



NSW Ombudsman's submission to the review of the *Children and Young Persons (Care and Protection) Act 1998* regarding the discussion paper – *Statutory child protection in NSW: Issues and options for reform*

(Please note: the chapter numbering corresponds to that in the discussion paper)

#### **4.1 Mandatory reporting**

We note that the Discussion Paper puts forward a number of options for facilitating improved reporting practices.

##### **(1) Require reporters to provide clearer evidence of a real risk**

The Discussion Paper canvasses the possibility of higher thresholds for the mandatory reporting of the risk of harm to children and young people, such as a requirement for “reasonable evidence” of a risk of harm and/or the “real likelihood” of harm.

We do not support either of these approaches.

While it is true that the current threshold “reasonable grounds to suspect” is not necessarily precise and may be open to different interpretations by mandatory reporters, this criticism can also be levelled at thresholds such as “reasonable evidence” and “real likelihood”. Indeed, we consider that, in practice, the threshold of “reasonable grounds to suspect” is more readily understandable – and more appropriate – than thresholds such as “reasonable evidence” and “real likelihood”.

##### ***“Reasonable evidence”***

A threshold such as “reasonable evidence” would impose on the reporter the need to consider what actually constitutes “evidence” of a risk of harm. While the concept of “evidence” may be well understood by people such as lawyers and those involved in investigative work, it may not be entirely clear to, and therefore confusing for, other people. Accordingly, the introduction of the word “evidence” might well create more difficulties for reporters than assessing whether there are “reasonable grounds to suspect” a risk of harm.

Furthermore, the requirement that there should be actual evidence of a risk of harm, and that this evidence should also be “reasonable”, appears to be too high as a threshold for mandatory reporting. It is preferable for the question of the availability of evidence as to the risk of harm, and the strength of that evidence, to be explored and assessed by DoCS following a mandatory report.

Finally, as the Discussion Paper emphasises, mandatory reporting should be “both a siren that calls us to action where there is a crisis for a child and an early warning system that should work to avoid such crises”. A threshold which requires “reasonable evidence” of a risk of harm may well militate against fulfilment of the second stated rationale for mandatory reporting.

### ***“Reasonable likelihood”***

Similar criticisms can be made of a higher threshold of “reasonable likelihood” of harm.

Mandatory reporters may take differing views as to both the meaning of “likelihood” and whether that likelihood is “reasonable”. Again, the need to assess the meaning and application of these terms is more difficult and confusing than assessing whether there are “reasonable grounds to suspect” risk of harm.

It would also become the responsibility of the reporter to assess whether there would be a “real likelihood” of harm. Such an assessment is inherently to difficult to make. We believe that it is preferable for the actual likelihood of harm to be determined as a matter of risk assessment by DoCS.

Again, a threshold which requires a “reasonable likelihood” of harm might well eliminate reports that could and should properly form part of “an early warning system”.

## **(2) Identify serious and persistent parental drug use as a behaviour with the potential to cause harm**

It could be argued that the inclusion of this ground is not strictly necessary, since it is already covered in substance by the broad definitions of “at risk of harm” under paragraphs (a), (b), (c) and (e) of section 23. Nevertheless, there would appear to be merit in focussing particular attention on the issue of drug abuse giving rise to a risk of harm to children and young people.

However, we have concerns about a number of aspects of the wording of the amendment to section 23 suggested in the Discussion Paper, namely:

*The child or young person is living in a household where there is evidence of serious and persistent parental use of illicit drugs and, as a consequence, the child or young person is at risk of serious physical or psychological harm.*

One concern is that the reference to “evidence” of drug use may create unnecessary confusion or difficulty. A reporter may consider that they should have actual evidence of drug abuse before being required to report the matter. As discussed above, the concept of “evidence” may be understood by people such as lawyers and those involved in investigative work, but may

not be entirely clear to, and therefore confusing for, other people. Furthermore, there may well be inherent difficulty for a reporter in obtaining evidence of drug abuse. In those circumstances, we suggest that the term “evidence” should not be used. In this respect, we note that section 23(d), which concerns situations of domestic violence giving rise to a risk of harm, does not specifically refer to the need for “evidence” of domestic violence.

Furthermore, the use of words such as “persistent” and/or “serious” may well lead to difficulties for reporters in assessing the level of drug abuse that is required to warrant a mandatory report of risk of harm. In addition, a requirement that the drug abuse be persistent and/or serious appears to be unnecessarily high, in circumstances where the principal focus should be on whether the drug abuse gives rise to a risk of harm.

In addition, while the abuse of illicit drugs may pose a risk of harm, it is also possible that the abuse of prescribed drugs may give rise to such a risk. In those circumstances, we suggest that the use of the word “illicit” is unnecessarily restrictive of the circumstances in which concerns about drug abuse should be the subject of a mandatory report.

Finally, it would also appear to be unnecessarily restrictive to confine the drug abuse in question to that of one or both parents. There may be others residing in or visiting the household whose drug abuse also poses a risk of harm.

In light of the above discussion, we suggest that any amendment to section 23 should be along the following lines:

*The child or young person is living in a household where there is abuse of drugs and, as a consequence, the child or young person is at risk of serious physical or psychological harm.*

The advantage of this formulation is that it is easy to understand and, importantly, does not simply refer to the existence of drug abuse, but clearly links any drug abuse to the risk of serious physical or psychological harm – just as the current section 23(d) appropriately links a situation of domestic violence to the risk of harm to a child or young person.

### **(3) Strengthen focus on neglect or “cumulative risk” cases**

We agree with the suggestion that the word “current” should be removed from the term “current concerns” in the definition of “risk of harm” under section 23.

We also agree with the suggestion that neglect of a child or young person should be specifically added to section 23 as a ground on which a report of risk of harm should be made.

## **4.2 Exchanging child protection information**

*Our submission to the review of the Act*

In our submission to the review of the *Children and Young Persons (Care and Protection) Act 1998*, we recommended that the legislation should clearly permit the exchange of information between prescribed bodies in relation to the safety, welfare and well-being of children and young people.

In support of this position, we said:

*Effective information exchange is fundamental to good care and protection practice. However, our work has identified that there are significant problems with information exchange between agencies. Some of these problems appear to exist because of perceived legal impediments to information exchange, and poor understanding of what information can be exchanged, when it can be exchanged, and who can exchange it.*

*DoCS and prescribed bodies should not be constrained in exchanging information relating to the safety, welfare and well-being of a child or young person.*

Our comments were made against the background of our work in reviewing the deaths of children and young people, where we have found that a significant failure in the current system for the care and protection of children and young people relates to the need for the improved and timelier exchange of information.

### ***Our current submission***

We strongly adhere to the position put forward in our previous submission. In the alternative, we would recommend that, at the very least, key agencies whose work may often involve dealing with critical issues relating to the protection of children and young people – that is, DoCS, the NSW Police Force, the Department of Health, health organisations and hospitals, and the Department of Education and schools – should be clearly entitled to exchange information relating to concerns about the safety, welfare and well-being of a child or young person.

Our arguments in support of this position are as follows.

### ***The legislative scheme for the exchange of the information***

Under section 248 of the Act, DoCS is specifically entitled to furnish “prescribed bodies” with information relating to the safety, welfare and well-being of children and young people, and to direct such bodies to furnish DoCS with such information.

The “prescribed bodies” under section 248 are:

- the NSW Police Force
- government departments and public authorities
- government schools and registered non-government schools

- TAFE establishments
- public health organisations within the meaning of the *Health Act 1990*
- private hospitals
- any other body or class of bodies prescribed by the regulations.

Clause 7 of the regulations currently provides that the following are prescribed bodies for the purpose of section 248:

- private fostering agencies
- residential child care centres and child care services
- designated agencies
- private adoption agencies
- the Family Court of Australia
- Centrelink
- the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs
- any other organisations the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children.

Significantly, section 248 does not permit prescribed bodies to exchange information relating to safety, welfare or well-being of children and young people between or among themselves.

Section 248 therefore seems to be proceed on an assumption that DoCS is at the centre or "hub" of all matters in relation to the care and protection of children and young people. As we discuss further below, this assumption is misconceived.

It is section 254 of the Act which governs the circumstances in which prescribed bodies may exchange information. Significantly, that section has as its starting point a general prohibition on the disclosure of information "obtained in connection with the administration or execution of this Act". The section then goes on to provide for the exceptional circumstances in which information may be disclosed. One such circumstance is the provision to the prescribed body of the consent of the person from whom the information was obtained. In the absence of consent, the prescribed body will only be able to disclose the information "in connection with the administration or execution of" the Act or the regulations under the Act, or with "other lawful excuse".

### ***Difficulties with the legislative scheme***

In practice, the legislative scheme under section 254 means that a prescribed body will have to carefully examine whether, and to what extent, the other provisions of the Act and the regulations, as well as other legislation, permit it to disclose – or restrict it from disclosing – relevant information to other agencies. This is not necessarily an easy exercise. The meaning of some provisions of the Act or other legislation may not be clear or open to debate. There may be difficulties in the application of the provisions to the circumstances of the particular matter. One particular difficulty may be interpreting and applying the provisions of the *Privacy and Personal Information Protection Act 1998* and/or directions made under that legislation.

Furthermore, in circumstances where the improper disclosure of information under section 254 of the Act is a criminal offence, agencies will understandably be cautious – perhaps unduly so – in disclosing information where there are or may be problems in interpreting and applying the relevant legislative provisions.

As we have emphasised above, our work in reviewing the deaths of children and young people has revealed that a significant current failure in the system for the care and protection of children and young people relates to the need for the improved and timelier exchange of information relating to the protection of children and young people.

Against that background, it would clearly be desirable for there to be much greater clarity about whether, and to what extent, prescribed bodies can exchange information relating to the safety, welfare and well-being of children.

### ***The significance of the principle in section 9***

Given that the fundamental principle of the Act, as articulated in section 9 of the Act, is that the safety, welfare and well-being of children and young people must be “the paramount consideration”, it is, on its face, difficult to understand why the Act should not specifically and clearly permit the exchange of information between and among DoCS and prescribed bodies where such exchange is necessary or desirable to ensure or promote the safety, welfare and well-being of children and young people. It is particularly difficult to understand why the legislation does not encourage information exchange between key agencies in those circumstances where critical child protection issues are at stake.

### ***The significance of section 29A and the Interagency Guidelines***

In this context, it is also important to emphasise the recent introduction of section 29A of the Act, which provides:

*Person who makes a report is not prevented from helping a child or young person*

*For avoidance of doubt, it is declared that a person who is permitted or required ... to make a report is not prevented, by reason only of having made that report, from responding to the needs of, or discharging any obligations in respect of, the child or young person the subject of the report in the course of that person’s employment or otherwise.*

Furthermore, the recently revised Interagency Guidelines include the following (our emphasis):

*3.1 After reporting – an agency’s initial responsibilities*

*Reporting is just the beginning of the child protection process and is not necessarily the end of a reporter’s role or responsibility in a matter. **Where reporters were providing services to the child and family prior to reporting, it is important that these continue to be provided.** Key considerations at this time include:*

- *what role can the reporter or the agency play to support the child or family?*
- *what will be the consequences for the child or young person of withdrawing support?*
- *what further or new information about the child, young person or family is available to the reporter, and how is this best communicated to the Department of Community Services?*
- *what expertise can the reporter contribute to assist the Department of Community Services in accurately assessing risk of harm, or that may assist in the development of a case plan?*
- *can the reporter continue to monitor the child’s situation for additional indicators of abuse or neglect?*

*It is often unwise for the reporter to withdraw or delay contact with the child or family on the basis of lodgement of a report of risk of harm. Where a practitioner is unsure about their continuing role with the child, young person or family, guidance could be sought from the local Community Services Centre or Joint Investigative Response Team to whom the report was transferred.*

*Another consideration is whether it is possible and appropriate to link the child, young person or family to other appropriate services within your agency or with another agency. These might target more peripheral difficulties facing the child and family (such as housing, financial management), or provide additional services aimed at supporting and strengthening the family.*

Taking these recent developments into account, it appears to us that it is a necessary corollary of the obligations on, and expectations of, agencies responsible for the safety, welfare and well-being of children and young people that they should be able to provide appropriate information to – and receive appropriate information from – other agencies to assist them in the performance of their functions, and that the Act should clearly articulate their rights in this respect.

As mentioned above, section 248 of the Act appears to proceed on the assumption that DoCS is at the hub of all care and protection matters involving children and young people. However, the reality is that, for many matters, other key agencies will be playing the central role, and will therefore need to be able exchange information with other players. Once again, it is

important to emphasise that our perspective is informed by our reviewable deaths work, which highlights the need for the greater and more timely flow exchange of information about the safety, welfare and well-being of children and young people.

### ***The involvement of non-government organisations in the care and protection of children and young people***

It is also important to emphasise the increasing involvement of non-government organisations (“NGOs”) in the system for the care and protection of children and young people. For example, the role of NGOs is critical to the early intervention program currently being rolled out by DoCS. Similarly, the responsibility for case management of children and young people in out-of-home care is increasingly being transferred from DoCS to NGOs.

In these circumstances, it is our submission that there should be a clear capacity for DoCS and certain prescribed bodies to exchange information about the safety, welfare and well-being of children and young people.

### ***The use of information for other purposes***

A major concern raised in the Discussion Paper is that information provided to agencies for the purpose of ensuring or promoting the safety, welfare or well-being of children and young people might be used for some other purpose or purposes by the prescribed body or agency. Another concern is that even the development of clear business rules will not prevent the possibility of the inappropriate use or disclosure of the information.

We acknowledge these concerns. However, we submit that the careful development and application of suitable business rules should serve to prevent or minimise the inappropriate use or disclosure of information.

Furthermore, even if there may be some legitimate concerns about the potential risks involved, these are not sufficient to outweigh the very significant public interest in ensuring the promotion of the appropriate exchange of information among prescribed agencies about the safety, welfare and well-being of children and young people, particularly that needed for their effective and timely protection.

### ***The proposal by the Ministerial Advisory Committee***

We note that the Ministerial Advisory Council recommended that there could and should be a power to pass on information without consent where it concerns the “health” of a child or young person.

It will be clear from the above discussion that we do not agree with this approach because we consider that it is unduly narrow. We would also submit that the meaning and scope of the term “health” is not sufficiently clear – particularly in the context of legislation which is concerned with the “safety, welfare and well-being” of children – and would therefore be difficult for agencies to apply in practice.



### ***The protection of the identity of reporters***

Another concern raised in the Discussion Paper is the protection of the identity of reporters.

We stress that the proposal that we have made in this and in our previous submission to the Review of the Act does nothing to undermine the protection afforded to reporters by section 29(1)(f) of the Act, which specifically provides:

*the identity of the person who made the report, or information from which the identity of that person could be deduced, must not be disclosed by any person, except with:*

- (i) the consent of the person who made the report, or*
- (ii) the leave of a court or other body before which proceedings relating to the report are conducted,*

*and unless that consent or leave is granted, a party or witness in any such proceedings must not be asked, and, if asked, cannot be required to answer, any question that cannot be answered without disclosing the identity or leading to the identification of that person.*

### ***The proposal in the Discussion Paper***

The Discussion Paper ultimately suggests that the legislation could be amended to allow the Director-General of DoCS to release information to police and/or another law enforcement agency where the information was required to assist in the investigation of a serious crime – but only with the approval of the Court (presumably the Children’s Court), which would have to be satisfied that it was in the public interest to do so, and could also specify conditions as to the release and/or use of the information.

As to this suggestion, we would point out that the time which would be involved in preparing an application to the Court, making submissions, and obtaining the Court’s decision, might well militate against the timely provision of information, and prejudice the effectiveness of the criminal investigation.

### ***Conclusion***

For all the reasons discussed above, we strongly submit that the Act should clearly permit the exchange of information between and among DoCS and all prescribed bodies in relation to the safety, welfare and well-being of children and young people.

However, if it is thought that there are still real risks posed by the breadth of this scheme in relation to the possibly inappropriate use and/or disclosure of information, we would recommend an alternative and more limited scheme. At the very least, the key agencies whose work may involve them in dealing with issues concerning the care and protection of children and young people – that is, DoCS, the NSW Police Force, the Department of Health, health organisations and hospitals, and the Department of Education and schools – should be clearly

entitled to exchange information relating to concerns about the safety, welfare and well-being of a child or young person.

### **4.3 The best interests of the child**

We generally support the formulation of the “best interests” principles suggested in the Discussion Paper, as set out at pages 32-33, and the suggested amendment to section 8(a), as set out at page 33.

#### ***Removal of the “least intrusive intervention” principle***

In particular, we support the removal of the “least intrusive intervention” principle in section 9(d) of the Act, for the reasons set out on page 28 of the Discussion Paper. In this respect, we note that we canvassed in detail a variety of problems in relation to the application of the “least intrusive intervention” principle in our recent Discussion Paper on “Care proceedings in the Children’s Court” (at pages 4-6). A full copy of our Discussion Paper on care proceedings is attached to this submission, for the purposes of considering both this issue and other matters raised in DoCS’ current Discussion Paper which are the subject of further submissions below.

#### ***Concerns about the suggested principles***

Although we generally support the formulation of the “best interests” principles suggested in the Discussion Paper, we do have concerns about two particular aspects of that formulation.

#### ***Principles (c)(i) and (d)(ii)***

Our first concern is about the inclusion of specific time frames in principles (c)(i) and (d)(ii).

As currently formulated, principle (c)(i) includes the following:

*A decision on the viability of restoration should, other than in exceptional circumstances, be taken within 6 months of the child or young person entering out-of-home care where the child is under 2 years of age and, for any other child or young person, within 12 months of entry into out-of-home care*

and principle (d)(ii) requires that consideration of the issue of restoration should include:

*... in any event, whether restoration can and should (other than in exceptional circumstances) occur within 2 years of the child entering out-of-home care.*

It does not appear to be appropriate to include specific time frames in a proposed provision concerning the broad general principles that articulate the “best interests” of children and

young people. If expected time frames are to be included in the Act, they should be contained in the separate provisions which set out the operation of the system following the commencement of care applications.

Furthermore, there is the question of whether the timeliness of the consideration of, and decision-making with respect to, the issue of restoration has indeed been a problem in practice.

In our Discussion Paper on “Care proceedings in the Children’s Court”, we have specifically considered the question of the timeliness of decisions in relation to the placement of a child or young person – see the discussion at page 39 of our Discussion Paper. We note in particular that the current data does not necessarily permit a reliable estimate of the time frames within which care proceedings are or should be finalised. However, we also note that some of the data being collected by DoCS “should assist in establishing benchmarks which should be used to drive improvements to the timeliness of care proceedings, and provide a platform for further research in this area”.

Leaving aside the issues surrounding the actual timeliness of decision-making, and the adequacy of the data relevant to the consideration of this issue, it is worth considering whether it is desirable to include specific timelines in the legislation itself.

A possible difficulty with the current formulation of the suggested time frames is that there is the risk that what are intended as maximum time limits could be treated in practice as appropriate time frames for decision-making about the issue of restoration. This difficulty could be further compounded by the use of the phrase “other than in exceptional circumstances”. At the same time, it must be recognised that the suggested general principle does emphasise that the “earliest possible consideration” should be given to the question of restoration.

On balance, we support the view that there should be some reference to timelines in the Act. However, as discussed above, we submit that this should not be contained in the “general principles” provisions of the Act, but rather in the provisions which set out the operation of the system following the commencement of care applications. We also suggest that, at the same time, there should be a commitment by relevant agencies to capture and monitor reliable data on the question of the timeliness of relevant decision-making.

### ***Principle (c)(ii)***

Our second concern is about suggested principle (c)(ii), which is that “the child’s or young person’s placement should not be disrupted unless required for the safety, welfare and well-being of the child or young person” (our emphasis).

We consider that the word “required” is too strong, and carries with it a real risk of raising the same sort of problems that have been raised by the “least intrusive intervention” principle. We suggest that it would be preferable to replace the word “required” with the words “it promotes”.

#### **4.4 Preventing harm to children: body piercing**

We do not wish to make any specific submissions on this issue.

#### **4.5 The role of the courts in the child protection matters**

We have given very detailed consideration to the role of the Children’s Court, and many of the crucial issues that arise in this respect under the legislation, in our recent Discussion Paper “Care proceedings in the Children’s Court”. As noted above, a full copy of our Discussion Paper is attached to this submission.

Against that background, we now turn to the specific issues for consideration canvassed in the Community Services Discussion Paper.

##### **(1) The scope of the role of Children’s Court**

###### ***The requirement for proceedings to be conducted in a “non-adversarial” manner***

The Community Services Discussion Paper says that:

*One substantial area of criticism is that the requirement for a non-adversarial approach to proceedings is honoured in the breach, and that adherence to legal technique remains a dominant feature of child protection proceedings.*

Our Discussion Paper (at pages 33-36) contains an extensive discussion of the application in practice of the requirement under section 93 of the Act that proceedings are not to be conducted in an “adversarial” manner, and canvasses in detail the various perspectives of DoCs, legal practitioners and the Children’s Court on this issue.

Importantly, our discussion of this matter reached the following conclusion (at pages 37-38):

*... it seems to us that the fundamental issue in this area is determining the best way to conduct child care proceedings in a way that is both fair to all parties and promotes the best interests of children.*

...

*... the various key players in the conduct of care proceedings are understandably interpreting whether or not proceedings are conducted in an “adversarial” manner from their own background and experience.*

*In those circumstances, we believe that the appropriate approach to resolve the issues involved would be further discussion, focussed on achieving a much more consensus-based understanding about the expectations surrounding the conduct of child care proceedings before the Children’s Court. Any appropriate legislative amendments, practice notes or code of practice to provide guidance to magistrates and legal*

*practitioners in this area should only be developed following the outcome of such a discussion.*

While we note that there is a Working Party consisting of the Children’s Court, DoCS and the Legal Aid Commission which deals with technical matters involving legal processes and procedures, it does not appear that either this Working Party, or some other forum involving those involved in the Working Party and other key players, has engaged in the type of broad discussion about the problem of “adversarial” proceedings of the type recommended in our Discussion Paper.

Accordingly, our submission is, again, that an appropriate forum among the key players should be arranged to focus on achieving a more consensus-based understanding about the expectations surrounding the conduct of child care proceedings.

We would emphasise that such a forum should take place whether or not the Children’s Court is replaced by some form of tribunal, or the scope of the Court’s role is limited in some way. We would anticipate that, in the absence of such a forum, most of the current difficulties in relation to the issue of whether, and to what extent, care proceedings are or should be conducted in a “non-adversarial” manner are likely to persist, irrespective of whether the Children’s Court or a tribunal is involved in the proceedings.

### ***The proposal for the creation of a tribunal***

It is unclear from the Discussion Paper what the precise benefits of a change from the use of the Children’s Court to the use of some form of tribunal would be. This would be the case whether or not the Children’s Court is replaced by a tribunal, or the role of the Court is confined in the way canvassed in the Discussion Paper.

If it is contemplated that the use of a tribunal would, of itself, resolve the problem of “adversarial” proceedings, we do not believe that would be the case. As discussed above, the fundamental issue would remain – how to determine the best way to conduct child care proceedings in a manner that is both fair to all parties and promotes the best interests of children.

Furthermore, it is our experience of tribunals at both the State and Commonwealth levels that, in practice, proceedings before such tribunals operate legalistically and in an adversarial manner.

### ***Alternative dispute resolution***

An important issue related to the appropriate resolution of care matters both before and during care proceedings is the role of alternative dispute resolution (“ADR”). For this reason, we canvassed in detail the nature and extent of ADR in our Discussion Paper on care proceedings (at pages 10-14). Our conclusions on this matter included the following (at page 13):

*... the legislation supports the use of alternative dispute resolution services that are designed to resolve problems at an early stage and to reduce the likelihood that a care application will need to be made. The legislation also envisages the use of ADR*

*services after a care application is made “to work towards the making of consent orders that are in the best interests of the child”.*

*While we acknowledge that ADR will not be appropriate in all cases, we would support moves to expand its application in a range of ways before and during care proceedings. We would also support associated research on how such expansion might best be achieved.*

...

*We would therefore be keen to see the major players come together in exploring further options for and approaches to ADR, and that future use of ADR should be supported by associated research that evaluates the outcomes of the various ADR strategies that employed.*

In this regard, the potential for expanded use of ADR options such as family conferencing and, for care matters involving indigenous children and young people, circle sentencing, warrant close examination.

Ultimately, once firm decisions are made about the merits of specific ADR strategies, there would appear to be value in entrenching appropriate ADR strategies within the legislation. In this respect, it should be noted that, while the legislation is strong in promoting the principles of ADR, it is not particularly clear on how these principles can be given effect in practice.

## **(2) The role of the Court in ordering contact**

The question of contact orders by the Children’s Court was considered in detail in our recent Discussion on care proceedings in the Children’s Court (at pages 31-32). Significantly, our conclusion on this issue was as follows:

*We recognise that the current arrangements present a challenge to all parties to work in the best interests of children and come up with flexible solutions regarding the important issue of children’s contact with family and other significant people in their lives.*

*We also acknowledge that there are divergent views about the circumstances in which contact is in the child’s best interests and about the extent of contact that is appropriate. We would make several points in relation to this debate.*

*It is clear that adequate information and further research is needed to inform the debate. In this respect, we note that DoCS has supported the need for further research. It is our view that lack of research in this area makes it difficult to assess the precise nature of and reasons for the perceived flaws in the current system. This in turn makes it difficult to determine whether an overhaul of the current arrangements is required (and, if so, what the changes should be) or whether the approaches employed under the current system might be a better way forward.*

*In these circumstances, we believe there should be an informed public debate between all of the key players involved, with a view to deciding on a pathway for effectively*

*promoting the maintenance of ties between children and their family – but only where this is clearly consistent with the best interests of the child.*

We maintain this position, and consider that the Community Services Discussion Paper would provide a useful platform for “an informed public debate between all of the key players involved”. Whether the collection and consideration of separate submissions from the players in response to the Community Services Discussion Paper is an adequate substitute for a debate of the nature contemplated in our own Discussion Paper is seriously open to question.

Whether or not a decision is made to remove or limit the current role of the Children’s Court in relation to the question of the determination of contact, we submit that it is essential to establish what constitutes “good practice” on the issue of contact in the light of evidence-based research, and to introduce appropriate “benchmarks” for the application of such practice.

### **(3) Managing appeals to final orders for parental responsibility**

One practical difficulty in assessing the merits of the options for change canvassed in this section of the Discussion Paper is that, while it is noted that there has been a dramatic case in the number of appeals to the District Court, there is no information provided as to the actual outcome of the appeals and the reasons for those outcomes. In the absence of this information, it is impossible to assess the extent to which these appeals were successful or unsuccessful, whether the decisions of the Children’s Court were overturned – particularly its decisions in relation to final orders – and the actual grounds leading to the success or otherwise of particular appeals.

Leaving this problem aside for the moment, it must be said that there will almost invariably be some ground for argument as to the merits or “correctness” of the Children’s Court’s decision. We can therefore understand the apparent attractiveness of limiting the scope for appeals from decisions of the Children’s Court.

However, we would submit that the first option canvassed in the Discussion Paper – that of limiting appeals to those against alleged “errors of law” – is, as a matter of principle, unduly restrictive, given the importance of the issues at stake for children and young people and their families.

The second, more generous, option is that the District Court would only review cases where the appellant could satisfy the Court that a review of the decision would be in the best interests of the child or young person, and that there is the prospect of a significantly different outcome on the basis of the available evidence. The difficulty with this proposal is that the making of submissions on these “threshold” issues level would, in practice, probably take the same or almost as much time as arguing the substantive merits of the case. In those circumstances, there is a real question as to the efficiency and effectiveness of the proposal.

Ultimately, we consider that, while it may be important to eliminate unnecessary appeals, there is not enough information in the Discussion Paper to adequately assess whether – and, if so, how – the basis for appeals from decisions of the Children’s Court should be more limited in scope.

### **Other matters not raised in the Discussion Paper**

Our Discussion Paper on care proceedings canvasses a number of matters that are not specifically raised by the Community Services Discussion Paper, but which we believe warrant further careful consideration. These matters are listed below.

- ***Monitoring and review by the Children’s Court of the suitability of care arrangements (section 82 of the Act)***

See the discussion at pages 29-31 of our Discussion Paper.

We note in particular that the issues canvassed in this section of our Discussion Paper need to be considered in the context of the question raised in the Community Services Discussion Paper about the role and functions of the Children’s Court, and whether and to what extent the functions of the Court should be taken over by a tribunal.

- ***The Aboriginal and Torres Strait Islander principles (sections 11-14 of the Act)***

See the discussion at pages 39-43 of our Discussion Paper – in particular, our discussion at pages 42-43 about the need for the greater participation of indigenous families, kinship groups, representative organisations and communities in significant decisions about indigenous children.

Our conclusions on this issue included the following (at page 43):

*... we believe that it is now essential that indigenous communities, government agencies, and other key players work constructively towards facilitating more meaningful participation by indigenous people in strategies for child protection. In this respect, we suggest that there is room for trialling models which involve genuine participation by indigenous representatives in child care and protection decisions, as envisaged by the Act itself. Indeed, we note that this sort of work is being explored in other Australian jurisdictions. This experience could be used for indigenous participation models in NSW.*

In this context, we refer to our earlier discussion about ADR, including family conferencing and circle sentencing.

We note that the use of these types of models would also assist in “fleshing out” at a practical level the application of the general principle under section 12 of the Act that indigenous people are to participate in the care and protection of their children with as much self-determination as possible.

- ***Orders for assessment (section 54 of the Act)***

See the discussion at pages 17-19 of our Discussion Paper – in particular, our discussion of the point (at page 18) that section 54 of the Act does not allow for the



Children's Court Clinic to assess short term carers who do not seek parental responsibility.

- ***Orders involving the acceptance of undertakings (section 73 of the Act)***

See the discussion at pages 22-24 of our Discussion Paper – in particular, our discussion (at pages 23-24) about the problems in relation to undertakings given by a person who does not legally have “parental responsibility” for the child or young person, as defined by the Act.

### ***Unproclaimed provisions of the Act***

We note that some provisions of the Act have not yet been proclaimed – in particular, those relating to out-of-home care, including voluntary out-of-home care, and compulsory assistance. These matters are not canvassed in the Discussion Paper. It appears to us that there is scope for further discussion of whether and, if so, when the unproclaimed provisions should come into operation and/or when further amendments to the legislation are required or desirable, and the timing of decision-making on these matters.