served on all parties, including the FaCS lawyer. One will find there everything under the heaven, bar the kitchen sink; at least half of the annexures are totally irrelevant, and that is an understatement. One has to wonder about the contribution by the NSW FaCS to the global warming: the reckless waste of paper must have cost our Planet millions of hectares of forests.
44. All that is required to be done in each child's case is for an IT person within the Department, on a request from the allocated case worker, to extract information about the child in question held in the computer database, which then can be presented to a legally qualified person in order to earmark the relevant documents. These then can be processed by a competent clerical person, who will consecutively number the pages of the documents to be annexed to the affidavit. All this can be done by using an ordinary computer and printer. Once the pages are numbered, the same clerical person should prepare the index of the documents and pass the whole lot to the case worker. The caseworker does not have to address each and every document in the annexure: the index will suffice. All she needs to say is that the annexure (a single paginated annexure) contains "relevant" documents on which she relies. Her lawyer will do the rest, when required.
45. The above is a simple recommendation of a way to fix the administrative inefficiency, however, there is more to it than the administrative side of the system. I will not exaggerate if I say that the case workers are the most hated people by the parents, and sometimes by the children, who are involved in the child protection system. I hope that I have identified the reason for this observation and provided a suggestion on how it should be remedied.

Assessments of the risk of harm reports

46. Provision of the Care Act mentioned earlier (section 30) compels FaCS to make "investigations and assessment" upon receipt of a risk of harm report. As stated earlier, very few of the risk of harm reports are ever investigated, however, it appears that some kind or

other of an assessment is made by someone within the FaCS Department. The initial assessment sometimes, it is not clear how often, is followed by another assessment of the individual risk of harm report which purportedly indicates whether the child is “safe”, “safe with plan” or “unsafe”. There appears to be a third kind of assessment which produces an output of a level of risk on which, it appears, a decision is made on whether to remove the child from his or her parents care.

47. All these “assessment tools” are computer programs which are most probably easy to learn how to operate, however, there does not appear to be any transparency of the way the program processes the input fed into it: it is left up to the operator to qualify or quantify the information received in the risk of harm report and turn it into the assessment tool input factor. In other words, it is the operator, usually the case worker allocated to the case, who determines the input based on her perception - or on her mood - of the information received.
48. This is very subjective process and is often based on the caseworker’s perception of the parent of the child under assessment. If it happens that the caseworker has had a contact with the parent in question prior to this formal assessment, the assessment is already pre-determined, consciously or subconsciously, or often capriciously. If a parent causes a caseworker to get offended, for real or as perceived by her, the parent has committed unpardonable sin: the caseworker will show the parent who is in charge. In order to demonstrate what I just said, I provide a short quote from the judgment of Justice Palmer in *Re: Georgia and Luke* (No.2) [2008] NSWSC 1387, at [22]-[23].

[22] Why, then, were the children of these parents removed forcibly by police officers from their home on 12 September 2008? Why have they been kept in DOCS’ custody for the last thirteen weeks? Why will they be kept in DOCS’ custody for another six weeks before their care application is heard in the Children's Court? Why do the DOCS officers seek a care plan which will keep these children in custody until May next year?

[23] In my opinion, the answer to these questions is: a serious abuse by certain DOCS officers of the Department's power to take children into custody under the Act. It is difficult to resist the conclusion that those officers grossly overreacted to the parents' hostility to DOCS’ unjustified insistence that the children were at risk of harm. This case has been generated and fed into the legal system, with all its inherent delays, when it should never have been started in the first place.

49. One may argue that the above case was an isolated case. Wrong! The case represents a rule rather than an exception. What was “an isolated case” in that matter was the fact that the matter was heard by a rare competent and unbiased judicial officer, endowed with political courage so as to call a spade, spade. No wonder that this case is hardly ever cited as an authority in the Children’s Court, except on rare occasions by the parents’ lawyer, in which event it is ignored by the magistrates.
50. Another reason for this case being perceived as “an isolated case” is the fact that very few cases are brought on an appeal to the Supreme Court (for justified reasons), thus a large number of similar, or even much worse, instances of the power abuse are swept under the carpet. As mentioned earlier, currently an appeal as of right to the District Court is only by

way of new hearing, thus any abuse of power or miscarriage of justice in the Children's Court is never exposed. This is one of the main reasons for my proposal to replace the right to a new hearing in the District Court with a right to appeal on the grounds of error of law and/or error of fact. Having a few 'Justice Palmers' in the District Court would quickly expose the abuse of power and the indifference to it, if not an outright encouragement of it, by the Children's Court magistrates.

51. Back to the assessment issue: in order to minimise the chances of an erroneous or arbitrary assessment, a full transparency of the algorithms of the computerised assessment tools must be made available at least to those professionals and magistrates taking part in the court proceedings, so that the results of the assessment may be properly scrutinised and tested. The same applies to the input parameters fed into the assessment tool, linking each parameter to the information contained in the risk of harm report.

The war between the parents and case workers

52. It appears that the main reason for the undisputable enmity between the parents and case workers is the dual role assigned to the latter. The case workers are the ones who are supposed to be there to assist the parents who are struggling with the care of their children and, at the same time, the same case workers are delegated the power to remove a child from his or her parents if the case worker forms an opinion that such action is necessary, or if she so wills. That dual role is the source of much evil.
53. Firstly, a good number of the case workers are young and inexperienced university graduates. When they join the FaCS Department they are given training, it appears (based on my observation of their behaviour and actions), mainly for their role as the officers whose duty is to remove children from the parents who have a perceived problem of caring for them. Giving such power to young, inexperienced persons, especially to those that may possess personality traits that are incompatible with the proper exercise of such power, is like giving a loaded AK-47 to a four-year old and letting him loose into the Melbourne Cup crowd. There is no shortage of such characters among the caseworkers.
54. Once the parents' trust in the case workers is lost there is no remedy except that the trust will have to be forced onto the parents. The usual way of enforcing the 'trust' is by threats of permanent removal of the child from the parents' care. The parents are forced into 'co-operation' lest they show "lack of insight" and not deserving restoration of their child. Needless to say, this 'co-operation' usually leads to a myriad of hoops through which the parents are forced to jump in order to – *perhaps* – prove at some future time that they have addressed the "issues" that the case worker has identified. As stated earlier, usually no issues have been established according to law. That is another source of friction between the parents and case workers. Just to mention an absurd case: a parent was requested to attend the "budgeting course", in spite of that parent being a qualified accountant with several years of experience!

55. Even before the child is removed from the parents' care, if a caseworker is the one who is to investigate the risk of harm report, down on the ground level, the very act of the attempted investigation is likely to cause friction between the parents and case workers. Hardly any parent is going to tolerate the intrusion into his or her privacy by a young person, not in an official uniform of a government officer, such as the Police. Description by a grandmother of a case workers as being a "Rottweiler in a chook pen" is a little bit harsh, nevertheless some of them appear to be trained in the art of provocation, intimidation and bullying. For example, one case worker has been recorded boasting: "the parents are upset with me because I am so young and ***I am*** calling the shots." I'd like to talk to those who placed such into a position where she can be "calling the shots".
56. For the above reasons, it is recommended that the investigation of the risk of harm reports is conducted by the Police officers who are already trained in the art of investigation and who are already well known to the community as the officers invested with legitimate power. The Police are already called to many instances of domestic violence, one of the major risk of harm to the children. A request for the investigation is to be made by the FaCS Helpline manager after the report is assessed in a usual manner. If the Police officer conducting the investigation finds that the child is at an ***immediate risk of serious harm***, the officers already have the power to remove the child and pass him or her to FaCS officers so that they can apply to the Children's Court for an emergency removal order.
57. Otherwise, once the investigating officer has completed the investigation, he or she should prepare a written report, stating the facts as observed. Ideally, a copy of the report should be shown to the parent for his or her approval and/or objection to the recorded observations that are disputed – a right to which each person is entitled under the provisions of the Privacy Protection legislation. Copy of the report, together with the parent's objection, is then to be sent to FaCS for the assessment of the nature and level of the risk of harm, if any, to the child and the level and kind of intervention required, bearing in mind the principles of sections 9 and 36 (as discussed earlier).
58. Then, and only then, the case worker allocated to the case should show her face to the parents and introduce herself as someone who has been appointed by FaCS as a person who is there for the child and the parents, ***to assist them*** in getting requisite skills and resources – yes, resources – so that they may be able to overcome the issues that may compromise safety of their child. Such an approach would allow the case worker to exercise her social science skills in a spirit of true co-operation rather than one unilaterally imposed on the parents.
59. Inevitably, there will be cases where the parents are not interested in the assistance offered. In such cases the caseworker should prepare evidence and file an application to the Children's Court for appropriate care orders. The court will then conduct the first step of the proceedings, as proposed by the recommendation in this submission, the fact-finding hearing. Once the facts are established according to law, it should be a trivial task for the court to determine: (a) if the child is in need of care and protection; and, if so, (b) what kind of intervention is ***necessary*** in order to safeguard the child's safety, welfare and wellbeing.

60. If such an approach is to be taken, the existing case workers will have to be “untrained” from the old ways and re-trained to their new role of being real resource to the unfortunate children and parents rather than an undercover intelligence officers digging out dirt on the parents, or even fabricating the evidence, in order to justify the act of the removal of the child from their care. Of course, there will be instances where it will still be necessary to remove the child from the parents’ care, at least temporarily, but those instances will be decided according to law and will not be anywhere near as numerous as we are currently experiencing.
61. There is another disturbing aspect of the FaCS casework that needs mention. In spite of the provision of the Care Act for an assistance to the pregnant mothers who have been subject of a prenatal risk of harm report (currently section 25), such assistance is seldom, if ever offered. Usually the caseworker allocated to the case will issue “birth alert” to the hospitals – and sit in ambush. Once the hospital makes a “risk of harm report” to the FaCS Helpline, namely that the baby is born (even though there is nothing wrong with the mother or the baby) the caseworker will swoop on the new-born baby like a vulture as soon as the umbilical cord is cut. This is a gruesome act by those who are tasked with providing assistance to the mothers-to-be. Such acts should be mercilessly punished.
62. Encouragingly, I have noticed lately some *fresh breeze* of change for the better in the casework ranks, however, I think we need a *hurricane* in order to witness a significant reduction in the number of children *unnecessarily* removed into, or held in, out of home care due to the misconduct, wrong motives, inexperience, wrong training or incompetence by significant number of caseworkers.

IV. Other significant players in the system

Mandatory reporters

63. Any member of public *may* call the FaCS Helpline and report that, in her or his opinion, a child is at risk of harm. However, there is a category of people who are designated as “mandatory reporters”, that means, if they suspect that a child is at risk of harm, they *must* report the matter to the FaCS Helpline. Most of the mandatory reporters hold genuine concerns when they call the Helpline and they base their assessment on the *Mandatory Reporters Guideline* issues by FaCS. However, there are some who consider themselves to be ‘mandatory investigators’ and for some ulterior motives will make a mountain out of a molehill, if not out of nothing.
64. The most notorious among these are the hospital social workers, who are providing ‘service’ to the mothers in the maternity wards of hospitals. They are usually in close contact with the FaCS caseworkers (usually with those on the ugly side of the system) and, if need be, will enlist co-operation of the willing hospital medical staff, for instance, to keep the mother and baby in hospital longer than medically necessary in order that the caseworker may prepare evidence in support of the removal of the baby from the mother’s care.

65. I will say no more on this issue, except to recommend introduction of harsh penalties, including criminal charges, for such behaviour.

Court appointed clinicians

66. Any party to the Children's Court proceedings may seek a parenting capacity assessment. The Children's Court Clinic usually chooses a clinician from the list of the approved experts who is then commissioned to prepare a report for the Children's Court. Most of the experts that I dealt with are competent and impartial in their work. However, there are some who are willing to bend their science in the direction from where their fee is coming, namely, in the direction of the case outcome as desired by FaCS.
67. It is not guaranteed that the most competent and most impartial expert will produce a report that reflects the best intention of that expert. The reason is the 'raw sewerage' (as described earlier) that is furnished to the expert, on which he or she relies as the facts about the parents who are being assessed. It is unfair to these experts to expect of them to be triers of fact as well. Almost all of them accept what is fed to them as being factual truth.
68. If a provision is made for an introduction of the facts-finding section in the Care Act that comes at the beginning of the court process, the experts would be greatly assisted and be able to conduct their assessment based solely on their expert knowledge of the subject in question and the facts as established by the court rather than guessing and deciding which information is correct and which one is not.

Funding

Terms of reference (c), (d) and (h)

69. If my recommendations are implemented, I guarantee that the only funding problem that Minister will be left with, would be what to do with the child protection budget surplus: what to do with a half a billion dollars of annual saving? Seriously. Let's consider just some of the proposals that I made.
70. For instance, if the risk of harm reports that had not been investigated are excluded from evidence, immediately there will be less paperwork to handle by the caseworkers, so they could spend more time assisting parents in need of assistance. At least some of those parents that received assistance will recover from their set-back and their children will not be removed from their care which, in turn, will free more time to the caseworkers, etc... An argument that the proposal would allow some of the children who are in need of care and protection to be left out is nonsensical: a serious risk report should have been investigated.
71. Likewise, if the task of the investigation of the risk of harm reports is passed to the Police, they would do it more efficiently, since that is one of their strong skills; perhaps for each hour that a Police officer spends on the investigation, a caseworker will save at least two.

72. By the introduction of the legislative changes, such as the fact finding section and the conduct of the “establishment hearing” according to law, will inevitably – I guarantee – reduce the number of children removed from their parents by a significant percentage, at a cost about (if anybody knows the real figure) \$40,000 p.a. per child. That means, for each child spared the ‘guillotine’ of the out of home care, a quality preventative service may be provided to a number of parents in crisis which, in turn, will lead to further reduction of the number of children in out of home care – a multiplier effect.
73. In order to be able to look at the funding issues scientifically, FaCS Department would have to be forced out of the bunker and to present the figures openly, category by category, so that the public and those charged with the oversight of the government spending may be able to trace every dollar that gets through the system and every hole into which that dollar eventually sinks. There is no other way around.
74. The law already mandates that the government agencies must publicly disclose every contract worth \$150,000 p.a. or more. A few years ago I checked the contracts involving FaCS and found no mention of any of the contracts by which even then hundreds of millions of dollars per annum were being collected by some of the ‘charities’ that were looking after the foster care system. I discovered that the contracts governing this massive transfer of money into private hands were “Heads of agreement”, where an hourly rate of service provided by these ‘charities’ were agreed on, with no mention of any ultimate figures of how much it would be transferred in a year. I raised this question the then Director-General of FaCS about this issue, who assured me that the matter was being addressed. To this day I have seen no result even though the current annual figures must run in total in excess of one billion dollars. I have no doubt that the current method of this massive fund transfer is based on some dodgy ‘bulk billing’ method, where each of these ‘charities’ issues a weekly statement to FaCS of how many children were in their care for that week – and get paid accordingly. Of course, this is only my speculation. If FaCS and the government came out openly there would be no need for any speculation.

Any other related matters

Term of reference (i)

75. There are number of specific examples, each of which makes a greater or lesser contribution to the inefficiency of the NSW child protection system to which I would like to advert and which, perhaps, could have been included in one of the above specific areas, but for the lack of time to re-arrange what I have already written, I will advert to these here even though somewhat randomly – if I figure out where to begin. I hope that the readers will forgive me.
76. It is amazing to see that most of the players involved in this child protection system act in near perfect unison: the misinterpretation of the law, the misapprehension of what is in the best interest of the child, the abuse of power and the lust by some players to “win” the case, all lead to the same outcome: maximisation of number of children in out of home care.

77. I am not going to give an answer to why is that the case but will give an example so that the reader may come to own conclusion. If one is to check the entrenched beliefs in any religious cult, one will find an incredible unity on the question of interpretation of scripture. If one then checks with another cult, within the same nominal religion, one will find the same kind of unity of mind – but different, and often violently opposed beliefs, to the beliefs in the first cult even though both claim to adhere to the same scripture. Any dissent in either cult will be severely punished by the cult leaders.
78. The law schools in this country, it appears, are still back in the sixteenth century: everything is based on “precedents”: one cannot interpret legislation unless there is an “authority”, an earlier decision of a higher court on the subject in question. Students are trained **not to** use their brainpower in order to interpret a provision of a legislation, but rather have to rely on somebody else’s interpretation. Such an attitude is carried over into the judiciary, at least by some officers. The examples below are not isolated cases: each one is a sample of reckless acts and attitudes of those involved in the child protection system leading to its inefficiency.

Some recent case examples

79. A Children’s Court magistrate ruled that it is the law that a person who has not filed an affidavit cannot be called to give oral evidence (on cross-examination). The magistrate stated, referring to the Children’s Court, “You know it’s a court of affidavits.” Yes, I know, but what does it mean? In my opinion it means that, unless a statement by any person is a sworn deposition of **that** person, it must not be admitted into evidence – unless that person is available for cross-examination.
80. Her Honour’s obvious interpretation of the law is that the statement of that person, since it was attached to an affidavit of a caseworker, is admissible into evidence and that the parties are entitled to cross-examine **only** the caseworker. The only thing that the caseworker will be able to answer is the fact that she read something that somebody else reported. Any party wishing to object to the admission of such evidence will have to state a reason for the objection which, in a matter like this one, will be the hearsay rule. Such an objection will be met with a chorus reply from both, the bar table and the bench: “the rules of evidence do not apply to this jurisdiction”. But, what about the rule of law and the procedural fairness?
81. In another case a District Court judge accepted the argument by the FaCS counsel that the expiry of an order of the Children’s Court is a “significant change to the relevant circumstances since the order was last made or varied” for the purposes of section 90 leave. The matter went on a trial, being conducted on the same evidence that underpinned the decision in 2009, some four years earlier. Astonishingly, the Court of Appeal confirmed the decision of the District Court (the matter is known as *Re Felicity*, and is published).
82. In the same matter the Court of Appeal accepted the counsel’s argument that FaCS have some overarching power and thus a right to intervene in a life of a child even without a risk of harm report being received in relation to that child; clearly contrary to section 34 (2).

83. In the second reading speech to the introduction of the Care Act in 1998, one of the MPs stated that the Bill was meant to “keep the families together and not to tear them apart”. My observations of what is taking place now in the child protection system is diametrically opposite to the legislative intent: the first thing in a case where the parents of the child live together is to drive the wedge between them and to separate them. When an argument was raised before a judge in the District Court about the principle of keeping the families together, the judge made a remark about the parents “bashing each other” and, therefore, in her Honour’s opinion, it would be wrong to keep these parents together.
84. *Obviously*, the legislative intent *was* to help parents, just like these two that were (in the past) “bashing each other” to help them stop doing it. Obviously, it was not intended to keep together families that have no problems: a healthy person does not need help from a physician, only the sick one does.
85. In another case, a first-time mother, a recent immigrant, complained to her obstetrician in her late pregnancy that she had an argument with her husband. The obstetrician kept interrogating her at every visit but the mother denied any physical violence, nevertheless, the obstetrician built up a whole story and passed the information to the hospital social worker for its completion. When the baby was prematurely delivered, two risk of harm reports were made to the FaCS Helpline, the same day, within about 45 minutes from each other, on the same purported story.
86. The FaCS caseworkers stepped in and the first thing they wanted to do was to get the mother to request an AVO from the Police against husband and to go to a refuge house. The mother was shocked and refused to do either, trying to convince them that her husband is not a violent man and does not pose a threat to her or to the baby. She was kept in hospital for extra two days on false infection diagnosis. Even Police were called to the Hospital where they were asked to apply for an AVO. The Police requested that one of those who wanted an AVO make a statement so that they can apply to the court; everybody declined. Why? The reason is simple: a statement to the Police would have to be a sworn statement. They all preferred to safely make “risk of harm report” to FaCS and say whatever they wish – with perfect immunity. Needless to say, the baby ended up in out of home care – until he turns 18 years of age! And, needless to say, the mother was shocked: as she stated, she read in the history books about the genocide over her nation, part of which was the removal of children by the occupying force from their parents, and that little she knew that 100 years later she was to experience the same thing in this ‘democracy’. Needless to say, she left Australia.
87. In another case involving an immigrant first-time mother who was put under enormous pressure to separate from the father because of his “history” of violence. This mother, after having lived with him for nearly two years, experienced no violence whatsoever. It is revealing to read the evidence by the caseworkers themselves how this young mother was gradually ‘converted’ – under the threat of removal of the child from her care - within several months from a person who fully trusted the man whom she knew well, to a person who had to say that she now has gained “insight” into the risks that he represents.

88. In another fairly recently decided case in the Court of Appeal, the counsel for the FaCS convinced the Court that the meaning of the current section 72 (1) (b) is that, if the child would have been found in need of care and protection at the time of the “establishment proceeding” in the Children’s Court, but for the interim care orders in place, that child remains being in need of care and protection at any subsequent higher court proceeding, no matter how many years after that finding was made (the matter of *VV v District Court of New South Wales* [2013] NSWCA 469).
89. According to section 72, FaCS must prove both, that the child was in need of care and protection at the time of making of the care application (section 72 (1) (a)), **and**, at the time of the establishment hearing (section 72 (1) (b)), otherwise the court cannot make a care order. Since, for the reason expressed earlier, no magistrate will rule that the child was not in need of care and protection when he or she was first removed and when the application for care order was made, there is no way that a parent will be able to ever contradict the FaCS application at any subsequent new hearing by proving that the child is no longer in need of care and protection. Subsequently, in a matter *TF v DFaCS* [2015] NSWSC 694, Justice Young expressed an opinion that the decision in *VV* ought to be “fleshed out a little bit more”, especially in the Court of Appeal.
90. Each of the above, and numerous similarly decided cases, contribute to the more children in out of home care than ought to be, thus contributing to the inefficiency of the whole child protection system.

Miscellanea

91. If one looks at the FaCS webpage or any pamphlets or posters about this wonderful care and protection system in the State of New South Wales, with all those smiling and happy faces of the children who have been removed from their parents’ care, one must conclude that either I am a serious “nut case” (as one of my ‘colleagues’ said), and that thousands of parents who know better, are liars, drug addicts and loonies.
92. However, the truth would be much better served and the propaganda would be much more effective, if FaCS show pictures and films of the desperate children who have been removed from their parents’ care, screaming their lungs out, with their little arms stretched towards their parents at every one of those separations after they have a supervised contact together.
93. Such pictures and short films shown occasionally on TV would have much more profound effect on the parents than any parenting courses and counselling sessions ever could. Such a picture, with a caption: “YOUR child is the next! – unless you abstain from that drug, or drink or domestic violence”, would do wonders.
94. I hope that I have woken up some people in position of power and that I have not manged to offend too many of those involved in our child protection system. So help me God!