



## *Children's Court of New South Wales*

### **NSW CHILD PROTECTION LEGAL CONFERENCE, THURSDAY 4 FEBRUARY 2021**

#### **“PERSPECTIVES FROM THE PRESIDENT”**

#### **INTERNATIONAL CONVENTION CENTRE, SYDNEY**

#### **JUDGE PETER JOHNSTONE**

#### **PRESIDENT OF THE CHILDREN'S COURT OF NSW**

#### **INTRODUCTION**

- 1 I am very pleased to have been invited to present an address today at the NSW Child Protection Legal Conference on Thursday 4 February 2021.
- 2 This paper has been prepared for the NSW Child Protection Legal Conference.<sup>1</sup>
- 3 Before I begin my presentation, I would like to acknowledge the traditional custodians of the land upon which we meet today, the Gadigal people of the Eora nation, and recognise their continuing connection to land, waters and culture. I pay my respects to their Elders past, present and emerging, and pay my respects to any Indigenous people who are here today.
- 4 I would also like to recognise the over-representation of Aboriginal and Torres Strait Islander children and families in the Children's Court jurisdiction and acknowledge that this over-representation is deeply intertwined with historical

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<sup>1</sup> I wish to acknowledge the considerable assistance provided in the preparation of this Paper by my Research Associate, Astrid von Drehnen.

and ongoing experiences of intergenerational trauma, institutionalisation, and colonisation.

- 5 I would like to acknowledge and thank The Law Society of New South Wales - our Major Sponsor and Principal Supporter of today's Conference. As the peak body for the state's 36,000 solicitors, one of the Law Society's key functions is to initiate and shape debate about law reform and the administration of justice in this state, including for matters relating to children and child rights.
- 6 I was first appointed President of the Children's Court of New South Wales on 1 June 2012, and it has been an honour to hold this position for the past eight and a half years. During this time, the care and protection jurisdiction has undergone a number of changes, and, I continue to be astounded by the complexity of the issues that arise in this Court.
- 7 Moreover, the Covid-19 pandemic has posed unprecedented challenges for all court jurisdictions, including the Children's Court over the past year. The Children's Court has moved swiftly to adapt to our 'new normal' and we have made significant changes to our operations in order to meet the increase in demand which was placed on court services and the judicial resources of the court as a consequence of the pandemic.
- 8 I note that the effects of the Covid-19 Pandemic have been particularly prominent in the care and protection jurisdiction, with care hearings being impacted to a greater extent due to the number of participants in hearings and the complexity of some matters coming before the Court.
- 9 Our response to the Pandemic has involved extensive adjustments to the Court's usual operations, which continue in a modified form today. Our response has not been static, but rather, we have been working collaboratively with key stakeholders, taking a consultative approach to develop flexible responses which meet the needs of our court users whilst

also reflecting updates to the health advice and legislative changes as they occur.

- 10 I would like to highlight that the Children's Court's response to the Covid-19 Pandemic has been focussed on the need to ensure that access to justice has continued throughout this difficult time, in order to ensure that we meet the needs of our children and young people without compromising the safety of staff and the community. The children and families that come before the Children's Court are amongst the most vulnerable, socially and economically disadvantaged members of society.
- 11 This disadvantage is a profound reminder of the need to work together to critically analyse the issues, build capacity to overcome challenges and develop realistic and achievable options for improvement. We must never allow ourselves to sit idly by while children and young people are denied the human rights and opportunities they are entitled to as citizens of the world.

## **SPECIALIST NATURE OF THE CHILDREN'S COURT**

- 12 The Children's Court of NSW is a specialist court which deals with both care and protection matters and offences committed by children and young people under 18.
- 13 The Children's Court of NSW consists of a President, 15 specialist Children's Magistrates and 13 Children's Registrars. It sits permanently in 7 locations, and conducts circuits on a regular basis at other country locations across New South Wales. Children's Magistrates also sit regularly in country locations, pursuant to the *Country Assistance Protocol*.
- 14 Today, the Children's Court of NSW conducts eight regional circuits:
  - Central Coast Circuit
  - Hunter Circuit

- Illawarra/Southern Highlands
- Mid-North Coast Circuit
- Northern Rivers Circuit
- Riverina Circuit
- Western Circuit

- 15 I am pleased to announce that the Children’s Court is currently exploring its options in relation to the establishment of a new North Western Circuit which would hear both care and protection and crime matters in the New England area. We are currently investigating which locations this new circuit would service, and are considering Moree, Tamworth and Armidale.
- 16 In my view, introducing such a circuit in this region would assist in furthering the recommendations made by the Special Commission of Inquiry into Child Protection Services in NSW (“the Wood Inquiry”), namely, the recommendation that there should be sufficient specialist Children’s Magistrates appointed to permit rural and regional circuits to be held, thus ensuring that the proportion of matters in ‘protection and care’ will be presided over by non-specialist Magistrates is fewer than 10 per cent of cases.
- 17 A specialist Children’s Magistrate is a magistrate nominated to exclusively preside over those matters that appear in the Children’s Court. Children’s Magistrates are selected from the general pool of Magistrates appointed under the Local Court Act 2007 having regard to their knowledge, qualifications, skills and experience in dealing with children, young people and their families.
- 18 I am of the view that specialist Children’s Magistrates are best placed to hear matters involving the care and protection of children in young people in NSW, due to their ability to bring an in-depth understanding and familiarity of the

care and protection jurisdiction to proceedings, which in turn supports enhanced updated practice standards in regional and rural areas, encourages greater confidence in decisions made for families and legal practitioners, and supports matters brought to the Children's Court to be heard and finalised in timely manner. Having specialist Children's Magistrates hear care and protection matters is also beneficial due to their nuanced understanding of the relevant legislation and specialised knowledge in relation to child development which assists in securing the best possible outcomes for the children and young people involved in care proceedings.

- 19 I will now provide a brief update in relation to the movements of some of the Children's Magistrates for 2021.
- 20 Children's Magistrate Virgo has recently completed her country service and as such returns to sit permanently at Parramatta. Children's Magistrate Maher has been allocated to the Riverina and Western Circuit from January 2021. Consequently, she will be leaving Campbelltown Court and Children's Magistrate Hayes has been allocated to Campbelltown from January 2021.
- 21 Children's Magistrate Ryan has now been allocated to Parramatta Children's Court for 2021, and Children's Magistrate Wynhausen has been allocated to Surry Hills Children's Court for 2021.
- 22 Children's Magistrate Skinner will be leaving Broadmeadow Children's Court and will commence at Surry Hills Children's Court. Magistrate Eckhold has been appointed to sit at the Broadmeadow Children's Court from January 2021.

## **CASE LAW UPDATE**

- 23 I will now discuss some important case law developments which are relevant to the care and protection jurisdiction.

24 The decision of Sackar J of the Supreme Court of NSW in the case of *GR v The Department of Communities & Justice and Ors* [2020] NSWSC 1622 ('GR') is one such important decision, which raises significant issues for the care and protection jurisdiction. There were two main issues: firstly, whether a guardian ad litem ought to be appointed for the child in the proceedings known as AB; and secondly, whether the ILR for that child ought to be removed or replaced and also whether she should remain a party to the proceedings.<sup>2</sup>

25 When considering whether or not to appoint a guardian ad litem for AB after he had been joined as a party, at this stage in the proceedings, Sackar J considered the construction of s 98 (2A) of the *Children and Young Persons (Care and Protection) Act 1988* (the 'Care Act').

26 Relevantly, s 98 (2A) of the *Care Act* provides that:

'If the Children's Court is of the opinion that a party to the proceedings is incapable of giving proper instructions to a legal representative, the Children's Court is to appoint a guardian ad litem for the person under section 100 or 101 (as the case may require).'

27 Sackar J held that:

'the words "is to appoint a guardian ad litem" in s 98(2A) clearly direct that the Court must appoint a guardian ad litem for a person when it is of the opinion that the person is "a party to the proceedings" and is "incapable of giving proper instructions to a legal representative".<sup>3</sup> Thus, he held that s 98 (2A) provides a mandatory rather than discretionary directive to the Court.

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<sup>2</sup> *GR v The Department of Communities & Justice and Ors* [2020] NSWSC 1622, at [11].

<sup>3</sup> *Ibid*, at [57].

28 Sackar J noted that in their view, such a mandatory construction of s 98 (2A) was not wholly inconsistent with the objects of the *Care Act*,<sup>4</sup> notwithstanding the discretionary nature of the directives contained in s 100 of the *Care Act*.

29 Relevantly, s 100 of the *Care Act* sets out that:

‘(1) The Children’s Court **may** appoint a guardian ad litem for a child or young person if it is of the opinion that—

(a) there are special circumstances that warrant the appointment, and

(b) the child or young person will benefit from the appointment.

30 Citing *News Ltd And Others v Australian Rugby Football League Ltd And Others* (1996) 139 ALR 193 Sackar J stated that ‘the correct test to apply in determining whether a person ought to be joined as party to proceedings is whether their rights against or liabilities to any party in the action in respect of the subject matter of the action will be directly affected by any order which may be made in the action.’<sup>5</sup>

31 Sackar J later went on to conclude that they saw ‘no reason why the usual considerations which focus upon the impact of curial proceedings on the legal rights of parties should not apply to the determination of proper parties in Children’s Court proceedings, in relation to the child or young person, their parents, the Secretary and the Minister for example, as well as an ILR for the child.’<sup>6</sup>

32 This development is of incredible practical significance and, its wide ranging impacts have the potential to permeate throughout the care and protection jurisdiction over the coming year. As such, I believe that this matter requires urgent legislative consideration to provide clarity.

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<sup>4</sup> Ibid, at [75].

<sup>5</sup> Ibid, at [69].

<sup>6</sup> Ibid, at [74].

- 33 Issues around the concept of who is a party to care and protection proceedings were also raised recently in *JE v Secretary, Department of Communities and Justice (No 2)* [2020] NSWCA 243 ('*JE*') in which the Supreme Court held that the young person involved in the proceedings, Michelle, was a necessary party and noting that she was 'entitled to appear' and that it was 'important given her age that she be informed of the course and outcome of the proceedings.'<sup>7</sup>
- 34 Another noteworthy case from the past 12 months is *Department of Communities and Justice (DCJ) and Ryan Masters* [2020] NSWChC 7 which was handed down by Children's Magistrate Virgo. This case provides some useful guidance on the issue of standing and the interpretation of s 90 (1AA) of the *Care Act*.
- 35 In this case, the Aunt of Ryan Masters, shared a limited category of PR (cultural up-bringing) jointly with the Minister.<sup>8</sup>
- 36 Section 90(1AA)(c) of the *Care Act* provides that a person having parental responsibility for the child or young person, has standing to bring a rescission or variation application.
- 37 When considering the construction of s 90(1AA), CM Virgo held that in her view, there was 'no relevant exemption or other qualification in the *Care Act* to indicate that an applicant must hold all aspects of parental responsibility to have standing under sub-section (c), or for that matter under sub-section (d).'<sup>9</sup>
- 38 As a corollary, her Honour then went on to conclude that 'an applicant such as the Aunt with only limited PR has standing.'<sup>10</sup>
- 39 Another important case which has been handed down in the past year which discusses the concept of unacceptable risk in non-accidental injury cases is

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<sup>7</sup> *JE v Secretary, Department of Communities and Justice (No 2)* [2020] NSWCA 243 ('*JE*'), at [16].

<sup>8</sup> *Department of Communities and Justice (DCJ) and Ryan Masters* [2020] NSWChC 7, at [17].

<sup>9</sup> *Ibid*, at [17].

<sup>10</sup> *Ibid*.



*The Secretary, Department of Communities and Justice v B* [2020] NSWDC 736 (*The Secretary v B*), in the District Court.

- 40 In the case of *The Secretary v B*, the Court upheld an appeal by the Secretary and established the matter on the basis of unacceptable risk, without the need to make a finding on any of the grounds listed under s 71 of the *Care Act*.<sup>11</sup> This decision follows the approach taken by Lindsay J in *A v Secretary, Department of Communities and Justice (No. 5)* [2020] NSWSC 1340 (*A v Secretary*). In citing *A v Secretary*, Dicker J expressed the view that: ‘It should also be noted that a lack of insight into child protection concerns and a lack of preparedness to engage with responsible authorities can justify a finding that a child is in need of care and protection’.<sup>12</sup>
- 41 Moreover, in discussing the decision handed down by Lindsay J, Dicker DCJ, highlighted that:
- “The Secretary has the onus of establishing a case for a care order and the standard of proof required is proof on the balance of probabilities having regard to the principle that the degree of proof required by the civil standard may vary with the gravity of the case to be proved. As Lindsay J stated in *A*, above, a positive finding of sexual abuse is not, of itself, required in care proceedings.”<sup>13</sup>
- 42 In my view, this line of cases is significant, as both *A v Secretary* and *The Secretary v B* elucidate important insights into the way in which the concept of unacceptable risk applies in non-accidental injury cases which come before the Children’s Court.
- 43 For a nuanced and in-depth discussion on the concept of unacceptable risk in non-accidental injury cases, I would recommend reading the article ‘Non-accidental Injury and the Children’s Court: Some Legal and Practical

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<sup>11</sup> Simon Handebo, ‘Non-accidental Injury and the Children’s Court: Some Practical Observations’ (2020) 2 Children’s Law News 11.

<sup>12</sup> *The Secretary, Department of Communities and Justice v B* [2020] NSWDC 736, at [57].

<sup>13</sup> *Ibid*, at [193].

Observations' by Children's Registrar Simon Handebo, which we have just published on our website as a part of the December 2020 edition of Children's Law News.<sup>14</sup>

## **DRCs and Children's Registrars**

- 44 The Children's Court's DRC program commenced in 2011, and was established following a recommendation of the Wood Inquiry. The Wood Inquiry recommended greater use of alternative dispute resolution in care proceedings and identified the "important role of registrars to facilitate early resolution of matters or ensure that a matter is ready for hearing".<sup>15</sup>
- 45 Section 65 of the *Care Act* provides for Children's Registrars to arrange and conduct Dispute Resolution Conferences ("DRCs").
- 46 A DRC is a form of alternate dispute resolution that uses a conciliation model.<sup>16</sup> The purpose of a DRC is to provide a confidential environment that promotes frank and open discussion between parties to a care application.<sup>17</sup> It is intended to facilitate the early resolution of care applications in an informal and non-adversarial environment.
- 47 Matters may be referred to a DRC by a Children's Magistrate or by a Children's Registrar, and, may be referred to a DRC at the request of a party or on the Court's own motion.
- 48 I would like to take this opportunity to note that the Children's Court is currently in the process of updating our Practice Notes as they relate to DRC's in consultation with some of our key stakeholders, and we are looking to move to a mode of operating whereby a presumption exists that all matters

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<sup>14</sup> Simon Handebo, 'Non-accidental Injury and the Children's Court: Some Practical Observations' (2020) 2 Children's Law News.

<sup>15</sup> The Hon J Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) ("The Wood Report") vol 2 at [12.29].

<sup>16</sup> Section 65A of the *Care Act* also empowers the Court to refer matters to external ADR.

<sup>17</sup> Sections 244B and 244C of the *Care Act* provide that information disclosed in ADR is not admissible in any proceedings before any court, tribunal or body.

will be referred to a DRC before being listed for hearing except in certain circumstances, and are looking to encourage referrals to DRCs at an earlier stage in the proceedings.

- 49 The Children's Court has 13 Children's Registrars, seven of which are currently based in Parramatta, with the remaining six positions based across our Campbelltown, Port Kembla, Wagga Wagga, Broadmeadow, Woy Woy and Lismore locations. Children's Registrars routinely travel to court locations across NSW to convene DRCs.
- 50 Pleasingly, there has been an increase in the number of matters which have been referred to DRCs from the Surry Hills Children's Court over the past few years since its opening in January 2018.
- 51 Consequently, in 2021, one of the Children's Registrars positions based in Parramatta will be relocated to the Surry Hills Children's Court to meet this increase in demand.
- 52 We have also seen a notable increase in referrals to DRCs coming from the New England area, with about 4% of our total referrals coming from this area in 2020 compared with 2% in 2019.
- 53 For the years 2018 to 2020, the number of DRCs convened by the Children's Court per calendar year gradually increased. In 2018, there were 812 DRCs held across NSW, in contrast with 2019, when there were 883 DRCs and with 2020 when there were 1085 DRCs convened. However, it is worth noting that although the numbers of DRCs convened have been steadily increasing over the past three years, the numbers are still down from the year 2016, when there were 1411 DRCs convened.
- 54 In 2018, the Children's Court established the Education Conference pilot program which moved to an ongoing arrangement in 2020. In 2020, the Children's Court convened 67 Education Conferences, or Compulsory Schooling Order Conferences (CSOCs) which was down from 115 in 2019.

This decline in matters being listed for a CSOC can be attributed to the Covid-19 pandemic, as the Children's Court could not list CSOC matters for a large portion of the year due to Covid-19 restrictions.

- 55 Over the past year, a number of changes to the way in which DRCs are conducted have been implemented as a result of the impacts of the Covid-19 pandemic, with the most significant change being a shift in DRC processes following on from the reversal of the presumption that DRCs will occur in person.
- 56 It is a basic principle of the conduct of DRCs that participants should attend in person except in exceptional circumstances. This principle arises from an expectation that communication will be most effective if parties meet face-to-face.
- 57 However, DRCs proceeded for most of 2020 by way of video rather than in-person attendance in an attempt to safeguard participants' health while at the same time continuing to provide parties with a forum to discuss and settle their dispute and participate more directly in proceedings.
- 58 Currently, DRCs in the Greater Sydney region are being conducted via video attendance unless arrangements have been made with the Children's Registrars' Office for personal attendance by some or all participants. For DRCs at other locations, Children's Registrars will attempt to facilitate in person conferences where it is appropriate to do so. It is our aim to return to in person conferencing as soon as we are able to, provided that we are able to ensure the safety of all those involved in the process.
- 59 I would like to encourage practitioners to regularly check the Public Notices issued on our website for updates in relation to changes to our practice and procedure as these adjustments are temporary measures only, aimed at minimising any public health risks.

- 60 I would also encourage any practitioners who are concerned that their client's ability to fully participate in the DRC process may be compromised if they are required to attend remotely to contact and seek guidance from the Children's Registrar who is convening the DRC they are involved in. In these circumstances, personal attendance is encouraged, and, the Children's Registrar will work flexibly with the parties involved to formulate the best plan that they can for a particular matter.
- 61 I would now like to highlight some unexpected benefits which have come out of the alternate attendance arrangements which have been put in place to facilitate Covid-safe participation in DRCs. Despite the challenges presented by Covid-19, there were more DRCs convened by the Children's Court in 2020 than 2019, and, approximately 10 % of the total number of DRCs were referrals from non-specialist Children's Courts (i.e. Local Court Magistrate's exercising Children's Court jurisdiction).
- 62 Additionally, we are now receiving more referrals from regional NSW, and from Courts where we do not typically receive referrals. This appears to be an upside of the Covid arrangements, where remote conferencing has increased our ability to service some regional locations.
- 63 In my view, this increase in referrals to DRCs is practitioner driven, and I would very much like to see this trend continue in 2021 and be in a position to service as much of NSW as possible.
- 64 I would also like to highlight that in some matters, DRCs have been crucial in re-engaging parents in the court process during the Covid-19 pandemic. Listing arrangements have resulted in parents often being excused from mentions, and DRCs have at times been one of the few opportunities for parents to be directly involved in the process. In some cases the DRC has been the first time that the parents have heard from the other parties, and importantly, the views of the child representative.

- 65 Something else that I would like to reiterate in relation to DRCs is that consideration should be given to referring matters to a DRC as early as possible in the proceedings. Ideally, in my view, a DRC should take place in the pre-care plan stage of the proceedings, and, what is discussed at the DRC should inform the care plan's contents. The utility of such an approach is that it enables the care plan to be developed with input from all of the parties.
- 66 Another point that I would like to make about DRCs is that in practice, parties do not often seek the attendance of the Children's Court clinician at the DRC, though it is the observation of the Children's Registrars that there are many cases where the matter may have resolved if the clinician had been in attendance. The Clinician plays an invaluable role in the court process. In circumstances where there remains a dispute after preparation of a Clinic Assessment, involvement of the Clinician in a DRC should be encouraged. By involving the Clinician in the discussion, targeted to the specific issues in dispute, it is more likely that parties will be in a position to reach an agreed way forward in the best interests of the children.
- 67 Lastly, I would like highlight that aside from promoting direct participation in the court process and providing an opportunity to engage in settlement discussion, DRCs can also be a useful case management tool, and can be used at multiple stages throughout the proceedings. I would strongly encourage the use of DRCs at any stage where there is a legitimate issue in dispute. Even if settlement is not achieved, the DRC provides parties an opportunity to refocus on the actual issues in dispute outside of a hearing setting, and to consider what needs to occur to effectively progress the matter.
- 68 Ultimately, DRCs are about involving families in decision making about their children. The success of the process is contingent on many factors, including participants attending with an attitude of openness toward listening to views and suggestions of other participants at the conference, as well as a mindset of working creatively to accommodate, where possible, the needs of all parties, but ultimately the needs of the child or young person. This includes

not just their need to be safe from harm, but also their need to be connected to family, community and culture.

- 69 These principles and the belief in people’s capacity to change lie at the heart of the philosophies which underpin the work of the Children’s Court, and as such, I am an advocate for the ongoing and increased use of DRCs in the care and protection jurisdiction.

## Section 82 Reports

- 70 Section 82 Reports play a vital role in the supervisory jurisdiction of the Children’s Court as contemplated by the *Care Act*. Section 82 of the *Care Act* empowers the Children’s Court to order a party to the proceedings to prepare a report concerning the suitability of the arrangements for the care and protection of the child or young person.<sup>18</sup>

- 71 As Children’s Magistrate Stubbs articulated in the case of *Department of Family and Community Services (DFaCS) and Amber* [2019] NSWChC 10 (*Amber*), the underlying purpose of s 82 is:

‘to ensure that the Court obtains information it has considered necessary in the progress and implementation of the *Care Act*. Its express statutory purpose is to bring the nature and success (or lack thereof) in the implementation of the Care Plan under judicial oversight, and to provide a mechanism allowing the Court to bring any concerns it has to the parties and the legal representatives of the child(ren) or young person(s) the subject of the Final Orders.’<sup>19</sup>

- 72 If the Court is not satisfied that proper arrangements have been made for the care and protection of the child or young based off of the information contained in the s 82 Report, the Court may of its own motion, within 30 days

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<sup>18</sup> *Department of Family and Community Services (DFaCS) and Amber* [2019] NSWChC 10, at [17].

<sup>19</sup> *Ibid*, at [101].

of receiving the s 82 report, give notice to all parties of the Court's intention to conduct a review of progress of implementing the Care Plan.<sup>20</sup> Then the Court, at its discretion, may invite the party to give evidence and make submissions at the progress review, including progress toward the implementation of a permanent placement of the child or young person.<sup>21</sup>

73 As such, s 82 Reports play a critical role in ensuring the safety, welfare and well-being of the subject child, and in facilitating the Children's Court supervisory role as envisaged by the unique protective jurisdiction of the *Care Act*.<sup>22</sup>

74 Consequently, the observations made by myself and other Children's Magistrates in relation to the frequency at which these reports are submitted late, is of significant concern.

75 In light of this, I would like to take this time to highlight some key points in relation to s 82 Reports.

76 Firstly, I would like to reiterate that the timely provision of s 82 Reports to the Court is essential. As Children's Magistrate Stubbs discusses in the case of *Amber*, late s 82 Reports are not only problematic in terms of the jurisdictional issues which can arise in terms of the Children's Court fulfilling its supervisory mandate, but also, can be problematic in terms of achieving the overarching objectives of the *Care Act* – namely, ensuring that the safety, welfare and well-being of vulnerable people – the children and young persons – who come before the Children's Court is paramount.<sup>23</sup>

77 It is important to remember that the late provision of s 82 reports can result in safety concerns and create delays in terms of addressing issues which could potentially be harmful. For example, a failing or failed restoration process might not be disclosed, meaning that there is the potential for the children

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<sup>20</sup> *Ibid.*, at [18].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at [63].

<sup>23</sup> *Ibid.*



involved in the care proceedings to be significantly disadvantaged. As such, the timely provision of s 82 Reports is essential in ensuring that children and young persons receive the full range of protections that they are entitled to under the *Care Act*.

78 Secondly, I would like to highlight s 82 Reports should be comprehensive. A s 82 Report should cover all of the information that the Court has specified in relation to the progress of the care plan, and any other reports from other agencies which are referred to should be attached. This ensures that the Judicial Officer who is hearing the matter has all the relevant information that they need to in order to make a timely and informed decision about the child's placement and whether conducting a progress review is in the best interests of the child or young person.

79 Lastly, I would like to note that s 82 Reports should comply with the model litigant obligations which legal practitioners representing the Department of Family and Community Services before the Children's Court of NSW must comply with as per the NSW Model Litigant Policy. In practice, these obligations mean that a s 82 Reports should be fair, balanced and written in a way which is not one-sided.

80 In my time as President of the Children's Court, I have observed that in a majority of cases, FACS caseworkers do their best to comply with the model litigant obligations, in difficult cases with limited timeframes.

### **FSP Misfeasance**

81 Approximately 50 per cent of children who are the subject of care proceedings or final orders made in the Children's Court are now case managed by a Funded Service Provider (FSP), and, I would like to acknowledge the hard work of the FSPs and the difficulties involved in working in the care and protection jurisdiction.

- 82 However, I would now like to address a troubling issue which has come to the attention of the Court over the past year in particular - FSP misfeasance.
- 83 Of particular concern to the Court, are instances where an FSP has made steps towards restoration, and in some cases, restored children to their parents without first bringing a s 90 application or variation in circumstances where Court has made a finding that there was no realistic possibility of restoration.
- 84 I will now outline one particularly striking and egregious example of such conduct which came to the Court's attention when it was sitting on Circuit.
- 85 In this case, the children had been removed from their parents at a very young age, with the youngest being just 5 weeks old, and the eldest child being 2 years old at the time of removal. The new-born baby had sustained terrible injuries, broken legs, swollen face with ear damage as well as bruising to numerous parts of the body. The injuries were suspicious as inflicted and the parents' explanations did not match the medical evidence.
- 86 The Secretary however supported restoration to the parents.
- 87 The parents owned their own home and there were no drug issues, no DV concerns, no criminal record or any other issues. There had been no previous intervention with DCJ. Following an investigation charges were later brought against the father but that did not happen in the initial proceedings. The parents were however investigated for a failure to seek timely medical intervention for the baby.
- 88 The ILR and the Children's Magistrate did not accept the Secretary's assessment as to restoration and the matter proceeded to a hearing. The Children's Magistrate found that there was no realistic possibility of restoration to either parent on the basis that there was an unacceptable risk of harm to the children in light of the unexplained injuries, and new care plans were

ordered. Final orders were made giving PR to the Minister until 18 with significant contact.

89 DCJ had transferred case management to an FSP. Within 6 weeks of final orders, the FSP decided that the level of contact provided for in the Care Plan supported a restoration, not PR to the minister and they then (without seeking guidance from DCJ) acted as if the permanency goal for the children was restoration.

90 The FSP then undertook to steps towards restoration, and, ultimately restored the children to the parents within a few months of the final orders being made by the Court. I would like to highlight the useful guidance provided by Children’s Magistrate Sheedy in *Department of Family and Community Services (DFaCS) and Bridget* [2019] NSWChC 4:

“Before a decision is made to recommend restoration when a child is in a safe, secure and stable long term placement, there must be a comprehensive assessment undertaken. The Assessment must take account of relevant history, must include gathering of objective evidence and may even require input from experts. It must focus on the best interests of the child and not solely on whether the parent has made progress in addressing the issues that led to the child’s removal.”

91 If, after the comprehensive assessment a decision is made to recommend restoration then a prompt application should be made to the Children’s Court. No steps should be taken towards restoration that could directly impact the child or the carers. Neither should any assurances or promises be made to the parents or to the child.<sup>24</sup>

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<sup>24</sup> *Department of Family and Community Services (DFaCS) and Bridget* [2019] NSWChC 4, at [102-103].

## Cross Over Kids

- 92 The Children's Court of NSW is empowered with the jurisdiction to make decisions in care and protection matters as well as criminal matters relating to all children and young people under the age of 18.
- 93 These two specialised jurisdictions operate distinctly and separately from one another. However, it is apparent that this legal framework fails to adequately take intersectionality into account. The reality is - that the lives of the children and young people who appear before the Children's Court are multifaceted, and, their life experiences cannot always be neatly siloed into these two jurisdictions. As such, whilst this is the Joint Care and Protection Conference, it would be remiss of me not to discuss the topic of cross over kids.
- 94 There is an unequivocal correlation between a history of care and protection interventions and future criminal offending. This nexus between care and crime has been persuasively articulated by a number of respected commentators, including Dr Judith Cashmore,<sup>25</sup> and former President of the Children's Court, Judge Mark Marien, whose seminal paper on 'Cross-Over Kids' examined the drift from children and young people in care into criminal offending.<sup>26</sup>
- 95 The bifurcated nature of the care and protection and criminal jurisdictions has its origins in a number of reviews to child welfare laws in the 1980s. These reforms culminated in a package of legislation that clearly demarcated the child protection jurisdiction from the youth crime jurisdiction. Whilst this was a positive step at the time (given the need to reform the punitive criminalisation of child protection issues under the *Child Welfare Act 1939*) it has created structural and legal barriers that fail to acknowledge and address the

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<sup>25</sup> Cashmore, J. (2011) 'The link between child maltreatment and adolescent offending: systems of abuse and neglect of adolescents', *Family Matters*, 89, 31-41.

<sup>26</sup> His Honour Judge Mark Marien (2012) 'Cross-Over Kids' Childhood and adolescent abuse and neglect and childhood offending' Paper delivered at the National Juvenile Justice Summit, Melbourne.

practicality of these young people's lives. This practicality is that criminal offending and care and protection are not mutually exclusive.

- 96 It is to this reality that we refer when we talk about the 'cross-over between care and crime' or 'cross-over kids'. As I mentioned above, the black letter law recognises care and protection and youth crime as two separate jurisdictions. However, when viewed through a criminological and socio-legal lens, the practicality and reality of these young people's lives highlights that there is a distinct correlation between a history of care and protection interventions and criminal offending.
- 97 Research has shown that there is a strong link between the time children spend in out-of-home care (OOHC) and youth detention. For example, in a recent study, the Australian Institute of Health and Wellness found that from 2014 to 2019 more than half of the young people who had been in the youth justice system had also received child protection services.<sup>27</sup>
- 98 Devastatingly, Aboriginal and Torres Strait Islander Children are over-represented in both youth detention and the OOHC systems.
- 99 As at the 30<sup>th</sup> of June 2019, there were 16,884 children and young people in OOHC in New South Wales.<sup>28</sup>
- 100 Of these children and young people, 6,754 were Aboriginal, meaning that Aboriginal children and young people made up 41% of the total number of children entering OOHC in NSW between the years 2018-2019.<sup>29</sup>
- 101 Additionally, as at the 30<sup>th</sup> of June 2019, there were a total of 3,050 children and young people on Guardianship orders in NSW.<sup>30</sup> Of these Guardianship orders, 34% related to Aboriginal children and young people.<sup>31</sup>

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<sup>27</sup> Australian Institute of Health and Welfare, *Young people under youth justice supervision and in child protection 2018–19* (2020), p 7.  
<<https://www.aihw.gov.au/getmedia/8442b61a-f3b9-4741-a5d7-75023cb0cd19/aihw-csi28.pdf.aspx?inline=true>>.

<sup>28</sup> Department of Communities and Justice, *Annual Statistics Report 2018-2019 Children and Families Thrive* (7 August 2020) 0

<[https://public.tableau.com/profile/facs.statistics#!/vizhome/ASR2018-19\\_textversion/Textversion](https://public.tableau.com/profile/facs.statistics#!/vizhome/ASR2018-19_textversion/Textversion)>.

<sup>29</sup> Ibid.

- 102 In NSW, there was a growth of 7.1% in the number of children and young people on Guardianship orders between the years 2018-2019, and over the same period, the number of Aboriginal children and young people on guardianship orders increased by 9.7%.<sup>32</sup>
- 103 During this same period in NSW, between the years 2018-2019, 2,661 children and young people exited from the OOHC system.<sup>33</sup> Of these children and young people, a total of 569 children and young people were restored to their parents.<sup>34</sup> Of these children and young people, 202 Aboriginal children and young people were restored to their parents.<sup>35</sup>
- 104 On a national level, as at 30 June 2019, the vast majority (92%) of children in OOHC were in home-based care, mostly with relative or kinship carers (52%), or in foster care (39%).<sup>36</sup> Another 6.4% were living in residential care, mainly used for children with complex needs. 63% of Indigenous children in OOHC, were living with family or Indigenous care givers.<sup>37</sup>
- 105 In light of this data and the increased awareness of the issues faced by cross over kids, I would like to emphasise the importance of diversion.
- 106 The Children’s Court is committed to increasing the diversionary options which are available to the children and young people of NSW, and to reducing the over representation of Aboriginal children and young people in both its care and crime jurisdictions.
- 107 I would like to highlight the work that is being undertaken as a part of the ‘A Place to Go’ program which aims to improve supports and deliver a better response for children and young people aged between 10-17 years entering and exiting the youth crime system, with a focus on young people in remand.

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Australian Institute of Health and Welfare (AIHW) 2020, *Child protection*, viewed 24 January 2021, <<https://www.aihw.gov.au/reports/australias-welfare/child-protection>>.

<sup>37</sup> Australian Institute of Health and Welfare, *The Aboriginal and Torres Strait Islander Child Placement Principle Indicators 2018-19: measuring progress* (2020) <<https://www.aihw.gov.au/reports/child-protection/atsicppi-2018-19/contents/summary>>.

108 The program endeavours to achieve this objective by providing a holistic, strengths-based wraparound service to these particularly vulnerable young people. Currently, we have a FACs liaison officer based at our Parramatta and Broadmeadow Children's Court locations as a part of this program, and, I would encourage practitioners to assist their clients to engage with this service.

### **The Youth Koori Court (YKC)**

109 The Youth Koori Court (YKC) is another incredibly important diversionary measure, which was established in response to the significant over-representation of Aboriginal young people in the criminal justice system. A pilot commenced in 2015 at Parramatta Children's Court.

110 Following the success of the Youth Koori Court pilot in Parramatta in 2015, the NSW Attorney General announced in May 2018 that the Koori Court would be expanded from Parramatta to the Surry Hills Children's Court, for at least three years. The Youth Koori Court in Surry Hills opened on 6 February 2019.

111 I am also pleased to announce that in 2021, an evaluation of the Youth Koori Court will take place following its expansion to Surry Hills. I would very much like to progress this project further, and am hoping to secure funding to expand the YKC to a regional location.

### **Residential Rehab Facilities**

112 Early intervention in the form of appropriate referrals to residential rehab facilities is another incredibly important part of improving the lives, experiences and outcomes of parents and children who may come into contact with the care and protection jurisdiction.

113 I would now like to highlight some of the invaluable services which are available for those of you who work with vulnerable clients or clients with substance misuse issues who would to make positive changes in their lives.

114 **Odyssey House**

Odyssey House is one of only a handful of rehabilitation centres in Australia that allow men and women to undertake treatment whilst their children (0-12 years) live with them. The Parent's & Children's Program allows parents who have misused substances to get the treatment they need, without worrying about finding a carer for their children before they start rehab.

115 The Parent's and Children's Program aims to repair the bond between child and parent by offering services focused on physical and mental health, education, interpersonal and social skills, and child development. Once they have completed their rehab, parents are encouraged to move into community housing if they can demonstrate they are able to responsibly take care of their child/ren.

116 **Phoebe House**

Phoebe House is currently the only specialist opioid treatment centre of its kind which assists mothers and their young children in NSW. Phoebe House is located in Rockdale in Sydney, and is a residential drug and alcohol rehabilitation program for women on opioid treatment in NSW that accommodates for their children, in a safe home environment.

117 Residents are supported to achieve their personal goals and to develop their parenting skills for independent living in the community.

118 Children are expertly cared for in the Myee Children's Program which nurtures and fosters optimal development through age-appropriate play activities.

119 **San Miguel**

San Miguel is a child-centred family residential service providing intensive, individualised support to vulnerable young parents and their children based in North Richmond. San Miguel offers:

- Accommodation for young parents (aged up to 25) and their children
- Strengths-based individual case management and support
- On-site training and support aimed at increasing independent living skills



- Assistance to access services in the community, including vocational training, education, employment, driving school, medical and dental services, mental health support and legal aid
- Child development support including playgroup, homework club, creative activities and games that encourage learning and growth
- Expressive Therapy to enhance parent-child bonding and help children overcome trauma
- Assistance to address housing barriers and secure long-term accommodation
- Outreach support for up to 36 months after leaving San Miguel

120 **Jarraah House**

Jarraah House is based in Little Bay, and is a not for profit organisation which was established to provide an effective and therapeutic drug and alcohol treatment service for women.

121 Jarraah House facilitate a trauma informed ten-week residential drug and alcohol program for women with or without their children. They also provide an Aftercare program for women within the Sydney metropolitan area and run a parenting program.

122 **Kathleen York**

Kathleen York House is an abstinence based residential drug and alcohol rehabilitation service for women who are working to overcome substance dependence problems which is based in Glebe in Sydney.

123 Kathleen York has a direct partnership with the inpatient withdrawal unit at Jarraah House and will work collaboratively in order to ensure women have a safe transition between withdrawal to residential rehab. Kathleen York admit women over 21, without children or with children under 11, and, also support women at any stage of their pregnancy.

124 **Program for Adolescent Life (PALM)**

PALM is a residential treatment program for young people (aged 13 – 17) to address serious drug and alcohol related difficulties. The three month

program provides a holistic, intensive, multi-disciplinary, residential treatment program staffed by professionals specifically trained in working through trauma, challenging behaviours and complex needs. The program offers counselling, family support, group work, vocational/educational modules, living skills and recreational activities. The cost of the program is \$160 per week for all expenses; however affordability is taken into consideration.

**125 Dunlea**

The Dunlea Centre, or Australia's Original Boys Town, provides family and individual therapy, academic and life skills education, and residential care for both boys and girls. Family Preservation and Restoration is the focus of the Dunlea Centre's program. The Dunlea Centre is also an out of home care service and students live-in from Monday to Friday, thus allowing the children and their family some space to bring about necessary changes.

**New Projects in 2021**

126 I am very pleased to announce that in 2021, we are beginning consultations in relation to establishing a dedicated, separate court list for Aboriginal and Torres Strait Islander families, with a dedicated Children's Magistrate trained in Aboriginal and Torres Strait Islander cultural identity and issues. Through implementing a dedicated list for Aboriginal families, the Children's Court hopes to align our court practices with recommendation 125 made by the Family is Culture review.<sup>38</sup>

127 We seek to provide more culturally appropriate and sensitive services to Aboriginal Families navigating the care and protection system.

128 We are also working towards revitalising and expanding our Care Circles Project. Unfortunately, our consultation process relating to the expansion of this project was delayed over the past year as a result of the impacts of Covid-19. However, we recognise that this project is a valuable opportunity to

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<sup>38</sup> Professor Megan Davis, *Family is Culture – Independent review of Aboriginal children and young people in OOHC* (Review Report, October 2019) 390 – 391  
<[https://www.familyisculture.nsw.gov.au/\\_data/assets/pdf\\_file/0011/726329/Family-Is-Culture-Review-Report.pdf](https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf)>.

increase participation by Aboriginal families and communities in decision-making about Aboriginal children and young people in care matters and are working to progress this project over the coming year.

- 129 In terms of technological advancements, the Children's Court is currently working towards the development of a single diary system in the form of an application in collaboration with the NSW Court's and Tribunal Services. It is envisaged that the electronic diary system will be accessible across all of court locations which will help facilitate the transfer of information to Child Story, make listing a matter easier and allow for us to obtain better statistics in relation to the care and protection jurisdiction.
- 130 This project also ties into our Standardised Care Order Project. The Children's Court in Collaboration with Legal Aid and the DCJ have developed a Standardised Care Order template which is available for use on our website.
- 131 The intention behind this project has been to develop a document which uses plain language so that the orders are more relatable for parents and so that other agencies are able to understand them. I would strongly encourage practitioners to use this template to ensure consistency is maintained across the jurisdiction.

## **Conclusion**

- 132 I look forward to working with you all in 2021 in a constructive and collaborative way, aiming to provide the best outcomes we can for children and families caught up in the child protection jurisdiction of the Children's Court.