



**Report of the
Special Commission of Inquiry into
Child Protection Services in NSW**

Volume 2

The Hon James Wood AO QC

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Acronyms

<i>Acronyms</i>	<i>Phrase/meaning</i>
1987 Act	<i>Children (Care and Protection) Act 1987</i>
AAE	Allegations Against Employees
AAS	Area Assistance Scheme
Aboriginal Affairs	Department of Aboriginal Affairs
Aboriginal Placement Principles	Aboriginal Child Placement Principles
ABS	Australian Bureau of Statistics
AbSec	Aboriginal Child, Family and Community Care State Secretariat
ACSAT	Aboriginal Child Sexual Assault Taskforce
ACWA	Association of Children's Welfare Agencies
ACYFS	Aboriginal, Child, Youth and Family Strategy
ADR	alternative dispute resolution
ADT	Administrative Decisions Tribunal
AHS	Area Health Service
AIFS	Australian Institute of Family Studies
AIHW	Australian Institute of Health and Welfare
AMIHS	Aboriginal Maternal and Infant Health Strategy
AODP	Alcohol and Other Drugs Program
Attorney General's	Attorney General's Department
AVO	Apprehended Violence Order
BOCSAR	Bureau of Crime Statistics and Research
CALD	culturally and linguistically diverse
Care Act	<i>Children and Young Persons (Care and Protection) Act 1998</i>
CCYP	Commission for Children and Young People
CCYP Act	<i>Commission for Children and Young People Act 1998</i>
CCYP Act	<i>Commission for Children and Young People Act 1998</i>
CDC	Caseworker Development Course
CDCRU	Child Deaths and Critical Reports Unit (DoCS)
CDRT	Child Death Review Team
CEC	Chief Executives Committee
CEO	Chief Executive Officer
CIW	Corporate Information Warehouse
Clinic	Children's Court Clinic
COAG	Council of Australian Governments
Community Welfare Act	<i>Community Welfare Act 1987</i>
Corrective Services	Department of Corrective Services
CRC	Children's Research Center
CS CRAMA	<i>Community Services (Complaints, Reviews and Monitoring) Act 1993</i>
CSC	Community Services Centre
CSGP	Community Services Grants Program
CYP	Children and young persons
DADHC	Department of Ageing, Disability and Home Care
Discussion Paper	DoCS Discussion Paper, <i>Statutory child protection in NSW: issues and options for reform</i> , October 2006
Displan	NSW State Disaster Plan

<i>Acronyms</i>	<i>Phrase/meaning</i>
District Court	District Court of NSW
DoCS	Department of Community Services
DPP	Office of the Director of Public Prosecutions
Education	Department of Education and Training
EOI	expression of interest
ESD	Enhanced Service Delivery
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
Family Court	Family Court of Australia
Family Law Act	<i>Family Law Act 1975</i>
FGC	family group conferencing
FTE	full time equivalent
Health	NSW Health
HNEAHS	Hunter New England Area Health Service
Housing	Housing NSW
HREOC	Human Rights and Equal Opportunity Commission
HRIP Act	<i>Health Records and Information Privacy Act 2002</i>
IFBS	Intensive Family Based Services
Interagency Guidelines	<i>Interagency Guidelines for Child Protection Intervention 2006</i>
Interagency Plan	Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities 2006-2011
JIRT	Joint Investigation Response Team
JRU	JIRT Referral Unit
Juvenile Justice	Department of Juvenile Justice
KiDS	Key Information and Directory System
LAC	Legal Aid Commission NSW
LAC proposal	Draft Proposal for a Care and Protection Mediation Pilot (Legal Aid NSW)
LAT	Less Adversarial Trial
Law Society	Law Society of NSW
Magellan	Magellan Case Management Model
MOU	Memorandum of Understanding
NCOSS	Council of Social Services of NSW
New Street	New Street Adolescent Service
NGO	non-government organisation
NTER	Northern Territory Emergency Response
OHS	Occupational Health and Safety
Ombudsman	NSW Ombudsman
Ombudsman Act	<i>Ombudsman Act 1974</i>
OOHC	out-of-home care
PANOC	Physical Abuse and Neglect of Children
Police	NSW Police Force
PPIP Act	<i>Privacy and Personal Information Protection Act 1998</i>
PPR	Personal Planning and Review
Premier and Cabinet	Department of Premier and Cabinet
PSA	Public Service Association
RACP	Royal Australian College of Physicians
RANZCP	Royal Australian and New Zealand College of Psychiatrists
RCMG	Regional Coordination Management Group

<i>Acronyms</i>	<i>Phrase/meaning</i>
Regulations	<i>Children and Young Persons (Care and Protection) Regulation 2000</i>
Rules	<i>Children's Court Rule 2000</i>
SAAP	Supported Accommodation Assistance Program
SACS Award	Social and Community Services Award
SAS1	Secondary Assessment Stage 1
SAS2	Secondary Assessment State 2
SCAN	Suspected Child Abuse and Neglect
SCI	Special Commission of Inquiry
SDM	Structured Decision Making
SDRC	State Disaster Recovery Centre
SERM Act	<i>State Emergency and Rescue Management Act 1989</i>
SNAICC	Secretariat of National Aboriginal and Islander Child Care
Treasury	NSW Treasury
Triple P	Positive Parenting Program
Usher Review	Review of Substitute Care Services in NSW 1992
Young Offenders Act	<i>Young Offenders Act 1997</i>

Part 3 Legal basis of child protection

11 Statutory basis of child protection

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Introduction

- 11.1 Much of the power of DoCS to intervene in the lives of children and young persons derives from legislation, primarily the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) and the *Children and Young Persons (Care and Protection) Regulation 2000* (the Regulations).
- 11.2 The Care Act establishes a regime under which the ultimate decision making about the removal of children from their families without their consent, and the consequent allocation of parental responsibility, rests with the courts. The Children's Court is the court with primary responsibility for making these decisions. The composition of the Children's Court will be dealt with in the next chapter.
- 11.3 The Care Act vests responsibility for decisions about the exercise of parental responsibility and the day to day care of the child or young person in the person who (for the time being) holds office as either the Director-General of DoCS (the Director-General) or the Minister for Community Services (the Minister). Each has delegated much of the relevant powers to the holders of specified positions within DoCS.¹ For reasons of simplicity, the term 'DoCS' is used in this chapter when dealing with the power of the Director-General, the Minister, and their delegates (as well as being used to refer to the Department in a more general sense).

Principles

- 11.4 In exercising any of the powers under the Care Act, DoCS (and others) must adhere to the principles set out in s.9 and s.10. In summary, they require that:
- a. The safety, welfare and well-being of the child or young person is to be the paramount consideration.
 - b. The safety, welfare and well-being of a child or young person who has been removed from his or her parents is to be paramount over the rights of the parents.
 - c. An opportunity is to be provided for the child or young person to express his or her views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances.
 - d. Account is to be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, of those with parental responsibility for the child or young person.

¹ The Minister and the Director-General have also delegated to others apart from DoCS, for example, the Minister has delegated parental responsibility for some children to Barnardos and the Director-General has delegated powers as to child employment to the Children's Guardian.

- e. In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development.
- f. A child or young person in OOHC is entitled to:
- i. special protection and assistance from the State, and the preservation so far as possible of his or her name, identity, language, and cultural and religious ties
 - ii. the provision in a timely manner of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and also recognising that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement
 - iii. the retention by the child or young person of relationships with people significant to the child or young person, including birth or adoptive parents, siblings, extended family, peers, family friends and community
 - iv. the provision of information and the opportunity for the child or young person to express his or her views, to enable participation in decisions that have a significant impact on his or her life.
- 11.5 A person who suspects that a child or young person is at risk of harm (that is, a person who has current concerns for the safety, welfare and well-being of the child or young person) can (or in some cases, must) make a report to DoCS. Upon receipt of such a report, DoCS must make such investigations and assessment as it considers necessary to determine whether in fact a risk of harm exists. In the case of a young person, DoCS is to take into account any known wishes of that young person.²
- 11.6 The definition of risk of harm and a consideration of the adequacy of that concept, and of the circumstances in which persons must or may report their concerns to DoCS, are dealt with in Chapter 6 of this report.
- 11.7 A suspicion of risk of harm is sufficient to enliven the power of DoCS to investigate and assess a case after receiving a report. If it forms the opinion on reasonable grounds that the child or young person *is in need of care and protection* then it must take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person.³ By virtue of s.39, it can at any time during or after the investigation and assessment of a report (or of a request for assistance) exercise any function conferred or imposed on the Director-General if in its opinion it is necessary or desirable to do so having regard to the safety, welfare and well-being of the child or young

² *Children and Young Persons (Care and Protection) Act 1998* ss.30 and 31.

³ *Children and Young Persons (Care and Protection) Act 1998* s.34.

person. Section 41 provides additionally that temporary care arrangements under s.151 can be made if DoCS forms the opinion that the child or young person is in need of care and protection.

- 11.8 A child or young person is in need of care and protection if the Court is satisfied as to one of a number of matters set out later in this chapter.
- 11.9 The action DoCS can take if it forms the view that a child or young person is in need of care and protection includes providing support services, developing a care plan or parent responsibility contract or exercising its emergency protection powers. DoCS can choose to do nothing if satisfied that proper arrangements exist for the care and protection of the child or young person and the circumstances that led to the report have been or are being dealt with adequately.⁴
- 11.10 In deciding the appropriate response to a report, DoCS must have regard to the principles that the immediate safety, welfare and well-being of the child or young person and of other children or young persons in the usual residential setting of the child or young person is the paramount consideration. Further, the action taken must be appropriate to the age of the child or young person, any disability that he or she or his or her family members have, and the circumstances, language, religion and cultural background of the family. Finally, removal of the child or young person may only occur where it is necessary to protect the child or young person from the risk of serious harm. These principles are to be applied in priority to the principles in s.9 set out in paragraph 11.4(a) to (f) above in deciding the appropriate response to a report concerning a child or young person.⁵
- 11.11 In addition to the principles set out above, specific principles apply to Aboriginal and Torres Strait Islander children and young persons. Sections 11 and 12 of the Care Act reflect the principle that Aboriginal and Torres Strait Islander people are to participate in decision making with as much self-determination as possible, and s.13 deals with the placement of Aboriginal and Torres Strait Islander children who are removed from their parents.

Aboriginal child placement principles

History

- 11.12 The Aboriginal Child Placement Principles (the Aboriginal Placement Principles) were first proposed in 1979, by the Commonwealth Department of Aboriginal Affairs.⁶ In 1986, Ministers of state and territory social welfare agencies agreed

⁴ *Children and Young Persons (Care and Protection) Act 1998* ss.34 and 35.

⁵ *Children and Young Persons (Care and Protection) Act 1998* s.36.

⁶ NSW Law Reform Commission, Research Report 7, *The Aboriginal Child Placement Principle*, 1997, Chapter 3, www.lawlink.nsw.gov.au.

to implement the Aboriginal Placement Principles as policy, but not necessarily as legislation. In 1989, the need for the Aboriginal Placement Principles to be contained in legislation was among the recommendations of the Royal Commission into Aboriginal Deaths in Custody and the Human Rights and Equal Opportunity Commission report into homeless youth.⁷

- 11.13 The Aboriginal Placement Principles first appeared in s.87 of the *Children (Care and Protection) Act 1987* (the 1987 Act). The review of the 1987 Act recommended that:

*The Aboriginal Child Placement Principle should apply to all non-voluntary placements of Aboriginal and Torres Strait Islander children. There should be an exception for emergency placements made to protect a child or young person from the serious risk of immediate harm, and other placements required for less than two weeks. The Act should require that where an Aboriginal or Torres Strait Islander child or young person has been removed on an emergency basis, as soon as practicable after the child or young person's safety has been ensured, consultation should take place with the relevant Aboriginal or Torres Strait Islander community in accordance with recommendation 6.5.*⁸

- 11.14 Recommendation 6.5 was that the Care Act should require Aboriginal participation in placement and other significant decisions made under the Care Act concerning the care and protection of an Aboriginal child or young person.⁹ Discussion of the recommendation noted that under the 1987 Act, consultation occurred in limited circumstances where the placement of an Aboriginal child outside the Aboriginal community was being considered.

- 11.15 However, the review said that:

A requirement for participation in decision making was identified as a key way of ensuring that intervention in Aboriginal and Torres Strait Islander families and communities was culturally appropriate and more likely to be effective in protecting children and young people.

*Many people argued that consultation with the Aboriginal family and community must happen early on in the process so that all those connected with the child or young person can be identified and intervention is appropriate for the particular child or young person and family.*¹⁰

⁷ *ibid.*, Chapter 3, paras. 3.4 and p.35.

⁸ DoCS, *Review of the Children (Care and Protection) Act 1987, Recommendations for Law Reform*, December 1997, p.130.

⁹ *ibid.*, p.128.

¹⁰ *ibid.*, p.129.

- 11.16 The review suggested that the Care Act could require that participation involve an accredited Aboriginal organisation, a recognised Aboriginal person with expertise in child protection, a person nominated by the Aboriginal community to which either or both parents belonged, and/or an Aboriginal person or organisation nominated by the family.¹¹
- 11.17 The final wording of s.13 of the Care Act reflects the recommendations made.

Section 13

- 11.18 Section 13 outlines a preference for the placement of Aboriginal children and young persons with Aboriginal people when they are placed outside their families. The general order of preference for placement is that an Aboriginal child or young person be placed with a member of his or her extended family or kinship group, or if this is not practicable, a member of the Aboriginal community to which he or she belongs, or if this is not practicable, a member of another Aboriginal family residing in the vicinity in which the child or young person normally lives, or if this is not practicable, a suitable person approved by the Director-General after consultation with the child's or young person's Aboriginal family or kinship group and an appropriate Aboriginal organisation.

Requests for services from other agencies

- 11.19 Under ss.17 and 18, DoCS can request a government department or agency, or a non-government agency in receipt of government funding to provide services to the child or young person or his or her family. When DoCS makes such a request, the government department or agency must use its best endeavours to comply.

Requests for assistance from DoCS

- 11.20 Under ss.20 and 21 of the Care Act, a child or young person or his or her parent may seek assistance from DoCS. The matters on which the child or young person can seek assistance are not limited by the Care Act, although a parent can do so in order to obtain services that will enable the child or young person to remain in, or return to the care of, his or her family.
- 11.21 A parent, child or young person, or any other person, may ask DoCS for assistance if there is a serious or persistent conflict between the parents and the child or young person, or if the parents are unable to provide adequate supervision for the child or young person, and this conflict or lack of supervision jeopardises the safety, welfare or well-being of the child or young person. On receiving such a request for assistance, DoCS may provide or arrange for the

¹¹ *ibid.*

provision of such advice or assistance as is necessary to help resolve the conflict or to ensure the child or young person is adequately supervised, or to enable access to appropriate services.¹²

- 11.22 If the differences between the child or young person and the parent are such that it is no longer possible for the child or young person to continue living with his or her parents, the child, young person or parents may request DoCS to attempt to resolve the differences. On receiving such a request, DoCS must seek to resolve the differences by any form of dispute resolution appropriate before making any application to the Children's Court. If DoCS is a party to proceedings in the Court in relation to persistent conflict, then it must formulate an alternative parenting plan in seeking to resolve the conflict. DoCS may apply to the Children's Court for an order approving an alternative parenting plan.¹³

Parent responsibility contracts and s.38 care plans

- 11.23 DoCS can develop a parent responsibility contract that is aimed at improving the parenting skills of the primary care-givers and encouraging them to accept greater responsibility for the child or young person.¹⁴ The contract can deal with attendance for treatment of the primary care-giver or testing for alcohol, drug or other substance abuse, counselling and participation in courses such as behavioural and financial management. The contract cannot exceed six months and must be registered with the Children's Court.
- 11.24 The breach of a parent responsibility contract gives rise to a rebuttable presumption that the child or young person is in need of care and protection.¹⁵
- 11.25 DoCS can also develop a care plan by agreement which may be registered with the Children's Court; if it allocates parental responsibility or aspects of it to a person other than the parents of the child or young person then an order from the Children's Court is needed for the care plan to take effect.¹⁶

Emergency care and protection and assumption of care

- 11.26 DoCS (and Police) may remove a child or young person from a place of risk without first seeking the Children's Court approval. This power can only be exercised by DoCS or by Police if satisfied on reasonable grounds that the child

¹² *Children and Young Persons (Care and Protection) Act 1998* s.113.

¹³ *Children and Young Persons (Care and Protection) Act 1998* ss.114-116.

¹⁴ *Children and Young Persons (Care and Protection) Act 1998* Chapter 4 Division 2 of Part 3.

¹⁵ *Children and Young Persons (Care and Protection) Act 1998* s.38E.

¹⁶ *Children and Young Persons (Care and Protection) Act 1998* s.38.

or young person is at *immediate risk of serious harm* and the making of an AVO would not provide sufficient protection.¹⁷

- 11.27 Additionally, DoCS or a police officer may remove a child from any public place or particular premises if they suspect on reasonable grounds that the child or young person is in need of care and protection, is not subject to the supervision of a responsible adult and lives in or habitually frequents a public place; or if they suspect on reasonable grounds that such person is in need of care and protection, and is participating in child prostitution or pornography, or has recently been on premises associated with those activities.¹⁸
- 11.28 Reasonable suspicion lies “somewhere on a spectrum between certainty and irrationality... Something substantially less than certainty is required.”¹⁹
- 11.29 Alternatively, if DoCS suspects on reasonable grounds that a child or young person is at risk of serious harm but is satisfied that it is not in the best interests of the child or young person to be removed from the premises where he or she is currently located, DoCS may instead assume the care responsibility of the child or young person by means of an order served on the person in charge of the premises.²⁰ Such action does not require that the risk of serious harm is immediate.
- 11.30 If the child or young person is removed, or his or her care assumed, DoCS must apply to the Children’s Court at the first available opportunity but no later than the next sitting day for a care or assessment order; or, if no order is sought, DoCS must explain the reasons for no care application being made.²¹
- 11.31 In accordance with the practice of the Children’s Court, an emergency care and protection application must be heard by a Magistrate no later than three days after the application is filed.²²
- 11.32 The Children’s Court can make an order for the emergency care and protection of a child or young person if it is satisfied that the child or young person is *at risk of serious harm*.²³ The order has effect for a maximum of 14 days. The order can be extended (by application) once only for a further maximum period of 14 days.²⁴
- 11.33 The emergency care and protection order, while in force, places the child or young person in the care responsibility of the Director-General or other person specified in the order.²⁵ The care responsibility may be vested in a designated

¹⁷ *Children and Young Persons (Care and Protection) Act 1998* s.43.

¹⁸ *Children and Young Persons (Care and Protection) Act 1998* s.43.

¹⁹ *Goldie v Commonwealth of Australia* [2002] FCA 433 at [5] per Gray and Lee JJ.

²⁰ *Children and Young Persons (Care and Protection) Act 1998* s.44.

²¹ *Children and Young Persons (Care and Protection) Act 1998* s.45.

²² Children’s Court NSW, *Practice Direction No.28*, para.7.1.

²³ *Children and Young Persons (Care and Protection) Act 1998* s.46(1).

²⁴ *Children and Young Persons (Care and Protection) Act 1998* ss.46(3) and (4).

²⁵ *Children and Young Persons (Care and Protection) Act 1998* s.46 (2).

agency and that responsibility may be delegated by the Director-General or designated agency.²⁶

- 11.34 DoCS is obliged to inform various persons of its actions and can discharge the child or young person from its care responsibility.²⁷ Care responsibility includes the authority to consent to certain medical and dental treatment, to correct and manage the behaviour of the child or young person, to give permission to participate in activities such as school excursions, and to make other decisions that are required in the day to day care and control of the child or young person.²⁸
- 11.35 DoCS or a police officer may apply for and be granted a warrant to enter, search premises and remove a child or young person from those premises if there are reasonable grounds for believing that there is, in those premises, a child or young person at risk of serious harm and the making of an AVO would not provide sufficient protection.²⁹ The requirement for satisfaction of the child being at 'immediate' risk of serious harm, which is necessary for the exercise of the emergency removal power discussed above, does not apply in this instance.

Care applications

- 11.36 Care applications seek from the Children's Court a determination that a child or young person is in need of care and protection, and often seek that some or all aspects of parental responsibility³⁰ for the child or young person be allocated to someone other than the person (or persons) who currently holds it.³¹ Care applications include emergency applications,³² of the kind mentioned earlier although some of the requirements in relation to emergency applications differ from those relating to other care applications.
- 11.37 Generally, care applications can only be made by DoCS. A care application must specify the particular care orders sought and the grounds on which they are sought,³³ and must be accompanied by an affidavit in support of the application.³⁴ The order sought can be varied without leave at any time before a determination as to care and protection has been made, or thereafter only with leave.

²⁶ *Children and Young Persons (Care and Protection) Act 1998* s.49.

²⁷ *Children and Young Persons (Care and Protection) Act 1998* ss.50 and 51.

²⁸ *Children and Young Persons (Care and Protection) Act 1998* s.157.

²⁹ *Children and Young Persons (Care and Protection) Act 1998* s.233(2)

³⁰ 'Parental responsibility' in relation to a child or young person means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children: *Children and Young Persons (Care and Protection) Act 1998* s.3.

³¹ *Children and Young Persons (Care and Protection) Act 1998* Chapter 5, Part 2.

³² *Children and Young Persons (Care and Protection) Act 1998* s.60.

³³ *Children and Young Persons (Care and Protection) Act 1998* s.61(1) and (2).

³⁴ *Children's Court Rule 2000* cl.21.

- 11.38 When making a care application, DoCS must provide the Children's Court with details of the support and assistance provided and the alternatives to a care order that were considered by DoCS before the application was made, and the reasons why those alternatives were rejected. However, the Children's Court cannot dismiss a care application only because it is of the opinion that an appropriate alternative action that could have been taken was not considered or taken.³⁵
- 11.39 DoCS must notify the child or young person who is the subject of the care application that the application has been filed and must also make reasonable efforts to notify the child's or young person's parents, and (if they are able to be located) must serve them with a copy of the care application and all supporting evidence.³⁶
- 11.40 Once a care application has been filed and the relevant parties notified, a Children's Registrar may arrange and conduct a preliminary conference between the parties.³⁷ The purpose of the preliminary conference is to identify areas of agreement, issues in dispute, the possibility of alternative dispute resolution, and any interim orders. Parties can be legally represented at the preliminary conference.
- 11.41 'Establishment' is the term commonly used within the care jurisdiction to describe the finding by the Children's Court that a child or young person is in need of care and protection.
- 11.42 DoCS informed the Inquiry that:

The 'establishment phase' is to satisfy the preliminary threshold question of whether the child is in need of care and protection. Without an affirmative answer to this question, the care jurisdiction has no further role.³⁸

Examination and assessment orders

- 11.43 An application to the Children's Court for an assessment order can be made by the Director-General or by any party to care proceedings. An assessment order is an order for an expert report in relation to the physical, psychological, psychiatric or other medical status of a child or young person, or in relation to the parenting capacity of a person who has parental responsibility or is seeking that responsibility.³⁹ An application for an assessment order should be made no more than seven days after establishment.⁴⁰

³⁵ *Children and Young Persons (Care and Protection) Act 1998* s.63 (1) and (2).

³⁶ *Children and Young Persons (Care and Protection) Act 1998* s.64.

³⁷ *Children and Young Persons (Care and Protection) Act 1998* s.65.

³⁸ Submission: DoCS, Operation of courts in the child protection system, (abridged), pp.4-5.

³⁹ *Children and Young Persons (Care and Protection) Act 1998* Chapter 5, Part 1, Division 6.

⁴⁰ Children's Court NSW, *Standard Direction in Care Matters*, para. 4.

- 11.44 In considering an application for an assessment order, the Children's Court will have regard to a number of factors including whether it is likely to provide relevant information which is unlikely to be obtained elsewhere.⁴¹
- 11.45 If the child or young person is of sufficient understanding to make an informed decision, he or she may refuse to submit to being assessed. A person may also refuse to submit to an assessment of his or her parenting capacity.⁴²
- 11.46 If the order is made, the assessment is carried out by the Children's Court Clinic (the Clinic) which submits a report to the Children's Court (although there is no obligation for the Clinic to accept that appointment if it is unable or unwilling to carry out the assessment and prepare the report, or if it is of the opinion that it is more appropriate for the work to be carried out by another person, in which event the Court may appoint another person to prepare a report).⁴³
- 11.47 If the Children's Court makes an assessment order, it will direct the party who made the application for the assessment to compile a file of documents to be sent to, read, and used by the Clinic as part of the assessment. This file must contain, *inter alia*, any documents that have not been filed in the proceedings which the parties agree should be included, or which the Court orders should be included.⁴⁴
- 11.48 Depending on the particular case, the Clinic might be asked to address issues such as:
- a. the individual characteristics of the child or young person, including any particular cognitive, adaptive, emotional, social and other individual developmental needs, and any mental health or behavioural issues
 - b. the characteristics of relevant parents or carers, including an exploration of any alcohol or other drug dependence, domestic violence or mental health issues, and any intellectual or other disabilities
 - c. the parenting capacity of the parents or carers, including the ability to meet the specific needs of the relevant child or young person;
 - d. strategies that can be put in place to deal with the needs of the child or young person and to promote his or her development, including identification of the kinds of services that should be accessed.⁴⁵
- 11.49 An assessment report submitted to the Children's Court as a result of an assessment order is taken to be a report to the Children's Court rather than evidence tendered by a party.⁴⁶ This independence from any one party is in part aimed at limiting the expert evidence in care proceedings to that of a single

⁴¹ *Children and Young Persons (Care and Protection) Act 1998* s.56.

⁴² *Children and Young Persons (Care and Protection) Act 1998* s.54(2) and (4).

⁴³ *Children and Young Persons (Care and Protection) Act 1998* s.58.

⁴⁴ Children's Court NSW, *Practice Direction No.28*, para.31-32.

⁴⁵ Children's Court Clinic suggestions for revision of the DoCS Business Help Application for an Assessment Guidelines, p.3.

⁴⁶ *Children and Young Persons (Care and Protection) Act 1998* s.59.

expert witness. In a document submitted to the Inquiry by the Clinic, Senior Children's Magistrate, Scott Mitchell is quoted as saying:

No longer is there likely to be the cacophony of conflicting reports which bedevilled care proceedings... in earlier times.⁴⁷

- 11.50 The Clinic does not undertake physical medical assessments, emergency assessments, or counselling. The Clinic informed the Inquiry that it prefers not to undertake placement assessments, defined as an assessment of the environmental characteristics of a potential placement.
- 11.51 When the Clinic accepts a referral from the Children's Court, the Clinic's Director will allocate the assessment to a clinician who is either employed by the Clinic, or who is a member of the Clinic's panel of external clinicians (both employees and panel members are referred to as 'Authorised Clinicians'). Since the Clinic's inception, 85 per cent of the assessments have been carried out by external clinicians.
- 11.52 From the time that he or she is allocated an assessment, the Authorised Clinician becomes a Court-appointed expert in the relevant proceedings, and is bound by the Expert Witness Code of Conduct contained within Schedule 7 of the *Uniform Civil Procedure Rules 2005*. Adherence to this Code of Conduct must be acknowledged in the Authorised Clinician's report.
- 11.53 The Clinic expects Authorised Clinicians to undertake a number of tasks during the course of their assessment, including obtaining background information in relation to the child or young person (from carers or other relevant people); observing and/or interviewing the child or young person, and where appropriate, carrying out psychometric testing of the child or young person; observing and/or interviewing the parents or carers, and where appropriate, carrying out psychometric testing of the parents or carers and interviewing other relevant people (sometimes referred to as carrying out 'collateral interviews').
- 11.54 Authorised Clinicians are encouraged by the Clinic to make contact with the relevant DoCS caseworker to obtain information about the relevant child and his or her family dynamics. All contact made with the caseworker should be recorded in the report.⁴⁸
- 11.55 Authorised Clinicians submit their reports to the Clinic's Director for review, and then the Clinic's Director, if satisfied that the report meets the Clinic's quality standards, submits the report to the Children's Court. The parties to the proceedings can then test the report, and can cross examine the Authorised Clinician in relation to his or her assessment, report, and recommendations.

⁴⁷ Senior Children's Court Magistrate cited in *Report on the Children's Court Clinic*, Attorney General's Department of NSW, August 2007, p.2.

⁴⁸ Children's Court Clinic, *Authorised Clinicians' Handbook*, p.5.

- 11.56 Clinicians are remunerated on a per report basis at a rate of \$140 per hour. A maximum number of hours are allowed for that purpose, depending on the number of children and young persons in the matter. The rate includes all reading, interviews, observation, analysis and report writing.
- 11.57 It usually takes about six weeks for the Clinic to prepare a report from the time the assessment order is made.⁴⁹
- 11.58 In 2006/07, 702 matters involving 1,264 children were referred to the Clinic, a small increase from 690 in 2002/03. The Inquiry has been informed that most of the assessments sought are in relation to parenting capacity and most of the children are aged under one year.

Other expert evidence

- 11.59 Practice Direction 28 specifies that if the child or young person is to be examined or assessed by any other expert and any subsequent report prepared, the leave of the Children's Court is required for its admission.⁵⁰ The expert report can be obtained for therapeutic purposes without the leave of the court.

Care plans and permanency planning

- 11.60 A care plan must be presented to the Children's Court before final orders are made, if an order for the removal of a child or young person from the care of his or her parents is sought. The care plan must provide for, *inter alia*, the proposed allocation of parental responsibility, the kind of placement proposed, contact arrangements, supervision of the placement and the services that need to be provided to the child or young person.⁵¹
- 11.61 The Children's Court must not make a final care order in relation to the care and protection of a child or young person unless it expressly finds that permanency planning for the child or young person has been appropriately and adequately addressed.⁵² This includes a finding as to whether or not there is a realistic possibility of the child or young person being restored to his or her parents.

⁴⁹ Children's Court NSW, *Standard Direction in Care Matters*, para. 4.

⁵⁰ Children's Court NSW, *Practice Direction, No.28*, para.33. The status and operation of practice notes in the care jurisdiction of the Children's Court NSW are discussed in Chapter 13.

⁵¹ *Children and Young Persons (Care and Protection) Act 1998* s.78.

⁵² *Children and Young Persons (Care and Protection) Act 1998* s.83(7).

Care orders

- 11.62 The Children's Court can make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any of the following reasons:
- a. there is no parent available to care for the child or young person
 - b. the parents acknowledge that they have serious difficulties in caring for the child or young person
 - c. the child or young person has been, or is likely to be, physically or sexually abused or ill-treated
 - d. the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers
 - e. the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living
 - f. in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service
 - g. the child or young person is subject to a care and protection order of another state or territory that is not being complied with.⁵³
- 11.63 Once it has been determined that a child or young person is in need of care or protection, the Children's Court can make an order allocating some or all aspects of parental responsibility for the child or young person to the Minister, or to one or both parents or another suitable person or persons, or to a combination of these people. The Children's Court must first have given consideration to the least intrusive intervention principle, and be satisfied that any other order would be insufficient to meet the needs of the child or young person.⁵⁴

Contact

- 11.64 In 2000, s.86 of the Care Act was proclaimed, permitting the Court to make orders as to contact as part of the orders made in care proceedings. The child or young person must be the subject of proceedings before the Court, and the application must be made by a party to the proceedings.

⁵³ *Children and Young Persons (Care and Protection) Act 1998* s.71.

⁵⁴ *Children and Young Persons (Care and Protection) Act 1998* s.79.

- 11.65 The wording of s.86 makes it clear that any order made under that section relates to the minimum requirements in relation to the frequency and duration of contact, and does not prevent more frequent contact with the child or young person, with the consent of the person who has parental responsibility.
- 11.66 Supervised contact can only be ordered with the consent of the putative supervisor (usually supervision is provided by an employee of DoCS). As stated by McDougall J of the Supreme Court:

*It is for the Children's Court, taking into account, among other things, the paramount consideration referred to in s 9(a), to decide whether supervision is required. If it is, the Court should, with the consent of the proposed supervisor, order it. If the supervisor does not accept the requirement then contact should not be given.*⁵⁵

Monitoring

- 11.67 If the Children's Court makes an order allocating parental responsibility for a child or young person to a person other than a parent, it can order that a written report be made to it within a specified period, in relation to the suitability of the arrangements for the care and protection of the child or young person. Such a report must include an assessment of progress in implementing the care plan, including progress towards the achievement of a permanent placement.⁵⁶
- 11.68 If, after consideration of such a report, the Children's Court is not satisfied that proper arrangements have been made for the care and protection of the child or young person, it may order that the case be brought before it so that the existing orders may be reviewed.⁵⁷

Other orders

- 11.69 The Children's Court may also:
- a. make an order accepting written undertakings given by a person responsible for the child or young person or given by the child or young person
 - b. order that support services be provided by a person or organisation who consents to provide such services
 - c. order that a parent or child less than 14 years of age attend a therapeutic program relating to sexually abusive behaviours, provided that the child has

⁵⁵ *Re Liam* [2005] NSWSC 75 at [48].

⁵⁶ *Children and Young Persons (Care and Protection) Act 1998* s.82(1) and (1A).

⁵⁷ *Children and Young Persons (Care and Protection) Act 1998* s.82 (2).

not been convicted in criminal proceedings arising from the same behaviours

- d. order that the child or young person be placed under the supervision of DoCS for a maximum of 12 months, (subject to possible extension for a further 12 months) in situations where, for example, a child or young person has been found to be in need of care and protection, but there is a plan for his or her restoration.⁵⁸

Rescission and variation of care orders

- 11.70 An application for the rescission or variation of a care order previously made by the Children's Court can be made by DoCS, the Children's Guardian, or a person who has (or previously had) parental responsibility for the child or young person, or any person with a sufficient interest in the welfare of the child or young person. Such application requires leave of the Children's Court.⁵⁹
- 11.71 Leave is granted if the Children's Court is satisfied that there has been a significant change in any relevant circumstances since the care order was made or last varied.⁶⁰ Factors which indicate a relevant significant change include (but are not limited to) the following:
 - a. the parents of the child or young person concerned have not met their responsibilities under an applicable care plan or restoration plan
 - b. a finding has been made by the Children's Court under s.82(2) of the Care Act that proper arrangements have not been made for the care or protection of the child or young person.⁶¹

Jurisdiction of the Supreme Court

- 11.72 Nothing in the Care Act limits the jurisdiction of the Supreme Court.⁶² Section 23 of the *Supreme Court Act 1970* states that the Supreme Court "shall have all jurisdictions which may be necessary for the administration of justice in New South Wales."
- 11.73 The Supreme Court also has a 'parens patriae' or welfare jurisdiction derived from the common law. This jurisdiction has been described in the following way:

The parens patriae jurisdiction derives from the royal prerogative and although its origins probably go back to the

⁵⁸ *Children and Young Persons (Care and Protection) Act 1998* ss.73-76(1) and (3).

⁵⁹ *Children and Young Persons (Care and Protection) Act 1998* s.90(1), (3) and (4).

⁶⁰ *Children and Young Persons (Care and Protection) Act 1998* s 90(2).

⁶¹ *Children and Young Persons (Care and Protection) Regulations 2000* cl.6.

⁶² *Children and Young Persons (Care and Protection) Act 1998* s.247.

*time of Edward III, in more recent centuries the Chancery Division in England and the Equity Court in New South Wales have been responsible for exercising the Queen's power to do good to all her subjects, particularly to those who are children or otherwise incapable of looking after themselves. In exercising that jurisdiction the court's concern is predominantly for the welfare of the person involved. It is not a jurisdiction that is bogged down at all with any technicalities. It is a quite separate jurisdiction to the supervisory jurisdiction that is committed to this court by way of prerogative orders under which this court supervises inferior courts and tribunals to make sure that they do justice and right to all people before them.*⁶³

- 11.74 In addition, the Guardianship Tribunal has jurisdiction to determine applications concerning the special medical treatment of children as well as, financial management for children and young persons with an intellectual disability.
- 11.75 In relation to questions concerning the care and protection of children and young persons, the Supreme Court has stated that the Care Act clearly sets out the legislature's intention that the Children's Court should be the primary forum for the determination of applications under the Care Act (*Re Liam*⁶⁴ - discussed below). It has also stated that the legislature clearly intended that appeals from the Children's Court should be heard in the District Court. In the Supreme Court decision of *Re Victoria*⁶⁵, followed by the decisions in *Re Liam* and *Re Elizabeth*,⁶⁶ it was determined that the *parens patriae* jurisdiction of the Supreme Court should not be used as a means to bypass the appeal process set out in the legislation. Accordingly parties should not resort to the *parens patriae* jurisdiction of the Supreme Court in order to appeal interim decisions of the Children's Court. However, the Supreme Court will exercise its *parens patriae* jurisdiction in 'exceptional circumstances' where "to do so is in the best interests of the child, such as where some form of protective order is urgently required and there is no other curial process available to provide it."⁶⁷
- 11.76 In *Re Liam*, in which the Children's Court had made an order delegating its responsibility to determine whether the best interests of the child required that contact be supervised, the Supreme Court determined that the Children's Court, in delegating its responsibility, had failed to consider a matter of real significance (that is, the best interests of the child in relation to contact), and that therefore there was sufficient justification for the Supreme Court to intervene.⁶⁸

⁶³ *Re Frances v Benny* [2005] NSWSC 1207 at [17].

⁶⁴ *Re Liam* [2005] NSWSC 75 at [30]-[31]; *Re Victoria* [2002] NSWSC 647 at [36].

⁶⁵ *Re Victoria* [2002] NSWSC 647 at [36]-[40].

⁶⁶ *Re Elizabeth* [2007] NSWSC 729 at [17]-[18].

⁶⁷ *Re Elizabeth* [2007] NSWSC 729 at [17].

⁶⁸ *Re Liam* [2005] NSWSC 75 at [41], [48]-[50].

- 11.77 In relation to the Supreme Court, the Legal Aid Commission NSW (LAC) submitted:

The majority of 'appeals' currently heard by the Supreme Court are either applications made pursuant to the Court's parens patriae jurisdiction (in which DoCS either seeks different orders than those made by the Children's Court or seeks orders that are unable to be made by the Children's Court at all, such as forced medical treatment or detention of the child) or challenges to the powers of the Children's Court to make the orders it has made (usually, such challenges are made to interim orders since interim orders cannot be appealed to the District Court, but they are not necessarily limited to these). These appeals are heard, most often, in the Equity Division of the Supreme Court, though it is not unheard of to find them in the Common Law or Administrative Law Divisions.⁶⁹

- 11.78 The Supreme Court will, in exceptional circumstances, hear applications for prerogative writs⁷⁰ concerning orders of the Children's Court. The Supreme Court also determines parentage under the *Status of Children Act 1996*, and deals with adoption applications under the *Adoption Act 2000*.

Issues arising

- 11.79 The Care Act establishes a regime whereby ultimate decision making about the removal of children and young persons from their families without their consent and the consequent allocation of parental responsibility, rests with the Court. Decisions about the exercise of that parental responsibility and the day to day care of the child or young person generally reside with DoCS or the agency into whose care the child or young person has been entrusted.
- 11.80 A range of issues were raised with the Inquiry concerning both the operation of the substantive law, and the procedural aspects of the care jurisdiction. Issues in relation to the latter are dealt with in Chapter 13. Matters of substantive law are addressed below.
- 11.81 The Children's Court has some powers after final orders have been made, notably a continuing role in determining contact between the child or young person and his or her family, and a monitoring power requiring DoCS to report back to the Court on the suitability of the arrangements for the care and protection of the child or young person.

⁶⁹ Submission: Legal Aid NSW, 20 February 2008, p.110.

⁷⁰ A prerogative writ is a determination by a superior court that a lower court or an administrative agency has exceeded its legitimate power.

- 11.82 At the heart of the submissions made to the Inquiry was whether the Children's Court should be empowered to embrace a more inquisitorial approach to care matters or confined to the more traditional role of deciding cases brought before it on the evidence adduced by the parties. Often this translates to competing arguments as to the powers that the Children's Court should, and on a 'proper' interpretation of the Care Act, does have, in relation to children and young persons once they have been subject to care proceedings and placed in OOHC.
- 11.83 DoCS recommended that the roles of the Children's Court and designated agencies be clarified, and that only it and the latter should have any responsibility for decisions concerning contact and the like in relation to children in OOHC, subject to review by a tribunal that considers the context in which a decision is made, and subject also to accreditation and monitoring (from a systemic perspective) by the Children's Guardian.
- 11.84 By contrast, the Children's Court, often supported by the LAC, submitted for an extension to its powers.
- 11.85 Integral to understanding the positions adopted by those before the Inquiry, is the extent of oversight, in contrast to judicial decision making, which exists in relation to DoCS. These matters are dealt with later in the report, however, for current purposes it should be noted that the Ombudsman has significant power to review DoCS' decision making and the Children's Guardian has an accreditation and monitoring role with respect to children and young persons in OOHC.

Participation in Children's Court proceedings

- 11.86 An issue before the Inquiry concerned the experience of DoCS caseworkers and legal officers in care proceedings in the Court, as recounted to the Inquiry. While DoCS acknowledged the need for judicial determination in relation to proceedings involving the potential removal of children or young persons from their families, it was critical of many aspects of the Court's operations and performance.
- 11.87 A significant concern which was entertained related to the difficulties which, it was reported, caseworkers often found in dealing with a process that they viewed as unduly adversarial. Where that led to overt criticism from the bench of those caseworkers, or of the Director-General of DoCS, or of DoCS itself, it was asserted that this left them "disempowered and shattered" and with a difficulty in continuing to work with the family involved in the proceedings.⁷¹
- 11.88 As it was put in DoCS' submission to the Inquiry:

The experience of caseworkers and legal practitioners appearing for the Director-General is that they encounter far

⁷¹ Transcript: Public Forum, Role of Courts, 22 February 2008 p.13.

greater criticism, and sometimes intemperate and personal attack, than is usually the case elsewhere. These comments are made from both presiding judicial officers and other practitioners appearing in the jurisdiction...

Caseworkers find that appearing in Court is a stressful experience. They feel, and sometimes, are, under personal and professional attack. This is exacerbated by caseworkers wishing to convey their general concerns about the child and the child's circumstances and the Court and the legal profession wanting to concentrate upon the specific circumstances of why the matter is currently back before the Court.⁷²

11.89 DoCS added that as a result some experienced Departmental legal officers have "refused to practice at Parramatta Children's Court or have asked to be transferred from that Court to other Courts exercising the care jurisdiction" and that some "caseworkers appear to prefer positions that do not require Court attendance."⁷³

11.90 The PSA informed the Inquiry, similarly, that some of its members reported that Magistrates "often treat caseworkers in an inappropriate manner, undermining and insulting them for the work they have produced."⁷⁴

11.91 Additionally, the attention of the Inquiry was brought to the matter of *Re Frances and Benny* [2005] NSWSC 1207, where his Honour Young CJ in Eq. quoted the Senior Children's Magistrate (from the transcript of the Children's Court) as having observed:

This is appalling. The Director-General has got more solicitors working for him than enough and he has got the resources of the profession, but he just deliberately, it seems to me, puts up a case that is... almost impossible to deal with. No reason, just - I don't think it is obtuseness. I don't know if it is stupidity or what it is.⁷⁵

11.92 That was a case where the application for a care order was dismissed by reason of the finding in the Children's Court that there was insufficient evidence to support the application. In holding that it was incorrect for the application to have been dismissed, Young CJ in Eq. said of the Senior Children's Magistrate's approach to the evidence:

I can well understand him being peeved, though it is not really the fault of the Department alone. Unfortunately, in this area,

⁷² Submission: DoCS, Operation of courts in the child protection system, (abridged), p.10.

⁷³ *ibid.*

⁷⁴ Submission: Public Service Association, 17 March 2008, p.8.

⁷⁵ *Re Frances and Benny* [2005] NSWSC 1207 at [13].

*case officers spend a very, very short time with the Department and one tends to find a large number of them in any particular case. There are a tremendous number of children in need in New South Wales. Unfortunately, those who have to attend to their problems and the courts can well understand why every witness is not available on every occasion and why the evidence presented by the Department would not necessarily be in a perfect state. However, that is no reason why proceedings involving children should be dismissed.*⁷⁶

- 11.93 Another area of concern that was raised by DoCS, by the LAC, and by the Aboriginal Legal Service was the practice of the Court in displacing fixtures, and bringing the proceedings on for hearing at an earlier date, and sometimes at a different venue, without sufficient regard being given to the impact on the parties in terms of maintaining the continuity of legal representation, with a knowledge of the case and the confidence of the parties, or to the costs occasioned to the LAC where this occurs.⁷⁷
- 11.94 In a submission provided to the Inquiry in response to the Public Forum concerning the operation of the Courts, and in response to the DoCS submission, the Senior Children's Magistrate took issue with the suggestions that the proceedings in the Court are conducted with undue legalism, that personal and intemperate attacks were made on caseworkers and legal practitioners, and that hearing dates were changed or cases moved without the arguments of the parties being given proper consideration.⁷⁸
- 11.95 In this submission, the Senior Children's Magistrate drew attention to a number of cases that he suggested showed that DoCS' decisions had been inappropriate, some of which he variously described as "idiosyncratic," "inexpert" or "unprofessional," and noted the "occasional need for the Court...to advise and, when that advice is rejected, warn and cajole DoCS to lift its game regarding vulnerable children."⁷⁹ Transcripts of the cases were attached in an addendum to this submission.
- 11.96 He accepted that, on occasions:
- Children's Magistrates have expressed their frustration and sometimes outrage regarding the behaviour of the department and/or its apparent failure to act protectively towards children the subject of proceedings.*⁸⁰
- 11.97 One of the transcripts provided contains observations to the following effect:

⁷⁶ *Re Frances and Benny* [2005] NSWSC 1207 at [22].

⁷⁷ Transcript: Public Forum, Role of Courts, 22 February 2008, pp.18-21.

⁷⁸ Submission: Children's Court NSW, 18 April 2008, pp.4-6.

⁷⁹ Submission: Children's Court NSW, 18 April 2008, pp.8, 13 and 14; Transcript: Inquiry meeting with Senior Children's Court Magistrate, 29 April 2008, p.60.

⁸⁰ Submission: Children's Court NSW, 18 April 2008, p.4.

His Honour: And they were wrong about that...

...I have no reason to be uncomfortable about the father, I don't know the father, I withdraw that, I am not able to say I have no reason, but I don't know the father and I'm certainly not making any accusations against the father and I note that the Director-General is comfortable with the father as a protective person for the child and I note that the allegation has never been made by the child against the father but the Director-General was recklessly able to believe the mother but now seems to have been a really negligent and dangerous thing for the Director-General to have done. I do not want to do the same thing by assuming that the allegations that the mother makes are without foundation just in case I am wrong about it. I'd like to be a little bit more protective than the Director-General obviously wanted to be.⁸¹

- 11.98 A second transcript provided records the Senior Children's Magistrates observing:

I can't understand how the Director-General could allow that litany of danger, a fair way of describing it, to go unattended for so long without apparently satisfying herself that those four children are in safe hands. I mean the Director-General knows about those matters because they are contained in his officer's affidavit but he appears to have done nothing about it.

...Well I must say if I had anyone else in whom I could place the parental responsibility for this child I would be doing it because on the track record that is shown in your officer's affidavit, you have to wonder if she is going to be properly cared for but I have no choice.⁸²

- 11.99 When the concerns which had been raised by DoCS, and the observations in the several transcripts, were brought to the attention of the Senior Children's Magistrate, he made it clear that his purpose had been to "raise the standard" of the work performed by DoCS, and also to ensure that cases were heard without delay.⁸³
- 11.100 The Senior Children's Court Magistrate informed the Inquiry additionally that it had not been his experience that DoCS legal officers had refused to practice at Parramatta,⁸⁴ and he drew to its attention the visits to the Children's Court

⁸¹ Children's Court NSW, transcript in the matter of *Re A*, 11 April 2008, Senior Children's Magistrate Mitchell, pp.5, 6 and 7.

⁸² Children's Court NSW, transcript in the matter of *Re C*, 7 April 2008, Senior Children's Magistrate Mitchell, pp.12-14.

⁸³ Transcript: Inquiry meeting with representatives of the Children's Court NSW, 29 April 2008, pp.54-55 and 23-26.

⁸⁴ *ibid.*, p.51.

which he had encouraged DoCS officers to make, as well as the occasions on which he had met with DoCS staff on social occasions and had given talks to them on a variety of relevant topics.

- 11.101 The Inquiry acknowledges the value of the kind of interaction mentioned, and notes the existence of a working group which could, with a degree of mutual trust, address some of the issues raised. At the same time it notes the cogent caution of the former President of the Court of Appeal of NSW, given in another context but equally relevant for all judicial officers that “the obligation to act without fear or favour does not authorise the venting of personal spleen even when error is clearly established.”⁸⁵
- 11.102 It is accepted that the transcripts provided relate to proceedings that represent only a fraction of the Court’s hearings, and that the Inquiry has only received the view of the Senior Children’s Magistrate in relation to the concerns expressed to the Inquiry by DoCS and by the PSA concerning the perceptions of DoCS staff; and in relation to the views of DoCS Director Legal Services and of the legal officers representing the LAC and Aboriginal Legal Service, concerning the problems said to arise from the changes in fixtures and venues for hearing.
- 11.103 It also acknowledges that the individual cases brought to notice may well have involved errors of judgement or insufficient attention on the part of DoCS to the safety, welfare or well-being of the children involved.
- 11.104 The Inquiry is, however, concerned with the reported perception of DoCS caseworkers and legal officers that their professionalism and that of DoCS, the primary litigant in the care jurisdiction of the Court, is undervalued, and that they are prone to personal criticism from the Bench.
- 11.105 The context in which care proceedings arise cannot be overlooked. Proceedings of this kind in the Children’s Court almost always commence in an atmosphere of acrimony and of great concern on the part of the family that they might lose their child; as well as concern on the part of DoCS staff as to the safety, welfare and well-being of the child, and of the need to be able to establish a positive working relationship if the child is in fact removed, either temporarily or on a long term basis.
- 11.106 In these circumstances of a potentially fraught relationship, the parties need to be confident that their cases will be advanced by those lawyers who they know, in whom they have established confidence, and who are appropriately apprised of the facts. Moreover, there is a risk that comments made in the presence of the family which are unduly critical or dismissive of DoCS, are likely to impact adversely on the trust that is essential if DoCS staff are to work constructively with the child or young person who is the subject of the proceedings, and his or her parents, for example in relation to contact, restoration and support if that

⁸⁵ The Hon K Mason AC, “Throwing Stones: A Cost-Benefit Analysis of Judges Being Offensive to Each Other,” *The Judicial Review Vol 9 No.1*, September 2008, pp.66-67.

child is taken into care. Additionally if DoCS workers feel, whether justifiably or not, that they are likely to be subject to sustained criticism, then this may adversely affect the quality of their case preparation or appearance in Court.

- 11.107 It is not the purpose of this Inquiry to ascribe fault to any party in relation to the matters canvassed, or to express any view in relation to the correctness or otherwise of the decisions reviewed in the submissions. Rather, its concern relates to the clear impression it has formed, from the material placed before it, that the relationship between DoCS and the Court does appear at least at times, to be strained, to the point where the best interests of the children and young persons involved may not always be served.
- 11.108 The reasons for this may include the nature of the jurisdiction which lends itself to strong emotional reactions, the strong and understandable desire of the Court to reach a correct decision, the pressure placed on DoCS staff working in a very challenging environment, a perception of and, at times, the reality of poor practice on the part of DoCS, the fact that it is a party in every case, the small pool of lawyers (mainly legally aided) who appear before the Court, and the personalities of those involved.
- 11.109 The Inquiry is strongly of the view that the relationship between DoCS and the Children's Court should change to one which is less adversarial, and more conducive to working cooperatively so as to ensure the safety, welfare and well-being of the children and young persons involved in care proceedings. This objective would be assisted by DoCS placing relevant, accurate and fair material before the Court in a timely way, and by the Court giving due respect to the professionalism of DoCS staff and making due allowance for the substantial pressures under which they necessarily work.
- 11.110 What follows in this, and the succeeding chapters, is an examination of various matters which may have contributed, collectively, to an unnecessary degree of complexity or conflict in care proceedings. The recommendations that are later set out are designed to restore a better working relationship between the Children's Court and DoCS, and to improve the relationships between the parties appearing in the Court in the best interests of the children and young persons who are subject to care proceedings.

Principles to be applied in care proceedings

- 11.111 Much has been said about the principles in the Care Act, both to the Inquiry and in various discussion papers which preceded it, in particular the Ombudsman's discussion paper, *Care Proceedings in the Children's Court* dated July 2006, and DoCS' discussion paper, *Statutory Child Protection in NSW: issues and options for reform* (the Discussion Paper) dated October 2006.
- 11.112 Concerns have been expressed, *inter alia*, about balancing the least intrusive intervention principle with the principle that, in all actions and decisions made

under the Act, the safety, welfare and well-being of the child or young person, is the paramount consideration.

- 11.113 The Ombudsman, from his investigations and reviews, identified cases where the level of protective intervention by DoCS following reports of risk of harm was not commensurate with the apparent level of risk to the child or young person. Others, most notably the LAC, gave examples to the Ombudsman and to the Inquiry of cases where, in the view of its lawyers, DoCS had intervened to remove a child in circumstances where there were other less intrusive measures available.
- 11.114 The Inquiry agrees with the comment made by DoCS that a number of these examples do not necessarily address the question of whether there is confusion about the concept of the least intrusive intervention.⁸⁶
- 11.115 The Senior Children's Magistrate was of the view that the principles are clear in the legislation and well understood by lawyers and by the Court.⁸⁷
- 11.116 In a meeting with the Inquiry, DoCS' Director, Legal Services also expressed the view that the courts properly apply the principles. In his view "the biggest problem I think comes in terms of the caseworkers rather than from the courts."⁸⁸
- 11.117 In its Discussion Paper, DoCS opined that the practical effects of the least intrusive intervention principle, the framing of the paramount interest principle, and the reference to parental rights in the objects of the Care Act⁸⁹ appear to be that the child centred approach of decision making is disrupted.⁹⁰
- 11.118 In addition, in its Discussion Paper DoCS also noted that the least intrusive intervention principle is in conflict with the policy goal of providing stability for children in OOHC.⁹¹ DoCS noted that s.9(f) of the Care Act was introduced in 2001 in order to promote placement stability. DoCS argued that stability and permanency would be assisted if the conflict between the least intrusive intervention and permanency planning principles was addressed.⁹²
- 11.119 It suggests a revision of the principles in its Discussion Paper by reframing s.9 as follows:

The principles to be applied in the administration of this Act are as follows:

⁸⁶ NSW Ombudsman, *Care Proceedings in the Children's Court, Discussion Paper*, 2006, p.6.

⁸⁷ *ibid.*

⁸⁸ Transcript: Inquiry meeting with DoCS lawyers, 1 February 2008, p.3.

⁸⁹ *Children and Young Persons (Care and Protection) Act 1998* s.8(a) and 9(a).

⁹⁰ DoCS, *Statutory Child Protection in NSW: issues and options for reform, Discussion Paper for review*, October 2006, p.28.

⁹¹ *ibid.*

⁹² *ibid.*, p.31.

In all actions and decisions concerning a particular child or young person that are made under this Act the safety, welfare and well-being of the child or young person must be the paramount consideration.

- a. *A child or young person must (wherever a child or young person is able to form his or her own views) be given an opportunity to express views freely on a matter concerning his or her safety, welfare and well-being. Those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances in which a decision is to be made or action taken.*
- b. *Account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person in all actions and decisions made under this Act that significantly affect a child or young person, and be reflected in any care planning and cultural care plan for the child or young person.*
- c. *If a child or young person is in need of care and protection and is temporarily or permanently withdrawn from his or her family environment then:*
 - i. *the earliest practicable consideration must be given to the possibility and appropriateness of restoration to the birth family. A decision on the viability of restoration should, other than in exceptional circumstances, be taken within six months of the child or young person entering out-of-home care where the child is under two years of age and, for any other child or a young person, within 12 months of entry into out-of-home care.*
 - ii. *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.*
 - iii. *unless it is contrary to his or her best interests and taking into account the views of the child or young person, the child or young person should retain relationships with people significant to the child or young person, including birth or adoptive parents, siblings, extended family, peers, family friends and community.*
- d. *In considering whether restoration of a child or young person is possible and appropriate the relevant considerations are whether restoration:*

- i. *could be achieved within a timeframe that is likely to minimise significant developmental disruption to the child or young person.*
 - ii. *will provide the child or young person with the opportunity to meet developmental milestones appropriate to that child or young person, and in any event, whether restoration can and should (other than in exceptional circumstances) occur within two years of the child or young person entering out-of-home care.*
- e. *If restoration is not considered possible and appropriate for a child or young person in out-of-home care, then the provision of a safe, secure, nurturing and stable environment is to be sought for the child or young person in a timely manner. In seeking this, regard is to be had to:*
- i. *the circumstances and needs of the child or young person;*
 - ii. *the views of the child or young person;*
 - iii. *the principle that, the younger the age of the child, the greater the need for early decisions to be made in relation to a stable and permanent placement;*
 - iv. *the need to avoid the instability and uncertainty arising from a succession of different placements or other care arrangements;*
 - v. *the paramount consideration in all decisions and actions, as set out in (a), is to take priority over any interests of parents; and*
 - vi. *proposed contact between a child or young person and other significant people in his or her life being designed to meet the needs of the child or young person.*⁹³

11.120 DoCS stated that it would also be necessary to amend the objects of the Care Act, so that s. 8(a) could read:

*that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them.*⁹⁴

11.121 In submissions responding to the Discussion Paper, the redrafting of s.8(a) was generally supported by the Ombudsman and the LAC.⁹⁵ The proposed change

⁹³ *ibid.*, pp.32-33.

⁹⁴ *ibid.*, p.33.

⁹⁵ NSW Ombudsman Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, p.10; Legal Aid NSW Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, p.6.

to s.9 received a mixed reaction, with many suggested variations. Generally, Police, Education, Health, the Children's Guardian, the Foster Care Association, and Barnados were in agreement with clarifying the principles and reducing conflict with the 'least intrusive' principle.⁹⁶

- 11.122 By contrast, a number of agencies wanted the 'least intrusive' principle retained, including the Law Society of NSW (the Law Society) and UnitingCare Burnside.⁹⁷
- 11.123 In submissions made to the review of the Care Act, prior to the publication of the DoCS Discussion Paper, a number of parties submitted that the objects and principles of the legislation do not adequately reflect the importance of early intervention. For example, UnitingCare Burnside submitted that a principle should be included that when a child or young person is at risk or has made a request for assistance, intervening early with support services will be a priority.
- 11.124 The Ombudsman submitted that where grounds for a care order had been established, there should be a presumption that the child will not be returned to the family unless and until risks are ameliorated and there should be an amendment to s.9(d) to this effect.
- 11.125 In his submission to the Inquiry, the Ombudsman supported the removal of the 'least intrusive' principle because of evidence suggesting that, in practice, it can be open to misinterpretation. He also questioned whether that principle is necessary in light of the clear and overriding principles of intervention in s.36.
- 11.126 The LAC informed the Inquiry that it is not always apparent what is in the best interests of a child for the purposes of applying the principles specified in s.9 of the Care Act. The LAC stated:

*There can sometimes be some difficulty I think with people making determinations as to what is in the best interests of the child because the Act does not set out what should be considered when considering what is in the best interests of the child and there are a number of factors that go into that.*⁹⁸

- 11.127 The Combined Community Legal Centres Group stated:

In relation to s.9 of the Act, we would suggest consideration of an expansion to include a reference to the Court considering

⁹⁶ NSW Police Force Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, p.4; Department of Education and Training Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, 21 March 2007, p.7; NSW Health Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, p.3; Children's Guardian Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, 4 April 2007, p.2; Foster Care Association Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, 20 March 2007, p.4; Barnados Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, 28 March 2007, p.1.

⁹⁷ Law Society of NSW Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, 3 April 2007, p.6; UnitingCare Burnside Submission to DoCS, *Statutory Child Protection in NSW: Discussion Paper*, March 2007, p.16.

⁹⁸ Transcript: Public Forum, Role of Courts, 22 February 2008, p.31.

*the psychological and/or harmful consequences of removal as opposed to the child remaining in the current circumstances.*⁹⁹

11.128 Women's Legal Services submitted that DoCS situates the paramount principles contained in s.9 against the rights of parents. It submitted that the best interests of children are frequently aligned with the interests of parents, and that it is not necessary to diminish the rights of parents in order to maintain a primary focus on the rights of the child. It stated that the *UN Convention on the Rights of the Child* explicitly recognises the rights, as well as the responsibilities and duties, of parents.

11.129 A retired Children's Magistrate submitted:

*The application of the 'least intrusive' provision is not assisted by the shorthand way in which it is commonly referred to, overlooking the qualification "that is consistent with the paramount concern to protect the child from harm and promotes the child's development" ...Further [s 9(d) of the Care Act] introduces the additional consideration of intervention in the life of the child's 'family' that is not followed through to other provisions of the Act.*¹⁰⁰

11.130 At the Public Forum on the Role of Courts, a representative from Health suggested that a further principle be inserted into the Care Act to reflect what it sees as a 'desirable object,' being the "continuity or permanency of placement."¹⁰¹

11.131 The Inquiry is of the view that the principles set out in s.9 and s.36 are not, of themselves, inconsistent or poorly drafted. However, the evidence before the Inquiry, particularly of caseworkers who may be reluctant to remove a child or young person because of a mistaken belief of the paramountcy of the 'least intrusive' principle or who may delay a removal while attempting other possible interventions, is of great concern.

11.132 The Inquiry has carefully considered the amendment proposed by DoCS. It finds a number of aspects attractive, in particular elevating the safety, welfare and well-being of the child by having the other principles enumerated below it, and making reference to early consideration of restoration and the need for a stable, permanent placement. It also agrees that the combination of s.9(d) and s.36 has the effect of diluting the least intrusive principle. On balance, however it is not persuaded that the difficulties or tensions exposed to the Inquiry are best resolved by repeal of the least intrusive principle.

11.133 Ultimately, the Inquiry agrees with Professor Patrick Parkinson, Professor of Law, University of Sydney, who told the Inquiry:

⁹⁹ Submission: Combined Community Legal Centres Group, p.6.

¹⁰⁰ Submission: John Crawford, 29 February 2008, p.5.

¹⁰¹ Transcript: Public Forum, Role of Courts, 22 February 2008, p.69.

*The least intrusive principle has been a staple of child protection legislation around the world for the last 20 or 30 years. It is nothing new and if one looks at other legislation you will find it is pretty well established. It is just an obvious principle of social work. One does not go to the option of removing the children from parents unless interventions are needed - basic human rights. I don't see it as conflicting with paramountcy because both of them have always been principles of child protection legislation.*¹⁰²

- 11.134 The Inquiry, however, is of the view that the objects as currently set out in s.8(a) can be interpreted to 'disrupt' the best interests of the child being the prevailing consideration. The reference to the rights, powers and duties of a parent or other responsible person sits uneasily with ss.9(a), 9(d) and 36(a). Accordingly, the Inquiry accepts the desirability of adopting the alternative wording suggested by DoCS for s.8(a) of the Care Act.
- 11.135 In addition, the Inquiry is of the view that section 9 should be recast so that the paramount consideration currently contained in s.9(a) sits above the remaining principles.
- 11.136 DoCS' current Casework Practice policy, Taking Action in the Children's Court, states that action in the Children's Court is taken when all less intrusive casework actions have not met the care and protection needs of a child or young person. This policy suggests that court proceedings are not appropriate unless other casework actions have previously been attempted. The policy does not identify clearly the distinction between the principles of ensuring the child's or young person's safety, welfare and well-being are paramount and how this interfaces with the least intrusive principles. As such the Inquiry is of the view that this policy requires review to ensure there is better guidance for its staff in understanding these principles, that would accord with the amendments proposed.
- 11.137 Further, the changes recommended to casework practices and supervision (discussed elsewhere in the report) should improve the decision making of caseworkers and align decisions with the principles enunciated in Care Act.

Aboriginal and Torres Strait Islander principles

Self-determination

- 11.138 The review of the 1987 Act resulted in self-determination being included in s.11 of the Care Act. This section does not, however, address the recommendation made following the review of the 1987 Act that to support self-determination:

¹⁰² Transcript: Inquiry meeting with Professor Parkinson, 27 February 2008, p.34.

*The Act should give the Minister for Community Services the power to delegate certain departmental functions to Aboriginal and Torres Strait Islander people to enable a greater degree of self-determination in the work of child protection.*¹⁰³

- 11.139 SNAICC recommended that the implementation of self-determination would require the transfer of aspects of control and resources from government agencies to local Aboriginal communities.
- 11.140 The Inquiry notes the finding of the NSW Children's Guardian following her analysis in 2007 that in NSW:

*The results of the 2006/07 audit showed that Aboriginal children and young persons under the parental responsibility of the Principal Officer [of an Aboriginal agency] were the least likely to have the following essential information recorded: birth family contact details, developmental history, current medication, doctor's contact details, past school reports, current school reports and immunisation status. In addition, they were the least likely to have a case conference convened to conduct the plan or review.*¹⁰⁴

- 11.141 The example of Manitoba, Canada, discussed in Chapter 18, shows that where such functions have been delegated, responsibility is dependent on the presence of Aboriginal agencies with capacity to discharge them effectively. Particularly in the case of the Métis people in Manitoba, a period of capacity building was required to enable the community to be in a position to start to undertake these responsibilities.
- 11.142 Referring to the concept of a statutory child protection service controlled and run by the Aboriginal community in Australia, Tomison and Stanley in 2001 referred to attempts to develop Indigenous led child protection and family support services in Canada. They stated:

Unfortunately, implementation of such a model is [not] easy, nor has it necessarily led to significant improvements in Canadian First Nation communities' health and well-being and/or a reduction in violence. Although providing an example of how to move forward with more effective services ... [the] model has some serious 'gaps'. It does not seem to address issues of how to place a child within their Indigenous community if the community is beset by familial violence, substance abuse etc. Nor does it provide a solution to the mainstream statutory authority's (or Aboriginal authority's) reluctance to intervene with Aboriginal families, which may leave children in serious

¹⁰³ DoCS, *Review of the Children (Care and Protection) Act 1987, Recommendations for Law Reform*, December 1997, p.126.

¹⁰⁴ Correspondence: NSW Children's Guardian, 21 July 2008, p.1.

*harm. Finally, it does not address the issue of effective prevention and/or community development to minimise the removal of children and violence in the first place.*¹⁰⁵

- 11.143 Under the DoCS *Aboriginal Strategic Commitment 2006-2011*, (discussed in Chapter 18) DoCS has an obligation to work with Aboriginal communities and Aboriginal and non-Aboriginal NGOs funded by DoCS to increase their capacity to deliver prevention and early intervention services for Aboriginal children and young persons and their families and communities, and to work with DoCS funded Aboriginal organisations to ensure they are fully functional, sustainable and have good governance.
- 11.144 However, the quantity and difficulty of the work required to bring the Aboriginal NGOs to the point where they can realistically take full responsibility for the safety and welfare of Aboriginal children should not be underestimated. The Inquiry would hold similar concerns to those documented above about any attempt to delegate functions for the care and protection of children to agencies that were not sufficiently prepared, supported, staffed or funded to perform such functions to the level required to keep children safe and to protect their welfare. This matter has been addressed in Chapter 9.

Aboriginal child placement principles

- 11.145 Although welcomed for its intent to preserve the identity, culture and heritage of each child and young person and its recognition of the rights of Aboriginal people to keep their culture and identity alive by passing them on to their children, the Aboriginal Placement Principles have also been criticised for their limitations. In a recent examination of Aboriginal OOHC in Australia, Valentine and Gray state that the most significant limitation is that:

*There is no requirement for Aboriginal children to be placed via an Aboriginal agency and many Aboriginal caregivers, for historical reasons, will not work with state agencies. In addition, even if an Aboriginal child is placed with an Aboriginal family by a non-Aboriginal agency, particularly if not supervised by an Aboriginal worker, Aboriginal culture is suppressed because the placement is subject to the dominant rules, mores, and conventions that inform non-Aboriginal policies, procedures, and practices as well as the values of non-Aboriginal workers.*¹⁰⁶

- 11.146 Similar concerns were raised by a number of agencies which made submissions to the review of the Care Act, prior to the publication of the DoCS Discussion Paper.

¹⁰⁵ A Tomison and J Stanley, "Strategic Directions in Child Protection: Informing Policy and Practice", 2001, *South Australian Department of Human Services*, p.85 www.aifs.gov.au.

¹⁰⁶ Valentine and Gray, "Keeping Them Home: Aboriginal Out-of-Home Care in Australia", *Families in Society*, Vol.87 Issue 4, 2006, p.538-539.

11.147 It became apparent to the Inquiry that there exists among DoCS caseworkers, and the community more generally, a range of views about actions that must be undertaken in order to satisfy the Aboriginal and Torres Strait Islander principles within the Care Act (both the Aboriginal Placement Principles, and the principles at ss.11, 12 and 14). This range of interpretations in turn influenced the range of views about whether the principles are themselves satisfactory, and whether they are being satisfactorily applied in practice.

11.148 The Inquiry heard that there were concerns regarding the frequency and adequacy of consultation by DoCS with Aboriginal people and Services particularly in relation to the cultural and family background of those involved in care proceedings. AbSec informed the Inquiry:

The legislation and the regulations and the policies that are written say that DoCS needs to consult Aboriginal people. Usually they rely on consulting an Aboriginal DoCS worker who has been in the Department for 20 years and has more of a DoCS mentality than a strong relationship with the community. There are a lot of Aboriginal caseworkers out there who still have a relationship with the community, but it is often different when you're working within the Department from working with a community organisation. That feedback that an Aboriginal caseworker would give from within the Department would be a lot different, I think, from what would be received if they had asked a community organisation for advice.¹⁰⁷

11.149 Concerns were expressed regarding the differences in compliance with s.13 from CSC to CSC, and from caseworker to caseworker. A representative of the Aboriginal Legal Service said:

There are certain areas, and in particular Wagga, has a very high compliance with s.13(1)(a) where that child goes directly to family or kinship groups. The rest of the regions the Aboriginal Legal Service is covering have a relatively poor compliance with that particular section of the Act.¹⁰⁸

11.150 In its submission, the Aboriginal Legal Service stated:

Section 13 of the Care Act should be considered even before the matter comes to court. In the experience of the Aboriginal Legal Service, the s.13 principles are only addressed at the final stages of a matter and in the development of a Care Plan.¹⁰⁹

¹⁰⁷ Transcript: Inquiry meeting with representatives of the Aboriginal Child, Family and Community Care State Secretariat, 18 December 2007, p.22.

¹⁰⁸ Transcript: Public Forum, Aboriginal Communities, 24 April 2008, p.43.

¹⁰⁹ Submission: Aboriginal Legal Service NSW, p.7.

DoCS' comments on the application of the Aboriginal Placement Principles

11.151 DoCS reported that a growing number of Aboriginal children are placed in accordance with the Aboriginal Placement Principles, rising from 2,262 (84.2 per cent) at 30 June 2005 to 3,284 (85 per cent) at 30 June 2007.¹¹⁰ This number remained steady as at 30 June 2008.¹¹¹ However, the Inquiry heard that DoCS, in common with other agencies, has recognised that the recording of children's Aboriginal status has not been consistent, and that it is now taking steps to improve the collection and recording of information about children's Aboriginality.

11.152 Further, the Inquiry heard that data extraction and analysis is currently not sufficiently sophisticated to report on compliance with the Aboriginal Placement Principles. The Inquiry asked DoCS, if it was possible to provide the number of children and young persons placed in compliance with each of the subparagraphs of the Aboriginal Placement Principles. Ms Mallett, Acting Deputy Director-General, DoCS, responded:

*I don't think the system would be that sophisticated in terms of all individual boxes. What it would have is an overall - 'tick' is not the right word, but anyway - mark, or indicator, that one of those four has been followed, or believed to be followed, in these circumstances.*¹¹²

11.153 The presence of a mark placed by a caseworker on the file is not a sufficient basis for a claim that Aboriginal Placement Principles have been met. For any such conclusion to be reached more is needed by way of a commentary as to what in fact was done.

11.154 DoCS advised the Inquiry, in relation to consultation:

*We don't have one standard protocol for across the State, but every region has a regional protocol that identifies what the individual differences may be for that individual region and their units.*¹¹³

11.155 Regional DoCS staff members provided information on the current implementation of the Aboriginal Placement Principles. At many CSCs, consultation occurred with Aboriginal caseworkers rather than with people living in the relevant community from which the child or young person came. For example, an Aboriginal caseworker informed the Inquiry:

¹¹⁰ DoCS, *Annual Report 2006/07*, p.55.

¹¹¹ DoCS, *Annual Report 2007/08*, p.56.

¹¹² Transcript: Public Forum, Aboriginal Communities, 24 April 2008, p.36.

¹¹³ *ibid.*, p.37.

Caseworker: I did actually recommend that because one of the children had high needs in regards to education and if we did place him with a family member, it would have taken him away from gaining the supports that he would get from that. It was at (X School) and it's such a hard school to get into. This child actually needed that school more than he would have needed the cultural identity. That was my decision because if we did relocate him, they don't have those services available.

Counsel Assisting: Did you talk to anyone from his extended family or the broader community before coming to that decision?

Caseworker: No, I did not. That was purely my decision on the evidence and the information that I had.¹¹⁴

- 11.156 One manager described how, because of the confidentiality issues involved, consultation may occur with Aboriginal community members employed in other agencies who understood the confidentiality needs, such as Aboriginal health workers.
- 11.157 In one CSC in Western Region, caseworkers advised the Inquiry of the extent to which the limited number of carers, and the large geographical area, impacted on their ability to place children and young persons in their own community.
- 11.158 The Inquiry was informed that a lack of Aboriginal carers was a barrier to proper implementation of the Aboriginal Placement Principles in another CSC in Western Region.
- 11.159 In a third CSC in the same Region, the Inquiry was advised of some strategies that the CSC used to try to engage effectively with the Aboriginal community:

We tend to work on a case by case basis. I meet with the local Aboriginal elders and due to some of our former staffing, the Aboriginal staff who have actually left our office at the moment, we enjoy a very good relationship with the women elders group who have good oversight of family issues and needs. We also have a process in the Western Region of Aboriginal consultation around every report that comes at certain points where there is decision making about a child who is an Aboriginal child. We work together on that. I think that is the whole area of work that we could do a lot more on. Our Aboriginal staff positions have been vacant now for the last nine months or so.¹¹⁵

¹¹⁴ Transcript: Inquiry meeting with DoCS staff, CSC Southern Region.

¹¹⁵ Transcript: Inquiry meeting with DoCS staff, CSC Western Region.

- 11.160 The Inquiry notes that the third projected result of the *DoCS Aboriginal Strategic Commitment 2006-2011* is that the Aboriginal Placement Principles will be consistently applied across all DoCS Regions. Quality of data on Aboriginal identity is likely to remain an issue in assessing progress against this aim, and the current lack of capacity of the system to provide reports on the level of compliance with each of the subsections of s.13 of the Care Act will also influence DoCS ability to measure progress.
- 11.161 Given the way in which consultation has been interpreted in different CSCs, and the fact that such practices may or may not meet the requirements of s.13 of the Care Act, depending on the connection of the specific Aboriginal caseworker or consultant to the family and/or community of the Aboriginal child or young person, it would appear that clear guidelines need to be developed and implemented to assist caseworkers to consistently and meaningfully apply the Aboriginal Placement Principles. There may be regional differences in their application which should be accommodated.
- 11.162 DoCS is currently developing Aboriginal consultation guidelines in order to provide an operationally consistent framework for the process of Aboriginal consultation, an initiative which the Inquiry supports, and which is further discussed in Chapter 18.¹¹⁶

DoCS' requests for services from other agencies

- 11.163 A number of agencies submitted that s.18 of the Care Act should be amended to oblige non-government agencies in receipt of government funding, for relevant services, to use their best endeavours to supply those services in response to requests from DoCS. The Act currently requires only government agencies to do so. The Inquiry agrees.

Requests for assistance

- 11.164 Submissions were made to the Inquiry and to previous reviews that although a request for assistance from DoCS can be sought without a report being made to DoCS, in practice a report must be made in relation to a child or young person before any assistance is considered. This seems to contradict the reason for inclusion of this section in the Act, namely to provide an entry point for assistance without the need for any assumption or stigmatisation that the family is now one that is 'known to DoCS.'
- 11.165 A number of peak bodies submitted that ss.20 and 21 of the Care Act should be amended to widen the class of persons able to request assistance on behalf of a parent or child or young person. The Inquiry agrees.
- 11.166 The Inquiry sought details on the numbers of requests for assistance made by children or young persons (s.20) or by parents (s.21). The data provided is set

¹¹⁶ DoCS, *Update on child protection and out-of-home care major projects*, June 2008, p.3.

out in Chapter 5. The numbers in 2006/07, fewer than 7,000 are remarkably low. Either DoCS' recording is less than perfect or too few people understand the availability of a right to seek assistance from DoCS or are concerned about seeking assistance in case it sets care proceedings in motion. The Inquiry agrees that the scope of such assistance should be expanded and it could play a role in providing a 'soft entry point' to families needing help rather than statutory intervention.

Reports to DoCS

- 11.167 A number of peak bodies recommended that s.28 of the Care Act, which requires the Director-General to keep a record of reports made, actions taken and any subsequent disposition of and dealings with children and young persons to whom such reports or actions relate, should be proclaimed. The Inquiry agrees.
- 11.168 Education recommended that the s.29(1)(f) prohibition on disclosure should extend not only to the person who actually makes the report (for example, school principals) but also to the staff member who initially raises a concern with the school principal or counsellor that a student may be at risk.
- 11.169 The recommendations made in Chapter 10 concerning the triaging of risk of harm reports should obviate the need for a specific amendment as sought by Education. There will, however, need to be an amendment of s.29 more generally to reflect the changed reporting regime set out in that chapter.
- 11.170 Police recommended that the s.29(1)(f) prohibition on disclosure be amended to provide for the disclosure of the reporters' details to a law enforcement agency pursuant to the investigation of a serious crime committed upon a child or young person, where that might impact on the child's safety, welfare or well-being.
- 11.171 The Inquiry agrees with the recommendation made by Police.

Grounds for the making of a care order

- 11.172 The Children's Court recommended that s.71 be amended in relation to the way in which the grounds for a care order are currently specified. It stated:

Presently the ground provided in s.71 is a finding that the child or young person 'is in need of care and protection' but the various subsections of section 71 go on to describe, and therefore to limit, the circumstances in which that finding can be made and this sometimes introduces difficulty and fruitless complexity. It is submitted that the section should be amended either by deleting the subsections altogether so that the Court is at large in determining the question of need of care and protection or else by reproducing the English provision provided

*in the Children Act 1989 (UK) that 'the child or young person has suffered or is likely to suffer significant harm.'*¹¹⁷

- 11.173 On the other hand, a retired Children's Magistrate stated that he did not agree with the proposition that either there be no specific grounds upon which a child or young person needs be found to be in need of care and protection, or that there only be very general grounds (such as in the Children Act UK). He stated:

The justification for State intervention is too important to be left to no or vague and ill-defined limits.

The apparent simplicity of the English test (Children Act s.31.(2) – the child is suffering or is likely to suffer significant harm and the harm is attributable to the care given to him etc) actually has given rise to much litigation.

*...One possible area of concern is that the present grounds could be too limited in picking up 'neglect' cases. No case comes to my mind where 'neglect' was not also accompanied by emotional abuse adverse emotional/developmental consequences.*¹¹⁸

- 11.174 DoCS informed the Inquiry that it:

has no objection to the proposal of the Court to amend s.71 so that the determination of the need for care and protection can be on any basis and is not limited to the sub-categories set out in that section.

This Department would not be prepared to agree to delete the subcategories (rather than making the definition one that included, rather than was limited to, the subcategories) for fear that Magistrates may not accept that certain circumstances support the need to establish that a child is in need of care and protection.

The Department does not agree to adding the words about risk of harm. This suggestion fails to recognise a significant role differentiation between this Department and the Court which the Act establishes. This differentiation is that this Department receives information about risk (s.23) but the response of both the Department and the Court is predicated not on the existence of possible harm but on whether action will achieve a better position for the child. If no action is possible, or no further action will improve the situation, then neither the

¹¹⁷ Submission: Children's Court NSW, 14 January 2008, p.33.

¹¹⁸ Submission: John Crawford, 13 February 2008, p.9.

*Department nor the Court should be taking action – see ss.30 and 71.*¹¹⁹

- 11.175 The Inquiry sees benefit in amending s.71 to ensure that the grounds are not limited to those enumerated, while still retaining each subsection. This should ensure that emerging areas of abuse and neglect can be accommodated, while keeping the current categories in the mind of the parties, and at the same time, preserving the important difference between the circumstances that give rise to an obligation or entitlement to report concerns to DoCS and the matters that justify statutory intervention once those concerns are assessed.

Allocating parental responsibility

- 11.176 Section 79 of the Care Act provides, in part, that the Children's Court can make an order allocating parental responsibility to one or both parents, the Minister or another suitable person (or to a combination of these people).
- 11.177 DoCS has recommended that s.79 be amended to make specific provision for the allocation of parental responsibility to a designated agency.
- 11.178 In a recent decision by the Children's Court, *In the matter of Director-General of the Department of Community Services and the BW children*,¹²⁰ the operation of this section was considered in the context of an application by DoCS seeking an order allocating parental responsibility to the Principal Officer of the Hunter Aboriginal Children's Service, a designated agency. Truscott CM declined to make that order, and in doing, described the Care Act in the following way:

A Designated Agency is limited to delegations of functions and tasks of supervision of residential care and control. This is called Care Responsibility, which is different to Parental Responsibility. It is significantly and importantly less than Parental Responsibility and suggests that there is legislative policy to limit the role of a Designated Agency rather than widen it to include Parental Responsibility...

But where a child is removed from his/her parents and is going to be placed in out-of-home care, there is no basis for treating those children differently from one another, by allocating Parental Responsibility to various organisations involved in providing that out-of-home care. There are good policy reasons for the Parental Responsibility for those children to remain with the Minister and the consequent administration of out-of-home care be consistent for all children who are subject to it...¹²¹

¹¹⁹ Submission: DoCS, Operation of courts in the child protection system (abridged), p.26.

¹²⁰ *In the matter Director-General of the Department of Community Services and the BW children* [2008] CLN 2.

¹²¹ *In the matter Director-General of the Department of Community Services and the BW children* [2008] CLN 2 at [30]-[35].

11.179 After considering various provisions of the Care Act, her Honour went on:

*Where sole Parental Responsibility is allocated to a natural person under s.79, [children] are deemed not to be in out-of-home care and where placed with a carer not supervised by a designated agency the provisions of Chapter 8 and 10 do not apply...*¹²²

*If Parental Responsibility was allocated to a Principal Officer pursuant to s79(1)(a)(iii) then there would be an anomaly whereby the Designated Agency would be subject to the Children's Guardian supervision in discharging its out-of-home care functions, but would be outside any such framework in discharging its duties of Parental Responsibility.*¹²³

11.180 Her Honour found as follows:

*I am of the view that the term 'person' in s.79 (1)(a)(iii) means an individual or natural person in his/her personal capacity and does not empower the Court to make s.79 orders allocating persons such as a Principal Officer of/or a Designated Agency.*¹²⁴

11.181 Professor Parkinson informed the Inquiry:

*It was never intended that a suitable person is ... an agency - that was subverting the entire out-of-home care system that we had set up, and this decision, going against submissions from the Crown extraordinarily enough, has confirmed the intent. There should not be a single child who is directly placed in the care of an agency.*¹²⁵

11.182 DoCS informed the Inquiry:

It is the view of this Department that parental responsibility should be exercised by a person as close as possible to the child so that information and decisions can be informed by direct knowledge of the child's circumstances. Where an agency is accredited by the Children's Guardian to perform a task then it is suggested that the agency should be able to perform all related aspects. This performance can currently be monitored either by the Children's Guardian under section

¹²² *In the matter Director-General of the Department of Community Services and the BW children* [2008] CLN 2 at [37].

¹²³ *In the matter Director-General of the Department of Community Services and the BW children* [2008] CLN 2 at [43].

¹²⁴ *In the matter Director-General of the Department of Community Services and the BW children* [2008] CLN 2 at [56].

¹²⁵ Transcript: Inquiry meeting with Professor Parkinson, 27 February 2008, p.27.

181(1) (e) or by the Children's Court where it has ordered a report under section 82.

The Department suggests that consistency can be encouraged by accreditation, monitoring and funding arrangements to achieve as great an extent (if not higher) level of consistency than may currently exist.

- 11.183 DoCS suggested that once accredited there should not be any further need to inquire as to suitability, which should overcome the concerns expressed in *the BW children* case.¹²⁶ It further submitted that the decision was wrong in so far as it stated that a placement in relation to which parental responsibility for a child had been directly allocated to the designated agency, would be outside of the power of the Children's Guardian to monitor. Section 135 of the Care Act does not restrict OOHC to placements where the Minister is allocated parental responsibility.
- 11.184 The Inquiry agrees that this aspect of the decision appears not to correctly reflect the legislation. However, the Inquiry is troubled by other aspects of the allocation of parental responsibility by the Court to a designated agency.
- 11.185 The Inquiry understands that the Minister has established procedures for the delegation of her parental responsibility to designated agencies where the agency has been granted accreditation for five years. In these cases residual powers are retained by DoCS, and a Deed of Agreement between the Minister and the agency details the roles and responsibilities of each. If the Court allocated parental responsibility, residual powers would also be allocated and no safeguards such as are contained in the Deed of Agreement would apply. The Inquiry is of the view that these safeguards are essential.
- 11.186 Truscott CM's decision is not binding on her colleagues on the bench. It has been brought to the Inquiry's attention that other decisions have been made that are inconsistent with that of Truscott CM. The Inquiry is of the view that, in other than emergency care and protection orders made pursuant to s.46(2), there should not be power for the Court to allocate parental responsibility to a designated agency or a principal thereof, but that the Minister should be able to delegate the parental responsibility that has been allocated to her, subject to the safeguards discussed above.

Permanency planning and care plans

- 11.187 There has been some debate between, among others, the Children's Court, DoCS, and various NGOs who facilitate OOHC, about the level of detail and certainty required in a care plan in order for the Children's Court to be satisfied that permanency planning has been satisfactorily addressed.

¹²⁶ *In the matter Director-General of the Department of Community Services and the BW children* [2008] CLN 2

11.188 The matter of permanency planning was considered in the Children's Court decision of *Re Rhett*.¹²⁷ The Children's Court found that the lack of sufficient information available to the Court about the proposed carers meant that permanency had not properly been addressed, and that as a result the Children's Court was not able to make final orders.

11.189 In that discussion, Mitchell SCM cited the House of Lords decision in *S. v S. and Ors*, in which it was held that:

*The Court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future. The degree of firmness to be expected, as well as the amount of detail in the plan, will vary from case to case depending on how far the local authority can foresee what will be best for the child at that time.*¹²⁸

11.190 His Honour stated that there will be some cases where, given the exceptional circumstances in relation to the particular child's needs, DoCS might be less able "to know what lies in store" for the child. His Honour said that in such a case DoCS should still be able to tell the Court of the type of arrangements that it thinks will be suitable for the child, and of the steps it has taken and will continue to take to secure such arrangements.¹²⁹

11.191 DoCS has interpreted *Re Rhett* as meaning that permanency planning requires a high level of detail in the care plan:

*It is certainly the Department's view that the obligation there upon the Court is to be able to understand what the plans are for the child, and the plans have to be grounded in reality, but that doesn't require the level of detail which would require a specific carer to be identified. You would say this child must remain in a particular high school, because the high school appears to be appropriate for that child. Therefore, you want to look for a carer who lives within a geographical proximity to that high school. You would be looking at those sorts of plans rather than coming down to particular details.*¹³⁰

11.192 It has advised the Inquiry that it accepts that the decision correctly interprets the Act, however, it is concerned that other Magistrates may not follow *Re Rhett*, or may read it as requiring too much in the way of detail as to the placement.

11.193 Some agencies have a policy of not recruiting long term carers for children until the final orders of the Children's Court are known. Barnardos is one such

¹²⁷ *Re Rhett* [2008] CLN 1.

¹²⁸ *S v S and Ors* [2002] UKHL 10.

¹²⁹ *Re Rhett* [2008] CLN 1 at [27].

¹³⁰ Transcript: Public Forum, Role of Courts, 22 February 2008, p.39.

agency. Barnardos informed the Inquiry that it is not possible to tell the Children's Court who the permanent carer for a child placed in long term OOHC will be. It stated:

Carers are not like a hotel room in which you can just pop anybody...

Many of us recruit carers to match to children. Those of us who have good research in relation to the permanency that we're able to achieve for children are those who do match placements, which are very carefully constructed. This means getting to know the child well and matching it with a carer who is suitable...

Many, many people will come forward before a carer is recruited who is likely to be able to achieve permanency with a child. Therefore, to be not able to say to a carer, "Yes, we have orders on a child" would mean that one could not recruit a matched carer. This would pose real difficulties.

It isn't simply that we are being awkward as organisations. It really is the long-term future of the child. Unless we know what the orders are, we are not able to actually seek the right sort of carer for that particular child.¹³¹

11.194 The Children's Court, in its submission, stated the following:

There will always be unforeseen events which cannot be the subject of the Care Plan and will be dealt with by whoever ultimately holds parental responsibility and there will be other matters of detail which the Court doesn't need to know about because they are details. But the broad outline of the kind of placement envisaged - including whether a child or young person will be brought up with or separated from siblings, the methods by which the special needs of a child or young person as to health, mental health, education, growth and development, heritage and the like will be addressed, how contact to parents, siblings or extended family will be accommodated, whether and in what time frames restoration and/or placements will be undertaken - should be disclosed to the Court by the Director-General as best they can be. There will be cases where the Director-General will be unable, for perfectly proper reasons, to address permanency planning as he would wish and, in those cases, he must do his best but the

¹³¹ *ibid.*, pp.37, 38.

*Court needs and is entitled to have proper information available to it in order to perform its duty.*¹³²

- 11.195 At the Public Forum on the Role of Courts, Deputy Chief Magistrate Syme stated the following:

*The Court only requires certainty in a Care Plan. We have never sought, nor do we seek, that there be cross-examination or identification of particular foster carers before a final order is made. That has never been the Court's position in any case.*¹³³

- 11.196 The Children's Court's position was generally supported by the LAC¹³⁴ and the Law Society.¹³⁵

- 11.197 The Ombudsman stated:

*Section 83(7) (a) places an obligation on the Court to expressly make findings "that permanency planning for the child or young person has been appropriately and adequately addressed," and so concentrates on the planning rather than the actual arrangements.*¹³⁶

- 11.198 The Inquiry does not share the concerns which have been raised in relation to the decision, nor does it believe that s.83 should be amended to require care plans to inform the Court of more precise details of the child's placement. They are matters properly for the person who is allocated parental responsibility and supervision of the care placement. Sufficient safeguards exist in relation to the oversight of DoCS' decision making concerning children and young persons in OOHC, including monitoring under s.82, review by the Ombudsman and exercise of the functions of the Children's Guardian. The Inquiry notes that *Re Rhett* is not binding on other Magistrates; however, the Inquiry is of the view that *Re Rhett* accurately reflects the law and represents good policy. It should be applied by all Magistrates exercising jurisdiction in care proceedings.

Contact orders

- 11.199 Determining the duration, frequency and supervision needs for contact between children and young persons in care and those significant to them, is a complex matter. The Inquiry is aware of the competing views in the literature concerning the benefits which may accrue to a child or young person from contact being maintained, and balancing the need for stability, the likelihood of restoration, the developmental requirements of a child or young person as well as changes in

¹³² Submission: Children's Court NSW, 14 January 2008, pp.5-6.

¹³³ Transcript: Public Forum, Role of Courts, 22 February 2008, p.43.

¹³⁴ Transcript: Public Forum, Role of Courts, 22 February 2008, p.41.

¹³⁵ Submission: Law Society of NSW, pp.6 and 7.

¹³⁶ NSW Ombudsman, *Care Proceedings in the Children's Court*, July 2006, p.27.

the circumstances of birth families and the quality of the contact, all within the context of the best interests of the child or young person.

- 11.200 A key issue before the Inquiry was whether the Children's Court should retain jurisdiction to make final contact orders. Further, whether it should have power to enforce those orders, and whether it should have the power to require DoCS to supervise contact.

DoCS' position

- 11.201 DoCS has recently issued a draft Policy Statement on Contact that provides a guide to the supervision of contact by a DoCS caseworker. The type and frequency of contact is noted to depend upon the case plan goal, for example, whether it involves assessment, restoration, permanent care or adoption, and the child's or young person's assessed needs and views.
- 11.202 The minimum frequency of contact extends from three times a week for at least six hours per week (for 0-2 months of age where the purpose of contact is assessment, or the plan is restoration) to two to six times per year for the same age group (where the case plan goal is permanent care or adoption). The minimum levels then vary according to the age of the child.
- 11.203 The draft contact policy is not prescriptive as to whether contact is supervised or unsupervised. It notes that there should be some supervision, whether or not so ordered, where there is a potential risk to the safety of the child or young person, or where there is a need to assess the interactions between the child or young person and family members or the effect of contact on the child or young person.
- 11.204 Supervised contact can be provided by DoCS caseworkers or by casual employees, non-government OOHC agency employees, foster carers, or by a contracted service that specialises in contact. For unsupervised contact, the child or young person can be dropped off and picked up from the place of contact by foster carers, DoCS carers, DoCS caseworkers, DoCS casual employees or NGO employees.
- 11.205 During the assessment phase, the draft provides that contact should generally be supervised once a month and then after six months have passed, once every two months, in the absence of an order requiring more frequent supervision by DoCS.
- 11.206 DoCS carried out an impact analysis for the draft contact policy. It estimated the cost in 2007/08 dollars based on whether all contact is supervised (A); contact is supervised about two thirds of the time for the children under twelve years and just over a third of the time for those aged over twelve years (B); as with (B) but with higher average hours per visit (C); and as with (B) but with higher visit frequency (D). The annual costs for each would respectively be around \$49 million, \$34 million, \$38.5 million and \$44.2 million. (A) and (D) reflect significant increases over current costs (increases in the order of 35 per

cent and 21 per cent) whereas the cost for (B) is seven per cent less than current costs and (C) represents a six per cent increase.

- 11.207 Supervised contact is a particularly vexed issue. There is literature to suggest that no program for supervised contact has yet been demonstrated to significantly improve parent/child relationships.¹³⁷ Notwithstanding, according to DoCS, there is still strong judicial support for supervised contact.
- 11.208 DoCS also stated “no other jurisdiction appears to give so extensive a power to order contact to the courts.”¹³⁸ DoCS recommended that the Children’s Court’s ability to make contact orders be limited to interim orders and to orders for a specified period of time following the making of final orders.
- 11.209 DoCS also urged the Inquiry to consider costs as a relevant consideration:

*These are matters which the Court of Appeal has said are quite properly taken into consideration. They are relevant factors in the consideration of any parent. They are certainly relevant for any agency who must decide how best to use the finite resources available to it.*¹³⁹

The Children’s Court’s position

- 11.210 The Children’s Court submitted that it should retain its power with respect to contact and its jurisdiction should be extended to enable an order requiring the Director-General to supervise contact.
- 11.211 The Senior Children’s Magistrate argued that contact is:
- too important a matter to be left to the internal process of the Department of Community Services or to private arrangements between the Department and agencies whose own interests in that regard may not entirely coincide with those of the child or young person.*¹⁴⁰
- 11.212 In addition, the Senior Children’s Magistrate noted that litigation in relation to varying contact orders has been relatively rare, a position with which DoCS agrees.
- 11.213 In a submission to an earlier review, the Children’s Court and the LAC submitted that the Court should have power to order contact during the period of an emergency care and protection order.¹⁴¹

¹³⁷ R Birnbaum and R Alaggia, “Supervised Visitation: A call for a second generation of research,” *Family Court Review*, 2006, DoCS, Intranet, Topic 20, Contact between a child and the child’s family.

¹³⁸ Submission: DoCS, Operation of courts in the child protection system (abridged), p.24.

¹³⁹ *ibid.*

¹⁴⁰ Submission: Children’s Court NSW, 14 January 2008, p.27.

¹⁴¹ *ibid.*, p.28.

The Children's Guardian's position

- 11.214 The Children's Guardian submitted that s.86 of the Care Act should be amended to allow the Children's Court to make interim contact orders only, with ongoing contact arrangements being determined through case review and planning. The Children's Guardian stated that parties should have a right to apply to the Children's Court or another review body for review of contact arrangements if they are dissatisfied with contact arrangements.

Legal agency positions

- 11.215 The LAC submitted that the Children's Court is best placed to make contact decisions. The Aboriginal Legal Service and the LAC both favour the Children's Court retaining the ability to make contact orders as a way of ensuring that the needs of the child or young person in relation to contact are not dwarfed by the resource considerations of DoCS or other agencies.
- 11.216 The Aboriginal Legal Service submitted that the Children's Court's power to make contact is particularly important for Aboriginal families. It stated:

*In the vast majority of care and protection matters where children are placed in out of home care, the Department recommends contact with birth parents four times per year.... In Aboriginal communities, this standard contact regime is insufficient to give children adequate exposure to their culture.*¹⁴²

- 11.217 The Law Society submitted that contact with birth parents is critical to the development and identity of a child, and stated that the importance of the issue renders judicial determination the appropriate approach. It also stated that:

*Limiting the power of the Court to make contact orders only during interim proceedings would return us to the problems that occurred under the Children (Care and Protection) Act 1987. Under the 1987 Act, contact could not be ordered in the context of final care orders and one significant adverse impact of this was that parents seeking additional contact would seek to rescind the final order to achieve this. This led to significant disruption to placements even where there was no genuine desire on the part of the birth parent to reassert parental responsibility for the child.*¹⁴³

¹⁴² Submission: Aboriginal Legal Service, pp.4 and 5.

¹⁴³ Submission: NSW Law Society, p.5.

- 11.218 The Redfern Legal Centre advised the Inquiry that in many cases, despite the existence of orders for more frequent contact, “DoCS informs the parents that they will be granted the minimum four visits per year.”¹⁴⁴
- 11.219 The Inquiry notes that in response to assertions that DoCS usually “proposes minimal contact of two to four occasions per year,”¹⁴⁵ the recent draft policy suggests that this should not continue to be the case, if it has been in the past.
- 11.220 Woman’s Legal Services, in relation to the introduction in the current Care Act of the power of the Court to make contact orders, stated:

*There was significant advocacy at the time for this change, due to the failure of the Department to facilitate continuing contact between children in care and their family of origin. Consequently we consider that it is crucial that the Children’s Court retain its power to make contact orders, as per section 86(1) of the Act.*¹⁴⁶

- 11.221 In relation to the ability of the Children’s Court’s to enforce contact orders, the LAC submitted that a contact order must be enforceable if it is to be adhered to. Similarly, the Combined Community Legal Centres Group submitted that it is currently difficult for a person in favour of whom a contact order is made to have that order enforced if the person with parental responsibility for the child refuses to allow contact to take place. The Law Society also recommended that the Children’s Court have power to enforce contact orders.
- 11.222 The Inquiry however notes that these orders are enforceable under the *Family Law Act 1975* if registered in the Family Court under that Act, as discussed in Chapter 14.

NGOs and peak bodies’ positions

- 11.223 The Council of Social Service of NSW (NCOSS) supports the retention of the Court’s power to make contact orders, noting that:

*The development of a strong policy framework to support decisions made by the Court – including better provision of information by caseworkers and designated agencies – may improve decisions made by the Court, but should not replace the role of the Court.*¹⁴⁷

- 11.224 Foster care groups did not agree with removing or limiting the Court’s role in ordering contact, but were concerned about the impacts of contact orders on foster families, particularly where that required extensive travel, or where

¹⁴⁴ Submission: Redfern Legal Centre, p.7.

¹⁴⁵ Submission: Children’s Court NSW, 14 January 2008, p.26.

¹⁴⁶ Submission: Women’s Legal Services, p.7.

¹⁴⁷ Submission: NCOSS, p.67.

contact was arranged but cancelled or ignored by the parents of the child or young person.

- 11.225 Other NGOs sought flexibility and the introduction of “evidence-based guidelines or benchmarks” to assist Magistrates determine appropriate levels of contact.¹⁴⁸
- 11.226 The Association of Children’s Welfare Agencies (ACWA) supported retaining the Children’s Court’s ability to make contact orders in relation to interim arrangements pending final orders.

Inquiry’s view

- 11.227 The Inquiry is of the view that, on balance, the Children’s Court should retain its power to make contact orders with respect to those children and young persons about whom the Court has accepted the assessment of the Director-General that there is a realistic possibility of restoration. For all other children and young persons, that is those where the Court has accepted that there is no such possibility, the Court should have no power with respect to making orders as to contact.
- 11.228 Contact is of great importance where restoration is contemplated and the Court properly has a role in those decisions. However, where permanency planning does not include restoration, it is appropriate that decisions as to contact are made by DoCS or the designated agency to whom parental responsibility has been delegated. They can take account of changing circumstances as the child or young person grows older. Any dispute should be dealt with by the use of alternative dispute resolution mechanisms as described in the next chapter. The principles set out in DoCS draft contact policy appear appropriate to guide its decision making, and that of others when acting in that capacity.
- 11.229 The Inquiry considers that the development of evidence based guidelines or benchmarks as suggested by Catholic Social Services NSW/ACT merits the attention of the Children’s Court or the Judicial Commission. The Inquiry notes that DoCS has carried out some excellent research in this area which could form the basis for educational material for the use of Magistrates (both specialist and non specialist).
- 11.230 Whether or not contact is supervised should be a matter for the Children’s Court during the period it has power to order contact, however, the consent of the agency with responsibility for any supervision should remain a pre-condition to the exercise of that power by the Children’s Court.
- 11.231 Of significant concern is the cost of contact. The Inquiry is aware of the existence of Contact Services, funded by the Commonwealth Government for the purpose of facilitating contact within the family law jurisdiction. In the

¹⁴⁸ Submission: Catholic Social Services NSW/ACT, p.26.

Inquiry's view, there should be discussions with the Commonwealth in order to obtain access to those services for the purpose of satisfying contact (both supervised and non-supervised) within the care jurisdiction.

- 11.232 The Inquiry understands from its discussions with caseworkers and from the review undertaken by the Premier's Delivery Unit, Premier and Cabinet that a deal of caseworkers' time is spent carrying out contact orders (primarily in driving children to the place of contact, supervising the contact, and returning the children to their authorised carers).
- 11.233 The Inquiry understands that DoCS has established a Parental Contact Centre in Northern Region. A recent evaluation suggests that the cost of centre based contact services is significantly less than the cost of casual NGO contact service provision and that service quality is better in the former.
- 11.234 Encouraging or requiring foster carers to deliver children and young persons to contact visits, minimising the role of caseworkers and increasing the use of Commonwealth or State provided contact centres are all supported by the Inquiry.

Rescission and variation of care orders

- 11.235 The Children's Court informed the Inquiry that the child's legal representative has no clear entitlement under s.90(3) of the Care Act, on behalf of the child, to bring an application for variation or rescission:

*The Children's Court has developed a mechanism to avoid this problem - the child representative writes to the Court suggesting that the Children's Magistrate, of his own motion, may wish to re-list the matter but it is submitted that this shortcoming should be corrected.*¹⁴⁹

- 11.236 DoCS stated that it supports amending the Care Act to permit a child or young person to make an application for the variation or rescission of a care order. The Inquiry agrees.

Compulsory Assistance

- 11.237 DoCS advises that there are a small but consistent number of serious matters raised before the Court where the issue for the care and protection of a child relates to their need for intensive care and support to protect them from suicide or other life threatening or self destructive behaviour.
- 11.238 The Care Act addresses this with a series of provisions for compulsory assistance orders, which have never been proclaimed. The making of a compulsory assistance order would depend on there being an identified

¹⁴⁹ Submission: Children's Court NSW, 14 January 2008, p.14.

therapy, treatment or service that, in a short period of time, would assist the child or young person to deal with the problem and that would more likely than not lead to a significant improvement in the circumstances of the child or young person. DoCS advised that such involuntary therapeutic services are unavailable in this State and it was unlikely either that such orders could be made or if an order could be made that it would have the appropriate outcome.

- 11.239 The Supreme Court's inherent *parens patriae* jurisdiction is usually invoked in these circumstances. The Ministerial Advisory Committee considered that there may be a need for the Supreme Court (or another Court), to have the power to have a child examined to determine what therapeutic treatment might be necessary, and that this may not be currently covered within the *parens patriae* jurisdiction. The committee therefore recommended to the Minister that a new power for medical intervention be included.
- 11.240 In response to the DoCS Discussion Paper, the Ombudsman submitted that there is a case for compulsory assistance provisions, but said they can only be used effectively if adequate supports or services are established.¹⁵⁰ Others, including NCOSS, and AbSec have recommended that these provisions be proclaimed in the same or a revised form.
- 11.241 DoCS was generally supportive of the Ministerial Advisory Committee's proposal, however, it was of the view that the length of stay for the child or young person should be no longer than absolutely necessary for the assessment, that there should be a clear process available for children or young persons to quit the assessment process and that when they did leave the assessment there would be treatment and support in the community for them.
- 11.242 The Inquiry is of the view that in the event that the powers set out in Chapter 9 of the Care Act are not sufficient, the *parens patriae* jurisdiction of the Supreme Court is capable of dealing with the very small number of children who may require an intervention of the type contemplated by the unproclaimed section. Part 3 of Chapter 7 of the Care Act should be repealed.

Extended role of the Court

- 11.243 The Inquiry received a number of submissions in relation to the extent of the Court's powers under the Care Act to make decisions about children and young persons who are in OOHC and more generally to act on its own initiative. In considering these submissions, the Inquiry was mindful that the courts exercising power under the *Family Law Act 1975* have own motion powers¹⁵¹ and more generally, in child related proceedings, are able actively to direct, control and manage the conduct of the proceedings.¹⁵²

¹⁵⁰ NSW Ombudsman, Submission to DoCS, *Statutory Child Protection in NSW: issues and options for reform, Discussion Paper for review, October 2006*, p.47.

¹⁵¹ *Family Law Rules 2004* rules 15.71 and 15.72

¹⁵² *Family Court Act 1975* s.69ZN.

- 11.244 As a matter of principle, the Inquiry agrees that Children's Court proceedings should be conducted in a way that permits the Court to direct, manage and control the proceedings in so far as that is designed to, and does, achieve better outcomes for the safety, welfare and well-being of the child or young person before it, and in so far as that is within the powers expressly vested in it.¹⁵³
- 11.245 However, the Inquiry is hesitant to recommend that further and extended powers be granted to the Children's Court. In the event that the Children's Court is headed by a District Court Judge, generally has specialist and trained Magistrates sitting in the care and protection jurisdiction, is staffed by an appropriate number of qualified Children's Registrars, has simpler procedures, practitioners who appear before it are accredited and conform to a Code of Conduct, and DoCS' caseworkers present fair and balanced evidence, there may be an argument to endow the Children's Court with greater powers. Each of these matters is addressed in this and the following two chapters.

Section 82 monitoring of orders concerning parental responsibility

- 11.246 Section 82 is a mechanism whereby the Children's Court can seek a report as to the arrangements that have been made for the care and protection of a child or young person and, if that report is not satisfactory, order that the case be brought back before it so that the existing orders may be reviewed.
- 11.247 There are two interpretations of the review contemplated by s.82. One is that review allows for existing orders to be changed. The other is that the Court can express its concerns, but that new orders will require an application by a party to the proceedings under s.90 for rescission or variation of an existing care order.

The Children's Court view

- 11.248 In the matter of *Re Calvin*,¹⁵⁴ Mitchell SCM determined that the 'review' referred to in s.82 allows the Court to take further action, in that it can order a further report pursuant to s.82. His Honour adopted a definition of 'review' which permits the revisiting of proceedings and, if necessary, re-working the decision and orders.

DoCS' view

- 11.249 DoCS submitted that the Children's Court interpretation of s.82 is contrary to the intention of the section.

¹⁵³ Such Courts do not have an inherent jurisdiction: *Walton v McBride* (1995) 36 NSWLR 440.

¹⁵⁴ *Re Calvin* [2003] CLN 6.

- 11.250 DoCS referred the Inquiry to the House of Lords decision in *Re S (Minors) (Care order: implementation of care plan)*,¹⁵⁵ which considered the jurisdiction of the Court after the making of a final order. In that case, Lord Nicolls said:

The particular strength of the courts lies in the resolution of disputes: its ability to hear all sides of a case, to decide issues of fact and law, and to make a firm decision on a particular issue at a particular time. But a court cannot have day-to-day responsibility for a child. The court cannot deliver the services which may best serve a child's needs. Unlike a local authority, a court does not have close, personal and continuing knowledge of the child. The court cannot respond with immediacy and informality to practical problems and changed circumstances as they arise. Supervision by the court would encourage 'drift' in decision making, a perennial problem in children cases. Nor does a court have the task of managing the financial and human resources available to a local authority for dealing with all children in need in its area. The authority must manage these resources in the best interests of all children for whom it is responsible.

*The Children Act, embodying what I have described as a cardinal principle, represents the assessment made by Parliament of the division of responsibility which would best promote the interests of children within the overall care system. The court operates as the gateway into care, and makes the necessary care order when the threshold conditions are satisfied and the court considers a care order would be in the best interests of the child. That is the responsibility of the court. Thereafter the court has no continuing role in relation to the care order. Then it is the responsibility of the local authority to decide how the child should be cared for.*¹⁵⁶

- 11.251 The Ombudsman informed the Inquiry that there is some uncertainty and inconsistency surrounding the use and status of s.82 reports and concluded that:

We believe that provisions such as ss.82 and 76 (the latter relating to reports on supervision orders) that enable the Court to require reports, provide important safeguards for children who have been removed from the care of their parents or have been placed under the supervision of DoCS. Accordingly, we believe that the Court's power to require reports at whatever periods the Court considers appropriate should not be restricted or narrowed. We consider that any issues of procedural

¹⁵⁵ *Re S (Minors) (Care order: implementation of care plan)* [2002] 1 FLR 815.

¹⁵⁶ *Re S (Minors) (Care order: implementation of care plan)* [2002] 1 FLR 815 at [27]-[28].

*fairness could be addressed through legislative amendment or court rules.*¹⁵⁷

Legal Aid Commission's view

- 11.252 The LAC submitted that the Children's Court should have a greater role in monitoring the implementation of its final orders in care and protection matters and that the Care Act should be amended to require the Court to conduct a review of any case in relation to which there had been, or is proposed to be, a change to the permanency plan upon which the Court's final orders were based. It stated:

*Legal Aid NSW takes this view because we are aware of many cases in which the permanency plan initially proposed by DoCS for a child (and that formed the basis on which the Court has made long term care orders) is ultimately not proceeded with... These issues have only come to light as a result of the Act's current requirement for the provision of section 82 reports.*¹⁵⁸

Proposal of the Honourable Mr Crawford

- 11.253 The former Children's Magistrate, Mr Crawford, has proposed a model to amend s.82 to clarify the powers of the Children's Court.¹⁵⁹
- 11.254 Mr Crawford suggested that, properly construed, the Care Act means that the Children's Court receives a s.82 report, considers it and makes a finding as to whether the proper arrangements have been made for the care and protection of the child. If the Children's Court is not satisfied that proper arrangements have been made, the Magistrate then exercises a discretion in determining whether or not to order that the matter be brought back before the Court. If the matter is brought back, the order is then reviewed by the Court (first by returning notionally to the position when the order was originally made, and then by considering whether the original order still remains appropriate in light of any new information). Mr Crawford suggested that what was intended was a consideration of whether the existing order is appropriate rather than inviting a speculative examination of whether some other order may be better suited even if the existing order is appropriate.
- 11.255 Mr Crawford stated that bringing the matter before the Court for a review hearing would be of limited use if there is no opportunity to alter the situation. He also stated that the process should be quick, simple and responsive. He stated that if there are factual matters in dispute, the Court cannot resolve them as it is not able to call witnesses or mount a case, but he suggested that where

¹⁵⁷ Submission: NSW Ombudsman, 10 March 2008, Part 1, p.23; NSW Ombudsman, *Care Proceedings in the Children's Court, A Discussion Paper*, 2006, pp.30 and 31.

¹⁵⁸ Submission: Legal Aid NSW, 20 February 2008, pp.96 and 97.

¹⁵⁹ J Crawford, "Monitoring and Review of Court Orders: Section 82 of the *Children and Young Persons (Care and Protection) Act 1998*," CLN 8, 2004, p.34.

there is a significant factual dispute, it could make a finding that the proper arrangements are not being made and leave it to a party to bring an application to rescind or vary.

Inquiry's view

- 11.256 The Inquiry takes the view that the Children's Court appropriately has decision making power in relation to matters requiring a judicial response. The ability to monitor the decisions it makes is entirely consistent with this approach. However, the Children's Court is not and should not be an oversight body. The Children's Guardian and the Ombudsman ably fulfil that role.
- 11.257 The Inquiry is of the view that the Children's Court should have the power to order that a written report to be made to it and, if not satisfied that proper arrangements have been made, to re-list the matter with notice to the parties to the original proceedings in order to give any of them an opportunity to make an application pursuant to s.90 or for any other ancillary or incidental order. However, if no party wishes to apply for an order varying any of the orders made, the matter should be taken no further. In the absence of a moving party, the Children's Court cannot act. It would be an odd outcome if the Court, based on nothing more than the s.82 report, and in the absence of any party indicating a desire for some alteration or calling evidence, determined to alter the existing state of affairs.
- 11.258 The Children's Court should develop rules concerning the timing, provision of notice, confidentiality and procedure to ensure that reports are made to it in a timely fashion, that all parties are provided with a copy of the report and that the process by which a date is set for any hearing is also clear.

Own motion powers

- 11.259 The Senior Children's Magistrate informed the Inquiry that he would like the Children's Court to have the ability to initiate action, particularly in cases where DoCS has removed some but not all of the children from a particular household, and where the Court feels that the remaining children are likely to be at risk of harm or where concerns become evident in proceedings in the Court's criminal jurisdiction. He said:

The Court remains what some might describe as a junior partner in the child care and protection system. Only the Director-General may initiate proceedings and, even where care and protection issues regarding a child or young person come to the attention of the Court, there is no power to require the Director-General to take any protective action. It frequently happens that, when a child is removed from a dangerous or abusive home, his or her young siblings are left in that home in most unsatisfactory conditions and the Court has no jurisdiction

*to influence events and must rely on seeking to persuade the Director-General to take action.*¹⁶⁰

- 11.260 The Deputy Chief Magistrate of the Local Court suggested, during the Public Forum on the Role of Courts, that it would be useful if the Children's Court could, of its own motion, call for particular evidence. She said:

*The way that the Court would currently get around that would be to suggest to a party or another that the Court may benefit from evidence from this particular area, but if that party doesn't want to bring that evidence, there's nothing that we can do about it at this stage.*¹⁶¹

- 11.261 The Inquiry believes that the Court should have the power to order that expert evidence be provided to it, in the form of Clinic reports or otherwise. In relation to lay evidence, the Inquiry believes that as the child is usually separately represented in care proceedings, as are parents or other interested parties, and DoCS, there are sufficient safeguards to ensure all appropriate evidence is before the Court.
- 11.262 In relation to the position of siblings, the Inquiry understands that there is a process whereby the Senior Children's Magistrate can report concerns to DoCS' Director, Legal Services. That is the appropriate route to take with any concerns the Court has arising from proceedings before it.
- 11.263 While the Inquiry notes that the Family Court has powers akin to 'own motion' powers, it understands that they are rarely used, and in any event that is a superior court of record. The Inquiry is of the view that such powers should not reside in the Children's Court.

Re Josie

- 11.264 In the matter of *Re Josie*,¹⁶² the Children's Court made an order granting interim parental responsibility to the Minister, and later made an order in relation to the interim placement of the child contrary to a decision DoCS had made. DoCS appealed this latter order. Levine J of the Supreme Court found that when parental responsibility has been allocated to the Minister, the Children's Court cannot derogate the Minister's power to exercise it in accordance with the discretion reserved to that office. In this case, the Supreme Court found that the Children's Court had acted beyond power in ordering that the child remain in a particular placement.
- 11.265 In relation to this decision, the LAC informed the Inquiry:

¹⁶⁰ Submission: Children's Court NSW, 14 January 2008, p.6.

¹⁶¹ Transcript: Public Forum, Role of Courts, 22 February 2008, p.23.

¹⁶² *Re Josie* [2004] NSWSC 642.

*This decision has been the cause of much concern to Legal Aid NSW, and in particular to our solicitors who act as the direct or independent legal representative for the children involved. Whether children are placed by DoCS in out-of-home-care, with their parents or with other relatives pursuant to an interim order allocating parental responsibility to the Minister, the current state of the law according to the Supreme Court is that they can be removed from that placement without anyone – even the child’s legal representative – being notified or heard in regards to whether such a removal would be in the child’s best interests. Indeed, as a result of this decision in several cases in which Legal Aid NSW has been involved DoCS has even refused to consent to giving an undertaking to the Court to notify the Court or the child’s legal representative in the event that a removal of the child from his or her interim placement is planned.*¹⁶³

11.266 The LAC stated that allowing DoCS to have this discretion even in relation to a grant of interim parental responsibility can lead to multiple short term placements for children.

11.267 The Combined Community Legal Centres Group stated:

*We consider it to be a highly unsatisfactory situation that the Court cannot make orders incidental to the primary orders for the purposes of rendering the primary orders capable of being complied with. We consider that the ability to make ancillary orders is a useful and necessary tool.*¹⁶⁴

11.268 For reasons consistent with those set out above in relation to s.82, the Inquiry is not of the view that it is in the best interests of children and young persons for the Children’s Court to have the power to intervene in the discretionary exercise of parental responsibility by the Minister or her delegate. It is not, in the Inquiry’s view, an ancillary power as described by the Combined Community Legal Centres Group.

Restoration

11.269 The Children’s Court is concerned that once parental responsibility has been allocated to the Minister, DoCS can choose to restore a child to his or her parents without any requirement to consult the Children’s Court. The Deputy Chief Magistrate of the Local Court said:

It would be a matter of logic that if a Court has made a finding already that there is no realistic prospect of a child being restored to the parents’ care and therefore made an order for

¹⁶³ Submission: Legal Aid NSW, 20 February 2008, p.79.

¹⁶⁴ Submission: Combined Community Legal Centres Group, pp.9 and 10.

*parental responsibility in the Minister and before it has made that order approved a permanency plan that places the child in out-of-home care, as a matter of logic if there then becomes a reasonable prospect of restoration of the child to a parent then that is something that the Court should know about.*¹⁶⁵

- 11.270 The Children's Court accordingly submitted that where the Minister proposes to restore a child or young person to the care of a parent after a finding of "no realistic possibility of restoration", she should be required to apply to the Children's Court so that the matter may be canvassed and determined, by the Court.
- 11.271 This issue is complicated by the lack of data available on failed restorations. The Inquiry does not know the frequency with which restoration fails, and if so, the number of such failures, or the reasons for them.
- 11.272 As noted above, the Inquiry agrees with the decision in *Re Josie*, and with the general proposition that while the decision as to the allocation of parental responsibility properly lies with the Court, decisions in relation to the exercise of parental responsibility properly should lie with the person to whom that responsibility has been allocated. This would generally include decisions as to placement (subject to matters properly the concern of the Court, as already discussed in relation to *Re Rhett*).
- 11.273 Decisions as to whether, and if so when, to restore children and young persons to their parents will rarely be straightforward. It is clear from the earlier chapters that poor judgements will be made from time to time. It is also clear that the circumstances of the child or young person and parents may change from time to time in ways that were incapable of prediction when the original assessment as to the realistic possibility of restoration was made. The Inquiry notes that DoCS has a Permanency Planning strategy operating in 42 CSCs, and that more than 1,000 caseworkers have received training on Permanency Planning, including restoration decision making.¹⁶⁶
- 11.274 However, the Inquiry is persuaded by the argument expressed by Deputy Chief Magistrate. It is of the view that the decision to restore a child or young person, who was removed from his or her parent by order of the Children's Court, and in respect of whom, the person with parental responsibility is now of the view should be restored, that decision should be made by the Children's Court, upon application of the person with parental responsibility.

Supervision orders

- 11.275 The Senior Children's Magistrate submitted that the Care Act should be amended to impose specific duties and responsibilities on the Director-General

¹⁶⁵ Transcript: Public Forum, Role of Courts, 22 February 2008, p.47.

¹⁶⁶ DoCS, *Annual Report 2007/08*, p.60.

when a supervision order is made (and/or to provide the Children's Court with power to specify those duties or responsibilities), and in addition, to allow a supervision order that is longer than 12 months' duration to be made. He stated that it is a shortcoming of s.76 that the form of supervision remains entirely a matter for the Director-General, and can in practice involve little more than a theoretical supervision.

- 11.276 The Inquiry received no other submissions, nor is it aware of any submissions being made to earlier reviews, recommending that a similar power be granted to the Children's Court. Nor is it aware of any specific evidence of inadequacies or deficiencies in the exercise of supervisory obligations by DoCS. It is unfortunate that insufficient data are available to understand the extent of the use of these orders, or of the form of the supervision provided where it is ordered.
- 11.277 Consistent with the approach adopted by the Supreme Court and Court of Appeal as set out above and below, the Inquiry believes no change is warranted. In any event it is of the view that there are a wide variety of ways in which a person may be supervised and that flexibility would be preferable to the rigidity of a formula. That is not to say that the Court could not make recommendations to assist the parties when it makes a supervision order.

Section 74: order for provision of support services

- 11.278 This provision was considered in *George v Children's Court of New South Wales*.¹⁶⁷ In that case, Jpp JA with whom the other members of Court agreed, said:

The pool of funds available to DoCS for carrying out its manifold duties is finite. No doubt, as with all government departments, DoCS works out its budget each year by reference to the amount allocated to it under the governing Appropriation Act. In doing so it will allocate a particular sum for the provision of services to children and young persons in need of care and protection. If the Children's Court is empowered to order DoCS to expend money other than in accordance with the current budget applicable, the result will be that some children who otherwise would have benefited will not receive the services intended. The money available for the services to be provided to them will have to be used to accommodate the orders of the Children's Court.

In essence, the allocation of money and other resources for the care and protection of children and young persons is a matter of policy. It is preferable that such policy decisions be made by the body vested with the administrative responsibility for the

¹⁶⁷ *George v Children's Court of New South Wales* (2003) 59 NSWLR 232.

proper use of the resources in question, and not by a Court on an ad hoc basis.

Next, I would point out that the overall amount likely to be involved in the provision of transport and accommodation expenses to parents of children in foster care, generally, is not necessarily trivial.

....all parents have to make choices in regard to their children. These choices involve such matters as the place of family residence, the kind and place of education each child is to receive, and the kind and standard of medical treatment each child is to receive. The number of choices that parents are required to make through the lifetime of their children is infinite. While parents will ordinarily have the welfare of their children at heart, the choices that parents will make will be dictated, largely, by the funds that they have at their disposal. It would be unthinkable to compel parents to make choices which they could not afford simply because those choices would advance the interests of a child.

In my view, the same approach has to be taken when parental responsibility is allocated to the Minister pursuant to the [Care Act]. What is in the best interests of the child one would readily expect to be left to the discretion of the Minister and the Director-General, having regard to the limited funds allotted to DoCS for the protection of children in need of care, generally.¹⁶⁸

11.279 Many submissions which recommended that the Director-General be required to provide support services if ordered to do so were received by the Inquiry and by the 2006 Discussion Paper.

11.280 DoCS submitted that the approach taken in *George v Children's Court of New South Wales* and restated in *Re Josie* is the correct approach. The Inquiry agrees, and does not consider amendment of the section necessary or appropriate.

Apprehended violence orders

11.281 The Senior Children's Magistrate submitted to the Inquiry that the Children's Court should have the power to make AVOs, or orders similar to AVOs, against parents or other persons in order to protect a child or young person. He described it as "a very handy weapon in the child protection armoury."¹⁶⁹ He advised of a case where Police were not willing to apply for an AVO in

¹⁶⁸ *George v Children's Court of New South Wales* (2003) 59 NSWLR 232 at [132]-[133].

¹⁶⁹ Submission: Children's Court NSW, 14 January 2008, pp.32-33.

circumstances where it was in the best interests of the child that one be obtained.

- 11.282 DoCS opposes giving this power to the Children's Court for a range of reasons, including the undesirability of the involvement of Police in care proceedings, altering the nature of the DoCS caseworkers work to enforcement and making the person against whom the order was sought a party to proceedings and as such giving them access to information, not otherwise available.
- 11.283 On balance, the Inquiry is persuaded by DoCS' arguments. Additionally it notes the recent statutory amendments which provide a more comprehensive structure for the obtaining of Apprehended Domestic Violence Orders and Apprehended Personal Violence Orders which make it more likely that Police will act in circumstances of the kind mentioned.¹⁷⁰

Order to attend therapeutic or treatment program

- 11.284 Health told the Inquiry that an order under s.75 to attend therapeutic or treatment program has not, to its knowledge, been made. Health's New Street Adolescent Program, which is discussed in Chapter 7, has argued for a greater use of this provision to reduce the likelihood of children and young persons dropping out of the program before benefits can be realised.
- 11.285 The Inquiry agrees and urges DoCS to have regard to the provision in appropriate cases. If in the future, its benefit is demonstrated, the Inquiry can see no reason for it to continue to be confined to children aged under 14 years.

Children's Court Clinic

Expanding the role

- 11.286 A number of bodies have submitted that the role of the Clinic should be broadened. Health submitted that the Clinic's role should include making physical health assessments of children and young persons and risk assessments in relation to adolescents who sexually abuse, and providing appropriate treatment services.
- 11.287 Health noted that Justice Health staff provide advice to the Children's Court in its criminal jurisdiction and indicated that it would support consideration being given to a transfer of responsibility for the Children's Court Clinic from the Attorney General's portfolio to Justice Health, on the basis that those who are providing Health interventions should work for the Health portfolio. Health noted that Justice Health currently provides forensic mental health and drug and alcohol services for both adults and adolescents in the community. The team providing these services to the Children's Court includes psychiatrists, drug and

¹⁷⁰ *Crimes (Domestic and Personal Violence) Act 2007.*

alcohol staff, specialist mental health nurses and a social worker. The team also provides community based assessments and referrals to appropriate community services, discharge planning for young persons in custody and case management of a small number of clients. The clinicians receive regular supervision, and while the team does not employ psychologists, a framework to extend the current supervision could be created to include this group.

- 11.288 The Inquiry is particularly interested in assessments for children or young persons who have sexually abused other children or young persons. Justice Health has staff with expertise in this area.
- 11.289 The Inquiry supports a feasibility study into the transfer of the Clinic to Justice Health and its possible expansion to provide the kind of services currently offered by Justice Health in the criminal jurisdiction.
- 11.290 In other submissions, it was suggested that the Clinic should be used to assess the parenting capacity of people who are not seeking parental responsibility, but with whom a child has been placed pending final orders. In his 2006 discussion paper, the Ombudsman expressed some concern about leaving the assessment of such carers to an 'in-house' placement assessment by DoCS (as opposed to an assessment by the Clinic).¹⁷¹
- 11.291 Against this, DoCS stated that any expansion of the Clinic's role without a significant enhancement of its budget would result in an increased delay in the time between the making of assessment orders and the provision of an assessment report to the Court, which would in turn delay care proceedings.
- 11.292 DoCS' internal guidelines in relation to making an application for assessment state: "it is not appropriate to lodge an application for an assessment when the assessment is required for therapeutic or case management purposes." However, a number of DoCS officers informed the Inquiry that the Clinic's reports are sometimes used by caseworkers as a basis for their casework decisions or for reaching a settlement. The Ombudsman also stated that: "people familiar with the specialist courts said that DoCS uses the Clinic to inform its casework decisions, including the question whether there is a realistic possibility of restoration."¹⁷²
- 11.293 The Inquiry agrees that the work of the Clinic should be expanded. The Inquiry sees no reason in theory or practice why the Clinic's reports should not assist caseworkers' decision making and be used as a basis for discussion between the parties which may result in matters being finalised without a court order. Section 56 of the Care Act provides a safeguard for children and young persons against the over use of assessments. Whether assessments are sought for temporary carers should be decided on a case by case basis. Clearly matters such as the length of time that temporary carers are expected to care for a child

¹⁷¹ NSW Ombudsman, *Care Proceedings in the Children's Court, A Discussion Paper*, 2006, p.18.

¹⁷² *ibid.*, p.19.

or young person, and other matters known about the carers, will influence whether an assessment is sought or ordered.

Completeness of material forwarded to the clinic

- 11.294 What emerged as a significant issue was the number of people unhappy with the documents provided to the Clinic for use in the preparation of its assessments. The rules are clear that all parties are to agree to the documents to which the Clinic has regard. However, it appears in practice that this does not always occur. It clearly should.
- 11.295 More generally, the Clinic also informed the Inquiry that it is often the case that either Authorised Clinicians do not receive all the information relevant to the assessment from the parties, or else they receive the entirety of the DoCS file, irrespective of the relevance of most of the documents on that file.
- 11.296 The Inquiry investigated a number of the claims made, usually by a parent, that all relevant documents had not been sent to the Clinic. None of those investigations supported the assertion that DoCS has sought to mislead the Clinic by the selection of documents forwarded to the Clinic.
- 11.297 However, more needs to be done to ensure that the documents forwarded are complete, only as voluminous as necessary to answer the questions posed in the assessment order, and that each party has consented to them. DoCS should ensure, where it is the applicant for an assessment order, that this occurs.

Timeframes

- 11.298 One concern raised with the Inquiry in relation to the production of reports by the Clinic was the delay between the Children's Court making assessment orders, and the report being submitted to the Court. In one case, the period taken was cited as being between eight and 18 weeks. Any reduction in that timeframe can only be in the best interests of children involved in care proceedings.

Communication

- 11.299 The extent to which the relevant DoCS caseworker should be able to communicate with the Authorised Clinician appointed to complete an assessment was raised by the Inquiry. As noted above, Authorised Clinicians are encouraged by the Clinic to make contact with the relevant DoCS caseworker to obtain information about the relevant child or young person and his or her family dynamics.¹⁷³ The Clinic's Director advised the Inquiry that

¹⁷³ Authorised Clinicians Handbook, p.5.

contact with the DoCS caseworker might be necessitated by the quality of the file of documents provided to the Authorised Clinician.¹⁷⁴

- 11.300 DoCS' internal guidelines in relation to making an application for an assessment order, place restrictions on the contact that a caseworker can have with an Authorised Clinician by stating that, outside of the file of documents provided to the Authorised Clinician pursuant to the directions of the Children's Court:

*other information may only be provided by the caseworker to the clinician upon their specific request. If the additional information is in writing then copies are to be distributed to all parties. Any other extra information should be limited to verbal clarification of the information already provided.*¹⁷⁵

- 11.301 In the event that information becomes available after the material has been forwarded to the Clinic, and it is information relevant to the Clinics' work, there should be provision for that material to be provided to the Clinic after each relevant party has been informed of its existence and of the intention to forward it to the authorised clinician thus giving them an opportunity to object.
- 11.302 The LAC submitted that the independent legal representative for the child in care proceedings should be able to communicate with the Clinic and to provide and receive information from the Authorised Clinician as currently occurs in the family law jurisdiction.
- 11.303 The Inquiry is of the view that the value of the Authorised Clinician's reports is enhanced by their independence from the process. It believes that DoCS' internal guidelines should be the standard governing communication between Authorised Clinicians, DoCS caseworkers and others. Additionally, it considers it important that each party should ensure that the documents provided to the Authorised Clinician reflect any information they wish him or her to take into account.
- 11.304 The Inquiry understands that there is no requirement that the Court advise parties that a Clinic's report has been received. The Inquiry is of the view that the Court should advise parties when such a report is received. The Court should be empowered to release a copy of the report to a person who is not a party to the care proceedings but nevertheless has an interest in the safety, welfare and well-being of the child or young person, by virtue of the professional services being provided to that child or young person, such as a health professional.

¹⁷⁴ Transcript: Inquiry meeting with representatives of the Children's Court Clinic, 26 May 2008, p.28.

¹⁷⁵ DoCS, Intranet, Casework practice, Courts and legislation, Court order procedures, Application for an assessment.

Quality of reports

- 11.305 The Inquiry received a variety of submissions (written and verbal) in relation to the quality of the Clinic's assessment reports. These submissions ranged from the comment of a caseworker in a CSC in Southern Region who stated that she had recently been involved in a matter where she felt that the Clinic carried out "an absolutely outstanding assessment,"¹⁷⁶ and the statement of the Clinic that its surveys of Magistrates in relation to the usefulness of Clinic assessments have generally resulted in positive feedback, to some submissions providing examples of what were asserted to be poor quality reports. The Inquiry has been advised on a number of occasions that reports submitted to the Court by the Clinic are of 'variable' quality.¹⁷⁷ In some cases, the quality of the Clinic's assessments were criticised on the basis of a failure to interview the subjects of the report.
- 11.306 Against this, the Clinic's Director informed the Inquiry that the Authorised Clinician would almost always observe or interview the child.
- 11.307 The Clinic acknowledged that work needs to be done to educate the Children's Court and the parties to care proceedings about what may be reasonably asked of the Clinic in the short time available for these assessments. The Clinic said that a presentation has been recently given to Children's Magistrates about this issue, during which the Magistrates were asked to simplify the areas to be addressed by Authorised Clinicians to ensure a useful assessment report.
- 11.308 The Clinic stated that it is exploring ways of achieving greater participation from Authorised Clinicians in group supervision and in the Clinic's Professional Development program generally, and stated that it has submitted a proposal for a new Panel application process to Attorney General's that explicitly requires participation in Professional Development.
- 11.309 The Clinic indicated that it will also be providing more outreach Professional Development opportunities for Authorised Clinicians located in rural and regional areas, which will include better use of the Clinic's website to convey relevant clinical information.
- 11.310 The consistency and quality of reports is an important matter and the Inquiry is of the view that the work proposed by the Clinic is positive. However, since the clinician's report will normally constitute the only expert evidence before the Court it is critical that it be impartial, fair and correct.
- 11.311 On a related matter, s.58 permits the Clinic to indicate it is "unable or unwilling to prepare the assessment report." While it is understood that there may be very good reasons why a lack of resources and the like mean that the Clinic is

¹⁷⁶ Transcript: Inquiry meeting with DoCS staff, CSC Southern Region.

¹⁷⁷ Transcript: Public Forum, Health and Disability, 11 April 2008, p.32; Transcript: Inquiry meeting with DoCS staff, CSC Northern Region; Transcript: Inquiry meeting with representatives of the Law Society of NSW, 29 April 2008, p.22.

unable to prepare a report, the concept of unwillingness does not properly reflect the Clinic's role as an expert consultant to the Court. That portion of the section should be deleted.

Payments

- 11.312 In relation to payment, the rate at which Authorised Clinicians are currently paid is (according to the Clinic) well below the hourly rate recommended by the Australian Psychological Society.
- 11.313 The Inquiry was provided with a copy of a proposal for a budget enhancement for the Clinic, and was told by Attorney General's that the proposal is currently being evaluated. The proposal states that the Authorised Clinicians' fees have not increased since June 2001.
- 11.314 The Inquiry supports an increase in payment in order to attract sufficiently skilled and experienced clinicians.

The data challenge in the care jurisdiction

- 11.315 Obtaining accurate data in relation to proceedings in the care jurisdiction has proven to be a challenge. Neither the Children's Court, nor Attorney General's, keeps detailed or reliable statistics in relation to care proceedings. The Children's Court publishes some of the decisions it makes in care proceedings on its website, whilst the District Court publishes very few, and, until recently, it did not provide a copy of decisions on appeal from the Children's Court to that Court. Decisions of the Administrative Decisions Tribunal in relation to appeals concerning care and protection issues are, however, routinely published on its website, as are those of the Supreme Court on its website.
- 11.316 The data limitations were lamented by many before the Inquiry. For example, DoCS stated:

In understanding the current working of the Children's Court, any discussion is severely hampered by an absence of reliable data and an inability to study a sample of cases.¹⁷⁸

- 11.317 The Commissioner for Children and Young People, in a joint submission with two academics, stated that even though the Children's Court played a critical role in making significant decisions in children's lives:

We know little about the processes in terms of the profiles of cases that come before it and the orders that are made. There is no reliable information on a court data base, and no

¹⁷⁸ Submission: DoCS, Operation of courts in the child protection system (abridged), p.6.

*comprehensive record of judgments or appeals from the Court.*¹⁷⁹

11.318 DoCS recommended that the Children's Court improve its data collection methods and procedures in relation to all care proceedings.

11.319 The Ombudsman stated:

*In our Children's Court Discussion Paper we highlighted the paucity of relevant data captured relating to Children's Court proceedings. We are also aware that there was a meeting in August 2004 between a range of agencies to better identify data needs.*¹⁸⁰

11.320 It appears that the meeting referred to by the Ombudsman identified the data that would be useful to capture. The Inquiry strongly encourages the Children's Court, Attorney General's and DoCS to move quickly to collect that data (independently of Justice Link if necessary). It also encourages the District Court to publish the decisions made in the exercise of its appellate jurisdiction, in relation to care proceedings as a matter of course.

11.321 The limited statistics currently available are set out in Chapter 5.

Recommendations

Recommendation 11.1

With respect to the *Children and Young Persons (Care and Protection) Act 1998*:

i. Section 8(a) should be amended to provide as follows:

that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them.

ii. Section 9 should be amended to provide:

The principles to be applied in the administration of this Act are as follows:

In all actions and decisions concerning a particular child or young person that are made under this Act the safety, welfare and well-being of the child or young person must be the paramount consideration.

¹⁷⁹ Submission: Commission for Children and Young People, p.48.

¹⁸⁰ Submission: NSW Ombudsman, 10 March 2008, p.6.

Paragraphs (b) to (g) should then be renumbered commencing with (a).

- iii. Section 18 should be amended to insert the words “or a non-government agency in receipt of government funding for the requested services” after “or agency”.
- iv. Section 21 should be amended to permit an NGO in receipt of government funding for the requested services to apply on behalf of a child or young person for assistance.
- v. Section 28 should be proclaimed.
- vi. Section 29(1)(f) should be amended to reflect the changed reporting structure as set out in Chapter 10.
- vii. Section 29(1)(f) should be amended to permit the disclosure of the reporter’s details to a law enforcement agency pursuant to the investigation of a serious crime committed upon a child or young person, where that might impact on the child’s safety, welfare or well-being.
- viii. Section 71 should be amended so that the grounds are not limited to those enumerated, while still retaining each sub-section.
- ix. The Act should be amended to make clear that, other than emergency care and protection orders made under s.46(2) of the Care Act, the Children’s Court can not allocate parental responsibility to a designated agency or a principal thereof.
- x. The Act should be amended to limit the power of the Children’s Court to make contact orders to those matters where the Court has accepted the assessment of the Director-General that there is a realistic possibility of restoration.
- xi. Section 90(3) should be amended to permit the child or young person to make an application pursuant to that section.
- xii. Part 3 of Chapter 7 should be repealed.
- xiii. Section 58 (1) (a) should be amended to delete “or unwilling.”
- xiv. Pursuant to s.82, the Children’s Court should have the power to order that a written report be made to it and, if after receiving that report, it is not satisfied that proper arrangements have been made, it should have the power to re-list the matter with notice to the parties to the original proceedings in order to give any of them an opportunity to make an application pursuant to s.90 or for any other ancillary or incidental order. However, if no party wishes to apply for an order varying any of the orders made, the matter should be taken no further. In the absence of a moving party, the Children’s Court should not be empowered to make orders of its own motion.

In addition, the Children's Court should develop rules concerning timing, notice, confidentiality and procedures to ensure that reports are made to it in a timely fashion, that all parties are provided with a copy of the report and that the process by which a date is set for hearing is also clear.

- xv. The Children's Court should have the power to order that expert evidence be provided to it, in the form of reports provided by the Children's Court Clinic or otherwise.
- xvi. Relevant amendments should be made to ensure that *Re Rhett* [2008] CLN 1 is followed.
- xvii. The Act should be amended to provide that a decision to restore a child or young person to the care of the parents from whom he or she had previously been removed by an order of the Children's Court, in circumstances where the Children's Court had accepted the assessment of the Director-General that there was not a realistic possibility of restoration, must be made by the Children's Court upon application by the person with parental responsibility.

Recommendation 11.2

There should be a feasibility study into the transfer of the Children's Court Clinic to Justice Health that should also investigate its expansion to provide the services of the kind currently offered by Justice Health in the criminal jurisdiction, as well as an extension of the matters dealt with in the current assessments so as to provide greater assistance in case management decisions.

Recommendation 11.3

Data in relation to all aspects of proceedings pursuant to the *Children and Young Persons (Care and Protection) Act 1998* should be kept by DoCS and the Children's Court and made public.

Recommendation 11.4

DoCS should review its Casework Practice Policy, Taking Action in the Children's Court, to ensure it is consistent with the *Children and Young Persons (Care and Protection) Act 1998*, in particular, the principles set out in ss.9, 10 and 36.

Recommendation 11.5

DoCS should develop Guidelines for staff in order to ensure adherence to the Aboriginal and Torres Strait Islander Child and Young Person

Placement Principles in s.13 of the *Children and Young Persons (Care and Protection) Act 1998*.

Recommendation 11.6

Evidence based guidelines for Magistrates should be prepared in relation to orders about contact made under s.86 of the *Children and Young Persons (Care and Protection) Act 1998*.

12 Other models of decision making

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Introduction

- 12.1 The Inquiry considered whether the existing model by which statutory child protection is delivered remains appropriate.
- 12.2 As noted earlier, the Children's Court, a court sitting at the fourth tier of the judicial hierarchy in NSW, is the principal decision maker in relation to matters concerning the removal of children and young persons, the allocation of parental responsibility and contact. The Children's Court, which for the purposes of this section encompasses the Local Court when it is sitting as a Children's Court, comprises both specialist and non-specialist Magistrates, with the work allocated roughly two thirds to one third respectively. Appeals from the Children's Court proceed to a higher court, generally the District Court.
- 12.3 DoCS, an administrative body, makes most other decisions in relation to children and young persons who are at risk of harm, and who may be or are in need of care and protection. Appeals from the administrative decisions of DoCS (and other agencies who have been delegated responsibility for the care of children and young persons) proceed to the Administrative Decisions Tribunal and occasionally to the Supreme Court.
- 12.4 The Inquiry is of the view that judicial oversight is necessary in this important jurisdiction. However, whether some of the decisions in relation to all or some children and young persons could be made in a forum other than the Children's Court, has been a live issue.
- 12.5 The Inquiry initially raised the issue of whether the Children's Court should be replaced by a tribunal, following from the DoCS 2006 Discussion Paper where this approach was suggested by DoCS. Since that time, DoCS has retreated from that position.¹⁸¹ It appears to the Inquiry that it was not strongly embraced by any other party, and it is not something which the Inquiry would support.
- 12.6 The Inquiry however considered a range of other decision making models or processes that might be used as an adjunct to, or in connection with, proceedings in the Children's Court.
- 12.7 First, the Inquiry considered whether the alternative dispute resolution mechanisms which are provided for in the Care Act, but which are apparently not used to any significant extent, could be more effectively utilised.
- 12.8 The Inquiry also considered the Family Court processes including the Magellan case management model (involving modification of the existing court processes), the NSW Care Circles pilot (which comes into play after the establishment phase of care proceedings, and involves an alternative process for decisions in relation to care plans), the New Zealand Family Group

¹⁸¹ Transcript: Public Forum, Role of Courts, 22 February 2008, p.5.

Conferencing model (a mediation model designed to resolve issues before court proceedings are initiated) and finally, the Scottish Children's Hearings Tribunal.

- 12.9 The unifying feature of all of these models or processes is that each is less formal and technical in nature than proceedings in the Children's Court.

Alternative Dispute Resolution

- 12.10 Notwithstanding that the Care Act specifically provides for alternative dispute resolution (ADR), the Inquiry has been consistently informed that in practice, there is no real form of ADR operating in the care jurisdiction.
- 12.11 The recommendations resulting from the 1997 review of the 1987 Act included a recommendation that mechanisms should be available as an early intervention strategy, both as an alternative to a care application and during the course of a care application.¹⁸² It was recommended that the Care Act should not be prescriptive about how or what form of ADR was used, nor mandate its use in all circumstances. The Care Act should allow for the widest possible range of options to accommodate the complexities and unique requirements of care and protection cases, and such options might include family group conferencing, mediation and preliminary conferences.
- 12.12 It was further recommended that the Minister should be responsible for establishing and funding ADR services that are independent of DoCS.
- 12.13 The legislation was amended along the lines suggested by the review.
- 12.14 There are three provisions in the Care Act that govern the use of ADR in care proceedings. Section 37 states:

- (1) *In responding to a report, the Director-General is to consider the appropriateness of using alternative dispute resolution services that are designed:*
- (a) *to ensure intervention so as to resolve problems at an early stage, and*
 - (b) *to reduce the likelihood that a care application ... will need to be made, ... and*
 - (c) *to reduce the incidence of breakdown in adolescent-parent relationships, and*
 - (d) *if an application for a care order ... is made, to work towards the making of consent orders*

¹⁸² DoCS, *Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform*, 1997, p.49.

that are in the best interests of the child or young person concerned.

- (2) *Attendance at a preliminary court conference is mandatory.*
- (3) *Participation in all other forms of counselling and conferencing is voluntary.*

12.15 A notation below this section states:

Within this provision, models for counselling and conferencing may be developed to accommodate the unique requirements of a community (whether cultural, geographic or language), the complexities of the case, or the nature and severity of the abuse suffered by the child or young person.

12.16 In addition, s.38 of the Care Act provides that care plans, developed by agreement in the course of ADR, may be registered with the Children's Court and used as evidence of an attempt to resolve the matter without bringing a care application.

12.17 The Senior Children's Magistrate advised the Inquiry that s.38 plans are used 'reasonably often' but said that it does not keep figures as to the frequency with which such care plans are filed with the Court.¹⁸³

12.18 Section 65 of the Care Act deals with preliminary conferences. Subsection 2 states:

The purpose of a preliminary conference is:

- (a) *to identify areas of agreement between the parties, and*
- (b) *to identify issues in dispute between the parties, and*
- (c) *to determine the best way of resolving any issues in dispute, including by referring the application to independent alternative dispute resolution, and*
- (d) *if it is not appropriate to refer the application to Independent alternative dispute resolution, to set a timetable for the hearing of the application by the Children's Court, and*
- (e) *to formulate any interim orders that may be made by consent.*

¹⁸³ Transcript: Inquiry meeting with representatives from the Children's Court NSW, 29 April 2008, p.46.

Preliminary Conferences

12.19 Professor Parkinson informed the Inquiry that the concept of preliminary conferences to be conducted by Registrars in the Children's Court had been an attempt at early resolution in care matters. The Inquiry understands that their intended role was twofold: first, to ensure that the matter was ready for hearing, in that the evidence was filed and served and the like; and secondly, to resolve issues in dispute.

12.20 DoCS informed the Inquiry that:

Preliminary conferences were to be meetings held on an appointment basis which were to be less alienating than court proceedings and allow greater accessibility to people with low levels of literacy... In fact, the preliminary conference is often little different to a directions hearing and the Court consistently seeks all parties to be legally represented. This denies individuals the ability to directly participate and adds to the sense of formality... The suggestion by the Court that it uses preliminary conferences as a form of 'in-house ADR' is rejected, as the experience of DoCS is that Children's Registrars have no training or demonstrated skills in ADR and instead use this forum as a directions hearing.¹⁸⁴

12.21 The LAC effectively agreed.

12.22 Caseworkers had different experiences. Some said that preliminary conferences were being used primarily as mediation sessions, and that agreement was reached in relation to the major issues in the case at about half of the preliminary conferences held. Some noted that preliminary conferences had been run like mediation when led by a particular, experienced Children's Registrar.

12.23 Others said that preliminary conferences have simply become another delay in the court process.

12.24 A legal practitioner who was present at the Nowra Public Forum stated that preliminary conferences were not being used as forums for settlement discussions, and said:

I don't believe Registrars have had mediation training, the DoCS solicitor doesn't attend and so usually nothing gets resolved. It seems to me to be a bit of a waste of time.

12.25 A particular issue raised was the timing of preliminary conferences. The LAC stated:

¹⁸⁴ Submission: DoCS, Operation of courts in the child protection system, p.13.

The preliminary conference is ... held at a time in proceedings where all parties have often already taken a strong position, leaving little room for discussion or compromise... the preliminary conference should be held earlier in the proceedings than is currently the case, and certainly before the filing of the care plan. The preliminary conference should be the vehicle by which an agreed care plan, with orders by consent, is drafted wherever possible... The preliminary conference could be used to identify and limit issues in dispute and to identify what parents may need to do for restoration to even be considered by DoCS.¹⁸⁵

- 12.26 A Children's Registrar informed the Inquiry that in cases where the preliminary conference is held prior to the establishment phase of the proceedings, and the meaning of establishment is explained to the parties, establishment is often settled. However, data are not kept as to the number of preliminary conferences held in which settlement discussions have occurred.
- 12.27 A current and former Children's Magistrate had different views. The Senior Children's Magistrate stated that in nearly every case, the child has been removed prior to the commencement of care proceedings, and that such circumstances are not conducive to effective ADR.
- 12.28 A former Children's Magistrate advised the Inquiry that the parties are reluctant to negotiate before they have all the information before them, and that it is unlikely that this will occur early in the proceedings.
- 12.29 The role, as originally envisaged, of the Registrars is an important one in facilitating early resolution of matters by way of agreement or ensuring that the matter is ready for hearing. It is clear that the former role is not occurring sufficiently often to make a real difference.
- 12.30 The Inquiry is not convinced that the prior removal of the child will always or necessarily mean that ADR will not be effective. Given that establishment is more often than not conceded, it should be possible for matters such as parental responsibility and contact to be resolved through ADR.
- 12.31 The Inquiry is of the view that DoCS, the parties and the Court need to do much more to bring ADR into child protection work. As a start, there should be more Children's Registrars and each of them should be legally trained and qualified as mediators. Recommendations are made about these and related matters in this and the following chapter.

¹⁸⁵ Submission: Legal Aid NSW, 20 February 2008, p.113.

Other alternative dispute resolution mechanisms

- 12.32 There have been no referrals to external ADR nor is there any arrangement in place whereby such referrals can be made. Nor is DoCS currently equipped to offer ADR.
- 12.33 However, in 2002 DoCS entered into an MOU with the Community Justice Centres whereby the Centres agreed to provide all clients referred under s.65 of the Care Act with an independent and confidential mediation service. It appears that this avenue has never been used.
- 12.34 In 2006, the LAC developed a Draft Proposal for a Care and Protection Mediation Pilot (the LAC proposal), based on its Family Dispute Resolution Service (used in the family law jurisdiction) which is geared towards multi-party dispute resolution and is child focused.¹⁸⁶
- 12.35 The LAC proposal involves a combination of mediation and conciliation, and the appointment of an impartial, trained and accredited chairperson to assist parties in a conference setting to discuss problems, consider options, and develop plans. Parties must agree to be referred to conferencing.
- 12.36 The LAC proposal envisages that the following people would attend the conference:
- a. the DoCS caseworker and/or manager as well as the DoCS legal officer
 - b. the children's representative
 - c. any other parties and their legal representatives
 - d. in some circumstances relevant others such as a carer grandparent, aunt or uncle.
- 12.37 The conference would only be held after a determination has been made that a child is in need of care and protection, and under the LAC proposal, only the Court would have the power to refer a matter to this process, and the Court would specify the issues which should be addressed.
- 12.38 Under the LAC proposal, any agreements reached during the course of the conference in relation to issues referred by the Court would be drafted into 'consent orders' for approval by the Court. All attendees would be required to enter into a confidentiality agreement.
- 12.39 A conference would not occur in circumstances where there was violence, where an AVO was in place and may be breached or where a party suffers from impaired functioning.

¹⁸⁶ Legal Aid NSW, "Care and Protection Mediation Pilot: Draft Proposed by Legal Aid Commission NSW – Alternative Dispute Resolution Section," 6 February 2006, pp.1-2.

- 12.40 The LAC proposal states that matters should be referred back to the Court where:
- a. a party had not cooperated in the timely organisation of the conference
 - b. a party withdrew consent to the holding of the conference
 - c. the chairperson considered that the matter was no longer suitable for a conference
 - d. the conference was complete.
- 12.41 DoCS informed the inquiry that it would have 'no problems' in adopting the model put forward by the LAC.¹⁸⁷

Family Court Processes

Less adversarial trial

- 12.42 Since 1 July 2006, the Family Court of Australia (the Family Court) has dealt with applications for orders concerning children by way of a Less Adversarial Trial (LAT). The relevant provisions are found in Part VII Division 12A of the *Family Law Act 1975 (Cth)*.
- 12.43 The Inquiry understands that the model is not followed in every respect in every Family Court in Australia, and this report describes the model rather than the details of its implementation.
- 12.44 The aims of the LAT model are to:
- a. focus on the children in the case and their future
 - b. be flexible so as to meet the needs of the family situation
 - c. be less costly compared with judicial trials and to save time in court
 - d. allow for participation of the family in the process
 - e. be less formal than is usually the case in a court.¹⁸⁸
- 12.45 The LAT has the following elements:
- a. the matter is heard on all occasions by the same Judge
 - b. the Judge (rather than the parties) decides what information is to be put before the Court
 - c. the Judge controls how the trial is run
 - d. the focus is on what is best for the children
 - e. a Family Consultant is made available to the parties throughout the hearing

¹⁸⁷ Transcript: Inquiry meeting with DoCS lawyers, 1 February 2008, p.13.

¹⁸⁸ Family Court of Australia, *Less adversarial trials*, 2008, p.1.

- f. technical rules of evidence are not applied.¹⁸⁹
- 12.46 Prior to the first day of the LAT, the family meets with the Family Consultant who has been allocated to the case.
- 12.47 The Family Consultant who is a psychologist or social worker attached to the Family Court attends the first day of the LAT to give general expert advice and information to the Judge to help identify the relevant issues in dispute. On the first day of the LAT, the parties are asked to talk about the case, and to indicate the orders they are seeking (either in their own words, or if they prefer, via their lawyer).¹⁹⁰ The Judge then identifies the issues to be decided.
- 12.48 Decisions are also made about the evidence to be heard (including which witnesses, if any, will need to attend), who should provide evidence in writing and what it should be about, what expert reports will be required if any, and whether a family report will be required. Where ever possible this report will be prepared by the Family Consultant allocated to the matter.¹⁹¹
- 12.49 In cases where there are concerns about family violence, the Family Court will make arrangements to enable parties to be both safe and able to participate fully in LAT. This might involve a person being heard by video or teleconference.¹⁹²
- 12.50 The LAT has been described as follows:

*In children's cases, Division 12A [of the Family Law Act 1975] swept away restrictive rules of evidence and the control of the proceedings was placed in the hands of the judge, rather than the parties or their legal representatives. The focus is a future looking one, geared to the needs of a child. As a consequence of the new procedures, parties are no longer free to conduct litigation as a forensic war between each other at the expense of the interests of the child. At the same time the best features of the Court's highly developed system for mediation and resolution of disputes has not only been preserved but also enhanced, and the role of ... the family consultant has become even more significant. The unique approach retains and relies on the special assistance provided by family consultants, whilst providing a clear child focus underpinned by active judicial leadership and direction.*¹⁹³

¹⁸⁹ Family Court of Australia, *Fact sheet: Less Adversarial Trial*, 2008, pp.1-3.

¹⁹⁰ Transcript: Inquiry meeting with representatives of the Family Court of Australia, 9 May 2008, pp.31.

¹⁹¹ Family Court of Australia, *Less adversarial trials*, 2008, p.3.

¹⁹² *ibid.*

¹⁹³ M Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings*, April 2007, p.ix.

- 12.51 The LAC recommended to the Inquiry that the Children's Court trial a LAT program.
- 12.52 In 2008, the Family Court implemented the Child Responsive Program nationally.¹⁹⁴ It appears that the program enhances the pre-court assessment role of the Family Consultant, and allows for a more thorough assessment of the child's needs. The Child Responsive Program involves the Family Consultant interviewing and assessing school aged children involved in family law proceedings. The Family Consultant assesses the developmental needs of the child, the child's emotional response to the parents' dispute, and considers the child's views on the various options available (for example, who they will live with). The assessment is summarised in a preliminary report by the Family Consultant, which is presented and discussed with the parents in a feedback session.¹⁹⁵
- 12.53 A 2006 study of the Child Responsive Program identified it as an important screening tool in the early detection of children who require child protection involvement, or therapeutic services, and in the identification of parents who required early, specialist services to assist the management of their separation, particularly those with personality or mental health disorders.¹⁹⁶

Magellan

- 12.54 The Magellan case management model (Magellan) was introduced to Family Court registries in 2003, and was designed to expedite children's matters in the family law jurisdiction in cases where one or both parties had raised serious allegations of child abuse.
- 12.55 Where a Notice of Child Abuse and Family Violence containing allegations of serious physical and/or sexual abuse is filed in a case involving an application for parenting orders, the application is referred to the Magellan Registrar for consideration for inclusion in the Magellan list.
- 12.56 Magellan has the following elements:
- a. cases are managed throughout by one Judge
 - b. each case is allocated a Registrar, who becomes familiar with the details of the case and coordinates the process
 - c. each case is allocated a Family Consultant, who prepares an early, detailed family report analysing the family dynamics and the needs of the child
 - d. every child has a court ordered legal representative (Independent Children's Lawyer) funded by Legal Aid

¹⁹⁴ Family Court of Australia, *Annual Report 2007/08*, p.20.

¹⁹⁵ J McIntosh and C Long, *The Child Responsive Program, operating within the Less Adversarial Trial: A follow up study of parent and child outcomes*, July 2007, pp.5.

¹⁹⁶ *ibid.*, p.7.

- e. the amount of Legal Aid funding is not capped for parents who qualify for Legal Aid.
 - f. interagency protocols are in place, and there is a multi-agency committee in each registry
 - g. resources are provided early in the case, including uncapped legal aid, provision of information by other agencies such as statutory child protection agencies and early access to the Judge, counsellors, and the registrar
 - h. there is a separate Magellan court list and there are timeline goals, with the aim to finalise matters within six months of commencement
 - i. the Court orders expert investigations and assessments from the state child protection service and the court counsellors.¹⁹⁷
- 12.57 Early in the Magellan process, the Family Court makes an order requesting the state/territory child welfare agency to intervene in the Family Court proceedings.

Magellan Report

- 12.58 DoCS provides its initial evidence in Magellan cases by way of a 'Magellan Report', which is essentially a summary of DoCS' involvement with the child and family, and of DoCS' recommendations (if any) in relation to the case. The Magellan Report typically sets out:
- a. family details, including names, ages, place of residence
 - b. a summary of the child protection history – including reports made to DoCS, primary risk of harm issues recorded, whether or not a secondary risk of harm assessment was carried out, and, if so, the outcome
 - c. an analysis of the issues
 - d. any recommendations
 - e. details of any current or proposed action by DoCS in response to the Family Court's request to intervene.
- 12.59 DoCS stated:

*One reason the Magellan model is considered effective in the Family Court context is because evidence is provided to the Court by DoCS in a manner other than by way of affidavit and in the process, DoCS caseworkers can, as experts in child protection, offer practical solutions to the problems facing the family in question.*¹⁹⁸

¹⁹⁷ DoCS, *Discussion paper on alternatives for hearing and making decisions in child protection matters*, February 2008, p.14-15; Family Court of Australia, *Magellan Manual: National procedures for conduct of Magellan cases*, 2 May 2007, p.2.

¹⁹⁸ DoCS, *Discussion paper on alternatives for hearing and making decisions in child protection matters*, February 2008, p.17.

Evaluations and comments

- 12.60 Two evaluations of Magellan have been carried out. The first, in 2001, evaluated the pilot. The second, in 2007, followed the implementation of Magellan nationally (it commenced in different registries at different times).
- 12.61 The 2007 evaluation found that Magellan cases, when compared with Magellan-like cases¹⁹⁹ in the Family Court:
- a. were shorter (from commencement to finalisation)
 - b. involved fewer court events
 - c. were dealt with by fewer judicial officers
 - d. were more likely to settle.²⁰⁰
- 12.62 Qualitative results of the evaluation also found that the following occurred in Magellan cases:
- a. cooperation between all agencies involved
 - b. good individual case management (Judge-led) with consistency of approach
 - c. child focused processes, including timely reports from Family Consultants and other experts.²⁰¹
- 12.63 It was noted in the 2007 evaluation:
- Participants felt that Magellan delivers better outcomes for children and families. A critical element to this is the tight case-management procedures, particularly the role of the Magellan Judges and Registrars.*²⁰²
- 12.64 A Family Court Judge was quoted in the 2007 evaluation as saying:
- It must be achieving good things. You get the early reports in. Then the parties can come to an acceptable agreement about what's in the best interests of the children promptly. The fact that the decisions are being made on proper supporting evidence, and you have the cooperation of the various people involved: police, the child protection department and the Court. That's got to work in children's favour. The sharing of information. They're not getting caught up in unnecessary bureaucratic quagmire.*²⁰³

¹⁹⁹ Cases in the Family Court, where one or both parties have raised allegations of sexual abuse or physical abuse of children in a parenting dispute, filed in a registry where Magellan was not operating at the time.

²⁰⁰ D Higgins, "Cooperation and coordination: An evaluation of the Family Court of Australia's Magellan Case Management Model," *Australian Institute of Family Studies*, 2007, p.16.

²⁰¹ *ibid.* pp.16-17.

²⁰² *ibid.*, p.18.

²⁰³ *ibid.*, p.123.

12.65 Another Family Court Judge was quoted in the 2007 evaluation as saying:

*The Judge can – despite high workloads – retain a level of familiarity with the file, and can remember the previous interim proceedings, the reports, and those outcomes. Whereas if you always had a different Judge every time, there wouldn't be that level of familiarity, and that could extend the proceedings. They may try to argue the same thing before a different Judge for the third or fourth time.*²⁰⁴

12.66 The evaluation also noted that in some registries, due to judicial resources, although Magellan cases were being managed by a single Judge, if they proceeded to a final hearing, they may have been heard by a different Judge.²⁰⁵

12.67 The Inquiry also understands that a substantial number of Magellan cases are resolved prior to hearing.²⁰⁶

12.68 In terms of efficiency, DoCS informed the Inquiry that the 2001 evaluation of the pilot examined costs and found that they had reduced for Victorian Legal Aid involvement in the Family Court by 50 per cent. In general, Magellan required a higher workload earlier in the case, which was however offset by requiring less work later, partly because more cases were resolved.²⁰⁷

Family Consultants

12.69 As noted earlier Family Consultants are social workers or psychologists attached to the Family Court and are used in all children's cases in that Court (both in Magellan cases and in LATs). When a children's matter comes before the Family Court, each family member meets with the Family Consultant prior to the matter coming before a Judge. The Family Consultant then prepares a brief report for the Court about the relevant issues in the matter. The Family Consultant remains associated with the matter for the duration of the proceedings, providing expert evidence about child development and the appropriate orders that might be made in relation to specific children.

12.70 The Inquiry understands that the Family Consultant generally provides the Judge with an 'issues assessment' early in the proceedings. The Judge then asks each parent to outline the orders they are seeking and, with the involvement of the Family Consultant, determines whether further reports are required. The Inquiry also understands that in cases involving child protection issues, the Family Consultant makes inquiries with service providers and schools to gather information about the child and the family. The Inquiry was told that the Family Consultants do not undertake confidential ADR.

²⁰⁴ *ibid.*, p.130.

²⁰⁵ *ibid.*, p.131.

²⁰⁶ Transcript: Representatives from the Family Court of Australia, 9 May 2008, p.4.

²⁰⁷ DoCS, *Discussion paper on alternatives for hearing and making decisions in child protection matters*, February 2008, p.17.

- 12.71 The Sydney Registry of the Family Court currently has eight full time Family Consultant positions. The Family Court also provides funding for external consultants to be contracted when internal resources cannot meet demand.²⁰⁸
- 12.72 The Inquiry was told that each Family Consultant in the Sydney registry has, on average, more than 80 matters allocated to them.²⁰⁹

Alternative dispute resolution in the Family Court

- 12.73 In most family law matters, ADR is compulsory.²¹⁰ The Law Society informed the Inquiry that mandatory ADR has worked well in the Family Court, and that as a result, only very complex cases proceed to a full hearing. However, compulsory ADR does not apply to matters in which there is an allegation of family violence or child abuse²¹¹ – and ADR is not compulsory in Magellan matters.

Care Circles

- 12.74 Attorney General's, in combination with DoCS, has this year commenced work on a Care Circle pilot as an alternative way of resolving care matters involving Aboriginal children and young persons. The Care Circle pilot will be run at Nowra,²¹² and the first Care Circle has been listed to occur on 10 December 2008.
- 12.75 The Care Circle is intended to be activated after the establishment phase of care proceedings (that is, after the Children's Court has determined that the child or young person is in need of care and protection) either on the Court's own volition, or on the application of one of the parties to the proceedings. The Care Circle is intended to provide a model for the increased participation of the child's or young person's family and community in relation to their future care arrangements.
- 12.76 Suitability of a matter for referral to the Care Circle would be based on consideration of:
- a. the child's or young person's and parent's connection to the local Aboriginal community

²⁰⁸ Correspondence: Family Court, 10 June 2008.

²⁰⁹ *ibid.*

²¹⁰ Family Court of Australia, *Fact sheet: Compulsory Family Dispute Resolution court procedures and requirements*, 2008.

²¹¹ *ibid.*, p.2.

²¹² Attorney General's Department of NSW and DoCS, *Care Circles: an alternative court process for Aboriginal children at risk*, November 2008, p.5.

- b. the potential benefits to the parents, child or young person and community.
- 12.77 DoCS advised the Inquiry that matters would be excluded from the Care Circle in certain circumstances, for instance if there was a dispute about whether the child or young person was Aboriginal or where one of the participants had been physically violent towards other participants.
- 12.78 The model envisages involvement of the following people in the Care Circle:
- a. three respected Aboriginal community members, who will have been provided with some training in relation to the operation of the Care Circle, the relevant legislation, and the concept of the paramountcy of the safety, welfare and well-being of the child or young person
 - b. the child or young person (the legal representative and the Magistrate are to agree that it is appropriate for the child or young person to attend)
 - c. the mother and father
 - d. the legal representatives of the child, mother and father (the mother and father may have separate legal representatives in attendance)
 - e. a DoCS legal officer
 - f. the DoCS caseworker and casework manager
 - g. the Care Circle Project Officer (an employee of the Attorney General's Crime Prevention Division)
 - h. the Magistrate (the Registrar coordinates the administrative aspect of the Care Circle and may attend)
 - i. other family members and advocates at the discretion of the Magistrate.²¹³
- 12.79 Participation in the Care Circle is to be voluntary and the consent of all parties to participate is required. The model envisages that the Care Circle should be held in a community environment, but should be confidential and closed to the public.
- 12.80 The model involves two Care Circle conferences. The first should be held as soon as possible after establishment, allowing time for the Care Circle coordinator to organise community members to sit on the Care Circle, and allowing time for any assessment reports (DoCS informed the Inquiry that five to six weeks after establishment should be an adequate timeframe).
- 12.81 The Care Circle proposal states:
- The first circle conference is an opportunity for the parties to come together to discuss what is in the best interests of the child or young person. The care circle may provide valuable input into the following:*

²¹³ *ibid.*, pp.13-15.

If there is to be a restoration

What interim arrangements there should be for the care of the child,

What services/supports can be made available to the family; or,

If there is to be no restoration, then

Where the child should live

What contact arrangements should be put in place

*Alternative family placements*²¹⁴

- 12.82 A summary of why the child is in need of care and protection and any issues to be discussed by the Care Circle will be agreed by all parties to the proceedings who are present at court when the matter is set down by the Magistrate for referral to a Care Circle.
- 12.83 DoCS informed the Inquiry that it is envisaged that the first Care Circle conference would typically run for about three hours. After the first Care Circle conference, the DoCS caseworker should prepare a care plan based on the discussion and outcomes.
- 12.84 The second Care Circle conference should be held about three weeks after the first. The purpose of the second Care Circle conference is to consider and discuss the proposed care plan, and to discuss and decide on appropriate care orders for the care and protection of the child. DoCS informed the Inquiry that it is envisaged that the second Care Circle conference would typically run for about 90 minutes.²¹⁵
- 12.85 In cases where agreement on care orders cannot be reached by all parties at the second Care Circle conference, the matter would be referred back to the Children's Court to be determined using the usual care proceedings processes.
- 12.86 One of the aims of the pilot is to demonstrate DoCS' recognition of the importance of kinship relations in the care and protection of children and young persons consistent with s.13 of the Care Act and to improve the effectiveness of undertakings agreed upon by parents.
- 12.87 DoCS informed the Inquiry:
- ...it is questionable whether this model of participation would work in the broader community, or even in Aboriginal communities in metropolitan areas or regional centres. In the broader community, there are unlikely to be persons generally*

²¹⁴ *ibid.*, p.10.

²¹⁵ DoCS, *Discussion paper on alternatives for hearing and making decisions in child protection matters*, February 2008, p.39.

*acknowledged to be in the position of Aboriginal elders or their equivalents. In metropolitan and regional centres, even Aboriginal community ties are likely to be less in evidence and families more isolated and transient.*²¹⁶

12.88 The Children's Court submission to the Inquiry stated that:

*the Children's Court believes that the proposal holds out great hope for the more sensitive and efficient provision of child care and protection services in the ATSI communities with a marked enhancement of community involvement in the lives of indigenous children and young persons.*²¹⁷

12.89 However, it also raised specific concerns regarding the potential of alternative mechanisms such as Care Circles to cause a delay in proceedings and exacerbate placement instability, the potential for a level of rigour in proceedings to be lost, and the need for the benefits of community participation to be balanced against "the right to confidentiality, the right to a fair hearing and the various presumptions which can be found, particularly in section 9 of the Act."²¹⁸

12.90 The Inquiry supports the trial as a means of exploring an alternative method by which decisions can be made concerning Aboriginal children and young persons and which actively engages members of the Aboriginal community. The evaluation should be closely considered and if successful, Care Circles should be implemented in appropriate locations in NSW for the same client group.

Family Group Conferencing

12.91 Family group conferencing (FGC) involves bringing together the child or young person, members of their immediate and extended family, and child protection professionals to discuss issues, come to a resolution and develop a plan for future action.

12.92 FGC began in New Zealand in the late 1980s and was based on Maori cultural practice. Its use in Australia is now supported in a number of States (Tasmania, Queensland, and Victoria). In NSW FGC has been strongly promoted and developed by UnitingCare Burnside, which has well established FGC programs in partnership with DoCS. Burnside has also developed an accredited training course for FGC facilitators.²¹⁹

²¹⁶ *ibid.*, p.20.

²¹⁷ Submission: Children's Court NSW, 14 January 2008, p.31.

²¹⁸ *ibid.*

²¹⁹ N Harris, "Family Group Conferencing in Australia 15 years on," *Australian Institute of Family Studies, Child Abuse Prevention Issues, No.27*, 2008, pp. 9, 17.

- 12.93 The FGC model is based on the following assumptions:
- a. families have a right to participate in decisions that affect them
 - b. families are competent to make decisions if properly engaged, prepared and provided with necessary information
 - c. decisions made within families are more likely to succeed than those imposed by outsiders.
- 12.94 In New Zealand, conferences occur in three stages. The first stage of the conference involves the sharing of information by child protection workers and other professionals with the family. This will usually include discussion of the concerns that are held for the child or young person, as well as the services that are available. The second stage of a conference involves the family having time on their own to deliberate and agree on possible solutions. In the final phase of the conference the aim is to arrive at agreement on first, whether the child or young person is in need of care and protection, and secondly, on the formulation of a plan that will address these concerns. This may involve negotiation between the family, care and protection workers, and other agencies about the services and supports that can be provided. For a conference agreement to come into effect it is necessary that all participants agree. If there is not agreement in the conference about whether a child or young person is in need of care and protection, or on a plan to address these needs, the conference can be reconvened or the case can be referred to the court.²²⁰
- 12.95 Conferences have particular significance because New Zealand's legislation prescribes that they are a key decision making process that must be used in particular situations, and that decisions made within them have a legal status that must be recognised by participants. In these respects, the decisions made in a conference are accorded no lesser status than that of court decisions.²²¹

Effectiveness

- 12.96 According to Huntsman's review on FGC, there is considerable evidence that families prefer FGC to other case planning processes, and some evidence that negative perceptions of the child protection agency and workers (as well as family/agency communication) lessen following the FGC experience.²²² Evidence is accumulating that children and young persons are more likely to be placed with relatives if FGC is used.²²³
- 12.97 However Connolly notes that, despite the success of FGC and consistent research evaluations indicating that FGC compares favourably in terms of child

²²⁰ *ibid.*, p.3.

²²¹ *ibid.*

²²² DoCS, *Family Group Conferencing in a child welfare context, Literature Review*, July 2006, p.15.

²²³ M Connolly, "Family Group Conferences in child welfare," *Developing Practice* 19, Winter/Spring, 2007, p.27.

safety and stability measures, the general shift of child protection services towards a more interventionist and forensic focus diminishes the focus on creating statutory environments within which families can participate and be involved in decision making.²²⁴

- 12.98 Harris provides a recent overview about the extent to which conferencing has become part of child protection practice in Australia over the last 15 years. Harris observes that the use of conferencing in Australian child protection systems is fairly limited and “that while conferences have had an impact on practice, they have not yet become part of mainstream practice.”²²⁵ The following table provides information on when FGC is used and how its outcomes are implemented.²²⁶

Table 12.1 Comparison of when conferences are used and how their outcomes are implemented

	<i>When</i>	<i>Outcome requires</i>	<i>Implementation</i>
New Zealand	When it is believed a child is in need of protection – prior/alternative to seeking court orders.	Agreement of the family, child protection worker and facilitator.	Outcome must be implemented by Department unless impractical or inconsistent with the Act.
Victoria	Various decision making points, for example, development of case plans or when significant decisions are to be made about an Aboriginal child.	There is variation in use of conferences, but agreement of the family and caseworker is usually required.	Expectation is that agreed outcomes will be implemented by the Department.
South Australia	Prior to seeking care and protection orders. Can be an alternative seeking court orders, but orders are still sought in some cases.	Agreement of the family and the facilitator. Agreement of child protection worker is usually sought.	Families SA has discretion whether to implement agreements and/or seek additional court orders.
Western Australia	An early intervention program was conducted for children younger than 10 identified as having behavioural problems.	During the trial, agreement of the family, child protection worker and facilitator.	When used, expectation was that outcomes would be implemented by the Department.
Australian Capital Territory	When it is believed a child is in need of protection – prior/alternative to seeking court orders.	Agreement of child’s parents, the child where appropriate, and child protection worker.	Department must implement outcome but may take further action.

²²⁴ *ibid.*, p.28-29.

²²⁵ N Harris, “Family Group Conferencing in Australia 15 years on,” *Australian Institute of Family Studies, Child Abuse Prevention Issues, No.27*, 2008, p.16.

²²⁶ *ibid.*, p.12.

	<i>When</i>	<i>Outcome requires</i>	<i>Implementation</i>
Tasmania	Usually in conjunction with court orders (for example, when an 8-week Assessment Order is made or a 12-month Care and Protection Order is extended), but can be used separately.	Agreement of the child's guardian, the child or their advocate, and the facilitator.	Department has discretion to endorse the outcome. If it is not endorsed, the conference can be reconvened, or the family's plan and a Departmental alternative are presented to the court.
Queensland	In most cases where it has been assessed that a child is in need of care and protection and ongoing intervention is required. A case plan must be developed before the court can make a Child Protection Order.	Unspecified in legislation.	Department has discretion to endorse the outcome agreement or amend if for submission to court.

12.99 The role that conferencing plays varies, so that in some states conferences focus "on early intervention, in others they occur en route to court, and in still others they are used to reach agreements once orders have already been sought in court."²²⁷ However:

*a distinct advantage of conferencing is precisely that they are a 'high tariff', formal process that engages and empowers family in making decisions when this is required because less formal approaches have not succeeded or are considered inappropriate. They provide a forum that communicates to families that the concerns are very serious, not least because the next option for statutory services is often to seek court orders, while at the same time allowing families to contest that opinion or to engage in finding solutions.*²²⁸

12.100 DoCS conducted a literature review in 2006, which found "some general consensus on the potential benefits as well as on the difficulties posed by FGC practice."²²⁹ Findings, in relation to client outcomes, included the following:

- a. inclusion in the decision making process can empower families who previously feel powerless in regard to their relationship with statutory authorities
- b. FGC positions child abuse as a community responsibility, potentially leading to more reporting of neglect and child abuse cases by communities

²²⁷ *ibid.*, p.16.

²²⁸ *ibid.*, pp.16-17.

²²⁹ DoCS, *Discussion paper on alternatives for hearing and making decisions in child protection matters*, February 2008, p.22.

and families and greater awareness of child protection issues by the community in general

- c. plans developed in negotiation with families are more likely to work.²³⁰

12.101 In relation to operational effectiveness, the literature review found that:

- a. there was an improved commitment and attitude of families towards implementation of decisions (as a result of families' higher satisfaction about their interaction with statutory child protection agencies and the outcomes of the process)
- b. children are more likely to be placed with extended family members which assists in retaining children's links to their family and increases the likelihood of finding a culturally appropriate placement.²³¹

12.102 However, DoCS stated that a potential problem of the FGC is that it positions the family as the primary source of protection in cases where statutory authorities should be retaining a larger proportion of protection responsibility. It also informed the Inquiry that in New Zealand "plans for the protection of children developed during the FGC are often not implemented due to lack of support services and funding."²³²

12.103 DoCS also stated that:

... managing confidential disclosures and sensitive information in a conference setting can be complex and difficult for FGC practitioners. The FGC process can also lack clarity on who holds responsibility for convening a conference, negotiating attendance and reviewing progress against the original plan. Families may not always have the capacity or cohesion to cooperate and communicate to develop adequate plans.

FGC also may not be useful in all contexts. Families with serious mental health issues, small extended networks, or substantial internal conflict may be better served by a more formal child protection procedure. In these cases, anecdotal evidence suggests that the FGC can become an administrative hurdle that must be legally completed before the agency can take the matter to court, where it may be more appropriately dealt with.

The flexibility provided by the FGC can also mean an absence of due process and inadequate legal representation and the conference structure may prevent disclosures from family

²³⁰ *ibid.*, p.22.

²³¹ *ibid.*, p.23.

²³² *ibid.*

*members intimidated by perpetrators present at the Conference.*²³³

- 12.104 DoCS submitted that the Care Act does not present a barrier to utilising FGC, and stated:

*FGC could be used to assist in the development of contact orders and care plans prior to resolution of matters in court, promoting early resolution of matters where an application to the Children's Court has been made.*²³⁴

- 12.105 Catholic Social Services NSW/ACT, in a joint submission with the Catholic Education Commission, recommended that the Inquiry investigate the efficacy of FGC and its potential as a mandatory precursor to care proceedings. Centacare Broken Bay made a similar submission.

UnitingCare Burnside's Family Group Conferencing Pilot

- 12.106 The Inquiry was informed that from 1996 to 1999, UnitingCare Burnside, in partnership with DoCS, piloted an FGC model of ADR in western Sydney, which dealt mostly:

*with matters that were post-court or with non-court matters, in which the issues involved decisions about placements for children, contact between the child and family members or the supports required to maintain or restore the children to the family.*²³⁵

- 12.107 DoCS said that outcomes of the pilot demonstrated:
- a. improved relationships between families and DoCS
 - b. better relationships between family members
 - c. an enhanced capacity to reach agreement
 - d. a reduced risk to children and children remaining at home in about two thirds of cases.
- 12.108 Dr Judy Cashmore, Research Academic, University of Sydney, who conducted an evaluation of the UnitingCare Burnside FGC pilot spoke positively of it to the Inquiry.
- 12.109 The LAC informed the Inquiry that since the conclusion of the pilot, UnitingCare Burnside has continued to conduct family group conferences (Family Mediation Service) on an as needed basis but the program itself has not been taken up as a model for dealing with child protection issues in general. UnitingCare

²³³ *ibid.*

²³⁴ *ibid.*, p.24.

²³⁵ Submission: Legal Aid NSW, 20 February 2008, p.40.

Burnside informed the Inquiry that its Family Mediation Service is used primarily in the family law jurisdiction.

Other Conferencing Models

- 12.110 There are a number of other models that have grown out of the family conferencing movement. For example, the Inquiry received information on the Family Engagement Model operating in Cannington, Western Australia. An evaluation indicated that while almost all stakeholders had a very positive attitude toward the model and reported that it was very empowering for families, the outcomes on select indicators were unclear. The evaluation recommended further analysis, evaluation and comparison with existing case management processes.

Children's Hearings (Scottish tribunal model)

- 12.111 In Scotland, care and protection matters, as well as juvenile crime matters, are heard by a tribunal (and are referred to collectively as 'Children's Hearings'). The key elements of this model are:
- a. a unitary system for hearing matters of juvenile justice (including truancy) and care and protection
 - b. the use of lay panels of volunteers comprising representatives of local communities to hear matters in a non-adversarial and informal setting (each Children's Hearing is heard by three panel members)
 - c. the use of straightforward procedures which minimise legal technicalities
 - d. the provision of an opportunity for parents and children to participate in the discussion of their difficulties and proposed solutions during the hearing
 - e. a separation of the responsibility of deciding upon the need for compulsory orders from the determination of the facts of the case. The role of the court is limited to establishing facts (where they are in dispute), hearing appeals and dealing with more serious offenders.²³⁶
- 12.112 Matters are referred to a Children's Hearing where the grounds for referral can be proven in court, where compulsory measures of supervision are required and where legal intervention will be more beneficial for the child than not making an order.
- 12.113 If a matter is referred to a Children's Hearing, the Children's Hearing Tribunal (Tribunal) can appoint a 'safeguarder' to offer an independent view of what is in the child's best interests. If the case is legally complex or secure

²³⁶ DoCS, *Discussion paper on alternatives for hearing and making decisions in child protection matters*, February 2008, p.27.

accommodation for the child is being considered, the Tribunal will appoint a legal representative to represent the child's views.

- 12.114 Attendees at the Children's Hearing are:
- a. the child
 - b. the parents/carers
 - c. relevant professionals
 - d. the safeguarder (if appointed).
- 12.115 The panel members discuss the circumstances with the attendees. If a safeguarder is appointed, he or she also assists the panel in its decision making.
- 12.116 The hearing is more inquisitorial than adversarial, and the Tribunal has the right to call for reports, require assessments of the child and adjourn the hearing to allow further investigations to take place. However, if the parents do not accept the 'grounds' or reasons for calling the Children's Hearing, the matter is referred to the Sheriff Court for a determination in relation to establishment. The Sheriff Court operates on an adversarial model, and DoCS informed the Inquiry that about 80 per cent of care and protection matters end up being referred to the Sheriff.
- 12.117 Decisions are made in the Children's Hearing itself, in the presence of the child and parents/carers.
- 12.118 DoCS informed the Inquiry that participants in a study of the Children's Hearings felt that they were less adversarial and formal than court hearings, and provided greater opportunity for party participation. However, DoCS indicated that evaluations of the Children's Hearings have found that the establishment phase is conducted in an adversarial manner, that children and young persons participated in a limited way, and that parents were not aware of their rights and needed to be provided more information on how the system works. These shortcomings were, it seems, based on resource considerations rather than on the model per se.
- 12.119 DoCS submitted that the advantage that the Scottish model has over the current NSW care proceedings model is that it is more inquisitorial, does not limit evidence to that provided through affidavits, and is, as a result, able to look at the needs of the child more holistically.
- 12.120 DoCS stated:
- Research suggests that tribunals, particularly those not involving legally trained personnel, can fail to provide procedural fairness due to lack of proper reasoning, lack of proper representation, failing to apply legal principles, perceptions of bias and formation of views prior to the hearing.*

*Anecdotal evidence and research findings in the first decade of the operation of the Scottish Children's Hearing system indicated that informality led to procedural laxity as well as wide variations in practice between hearings. This is supported by 2007 research into the relationship between social work recommendations to Scottish Children's Hearings and the decisions taken, which found that widely different policies and practices operated between different regional localities throughout Scotland. There is a risk that a failure to provide procedural fairness can lead to complex, costly and formal appeal processes.*²³⁷

- 12.121 The Inquiry does not however favour a model that includes lay, volunteer panels who often lack the rigour and experience in decision making that is necessary in such a sensitive and complex area.

Conclusion

- 12.122 The Inquiry does not consider it necessary to replace the existing model of decision making by the Children's Court. It makes recommendations as to its operation in the previous and following chapters.
- 12.123 The Inquiry is, however, of the strong view that ADR should be used before and during care proceedings. Most of those who spoke to the Inquiry or submitted information to it supported the greater use of ADR in child protection including the Benevolent Society, Centacare, ACWA, UnitingCare Burnside, the Intellectual Disability Rights Service and the Aboriginal Legal Service.
- 12.124 In this respect, the Inquiry favours adopting an approach that would preserve flexibility and be capable of using FGC and aspects of other models including that proposed by the LAC.
- 12.125 In relation to the model proposed by the LAC, the Inquiry understands that the presence of violence may be a feature not always present in family law matters. Child protection work however, has violence, actual, threatened or apprehended, as a constant feature. Its presence should not operate to exclude ADR, rather those conducting it should have appropriate training.
- 12.126 The Inquiry agrees with DoCS that all of the following should be able to be dealt with, or at least discussed, with the assistance of one or more of the ADR mechanisms discussed in this chapter:
- a. placement plans
 - b. contact arrangements

²³⁷ *ibid.*, p.30.

- c. treatment interventions
 - d. long term care issues
 - e. determination of the timing/readiness for returning a child or young person to the home
 - f. determination of when to discontinue protective supervision
 - g. the nature and extent of a parent's involvement
 - h. parent/child conflict
 - i. lack of, or poor, communication between a worker and parents due to hostility
 - j. negotiation of length of care and conditions of return
 - k. foster carer/agency/parent issues.
- 12.127 ADR should not be used to resolve a dispute about whether a child or young person has been abused or neglected or is otherwise in need of care and protection or in cases where an AVO has been granted, (where the process of ADR or the desired outcomes would lead to a breach of the AVO). If used effectively there would be no need to introduce the resource intensive procedure employed in the Family Court.
- 12.128 The Care Act needs no amendment to achieve the goal mentioned. It can be attained by a combination of the greater use of trained and legally qualified Children's Registrars, access to externally operated services such as those described in the LAC submission, or the MOU with the Community Justice Centres, or through FGC offered by an NGO, or by trained DoCS staff. The last option is perhaps the least attractive because of perceptions by those involved in the jurisdiction of DoCS partiality. The benefits are obvious and include improved participation by the children and families in the decision making process.
- 12.129 Detailed guidelines will need to be developed to determine who is entitled to apply for and whether a matter is referred to ADR. Practically, ADR will have to be funded by the State regardless of which party initiates proceedings. This means that the person presiding or mediating will be funded by the State. However, the appearance by the parties in any ADR proceedings should be funded in the same manner as if they were attending court proceedings. It is noted that DoCS has estimated that the additional resources required for its Legal Services area alone would amount to about \$1.44 million (presumably annually). Costs, of course, are likely to be saved by reduced hearing times, if ADR is successful.
- 12.130 In addition, for those matters which are dealt with by the Children's Court, the Inquiry is of the view that there should be consistency of judicial officers, a Children's Registrar allocated to each matter, less formal requirements for adducing evidence and an enhanced role for the Children's Court Clinic. Each of these is addressed in the preceding or following chapter.

Recommendations

Recommendation 12.1

Adequate funding should be provided so that alternative dispute resolution is used prior to and in care proceedings in order to give meaning to s.37 of the *Children and Young Persons (Care and Protection) Act 1998*, in relation to:

- a. placement plans
- b. contact arrangements
- c. treatment interventions
- d. long term care issues
- e. determination of the timing/readiness for returning a child to the home
- f. determination of when to discontinue protective supervision
- g. the nature and extent of a parent's involvement
- h. parent/child conflict
- i. lack of, or poor, communication between a worker and parents due to hostility
- j. negotiation of length of care and conditions of return
- k. foster carer/agency/parent issues.

Recommendation 12.2

The Nowra Care Circle Pilot should be monitored and evaluated. If successful, consideration should be given to its extension to other parts of the State with significant Aboriginal communities.

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Court processes

- 13.1 The Report thus far has considered matters of substantive law in relation to child protection. However, just as frequently (if not more so), real issues arise in relation to the processes by which significant decisions about the lives of children and young persons are made. This chapter deals with these matters.

The Children's Court

- 13.2 As noted above, the Children's Court deals with matters related to the care and protection of children and young persons (care proceedings), and also criminal cases in which the alleged perpetrator is a child or young person.
- 13.3 The Children's Court is composed of Children's Magistrates and Children's Registrars, as well as generalist Magistrates and Registrars in situations where the Local Court sits as a Children's Court. Children's Magistrates are from time to time appointed by the Chief Magistrate of the NSW Local Courts (the Local Court). A person is qualified to be appointed as a Children's Magistrate if the person:
- a. is a Magistrate
 - b. has (in the opinion of the Chief Magistrate) the knowledge, qualifications, skills and experience in the law and the social or behavioural sciences, and in dealing with children and young persons and their families, necessary to enable the person to exercise the functions of a Children's Magistrate.²³⁸
- 13.4 Children's Magistrates are appointed for a three year term, however they are eligible to be re-appointed at the expiry of a term. A Children's Magistrate does not cease to be a Magistrate during the term of his or her appointment as a Children's Magistrate.²³⁹
- 13.5 The most senior judicial appointment within the Children's Court is that of the Senior Children's Magistrate.²⁴⁰ Currently, this position is held by his Honour Mr Scott Mitchell.
- 13.6 The functions of the Senior Children's Magistrate are to:
- a. administer the Children's Court
 - b. arrange sittings of the Children's Court
 - c. convene, at least once every six months, a meeting of Children's Magistrates and such other persons as the Senior Children's Magistrate thinks fit

²³⁸ *Children's Court Act 1987* s.7(2).

²³⁹ *Children's Court Act 1987* Schedule 1(1), (2) and (6).

²⁴⁰ *Children's Court Act 1987* s.8.

- d. confer regularly with community groups and social agencies on matters involving children and the Children's Court
 - e. provide judicial leadership to the Children's Court
 - f. develop practice directions and recommendations for rules, in conjunction with the Chief Magistrate
 - g. oversee the training of Children's Magistrates and prospective Children's Magistrates in accordance with the *Children's Court Rule 2000* (the Rules).²⁴¹
- 13.7 Children's Registrars are employed under the *Public Sector Management Act 1988*, and can have any function of the Children's Court or of a Children's Magistrate conferred on them.²⁴² The Children's Registrars are attached to the specialist Children's Courts. They undertake both quasi-judicial and administrative functions. They conduct call overs and preliminary conferences, hear applications for adjournment, make procedural directions, assist in case management, and sometimes assist in ADR.²⁴³ The Children's Registrars also conduct research and provide advice to the Children's Court on case flow management systems, listing and other practices.²⁴⁴
- 13.8 There are seven dedicated Children's Courts in NSW. These are: Parramatta Children's Court (six courts), Bidura Children's Court – Glebe (two courts), Campbelltown Children's Court, Woy Woy Children's Court, Wyong Children's Court, Broadmeadow Children's Court and Illawarra Children's Court – Port Kembla. The Children's Court currently has 13 Children's Magistrates.²⁴⁵
- 13.9 In regional NSW, the Local Court sits as a Children's Court (that is, it hears and determines matters that are within the jurisdiction of the Children's Court), and is presided over by either a Local Court Magistrate, or occasionally by a Children's Magistrate from one of the above Children's Courts. In 2007, there were 135 generalist Magistrates (including Children's Magistrates) located throughout NSW.²⁴⁶
- 13.10 The Senior Children's Magistrate has issued a number of Practice Directions relevant to care proceedings including: Practice Direction No.20 – Hearing dates and applications for adjournment (PD 20), Practice Direction No.25 – Requirement for conference of expert witnesses in Care Proceedings (PD 25), Practice Direction No.28 – Case management in the Care Jurisdiction (PD 28), and Practice Direction No.30 – Access to and Publication of Confidential Children's Court documents. Four Practice Notes have also been issued by the predecessor in the office of Senior Children's Magistrate.

²⁴¹ *Children's Court Act 1987* s.16(1).

²⁴² *Children's Court Act 1987* s.10A.

²⁴³ Local Court of NSW, *Annual Review 2007*, p.22.

²⁴⁴ Children's Court: www.lawlink.nsw.gov.au/lawlink/children's_court.

²⁴⁵ Transcript: Inquiry meeting with representatives from the Children's Court NSW, 12 December 2007, p.14.

²⁴⁶ Local Court of NSW, *Annual Review 2007*, p.5.

- 13.11 In *KF v Parramatta Children's Court*²⁴⁷ Hidden J held that Practice Direction 30 is *ultra vires* as it is inconsistent with the Care Act. The Inquiry understands that this decision is unlikely to be appealed by DoCS. While the Inquiry makes no comment in relation to the decision, there is a wider issue alive concerning the issue of general Practice Directions, so far as the Children's Court is concerned.
- 13.12 Its power in relation to making directions is derived from Rule 17 of the Rules, which provides as follows:
- (1) *In any proceedings, the Court may, in respect of any matter for which this Rule does not make provision, give any directions that it considers appropriate in connection with the practice and procedure to be followed in relation to that matter.*
 - (2) *A practice direction given under this Rule that is inconsistent with:*
 - (a) *the Act under which the Court has jurisdiction to hear proceedings in respect of that matter, or*
 - (b) *any regulation under that Act,*

does not apply to the extent of the inconsistency
- 13.13 The Inquiry interprets this provision as permitting directions to be made in relation to particular proceedings before the court. On its face it would not seem to authorise the issue of general practice directions. If this is correct, then all Practice Directions made in the Children's Court in relation to matters at large, are arguably, invalid. The Inquiry notes, by way of contrast, that the *Local Court Act 2007* empowers the Chief Magistrate to issue practice notes in relation to any matter with respect to which rules may be made, and establishes a Local Court Rule Committee which is empowered to make rules in relation to the practice or procedure of the Court.²⁴⁸ The Children's Court does not have a similar authority to establish a Rules Committee with equivalent power to make rules, nor does it vest in the Senior Children's Magistrate any power to issue practice note or directions.
- 13.14 In this respect, while the functions of the Senior Children's Magistrate include a function, in conjunction with the Chief Magistrate to "develop Practice Directions and recommendations for rules" this would seem to fall short of authorising their issue. The authority to make rules for the practice and procedure of the Children's Court lies with the Governor.²⁴⁹ It would appear, accordingly that as

²⁴⁷ *KF v Parramatta Children's Court* [2008] NSWCA 1131.

²⁴⁸ *Local Court Act 2007* ss.25-27.

²⁴⁹ *Children's Court Act 1987* s.23.

the Act is currently framed, general Practice Directions would need to be incorporated in the Rules.

- 13.15 The Inquiry considers that this situation needs to be regularised in order to remove any doubt in relation to the validity of any practice directions or notes which the Court sees fit to issue.
- 13.16 The Inquiry recommends that the *Children's Court Act 1987* be amended to insert a provision similar to s.27 of the *Local Court Act 2007*, and that the Rules be reviewed to ensure that they are consistent with the *Children's Court Act 1987* and the Care Act, and that any Practice Directions or notes that are issued after amendment of the Act similarly accord with the legislation.

General procedure in care proceedings

- 13.17 Hearings in care proceedings are not public,²⁵⁰ and consistent with provisions in relation to many tribunals that have been established in NSW, care proceedings are not to be conducted in an adversarial manner, and are to be conducted with as little formality and legal technicality and form as the circumstances of the case permit.²⁵¹
- 13.18 Similarly, they should proceed as expeditiously as possible.²⁵² Legal practitioners and parties involved in care proceedings must do all they can to facilitate the just, quick and cost effective disposal of those proceedings.²⁵³
- 13.19 To aid this expeditiousness, hearing dates will not be vacated and adjournments will not be granted without "cogent and compelling reasons."²⁵⁴
- 13.20 The rules of evidence do not apply in care proceedings, unless the Children's Court determines that they should apply in a particular case.²⁵⁵
- 13.21 A recent amendment to the Care Act has resulted in a requirement that the Children's Court admit evidence that a parent (or primary care-giver) of a child or young person who is the subject of care proceedings has had a child previously removed from his or her care and not restored, or is a person who has been named or otherwise identified (by the coroner or a police officer) as a person who may have been involved in causing a reviewable death of a child or young person.²⁵⁶

²⁵⁰ *Children and Young Persons (Care and Protection) Act 1998* s.104B.

²⁵¹ *Children and Young Persons (Care and Protection) Act 1998* ss.93(1) and (2).

²⁵² *Children and Young Persons (Care and Protection) Act 1998* s.94.

²⁵³ Children's Court NSW, *Practice Direction No.20, Hearing Dates and Applications for Adjournments in Criminal and Care Jurisdictions*, para.1.

²⁵⁴ Children's Court NSW, *Practice Direction No.20, Hearing Dates and Applications for Adjournments in Criminal and Care Jurisdictions*, para.7 and 11; see also *Children and Young Persons (Care and Protection) Act 1998* s.94.

²⁵⁵ *Children and Young Persons (Care and Protection) Act 1998* s.93.

²⁵⁶ *Children and Young Persons (Care and Protection) Act 1998* s.106A(1). See Chapter 23 concerning reviewable deaths.

- 13.22 Such evidence is deemed to be prima facie evidence that the child or young person the subject of the care proceedings is in need of care and protection.²⁵⁷ A parent or primary care-giver in relation to whom this evidence has been admitted can rebut the prima facie evidence by satisfying the Children's Court on the balance of probabilities that either:
- (a) the circumstances that gave rise to the previous removal of the child or young person concerned no longer exist, or*
- (b) the parent or primary care-giver concerned was not involved in causing the relevant reviewable death of the child or young person.*²⁵⁸
- 13.23 All documentary evidence in care proceedings must be in affidavit form unless a Children's Magistrate or Children's Registrar directs otherwise. Affidavits must be written in the first person, must be divided into numbered paragraphs, and any extractions from other documents contained within or annexed to affidavits must be fair extracts.²⁵⁹
- 13.24 The usual procedure in relation to the evidence of witnesses is that the affidavit of the witness is tendered into evidence and is treated as being his or her 'evidence in chief'. The witness can be called to be cross examined on their evidence if the parties desire it. Leave may be granted to a party to supplement the affidavit evidence of a witness with further oral evidence, or to call a witness who has not sworn or affirmed an affidavit in the proceedings, if the Children's Court is satisfied that to do so would promote the interests of justice and the interests of the child or young person the subject of the proceedings.²⁶⁰
- 13.25 The standard of proof in care proceedings is on the balance of probabilities.²⁶¹

Appellate structure

Appeals to the District Court

- 13.26 A party who is dissatisfied with a care order made by the Children's Court (other than an interim order) can appeal to the District Court against the order.²⁶² No review lies to the Supreme Court unless the case is one that would attract prerogative relief or invocation of the *parens patriae* jurisdiction.²⁶³

²⁵⁷ However, it was held in the matter of *SB v Parramatta Children's Court* [2007] NSWSC 1297 that evidence of a previous removal is not in itself a ground for determining whether a child or young person is 'in need of care.'

²⁵⁸ *Children and Young Persons (Care and Protection) Act 1998* s.106A(3).

²⁵⁹ Children's Court NSW, *Practice Direction No.28, Case Management in the Care Jurisdiction*, paras. 16 and 28.

²⁶⁰ *ibid.*, paras 17, 17.2, 17.3, 17.14.

²⁶¹ *Children and Young Persons (Care and Protection) Act 1998* s.93, see also *Re Sophie* [2008] NSWCA 250.

²⁶² *Children and Young Persons (Care and Protection) Act 1998* s.91.

²⁶³ *Re Sophie* [2008] NSWCA 250.

- 13.27 An appeal to the District Court is by way of a new hearing, and fresh evidence (or evidence in addition to or in substitution for the evidence on which the care order was made) can be received. The Court may, instead of taking fresh evidence, admit into evidence the transcript of the Children's Court proceedings and any exhibits tendered.²⁶⁴
- 13.28 Statistics held by the District Court of NSW (the District Court) indicate that just over one per cent of all District Court lodgements were care proceedings appeals in 2005, 2006, and 2007. In 2005 there were 31 such appeals, increasing to 37 in 2006 and to 40 in 2007 with the average disposal time being 7.7 months. However, data provided by DoCS indicate the number of appeals in 2004/05 and in each successive year was 54, 92, 85 and 86. The Inquiry understands that the difference between the figures arise, in part, because DoCS' data concern workload, whereas the District Court's data relate to new matters commenced in that year.
- 13.29 The District Court was unable to provide the numbers of individual children and young persons involved in the appeals or the numbers of appeals relating to Aboriginal children and young persons.
- 13.30 Information held by DoCS indicates that between July 2002 and December 2007, 73 per cent of appeals were brought by the parent and 17 per cent by DoCS. The parent was successful in 39 per cent of the parent instituted appeals, and DoCS was successful in 66 per cent of the remaining appeals.
- 13.31 Of the 35 pending District Court care proceeding appeals as at 30 June 2007, three had been ongoing for at least 12 months, none for longer than 15 months and 18 for more than six months.

The Administrative Decisions Tribunal

- 13.32 The Administrative Decisions Tribunal's (ADT) Community Services Division has jurisdiction in relation to original decisions and reviewable decisions. In its original decision jurisdiction, applications can be brought by a prohibited person - that is a person convicted of sex offences or offences involving the use of violence against a child. A prohibited person is barred from working with children unless a declaration stating otherwise is made by the ADT. Before making such an order, the ADT must be satisfied that the applicant does not pose a risk to the safety of children.
- 13.33 Under s.245 of the Care Act, decisions reviewable by the ADT include decisions in relation to:
- a. the authorisation of people as authorised carers for children or young persons in OOHC, and the cancellation or suspension of their authorisation

²⁶⁴ *Children and Young Persons (Care and Protection) Act 1998* s.91(2) and (3).

- b. the granting to, or removal from, an authorised carer of the responsibility for the daily care and control of a child or young person
- c. the accreditation of agencies in relation to the conduct of OOHC services
- d. the disclosure (or non-disclosure) by an agency conducting OOHC of high level identification information concerning the placement of a child of young person
- e. the employment of children in the entertainment, exhibition and door-to-door sales industries
- f. the transfer of a child protection order to another participating state.

13.34 Most of the decisions reviewed by the ADT concern the removal of children and young persons from foster parents and the cancellation or suspension of a foster parent's authority.

13.35 The number of applications for review of decisions made under the Care Act fell from 18 in 2006/07 to 17 in 2007/08. Twenty applications were filed under the *Commission for Children and Young People Act 1998* (the CCYP Act) in 2007/08, representing no change from the previous year. Approximately two thirds of all applications disposed of in the course of 2007/08 were determined in less than six months from the date of filing.²⁶⁵

13.36 Appeals in care matters from a decision of the ADT are heard by an appeal panel. Appeals under the CCYP Act, from a decision of the ADT, are heard by the Supreme Court. In 2006/07, two decisions made under the predecessor to the CCYP Act were appealed to the Supreme Court. Both were dismissed.²⁶⁶ The Inquiry does not know the number of appeals (if any) from decisions made by the ADT under the CCYP Act in 2007/08.

13.37 The ADT advised the Inquiry that between 2002 and 6 February 2008, 22 matters were listed for mediation. Of these, three were vacated and listed for later in 2008, six settled and 11 did not settle.

The Supreme Court

13.38 The Supreme Court has jurisdiction to conduct a judicial review of administrative decisions made in the course of the management of matters arising in relation to the care and protection of children and young persons. Such jurisdiction is exercised in accordance with usual administrative law principles. Additionally it can intervene in the exercise of its' *parens patriae* jurisdiction (although subject to the limitations noted in *Re Elizabeth*²⁶⁷) as discussed in Chapter 11.

²⁶⁵ Correspondence: Administrative Decisions Tribunal, 7 November 2008.

²⁶⁶ Administrative Decisions Tribunal, *Annual Report 2006/07*, p.21.

²⁶⁷ *Re Elizabeth* [2007] NSWSC 29.

Legal representation in care proceedings

- 13.39 The following people have a right of appearance in care proceedings:
- a. each child or young person who is the subject of the care proceedings
 - b. each person who has parental responsibility for the child or young person
 - c. the Director-General
 - d. the Minister.²⁶⁸
- 13.40 Each of these people may appear in person (if capable) or be legally represented.²⁶⁹
- 13.41 Other persons who, in the opinion of the Children's Court, have a genuine concern for the safety, welfare and well-being of the child or young person may, with the leave of the Children's Court, appear in care proceedings (in person or through a legal representative).²⁷⁰
- 13.42 Section 99 of the Care Act allows the Court to appoint a legal representative to act for a child or young person who is the subject of proceedings brought under the Care Act (Care Proceedings). There is a rebuttable presumption under the Care Act that a child aged less than 12 years is not capable of giving proper legal instructions.²⁷¹
- 13.43 A legal practitioner will act as an Independent Legal Representative if the child is younger than 12 years or if a guardian ad litem (see below) has been appointed. Such a representative is often referred to as a 'separate representative.' A practitioner appointed to represent a child or young person 12 years of age or older, for whom a guardian ad litem has not been appointed, will act as a Direct Legal Representative, on the instructions of child or young person.²⁷² If a guardian ad litem has been appointed the legal representative will act on that person's instructions.²⁷³
- 13.44 Appointments of Independent Legal Representatives and Direct Legal Representatives in care proceedings are referred to the LAC and the work is allocated to a practitioner who is either employed by the LAC, or engaged by it on its Care and Protection Panel.²⁷⁴ The Panel is comprised of private practitioners who have been accepted by the LAC as being eligible to carry out legal work in care proceedings. Generally, they need a demonstrated knowledge and experience in the conduct or preparation of matters under the

²⁶⁸ *Children and Young Persons (Care and Protection) Act 1998* s.98(1).

²⁶⁹ *Children and Young Persons (Care and Protection) Act 1998* ss.98(1) and (2).

²⁷⁰ *Children and Young Persons (Care and Protection) Act 1998* s.98(3).

²⁷¹ See *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ss.99A, 99B and 99C.

²⁷² See *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ss.99A, 99B and 99C.

²⁷³ *Children and Young Persons (Care and Protection) Act 1998* s.100(4).

²⁷⁴ Children's Court NSW, *Practice Direction No.28 Case Management in the Care Jurisdiction*, para.10.1.

Care Act. Successful applicants are appointed to the Panel for up to five years.²⁷⁵

- 13.45 The key difference between the two types of representation is that the Direct Legal Representative acts on the instructions of the child or young person, while the Independent Legal Representative acts in the best interests of the child or young person.
- 13.46 There is currently no requirement that legal practitioners appearing in care proceedings undergo any specialist training or have any specialist accreditation. However, Panel members must complete at least five Continuing Legal Education points (equivalent to five hours of face to face learning, or 10 hours of video or online learning) each year in courses relevant to their practice in care proceedings.²⁷⁶
- 13.47 The absence of a specialist training requirement to be an Independent Legal Representative or Direct Legal Representative, is in contrast to the eligibility to be a children's representative in the family law jurisdiction.
- 13.48 Eligibility to become a children's representative in the family law jurisdiction requires, *inter alia*, participating in a compulsory two day National Training Program.²⁷⁷
- 13.49 The LAC annually conducts a one day training course in Care and Protection Law, which it offers to its in-house solicitors and current Panel members. DoCS also conducts a single day of training to legal practitioners who are on its panel. Apart from this (and from any Continuing Legal Education courses that might be offered by various institutions from time to time), the Inquiry does not know of any training courses currently available that are specifically targeted at practising in care proceedings. It is noted that the Children's Court facilitates a mentoring program to provide Independent Legal Representatives with advice and assistance in relation to their role.²⁷⁸
- 13.50 The Law Society offers specialist accreditation in various areas of the law. A practitioner wishing to become an accredited specialist must have completed at least five years of full time practice, and at least three years of work in the area of specialisation. In addition, the practitioner must pass exams in communication, problem solving, client service, and the law. The Law Society asserts that the benefits of specialist accreditation include:
- a. offering the public and the profession a reliable means to identify a practitioner with proven capability in a specific area of law
 - b. encouraging improvements in the quality and delivery of legal services

²⁷⁵ Legal Aid NSW, *The Panels Process*, www.legalaid.nsw.gov.au.

²⁷⁶ Legal Aid NSW, *Care and Protection Practice Standards*, November 2007, p.8.

²⁷⁷ Legal Aid NSW, *Panel for Independent Children's Lawyers, Information for new applicants*, p.2.

²⁷⁸ Children's Court NSW, *Mentoring Program*, www.lawlink.nsw.gov.au/childrenscourt.

- c. providing practitioners with an incentive and opportunity to increase their competency in their chosen area of law.²⁷⁹

13.51 Children's Law is one of the areas in which specialist accreditation is periodically offered.²⁸⁰ However, the Law Society informed the Inquiry that accreditation in Children's Law has not been offered for a number of years, and that when it will next be offered depends on market interest. DoCS has however informed the Inquiry that it understands from the Law Society that specialist accreditation in children's law will be next offered in 2009.

Guardians ad litem

13.52 Under s.99C(2) of the Care Act, the Children's Court can, on the application of a legal representative for a child or young person who is older than 12 years, make a declaration that the child or young person is not capable of giving proper instructions. In such cases, the Children's Court will generally appoint a guardian ad litem for the child or young person under the provisions of s.100 of the Care Act.

13.53 The Children's Court can also appoint a guardian ad litem for a child or young person over the age of 12 years, if the Court is satisfied that there are special circumstances that warrant the appointment of a guardian ad litem, or that the child or young person will benefit from that appointment.²⁸¹

13.54 The Court can appoint a guardian ad litem for the parent of a child or young person the subject of care proceedings if it is satisfied that the parent is incapable of giving proper instructions to his or her legal representative,²⁸² or request the legal representative to act as *amicus curiae*.

13.55 Where any party seeks to appear in person, the Children's Court can require that person to be legally represented if it is satisfied that he or she is incapable of representing him/herself. If the Court is also satisfied that such a person is incapable of giving proper instructions to his or her legal representative, it can appoint a guardian ad litem to instruct that party's legal representative.²⁸³

13.56 The Inquiry was informed that a guardian ad litem appointed in care proceedings is entitled to retain a solicitor, who will be funded by the LAC. In situations where a guardian ad litem has been appointed for a child or young person, the legal practitioner representing the child in the proceedings will in fact act on the instructions of the guardian ad litem.²⁸⁴

²⁷⁹ Law Society of NSW *Specialist Accreditation Scheme, Guide to Application and Assessment*, 2008, p.4.

²⁸⁰ *ibid.*

²⁸¹ *Children and Young Persons (Care and Protection) Act 1998* s.100(2).

²⁸² *Children and Young Persons (Care and Protection) Act 1998* s.101.

²⁸³ *Children and Young Persons (Care and Protection) Act 1998* s.98 (2) and 98(2A).

²⁸⁴ *Children and Young Persons (Care and Protection) Act 1998* ss.99D(b)(i) and 100(4).

- 13.57 The Children's Court may require that a guardian ad litem provide written evidence of their views and of the instructions that they have given to the legal representative acting for the child, young person or parent for whom the guardian ad litem has been appointed. This evidence may be provided by way of affidavit (which would be prepared by the solicitor), or by way of a report prepared by the guardian ad litem.²⁸⁵
- 13.58 All guardians ad litem, upon appointment by the Children's Court, are given access to the Court's file in relation to the care proceedings.

Issues arising

Initiating process and affidavits

- 13.59 DoCS submitted that the requirement that evidence be submitted by way of affidavit is unduly legalistic, and stated:

*No other Australian care jurisdiction has this requirement for the submission of all evidence to be included in an affidavit, for example, as part of the innovations within the Family Court, the Magellan Project allows for the information to be supplied by the child welfare agency by way of a report. Similarly, the Family Court's practice in children's matters is to initially ask the parties to identify what is agreed and what is in dispute and then affidavits are only allowed to be filed about issues in dispute.*²⁸⁶

- 13.60 According to DoCS lawyers, the use of affidavits is contrary to a holistic approach to child protection work.
- 13.61 The LAC submitted that affidavits might not be the best way to ensure that all relevant information is put before the Court. It stated:

*An alternative might be to consider simpler documentary requirements at first instance (that is, when the care application is first filed), provisions for discovery of the DoCS file, and directions for the filing of affidavits (and the matters to be addressed in those affidavits) when it is clear that the matter is proceeding to a defended hearing.*²⁸⁷

- 13.62 The Children's Court favours the use of affidavits (indeed, it is the Children's Court's Practice Direction that requires that affidavits are used), but stated:

²⁸⁵ Children's Court Clinic, *Guardian ad Litem Handbook*, para.3.4.

²⁸⁶ Submission: DoCS, *Operation of courts in the child protection system* (abridged), p.12.

²⁸⁷ Submission: Legal Aid NSW, 20 February 2008, p.44.

*It would be very helpful if the Department of Community Services were prepared to be more economical and selective in the matters contained in its affidavits that, from the Court's point of view, frequently are far too long and contain far too much information, a great deal of which is unreliable.*²⁸⁸

- 13.63 The combination of ss.61(2) and 68 of the Care Act (which require that DoCS specify the orders that it seeks in its application and that leave be sought before further documentary evidence can be filed) and cl.21 of the Rules (which requires that an application be accompanied by an affidavit supporting the orders sought) has resulted in the general view that DoCS is required to file the entirety of its evidence at the outset of care proceedings. Further, altering the orders sought, and filing further evidence, can only be done with the leave of the Court.²⁸⁹
- 13.64 A representative from the LAC informed the Inquiry that DoCS makes ambit claims, although she conceded that the legislation might be the cause of this.²⁹⁰ She said that DoCS often sets out "as much as possible of the most damning evidence it has,"²⁹¹ and that, especially in matters where DoCS does not ultimately seek long term orders for parental responsibility, this process of making an ambit claim "gets everyone sort of tense and anxious unnecessarily."²⁹²
- 13.65 The LAC informed the Inquiry that in many cases DoCS does not specify the actual final orders it will seek until shortly before the final hearing. This statement is to some extent supported by the results of the LAC's own survey of care proceedings in which it was involved that were finalised between 1 January and 31 March 2008. The LAC informed the Inquiry that this survey indicates that it was in only 17 out of the total of 58 cases, that DoCS specified the exact orders it would finally seek at the commencement of the proceedings. In 12 cases, it specified the exact orders it would finally seek either at the preliminary conference or in a Care Plan filed before the preliminary conference. In 29 cases, it specified the exact orders it would finally seek after the Care Plan had been filed (this number includes seven cases in which DoCS did not specify the exact orders it would seek until the commencement of the final hearing).
- 13.66 The Children's Court, while supporting the continued use of affidavits, stated:

It might be more useful if the Director-General were to present to the Court on that first day only sufficient material to allow the case to be established and to support his application for interim care orders and, thereafter, to make the DoCS file available for inspection by the child representative and the legal

²⁸⁸ Submission: Children's Court NSW, 14 January 2008, p.16.

²⁸⁹ *Children and Young Persons (Care and Protection) Act 1998* ss 61(3) and 68.

²⁹⁰ Transcript: Inquiry meeting with representatives of Legal Aid NSW, 8 February 2008, p.23.

²⁹¹ Submission: Legal Aid NSW, 20 February 2008, p.44.

²⁹² Transcript: Inquiry meeting with representatives of Legal Aid NSW, 8 February 2008, p.23.

*representatives of the parties. Discussions along those lines are underway by 'the working party' made up of representatives of the Department of Community Services, the Attorney General's Department, Legal Aid NSW and the Court.*²⁹³

13.67 DoCS stated:

An alternative approach would be to file a far more limited document that merely addressed the evidence to support a determination that the child is in need of care and protection and interim orders. Detailed material to support final orders could then be filed at a later time in the process allowing greater time for deliberation and consultation over the proposals.

*By requiring DoCS to file all material at the commencement of proceedings, DoCS is often unaware at that time as to the final orders which may be sought and will not have received the benefit of hearing from the child or the child's family. This means that DoCS must file comprehensive material to cover all possibilities. In filing any material that might be held, irrespective of whether it is later relied upon, DoCS can antagonise the child's family and induce unnecessary argument and anxiety. This can add to the adversarial nature of the proceedings.*²⁹⁴

13.68 DoCS recommended:

- a. Dispensing with the requirement that DoCS must file all material at the commencement of the proceedings.
- b. Simplifying court documentation and recognising the constraints of time in preparing such documents.
- c. Simplifying documents required to commence proceedings so that the information provided supports a determination that the child is in need of care and protection and interim orders. Detailed material to support final orders could be filed at a later date.²⁹⁵

13.69 A retired Children's Magistrate informed the Inquiry:

A procedure where DoCS only files minimum evidence at the outset and perhaps in (unsworn) report form is something of a return to the processes under the 1939 Act. This often placed the Court in a difficult position when considering making interim orders. Magistrates were faced with conflicting submissions

²⁹³ Submission: Children's Court NSW, 14 January 2008, p.16.

²⁹⁴ Submission: DoCS, Operation of courts in the child protection system (abridged), pp.13.

²⁹⁵ *ibid.*, p.34.

from the bar table with little reliable evidence. Sometimes there were requests for officers to be cross-examined on reports.

....the notion that there be full disclosure (or discovery) to the parties but only selective evidence to the Court (being only that which is essential for that stage of the hearing process reached), may reduce the volume of the court files but is also a slippery slope towards the Court actually being misled by omission.²⁹⁶

- 13.70 The Inquiry is persuaded that the requirement for affidavit evidence, and all material relied upon, to be filed at the beginning of the proceedings is ultimately not in the best interests of the children and young persons for whom the system operates.
- 13.71 The Inquiry is of the view that applications by DoCS should be by way of report which succinctly and fairly summarises the information available to DoCS and contains sufficient information to support a determination that a child or young person is in need of care and protection and any interim orders sought. Where further evidence dealing with matters in dispute is necessary the Court can give directions as to how that evidence is to be adduced, once those matters have been identified.
- 13.72 The Inquiry is keen to see the system move towards a more holistic and less incident based response. Changing the initiating process in this way should reduce the 'legalism' associated with care proceedings, ease the anxiety of caseworkers caused by preparing lengthy affidavits and lessen tension between DoCS and the family by not commencing with an 'ambit' claim.
- 13.73 In relation to the requirement that DoCS indicates in its application the particular care order sought, the Inquiry is of the view that this provision should remain, as it permits all parties to understand the position taken by DoCS. It should not be onerous on DoCS as it should have formed the requisite opinion by the stage of instituting proceedings.
- 13.74 The Inquiry is troubled by the use of the 'ambit' claim as asserted by the LAC. It will not enhance any early resolution of the matter and may well alienate the parents, or their lawyers. DoCS should refrain from its use. Where preliminary conferences work as intended (see the previous chapter) the final orders sought by DoCS should be made known to the other parties at least one week prior to the preliminary conference.
- 13.75 The reliability of some of the material supporting the application will be an issue, regardless of whether it is in the form of an affidavit or a report. The nature of the jurisdiction is such that reports of risk of harm are nothing more than assertions by the reporter. The veracity of the material contained in the report

²⁹⁶ Submission: John Crawford, 29 February 2008, pp. 2-3.

will still be able to be tested and its form should not impede the Magistrate's decision making.

- 13.76 There is merit in making the DoCS files available to parties to the proceedings shortly after an application is made. The Inquiry understands that the work involved in masking the identity of reporters before providing access to the file can be considerable. However, to provide the files as a matter of course, obviates the need for subpoenas, gives all parties the opportunity to know the available information and rely on it as necessary, and reduces the likelihood of allegations of skewed affidavits by DoCS (see below).
- 13.77 Alternatively, DoCS might provide specified documents which may include previous court orders and reasons for decision, minutes of key meetings, any assessment or other expert reports. Whichever solution is adopted should improve the process and relationships.

Evidence in relation to emergency removals

- 13.78 Many DoCS caseworkers, and the PSA, informed the Inquiry of the difficulties in drafting an affidavit within hours of an emergency removal.

- 13.79 The Children's Court submitted:

The statutory requirement that DoCS file an affidavit within 24 hours of its removal of a child from the care of his/her family...is designed to ensure that the State does not arbitrarily remove children from the care of their parents and that it acts with proper cause. It is submitted, in the circumstances, that the inconvenience to DoCS officers is justified particularly since all that is required to support an Emergency Care and Protection Order is a brief affidavit outlining an immediate risk. The resulting emergency care and protection order will "hold the ring" for a fortnight giving DoCS a further period in which to prepare its affidavit as to the need of care and protection which will ground its s.61 care application.²⁹⁷

- 13.80 A former Children's Magistrate submitted that amending the legislation to allow for a three working day period in which to file an emergency application could be desirable in that it would allow for better preparation of evidence.²⁹⁸
- 13.81 As the Inquiry understands it, the length of time prior to a court determining the needs of a child, in relation to an emergency removal, varies from jurisdiction to jurisdiction. In some jurisdictions, an application must be made within one

²⁹⁷ Submission: Children's Court NSW, 21 April 2008, p.2.

²⁹⁸ Submission: John Crawford, 13 February 2008, p.1.

working day or eight hours²⁹⁹, 48 hours,³⁰⁰ in some 72 hours,³⁰¹ in some 10 days.³⁰² A Judge in Manitoba, Canada stated that the timing should:

*Achieve a constitutional balance between the need for interim measures to protect the child at risk of serious harm and a requirement for an expedited post apprehension hearing process.*³⁰³

- 13.82 NSW seems to have one of the shortest timeframes. The Inquiry is aware that Professor Parkinson recommended the provision which now appears in the Care Act, which involved a change from the 1987 provision which permitted an application within 72 hours. While the Inquiry understands the policy underpinning the current provision, it is of the view that the timeframe should be extended to 72 hours, in order to properly put the evidence before the Court, and that such an extension would not infringe the balance set out above.

Expedition

- 13.83 DoCS informed the Inquiry:

*The duration of court proceedings is important for a child. Not only is the process stressful for the child and will disrupt other important activities (such as schooling, for those of that age) but pending the making of final orders, it defers the implementation of plans for the long term stability of the child and the formation of new stable, nurturing and loving relationships where these might be necessary.*³⁰⁴

- 13.84 A number of submissions similarly described the deleterious effect that waiting for final orders has on children. The Children's Court agreed.
- 13.85 Most submissions that referred to the length of care proceedings favoured shortening, to the extent possible, the time taken to complete proceedings and reach a final decision about the child's future care.
- 13.86 DoCS informed the Inquiry:

*For the very young child, the best evidence available to this Department is that long term arrangements should be in place within six months.*³⁰⁵

²⁹⁹ *Children, Youth and Families Act 2005* (Vic) s.242(2) and *Child Protection Act 1999* (Qld) s.18(5) and (7).

³⁰⁰ *Los Angeles County Department of Child Services v Superior Court* (1988) 200 CalApp3d505 cited in DoCS, Intranet, *Topic 15: Emergency removal of children for their care and protection*, p.17.

³⁰¹ *Jordan v Jackson* (1994) 15F3d333.

³⁰² *State X REL Miller v Locke* (1979) 253SE2d540.

³⁰³ *Winnipeg Child and Family Services v Child and Family Services v W(KAL)* (2000) 191DLR (iv) 1 at [127].

³⁰⁴ Submission: DoCS, Operation of courts in the child protection system (abridged), p.9.

³⁰⁵ *ibid.*

13.87 DoCS stated that the duration of the process might be shortened if the process itself was trying to achieve less, and therefore stated “limiting of the Court’s jurisdiction might permit earlier final orders – to the benefit of the child.”³⁰⁶

13.88 Other submissions pointed to the procedural and practical problems which were thought to prolong proceedings. A legal practitioner who was present at the Public Forum in Wagga Wagga stated that in regional areas, there can be long delays in the court process due to the length of time between sittings. She said:

*In regional areas where there are circuit courts... courts don't sit every day in that particular location. For example, in the Griffith circuit, where parties have their children removed, they face the disadvantage of either having to wait a longer period of time than anticipated in the legislation to have their matter come back before the court. Alternatively, which is often what is happening, if we seek to have the matter listed within the circuit, then they have to travel numerous hours in regional areas where no public transport is available in order to have that decision reviewed at an earlier stage.*³⁰⁷

13.89 Another legal practitioner present at the Wagga Wagga Public Forum said that she has experienced delays in proceedings due to DoCS not filing evidence on time.

13.90 A DoCS officer from a CSC in Southern Region described delays as a result of the actions of parents not attending Court or awaiting legal representation, or the granting of adjournments by the Court. She also said that matters are being delayed on account of legally aided practitioners lengthening the process for financial reasons. She said:

*One solicitor said to me that if they offer up a draft minute of care then Legal Aid will pay them more money, so they will ask for an extra week's adjournment so that they can offer up a draft minute of care which is nearly identical to the Department's, but maybe has two or three different words in it, so then that means that the case has to take an extra week in court.*³⁰⁸

13.91 Another DoCS officer from a Northern Region CSC informed the Inquiry that care matters before the Children’s Court are continually adjourned due to parents not filing their evidence.

13.92 The PSA stated:

The inefficiency of the court system is a constant frustration for caseworkers. The court expects (caseworkers) to adhere to

³⁰⁶ *ibid.*

³⁰⁷ Transcript: Public Forum, Wagga Wagga, 11 March 2008 pp.3 and 4.

³⁰⁸ Transcript: Inquiry meeting with DoCS staff, CSC Southern Region.

*timeframes, but then does not adhere to its own time restrictions, leading to inefficiencies in caseworkers' time. For example, caseworkers report that it is not unusual for there to be five or six caseworkers waiting all day in court for their matters to be heard.*³⁰⁹

- 13.93 The Inquiry received a submission from a DoCS caseworker in relation to the difficulty in determining the prospects of restoration within a short timeframe. She stated:

*On many occasions, the timelines set by the Children's Court seem to be unrealistic, in my experience. Once a determination is made that the child is in need of care and protection, the Director-General has three weeks in which to file and serve his Care Plan. Where a family has been known to the Department for some time, this deadline is not usually a problem. Where a family has just become known to the Department, the deadline provides no leeway for the parents to demonstrate whether or not there is a realistic possibility of restoration. It is often frustrating for managers and caseworkers to make a well thought out, appropriate recommendation for final orders for the child.*³¹⁰

- 13.94 The Inquiry is of the view that expedition is in the best interests of children and young persons, however, not at the expense of a fair, considered hearing. There should be no changes to the processes solely to reduce the time taken.

Movement of hearing dates

- 13.95 DoCS stated that listing dates in the Children's Court shift so that court rooms and Magistrates are constantly occupied:

*Dates for hearing are often moved between courts and even moved to earlier dates. Consideration is rarely given to the availability of legal representatives, instructing caseworkers or witnesses or to the need to maintain continuity of legal representation. This leads to hearings being conducted by legal representatives with less than 24 hours notice. It is now the full time work of a clerical officer within DoCS Legal Services to do nothing but re-arrange timetables and locate lawyers who may be able to handle matters at the last moment.*³¹¹

³⁰⁹ Submission: Public Service Association, 17 March 2008, p.8.

³¹⁰ Submission: DoCS current staff member, p.3.

³¹¹ Submission: DoCS, Operation of Courts in the child protection system (abridged), p.11; Transcript: Public Forum, Role of Courts, 22 February 2008, p.18.

- 13.96 DoCS recommended that the Children's Court adhere to the principles of continuity in judicial and legal representation, given the specialist nature of the jurisdiction and the significant impact court orders will have on the lives of children, young persons and their families.
- 13.97 The LAC also cited the movement of hearing dates without regard to the availability of children's solicitor. A representative informed the Inquiry:
- Those children have a relationship with that lawyer; they know that lawyer and that lawyer knows them. To have another lawyer turn up at a hearing because their lawyer isn't available is inappropriate for those children.*³¹²
- 13.98 The LAC also said that the Court's desire to expedite proceedings was leading to listing problems and a lack of predictability.
- 13.99 A representative from the Aboriginal Legal Service, who had also experienced alterations to court dates and locations, said that this was problematic for Aboriginal people, stating "continuity is particularly important to Aboriginal people."³¹³
- 13.100 As stated earlier in this chapter, expedition is important in this jurisdiction, but not at the expense of a fair hearing in which a party can be represented by a lawyer with whom they have developed a relationship. The Children's Court should reconsider its practice of moving cases to different courts and on different dates at short notice.
- 13.101 In addition, the Inquiry considers that the Children's Court should reconsider its listing practices in its criminal and care jurisdictions in relation to callover days and mentions, by listing cases in successive time brackets, so as to avoid the need for practitioners, caseworkers and families to remain at the Court for unnecessarily lengthy periods waiting for their cases to be called up for what can be quite brief hearings.

'Adversarial' Proceedings

- 13.102 The Inquiry received a number of submissions stating that care proceedings are, or are increasingly becoming, 'adversarial', or that legal practitioners and DoCS were behaving in an 'adversarial' manner. It was not always clear what was meant by 'adversarial', and it seems likely that the term means different things to the different people who used it. The definition of the term is likely to cover everything from the mere testing of evidence in court, the presence of a number of legally represented parties, to combative, hostile and point scoring behaviour. It may relate to procedures, processes or the conduct of participants.

³¹² Transcript: Public Forum, Role of Courts, 22 February 2008, p.20.

³¹³ *ibid.*

- 13.103 DoCS characterised an adversarial approach as being akin to a contest between competing interests. DoCS stated that adversarial approaches do not assist families, carers and officers of welfare agencies in building cooperative working relationships, and can make it “almost impossible” in many cases for caseworkers to continue working with the family of the child who is the subject of the proceedings.³¹⁴ DoCS further stated:

*Child protection is not (or should not be) about balancing competing interests. It is about identifying the risk(s) to a child and protecting that child from the risk(s). An adversarial contest is unlikely to be the best way to arrive at a sound decision on such issues.*³¹⁵

- 13.104 DoCS recommended that the Children’s Court adopt ‘less adversarial court procedures’ as trialled in other courts, such as the Family Court (discussed in the previous chapter).

- 13.105 The Ombudsman characterised the adversarial approach of lawyers as being “to vigorously represent the interests of their clients”³¹⁶ and stated:

*It must be said that such an approach does not necessarily assist in facilitating the conduct of care proceedings in a way that promotes the best interests of children.*³¹⁷

- 13.106 During a meeting with the Inquiry, a representative from the LAC stated:

*The word ‘adversarial’ has some very difficult connotations. It is put as a very bad thing. But if it means that cases are being run properly, that evidence is being required, that the decisions are being based on appropriate evidence and therefore are in the best interests of those children, I don’t see that as being a bad thing.*³¹⁸

- 13.107 However, the LAC was critical of DoCS appealing Children’s Court decisions, an approach it described as adversarial.

- 13.108 A barrister practising in care proceedings informed the Inquiry that the child protection system would be improved by giving properly trained Magistrates “more inquisitorial powers.”³¹⁹ The PSA also submitted that the Children’s Court should be inquisitorial rather than adversarial. Similarly, Women’s Legal Services stated:

³¹⁴ *ibid.*, p.13.

³¹⁵ Submission: DoCS, Operation of courts in the child protection system (abridged), p.5.

³¹⁶ NSW Ombudsman, *Care Proceedings in the Children’s Court: A discussion paper*, July 2006, p.36.

³¹⁷ *ibid.*

³¹⁸ Transcript: Legal Aid NSW, 8 February 2008, p.17.

³¹⁹ Submission: a barrister, p.1.

*The Children's Court does not function in the non-adversarial manner legislatively required. This is perhaps inevitable, given...the Act does not substitute an adversarial model by assigning an inquisitorial role to the Court. In the absence of this, it is unsurprising that the Children's Court defaults into an adversarial role.*³²⁰

13.109 Women's Legal Services also stated that care proceedings are 'legalistic' in that practitioners and the Court use 'jargonistic language,' which can 'disempower' parties to the proceedings.³²¹

13.110 The Inquiry was informed by DoCS caseworkers and legal officers in every non-metropolitan region, that care proceedings in those regions are being conducted in an increasingly adversarial manner.

13.111 A DoCS legal officer in a CSC in Western Region stated:

*Every step of the way sometimes is a big battle. Interim orders go to hearing quite often to establish the child's in need of care goes to hearing...Contact, in particular, is becoming more adversarial in court.*³²²

13.112 DoCS caseworkers in different CSCs in the Southern Region informed the Inquiry that there had been a recent increase in the number of cases in which 'establishment' is contested (that is, there is a contest in relation to whether the relevant child or young person is in need of care or protection).

13.113 There can be little doubt that there is much concern amongst stakeholders about the way in which care proceedings are conducted. However, for reasons already discussed, use of the word 'adversarial' is ultimately not very helpful.

13.114 The Inquiry agrees that the model of a judicial officer balancing competing interests is not an appropriate one in this jurisdiction. However, it is also the case that the consequences of the decisions made in care proceedings on families and children are enormous. There should be testing of evidence, there should be legal representation and it is appropriate that both DoCS and representatives for children and families vigorously seek to obtain an outcome in the best interests of children. However, it is clear that practice and procedure in this area requires change and improvement, and recommendations to this end are made later in this chapter.

³²⁰ Submission: Women's Legal Services, p.4.

³²¹ *ibid.*

³²² Transcript: Inquiry meeting with DoCS staff, CSC Western Region.

Rules of evidence

13.115 Rules of evidence place limits on the information that can be considered by a court, but also assist the court in determining the strength and reliability of the information that is before it.

13.116 The Inquiry received some submissions in relation to some of the consequences of non-application of the rules of evidence in the Children's Court.

13.117 The Children's Court stated:

It doesn't matter if material complies or fails to comply with the rules of evidence. What matters is whether, acting protectively, the court can place some reliance on the material. It is a feature of the information provided to the court on behalf of the Director-General that it may include anonymous, and sometimes unreliable and occasionally malicious and/or quite incredible reports which have been made to the Department and then handed on to the Court. It is another feature that many of these reports will never have been closely investigated or examined by departmental offices before handing them on to the court. It is not the approach of the court to ignore those reports simply because they are hearsay or anonymous or vague or deal with 'historical' matters but it is necessary, in order to avoid error and the possibility of making unnecessary or inappropriate care orders to the ultimate disadvantage of the child or young person, to sift the material carefully in order to arrive at the truth.³²³

13.118 A barrister practising in care proceedings informed the Inquiry:

Evidence is almost never excluded because it is not in proper form. The increase in 'paper' may have been at the behest of the Senior Children's Magistrate who has been properly concerned about how he is to find 'facts' when there is no-one with first hand evidence to contradict a parent's denial of neglect or abuse.³²⁴

13.119 The PSA stated that the 'standard' and 'level' of evidence expected by the Children's Court in care proceedings is too high.³²⁵

13.120 The Inquiry agrees with the approach set out above by the Senior Children's Magistrate. From the various transcripts the Inquiry has reviewed, it is satisfied

³²³ Submission: Children's Court NSW, 14 January 2008, p.16.

³²⁴ Submission: a barrister, p.1.

³²⁵ Transcript: Inquiry meeting with representatives of the Public Service Association, 9 January 2008, p.25.

that the Court appropriately applies ss.93(3) and (4) of the Care Act in relation to the rules of evidence and standard of proof.

A model litigant?

- 13.121 During the course of the Inquiry, it was frequently asserted in submissions and during Public Forums that the affidavits sworn by DoCS caseworkers and tendered in Court did not always contain all relevant material in DoCS possession. In particular, it was asserted that material favourable to the opposing party, and material that was not consistent with DoCS' application was omitted from some DoCS affidavits.
- 13.122 It is obviously of critical importance to the court system that government agencies with a statutory responsibility to bring applications in relation to care and protection do so fairly and objectively. Accordingly, the Inquiry was concerned to receive evidence supporting these assertions. The assertions were made by lawyers as well as by parties to proceedings.

DoCS affidavits

- 13.123 Some submissions stated that in some cases, DoCS caseworkers select only the information supporting the DoCS case for inclusion in their affidavit. A solicitor who was present at the Public Forum in Nowra informed the Inquiry that in his experience DoCS was selective about the material it put into its affidavits. He stated:

In my experience, they very selectively put material before the court that's prejudicial to the parents. If I subsequently subpoena the DoCS file, I'll find a whole lot of things that are very useful, for instance, that the parents aren't really the parents from hell, but that doesn't go into the DoCS affidavits. It seems to me that they've actually usurped the role of the magistrate. It is up to the magistrate to decide whether or not the children should return home or not. It's actually the department doing all they can to make sure that they decide it by only feeding selected material to the magistrate.³²⁶

- 13.124 The Inquiry sought documents from this solicitor as well as material and a response from DoCS. The Inquiry's examination of the documents from the two sets of proceedings in relation to which the solicitor provided documents, revealed the following:
- a. There was information favourable and unfavourable to DoCS application which was omitted from an affidavit tendered by DoCS.
 - b. One DoCS affidavit selectively quoted from a report, however that report was annexed in full to the affidavit.

³²⁶ Transcript: Public Forum, Nowra, 13 May 2008, p.19.

- c. In the same affidavit, the caseworker inaccurately quoted from a report by an expert. That report was separately tendered to the Court and the caseworker acknowledged to the Court, via the lawyer representing DoCS, the inaccuracy. Unfortunately, however, in the ultimate judgement by the Court the inaccurate reference in the affidavit was relied upon by the Magistrate.
 - d. In relation to the other matters raised by the solicitor, they were either not supported by the material reviewed by the Inquiry or there was insufficient information available for the Inquiry to form a view.
- 13.125 However, as illustrated by various submissions to the Inquiry, a lack of attention to detail can be perceived as DoCS selectively presenting a position and, at the least indicate poor practice.

- 13.126 The LAC informed the Inquiry:

DoCS does not always present all the evidence of which it is aware when filing evidence in support of its positions. Affidavits filed by DoCS in support of its position that the child is 'in need of care and protection' and/or in support of the final orders that it is seeking can set out all of the 'bad' and none of the 'good', all of the 'weaknesses' and none of the 'strengths' of the parents. Summaries of other documents that are contained in these affidavits can minimise or even omit altogether evidence that would paint the parents in a better light. These practices mean that DoCS' case often contains only that evidence that supports its own position and omits evidence of which it is aware that might support the parents' or child representatives' positions.³²⁷

- 13.127 The Inquiry spoke with a group of six experienced and well regarded barristers and solicitors who regularly appear in the care jurisdiction (both for DoCS and for other parties). In relation to representing DoCS, one said:

It is the approach of the Department, and it's an endemic problem, that we must prove our case; we must only marshal the evidence that will support us; and we must ignore or not produce the evidence against us

I'm not saying it's deliberate. It is an endemic policy that seems to be within the Department itself. It is not individual officers ...

That has been my experience. When I act for the Department, I say, "Our position is to provide all relevant information - good, bad or ugly - to assist the Court in reaching the most proper decision." I know my colleagues certainly will do the same, but

³²⁷ Submission: Legal Aid NSW, 20 February 2008, pp.48-49.

I will disclose information that I know does not advance my case and might be adverse to it because I see an obligation as a representative of the Department to provide all relevant information to the court and to the parties that touches upon the issue to be determined ...

They often selectively quote from reports instead of producing the whole report.³²⁸

13.128 Another, in relation to acting for the child or young person, said:

One of the functions is that really you must subpoena the DoCS file. When you do that and you go through the file, invariably you find that there is a mountain of material plus and minus. Sometimes DoCS says that you should be restoring; then you find a huge amount of material as to why it should not be, or vice versa.³²⁹

13.129 As part of its investigation, the Inquiry sought the views of a number of caseworkers employed by DoCS throughout the State. The information they provided ranged as set out below, however it emerged that among at least some of those workers, there was a belief that they are required to place before the Court only that material which is favourable to their application.

13.130 At one end of the spectrum caseworkers in CSCs in the Hunter/Central Coast, Western and Southern Regions, and a legal officer from a Hunter/Central Coast CSC, informed the Inquiry that casework managers ensure that caseworkers tell the 'whole story' in their affidavits.

13.131 Other DoCS caseworkers had a different approach. In a Hunter/Central Coast CSC, one caseworker stated that DoCS caseworkers skew the evidence they put into their affidavits in order to support their case:

I believe that we do skew them towards the Department's point of view. And I know there are people sitting in this room that would not agree with me because we have had that discussion about the fact that we do tend to present the Department's case which, as I have been informed, is our job regardless of whether we agree with what we are presenting, that our job is to present it to the Court.³³⁰

13.132 Another said:

My training was 22 years ago and it was very different then and caseworkers are constantly retraining me on how it's supposed

³²⁸ Transcript: Inquiry meeting with lawyers specialising in care and protection matters, 12 March 2008, p.36.

³²⁹ *ibid.*

³³⁰ Transcript: Inquiry meeting with DoCS staff, CSC Hunter/Central Coast Region.

*to be done now, but very much for me the basis of an affidavit is to provide evidence to the Court to support the action that the Department has taken. It needs to talk to why the child is in need of care and protection. It doesn't need to provide every single thing we've ever done with the family and in fact if we include that, the legal support officer will take it out because affidavits shouldn't be too long. They're too difficult for the Magistrate and the solicitor's to read if they're 25 pages long.*³³¹

13.133 The following exchange took place during a meeting with DoCS officers:

Counsel Assisting: If there's material which suggests, by way of a report of other information available to you, that the parents or mother is actually capable and competent to look after the child and there is no need of care and protection, it is clearly a piece of information you've taken into account and in the overall scheme discounted to have come to the view that an application was necessary, but is that the sort of information you would put in your affidavit?

*Caseworker: I'm not sure. I can't think of a time when we'd do that. We'd certainly encourage the mother to put that before the Court herself as part of her evidence. We wouldn't discount it, but it probably wouldn't form part of our evidence.*³³²

13.134 The following exchange took place during another meeting with DoCS officers:

Caseworker: I think when we first got the solicitors on board, which was only in recent times, initially it became very adversarial and it became very much you had to win your case, so you only put the stuff that backed up our arguments. We fought that and I think we won.

Counsel Assisting: Who did you fight with?

*Caseworker: We actually fought with legal branch and we went up to management to the Regional Director. Eventually it came back down that no, we wouldn't do it this way. I think it's working well.*³³³

13.135 During another meeting, a caseworker said:

I have been with the Department for 14 years. I haven't done fieldwork for a significant number of years. However, when I was in the field as a caseworker and then also as a casework

³³¹ Transcript: Inquiry meeting with DoCS staff, CSC Southern Region.

³³² *ibid.*

³³³ *ibid.*

specialist, historically that was definitely my training, and my line direction from my managers was that you only focus on the negatives of the situation – so not to risk losing the case.

In all my years, I can't say that I had any training or influence to balance that up. I can definitely say that the focus was to get whatever efforts you could get – in my experience – to demonstrate that the family is not coping and, I guess, to make a very clear statement that that child is at great risk of harm if the court doesn't accept what our recommendations are. But again that's not current; I haven't had any recent experience.³³⁴

13.136 A more recently trained DoCS caseworker said:

I have been around for two years, so I finished my training just over a year ago. The affidavit training we received was basically that, in a case where we are going for removal, what we are actually putting in is: these are the reasons why we want to remove and this is how the family has engaged with us or how they have not. In cases where they have and where attempts have been made by the family to say "These are the reasons why we shouldn't remove our children," what we are actually doing is we are saying that, but we are trying to use it as a leverage point to say, "Okay, these are the positive things that this family has, but this is why, in our opinion, this is not enough."³³⁵

13.137 In *Re Liam*, McDougall J commented on the evidence of DoCS. He noted that in an affidavit, a caseworker had included some material about a contact session that was taken out of context and resulted in that part of the affidavit being misleading.³³⁶ His Honour said:

I draw attention to this in the hope that, in future, care will be taken to ensure that when employees of DoCS summarise or extract from documents that are not otherwise in evidence (as the relevant access report was not in evidence before the Children's Court) they do so accurately, fairly and impartially. In my view, any other approach is inconsistent with the paramount consideration specified in s.9(a) of the Act.³³⁷

13.138 The Inquiry sought further information about the events described above by caseworkers and was advised by DoCS that "at no stage was anything stated by way of policy other than that all relevant information should be included [in

³³⁴ *ibid.*

³³⁵ *ibid.*

³³⁶ *Re Liam* [2005] NSWSC 75 at [60]-[63].

³³⁷ *Re Liam* [2005] NSWSC 75 at [64].

affidavits].”³³⁸ DoCS stated that since 2004, more guidance has been provided to casework staff as to the content of affidavits.

- 13.139 The Inquiry sought from DoCS the current and historical policies, procedures, transcripts and programs concerned with educating caseworkers and others who regularly swear/affirm affidavits in care and protection proceedings as to the requirements. From that material it appears that between 2000 and 2004 the information contained in relevant policies and procedures was that affidavits should include all relevant information, including evidence of any alternative action attempted.
- 13.140 A discussion on the types of matters that should be included in the affidavit appears in the policy relevant to the period from 2004 to 2007. There is no reference to the important principle that affidavits should contain all material whether favourable or not favourable, which is relevant to the application.
- 13.141 Since January 2007 a new policy has been published by DoCS for its staff. In this document there is reference to the affidavit containing truthful material which should not be put in a way that either deliberately misleads the court or is false. There is reference to only stating relevant facts.³³⁹
- 13.142 In relation to training caseworkers in the art of preparing affidavits for court, the materials have changed over the years. In the most recent training package there is reference to the fact that DoCS must prove its case in support of an application, which is of course true. There is no reference to ethical requirements in relation to presenting all relevant evidence to a court.
- 13.143 DoCS also provided the Inquiry with its care and practice standards which are said to apply to both in-house legal officers and external legal practitioners acting in care matters on behalf of DoCS. There is nothing in that document which refers to ethical responsibilities other than a reference to being a ‘model litigant.’ A Code of Conduct and Ethics dated May 2004 has been provided. It contains little guidance in this area.
- 13.144 It is clear from the material provided that some effort has been directed at educating caseworkers in the use of affidavits. The introduction of Care Legal Support legal officers in 2006 was designed to ensure that affidavits were improved in quality. In addition, there was a joint project with the LAC and the Children’s Court to remove extraneous material from affidavits and instead focus on the applications before the Court and the Inquiry understands that this project is still ongoing.
- 13.145 DoCS indicated to the Inquiry that:

as there are no known cost orders from the 2007 to 2008 period arising from a failure to properly disclose information and very

³³⁸ Correspondence: DoCS, 4 June 2008.

³³⁹ DoCS, Intranet, *Casework Practice, Affidavits*.

few comments on appeal on this topic it is not possible to further comment other than to point out that if this was a significant issue then either or both of these avenues would be expected to elucidate the issues.³⁴⁰

- 13.146 The information available to the Inquiry is troubling. The Inquiry concludes that there is a practice in, at least, some CSCs whereby caseworkers routinely do not provide all relevant material which both supports and does not support its application, to the Children's Court. It is unlikely that those caseworkers intend to mislead the Court, rather they are acting on a mistaken belief that this is required of them. Unfortunately, the effect of such actions is that the Children's Court may not always have all the relevant information before it in order to make decisions in the best interests of the children and young persons who are subject to its jurisdiction.

Case study 20

The Inquiry received a submission from the Redfern Legal Centre in relation to statements made by DoCS officers in criminal proceedings against their client (the mother). The criminal proceedings related to the mother's alleged assault of her two daughters, "A" and "B". The following information was provided.

DoCS records indicate that A, B and the mother's son "C" were known to DoCS. DoCS records show a number of risk of harm reports and requests for assistance relating to A and B dating back to 1995 (usually made by either the mother, or her former partner and father of A and B – "the father"), the presence of AVOs protecting the mother and children from the father, and a "system alert" that was sent to Queensland Department of Children and Family Services (after A had run away from the mother and was living with the father in Queensland). DoCS records show that the system alert states:

There is a history of severe and ongoing domestic violence perpetrated by [the father] against [the mother] dating back to 1999.

The mother and the father had been involved in "a long running and acrimonious family law dispute over the custody of their daughters," and that at various times the Family Court had allocated parental responsibility to the mother, and at other times to the father. On three occasions the Family Court had made recovery orders against the father for the return of the children to the mother.

In November 2006, A made allegations that she and B had been assaulted by the mother in 2003. The mother was charged with eight counts of common assault against her daughters. On the day that the mother was

³⁴⁰ Correspondence: DoCS, 5 June 2008.

arrested and charged by Police, B and C were assumed into care by DoCS.

At the time of making the allegations, A was living with the father, B had recently started having contact with the father and A, and the father was again seeking "custody" of B in the Family Court. DoCS was aware of these circumstances.

A had originally made allegations of assault against her mother in 2003. Police reports and DoCS records demonstrate that this was investigated at the time. The mother had reported to Police that A and B had fought over a jar of Nutella, and that the mother had restrained A to prevent her from harming her sister. When interviewed by DoCS officers, A informed them that she had been fighting with her sister and that she had told her sister that she was going to "smash her face in," and that her mother had restrained her. DoCS and Police took no further action in relation to this incident.

In relation to the complaints made by A in 2006, two DoCS officers (the caseworker with day to day responsibility for the casework in relation to B and C, and the secondary caseworker) provided statements to Police (at the request of Police). Despite extensive knowledge of the family and the context in which A's allegations against the mother were made, DoCS did not provide relevant information to Police. The caseworkers' statements:

could be read as inferring that the historical risk of harm reports (dating from 1995) were made only against [the mother]. The statements contain no reference to any report of violence against [the father] or the children, they contain no reference to the earlier Recovery Orders and the involvement of the Australian Federal Police, they contain no reference to the Systems Alert regarding [the father] and they contain no reference to the investigation by DoCS caseworkers into the allegations of assault made by A in 2003, which then became the subject of the Police investigation in 2006.

The criminal charges made against the mother were dismissed after hearing the prosecution evidence only. The Magistrate noted that the statement of one of the DoCS caseworkers:

does appear to give a one sided account of key aspects concerning the DoCS file. It seems to gloss over what appears to have been a number of notifications over the years which, rather than implying they were the result of a concern conducted by the accused they may well have been a concern of conduct by the father of A. But the statement is one sided and doesn't really bring out the full detail there, doesn't go to matters such as more that one AVO being in place for the protection of the accused against [the father] and the children involved. So it does appear to be one sided and unsatisfactory.

The Inquiry sought a response from DoCS to the submission. DoCS accepted the facts as recounted above and stated:

it is acknowledged the witness statements provided to the Police by [caseworker] and [secondary caseworker] did not contain a full overview of the history of reports received by the Department, references to any domestic violence, or previous family law court proceedings involving family members.

DoCS sought to explain how the one sided statements came to be provided to Police. DoCS stated:

[Secondary caseworker] advises that the statements provided were requested by [Constable] of NSW Police. Specifically, [Constable] requested information about any physical abuse of B by [the mother] that the caseworkers were aware of.

The caseworkers entered into the formulation of a statement with Police in the context of new advice that [the mother] had been charged with an alleged assault against her daughter. The caseworkers reasonably took this request to be a request for information specifically in relation to these allegations.

[Secondary caseworker] advises that at the time she provided her statement she held the view (as did the Department) that Police would subpoena the Department's files to supplement the information that she had given in her statement. Departmental files show that a subpoena was received from NSW Police for the children's files on 10 October 2007.

DoCS also told the Inquiry that its files show that on 20 December 2006 the caseworker had prepared and filed two detailed affidavits to the Children's Court in relation to this matter, which outlined the history of the reports received by DoCS and its interventions with the family.

While it is accepted in hindsight the statements proffered by [caseworker] and [secondary caseworker] were narrow and indeed not reflective of all the information known to the Department at the time, the context in which they provided these statements must be considered. That is, that the Police requested statements about a particular aspect of the caseworkers' knowledge of the family and this request was responded to, thereby giving the mistaken view that the allegation of physical abuse by [the mother] was the key issue in the Department's perspective.

Actions have been initiated within the Community Services Centre in order to address the practice issues identified in this complaint by Redfern Legal Centre. For example, the Manger Client Services is arranging for legal services to run a staff training session on providing

statements to the Police and the importance of obtaining legal advice in such matters. A broader practice issue for further consideration is how DoCS and NSW Police can work together to share information more effectively in matters of child abuse.

13.147 Further education of DoCS caseworkers in relation to the nature of care proceedings and the information that should be included in affidavits is required.

13.148 The LAC informed the Inquiry that it sees a relationship between adversarial behaviour, and the lack of an implemented model litigant policy. It stated:

Were DoCS to act as a 'model litigant', whereby it presents a fair and balanced case, makes full disclosure, acts in such a way as to ensure that all of the evidence relevant to the child's best interests (rather than only that evidence which supports its own case) is before the court, shares all information about its case with the other parties and accepts and recognises that it is bound by the decisions of the court, the adversarial nature of the proceedings would be muted rather than enhanced.³⁴¹

13.149 The Model Litigant Policy for Civil Litigation has recently been approved in NSW. That document describes the nature of the obligation to act as a model litigant as follows:

The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.³⁴²

13.150 The obligation requires that the State and its agencies act honestly and fairly in handling claims and litigation. The details are more appropriate to *inter partes* civil litigation than care proceedings, although the underlying policy is sound.

13.151 The LAC recommended that all agencies responsible for conducting care proceedings be required to act as a model litigant. It stated that "the policies and guidelines that apply to the officers of the DPP are an appropriate model."³⁴³

³⁴¹ Submission: Legal Aid NSW, 20 February 2008, p.50.

³⁴² Attorney General's Department NSW, *The Model Litigant Policy for Civil Litigation*, 22 July 2008, para.3.1–3.4.

³⁴³ Submission: Legal Aid NSW, 20 February 2008, p.50.

- 13.152 A barrister experienced in care proceedings stated that the care jurisdiction is quasi-prosecutorial, and also suggested that a code of conduct needs to be introduced, similar in nature to that followed by prosecutors in the criminal jurisdiction, and reflecting “the ethical duties and responsibilities of the Director-General in cases before the care court.”³⁴⁴
- 13.153 The Inquiry agrees that DoCS should do more to install in its staff the principle underpinning the concept of the model litigant. The Inquiry recommends guidelines be developed for DoCS caseworkers based on the guidelines applicable to the DPP.³⁴⁵

Appeals

- 13.154 A number of submissions were made about the nature and timeliness of appeals from the Children’s Court to the District Court. Surprisingly, and somewhat alarmingly, the Children’s Court holds no information as to the outcomes of appeals from its jurisdiction. This issue was raised at one of the Inquiry’s Public Forums and soon thereafter, the Inquiry was informed that the District Court will now provide copies of such decisions. That is clearly necessary for the Children’s Magistrates to properly carry out their functions.
- 13.155 At issue before the Inquiry was whether there should be a change to the appellate procedure including whether appeals should be limited to questions of law, whether there should be a leave requirement and whether a specialist division of the District Court should be established.
- 13.156 The recommendation made by DoCS that appeals be heard by a full bench of Children’s Magistrates to ensure the same level of expertise as in the Children’s Court was explored with stakeholders. The LAC stated that if this occurred, the full bench should be made a court of record. The Children’s Court however noted that the full bench model would require the appointment of more Children’s Magistrates. The Deputy Chief Magistrate stated that she had some “philosophical difficulties” with a review panel being composed of judicial officers who are, in other cases, sitting as the first instance decision maker.³⁴⁶
- 13.157 Alternatively, it was suggested by CCYP that specialist District Court judges hear the appeals. The LAC agreed. Similarly, the Law Society said that it favoured:

*the creation of a Care and Protection Division in the District Court, with specially nominated judges trained in care and protection matters to increase the efficiency of hearings.*³⁴⁷

³⁴⁴ Submission: a barrister.

³⁴⁵ Office of the Director of Public Prosecutions, *ODPP Guidelines*, 1 June 2007. Guidelines 3-7 and 26-27 are of particular relevance.

³⁴⁶ Transcript: Public Forum, Role of Courts, 22 February 2008, p.63.

³⁴⁷ Submission: Law Society of NSW, p.8.

13.158 Many submissions were concerned with the 'inexperience' of judicial officers in the District Court in dealing with care proceedings.³⁴⁸

13.159 If the District Court continued to hear appeals, the Children's Court and DoCS suggested that such appeals only be allowed with the leave of the Court, and DoCS recommended that they be limited to questions of law. By contrast, the Law Society stated there should be no impediment to an appeal, as did the Foster Care Association and the LAC. The LAC stated:

*As things currently stand, care decisions can often be made by Local Court magistrates sitting as the Children's Court who have no expertise in the Act or in care matters. Further, even those Magistrates who sit in the Children's Court as specialists do not always agree on the application of the law to cases with similar facts. It is essential that the appeals courts in these matters be able to review not just errors of law but also the merits of these cases. Given that appeals are few and far between,... there does not appear to be any reason, other than the resource problems that appeals cause for DoCS, for any change to the current system.*³⁴⁹

13.160 The LAC advised that it applies a means and merits test for grants of legal aid to potential appellants (other than children's representatives) in the District Court, and that this effectively operates as a leave mechanism.

13.161 The Children's Court recommended that appeals should proceed on the basis of the material filed in the Children's Court, and on the transcript of the Children's Court proceedings, rather than as a new hearing.

13.162 The Inquiry also received some submissions in relation to the time taken to complete appeal hearings in the District Court. The Children's Court stated that:

*an appeal to the District Court is likely to add the best part of a year to the delay in settling a child or young person and this is unfair and unsatisfactory.*³⁵⁰

13.163 The Inquiry is not in favour of a full bench comprised of Children's Magistrates. While they undoubtedly have the necessary expertise, they are relatively small in number and the importance of the matters being considered warrants an appeal to higher level court which is a court of record.

³⁴⁸ Submission: Legal Aid NSW, 20 February 2008, p.109; Submission: Law Society of NSW, p.8; Submission: Children's Court NSW, 14 January 2008, p.30.

³⁴⁹ Submission: Legal Aid NSW, 20 February 2008, p.107.

³⁵⁰ Submission: Children's Court NSW, 14 January 2008, p.31.

- 13.164 The Inquiry understands that the Chief Judge of the District Court is of the view that it is not possible for a specialist bench of the District Court to be created to deal with the small number of appeals.
- 13.165 The Inquiry notes that the District Court has established a group of judges who sit on the Medical Tribunal, which, deals with a smaller number of cases on an annual basis, than appeals in the care jurisdiction. Unlike care matters, the Medical Tribunal hears first instance matters as well as appeals, and the District Court judge sits with two medical practitioners and a lay person.
- 13.166 The Inquiry is persuaded that the relatively few appeals would be best served by being heard by judges with particular expertise in the care jurisdiction. While it may not be necessary to create a separate division, a process whereby the selection of judges to hear such matters takes into account their knowledge, interest and experience, would be useful.
- 13.167 As about one third of care matters are dealt with by non-specialist Magistrates, the Inquiry is not of the view that appeals should be limited to questions of law alone. The Inquiry has had the benefit of reading a number of transcripts of hearings from specialist and non-specialist Magistrates. It is fair to say that the understanding from the bench of not only the law but the research and learning behind children's development and related matters is variable. Occasionally, non-specialist Magistrates equate matters of contact with access or 'spending time' decisions in the family law jurisdiction. It is clear to the Inquiry that this kind of misconception can have significant effects on families when translated into orders. This matter could be revisited if a circuit of some sort is introduced so that fewer than 10 per cent of care matters are dealt with by non-specialist Magistrates.
- 13.168 It is also the Inquiry's experience that leave applications can be lengthy and can canvass those matters that would ordinarily be covered in an appeal, and thus it is not of the view that a leave requirement should be required.
- 13.169 However, the District Court should, as a general rule, hear appeals based on the transcript in the Children's Court particularly when the appeal is from the decision of a specialist Children's Magistrate. Clearly when new facts or issues have emerged since the time of the first decision, there will be a necessity for the evidence below to be supplemented by additional evidence.

Legal representation in care proceedings

- 13.170 An academic lawyer, in a paper submitted to the Inquiry, said:

The effective representation of children is challenging and requires lawyers to develop new skills and knowledge beyond those required when working with adults. Lawyers working in these jurisdictions have to develop skills in communicating with and relating to children and young people as clients. Lawyers also have to develop means of communicating with other non-

*legal professionals involved in judicial decision making for children.*³⁵¹

- 13.171 The Inquiry agrees. A number of recommendations were made to the Inquiry in relation to improving the quality of representation.

Training

- 13.172 The Inquiry received a number of submissions supporting the introduction of training for practitioners who practice in care proceedings, both those representing children and young persons, and those representing adults.

- 13.173 This issue is not a recent one, in his 2006 discussion paper on care proceedings in the Children's Court, the Ombudsman stated:

*Questions have been raised about the inconsistent quality of legal representation in country courts, where there are said to be few practitioners well versed in the legislation and sufficiently experienced in care proceedings.*³⁵²

- 13.174 An academic lawyer informed the Inquiry that in the course of her research, she had interviewed 35 lawyers representing children in care proceedings, family law proceedings, and criminal proceedings. She stated:

*Independent lawyers representing children in child protection matters have been offered significantly less education and support in undertaking their roles compared with those representing children in family proceedings and criminal matters...Some lawyers with significant experience expressed concerns about the way in which new lawyers representing children in care matters were supported and educated in order to be able to perform the role competently.*³⁵³

- 13.175 The Inquiry also received oral submissions in relation to some practitioners not spending enough time with their clients prior to hearings, and on occasions not even speaking to the children or young persons involved in the proceedings.

- 13.176 Compulsory training for Independent Children's Lawyers is a feature of the family law jurisdiction, and its use in care proceedings was cautiously suggested by the LAC.

³⁵¹ N Ross, "Legal Representation of Children," in G Monahan and L Young (eds), *Children and the Law*, 2008, p.552.

³⁵² NSW Ombudsman, *Care Proceedings in the Children's Court – a Discussion Paper*, 2007, p.42.

³⁵³ Submission: N Ross, p.3.

Code of conduct for legal representatives

- 13.177 It was also submitted that a code of conduct or best practice standard be developed for all legal representatives in care proceedings.
- 13.178 The Family Court and the LAC informed the Inquiry that the establishment of training and codes of conduct for Independent Children's Lawyers has worked very well in the family law jurisdiction.
- 13.179 Practitioners representing children and young persons in care proceedings are subject to the LAC's *Care and Protection Practice Standards*, which set out the practitioner's responsibilities to the child. Compliance with the standards is monitored by the LAC. The obligations include maintaining continuity of representation, maintaining a relationship with the child or young person, interviewing the child or young person, explaining the procedure and possible outcomes, exploring the child or young person's wishes or instructions, obtaining and advising the child or young person of all relevant material, and participating in court proceedings either in the child's or young person's best interests or with a view to advancing the child's or young person's stated position.
- 13.180 In order to comply with the LAC's practice standards, Independent Legal Representatives and Direct Legal Representatives must observe the Law Society's *Representation Principles for Children's Lawyers*. These principles include matters such as determining whether or not a child or young person is capable of giving instructions, the role of direct and independent representatives and how to determine what is in the best interests of a child or young person.³⁵⁴

Legal Aid funding issues

- 13.181 DoCS submitted that, as a result of the LAC's funding policy, which provides funding in stages, one of which is the hearing, some private practitioners who are being funded by the LAC prolong matters that might otherwise be resolved in order "to gain additional funding under a grant." This view was supported by caseworkers in a Southern Region CSC. The LAC conceded that it was possible that the way in which it funds these cases might encourage practitioners in receipt of Legal Aid funding to proceed to a full hearing of a matter rather than to attempt settlement.
- 13.182 DoCS has submitted that, in order to avoid this, practitioners should be required to sign a certificate certifying that, after a review of the materials, they are satisfied that there are reasonable prospects of their client obtaining care orders that are substantially different from those proposed by DoCS. DoCS submitted that any finding at the end of the proceedings that there was no reasonable basis for the certification should result in a financial penalty in relation to the funding grant.

³⁵⁴ Law Society of NSW, *Representation Principles for Children's Lawyers*, pp.5 and 7.

Guardians ad litem

- 13.183 The Inquiry was informed that in England, children’s guardians (the English equivalent of guardians ad litem) are always interposed between a child who is involved in, or is the subject of, proceedings, and the child’s legal representative. The Executive Officer of the Children’s Court stated that the advantage of the English system is that:

The guardians are very experienced social workers. The first thing that they do when they’re appointed is to go to...the Social Services office, and read the file from beginning to end. They can critique the work that has been done, and they can build up a rapport with the child and all of those things which a lawyer doesn’t have the time to do, won’t be paid to do and won’t do. So their decision making is on a par with what DoCS decision making should be, because they’re coming from the same discipline... the lawyers just argue the case.³⁵⁵

- 13.184 DoCS informed the Inquiry that the role of the Independent Legal Representative would be ‘clarified’ if a guardian ad litem were to be appointed for all children and young persons under 12 years of age for the purpose of providing instructions, and recommended that a guardian ad litem should be appointed in these cases. A group of guardians ad litem to whom the Inquiry spoke, suggested routinely interposing a guardian ad litem between the child and their lawyer.
- 13.185 DoCS also recommended that there should be a requirement that some of the guardians ad litem appointed to the Guardians ad Litem Panel are Aboriginal “so that decision making might be appropriately crafted to accommodate particular concerns of Aboriginal people.”³⁵⁶ The Senior Children’s Magistrate indicated that he believed the system of interposing a guardian ad litem between a child and his or her lawyer is a “better system,”³⁵⁷ but stated that it is also a very expensive system.³⁵⁸
- 13.186 The coordinator of the Court’s guardian ad litem program stated that there is currently no code of conduct, nor any formal complaints procedure, in relation to guardians ad litem. She also informed the Inquiry that there is currently some work being carried within Attorney General’s to develop a centrally coordinated guardian ad litem panel to be used by all courts and tribunals in NSW.

³⁵⁵ Transcript: Inquiry meeting with representatives of the Children’s Court NSW, 29 April 2008, p.11.

³⁵⁶ Submission: DoCS, Operation of courts in the child protection system (abridged), p.33.

³⁵⁷ Transcript: Inquiry meeting with representatives of the Children’s Court NSW, 29 April 2008, p.12.

³⁵⁸ *ibid.*, p.11.

Inquiry's view

- 13.187 The Inquiry supports the development of a coordinated capacity in NSW to appoint guardians ad litem in care and other proceedings, as well as the development of requirements to ensure that they have the relevant qualifications and experience and that they attend relevant and regular training. It also support the development of a code of conduct for their role in legal proceedings, in particular in care proceedings, and arrangements for monitoring compliance with it.
- 13.188 The requirement that some of the guardians ad litem are Aboriginal is seen by the Inquiry as important given the over representation of Aboriginal children and young persons in the child protection system.
- 13.189 While the Inquiry accepts the evidence before it that the interposition of a guardian ad litem between a child under 12 years of age and his or her legal representative, may ultimately work in the best interests of the child, it is not persuaded that this is the most effective way of ensuring children are well represented.
- 13.190 The Inquiry is of the view that a code of conduct should be developed applicable to all legal representatives in care proceedings. Particular attention should be given to the training that they are required to undergo, using the training available in the family law jurisdiction as a guide. Further, specialist accreditation should be available. The LAC and DoCS, in the operation of their respective panels, should establish a mentoring or supervision system to assist inexperienced practitioners to enter the jurisdiction with suitable direction.
- 13.191 The Inquiry is not persuaded by DoCS' recommendation to introduce a certification of a client's case having reasonable prospects of success. It accepts the contention of the LAC that its processes for granting legal aid should have the same or similar effect. It believes that an appropriately drafted code of conduct should also address the issue.

Magistrates exercising care jurisdiction

- 13.192 The Inquiry considered a number of matters in relation to the constitution of the Children's Court including, whether it should be headed by a District Court Judge, whether those sitting as Children's Magistrates should be regularly rotated and whether there should be a rural circuit.

A District Court Judge

- 13.193 The review of the 1987 Act chaired by Professor Parkinson which led to the Care Act and the amendments to the *Children's Court Act 1987* recommended

that, as in Victoria and other jurisdictions, the senior judicial officer in the Children's Court should be of a status equivalent to a District Court Judge.³⁵⁹

- 13.194 This has been supported by DoCS, lawyers who frequently appear in the jurisdiction and by the NSW Law Reform Commission in a 2005 report.³⁶⁰ The Inquiry agrees. The appointment of a District Court Judge to head the Children's Court would reflect the importance of the care and protection of children or young persons and the complexity of many of the cases heard in the jurisdiction. In other respects that person would take on the responsibilities of the current Senior Children's Magistrate position.

Circuits

- 13.195 The Local Court informed the Inquiry that in 2006, a total of 4,875 care matters were "dealt with" in NSW.³⁶¹ The Local Court said that 2,731 of these matters were heard in designated Children's Courts, that is about 56 per cent, although it may be higher as specialist Magistrates can hear cases in regional areas.
- 13.196 In its submission, DoCS stated that, based on the statistics it had received from Attorney General's (which, DoCS stated, were flawed due to a change in the counting system and a duplication of some counting), about 65 per cent of care matters are dealt with by specialist courts.
- 13.197 DoCS stated:

*It is strongly recommended that an arrangement be put in place so that there ... be circuits of specialist Children's Magistrates to cover the State so that hearings of more than 95 per cent of care matters may be dealt with by a specialist Children's Magistrate.*³⁶²

- 13.198 DoCS also recommended that the numbers of specialist Children's Magistrates and Children's Registrars be increased, thus "permitting a greater coverage of the State."³⁶³
- 13.199 The NSW Law Reform Commission also formed this view as expressed in a 2005 Report on Young Offenders.³⁶⁴
- 13.200 The Children's Court advised that it would "welcome a system which allowed all care cases to be heard by specialist Children's Magistrates."³⁶⁵ The Children's Court stated that if it was given the resources for the appointment of another

³⁵⁹ DoCS, *Review of the Children (Care and Protection) Act 1987, Recommendations for Law Reform*, December 1997.

³⁶⁰ NSW Law Reform Commission, Report 104, *Young Offenders*, 2005.

³⁶¹ Submission: Local Court of NSW, p.2.

³⁶² Submission: DoCS, Operation of courts in the child protection system, pp.30 and 31.

³⁶³ Submission: DoCS, Operation of courts in the child protection system, p.37.

³⁶⁴ NSW Law Reform Commission, Report 104, *Young Offenders*, 2005.

³⁶⁵ Submission: Children's Court NSW, 21 April 2008, p.20.

two Children's Magistrates, then they could assume responsibility for country circuits, and "could make a big dint in all of the non-urban work in the State."³⁶⁶ The Children's Court said that this number would not include coverage of the big regional centres.³⁶⁷

- 13.201 The Inquiry is of the view that there should be sufficient specialist Children's Magistrates appointed to permit a circuit to be held and that the number of matters presided over by non-specialist Magistrates should be reduced to fewer than 10 per cent. The Inquiry notes that in the event that Children's Registrars assume greater responsibility as set out below, more Magistrates' time may become available to assist in establishing a circuit.

Qualifications and tenure

- 13.202 DoCS stated:

*The criteria that the current (or indeed any previous) Chief Magistrate has applied in selecting Magistrates to be appointed to the Children's Court are unknown. It is presumed that the current criteria are restricted to the Magistrate expressing an interest in working in the Court. While the current Senior Children's Magistrate has extensive experience in child and family law, other appointments as Children's Magistrates would not appear to have any experience in a professional capacity in dealing with children or young people or their families or be able to demonstrate a requisite level of knowledge, qualifications or skill.*³⁶⁸

- 13.203 The Women Lawyers' Association of NSW recommended that all judicial officers presiding over care proceedings be specialists in child protection. A barrister practising in care proceedings submitted that the manner in which magistrates are rotated in and out of the Children's Court jurisdiction requires review. He also informed the Inquiry:

*rarely, if ever, are any persons with any background in both the law and social or behavioural sciences ever appointed to the Children's Court.*³⁶⁹

- 13.204 DoCS caseworkers in the Northern and Western Regions were critical of local Magistrates' knowledge of the jurisdiction. Some lawyers practising in the jurisdiction were also concerned about the expertise of Children's Court Magistrates.

³⁶⁶ Transcript: Inquiry meeting with representatives of the Children's Court NSW, 19 December 2007, p.13.

³⁶⁷ *ibid.*, p.14.

³⁶⁸ Submission: DoCS, Operation of courts in the child protection system, p.30.

³⁶⁹ Submission: a barrister.

- 13.205 A DoCS officer informed the Inquiry that one of the Local Court Magistrates in her area makes contact orders based on standards used in the Family Court. She said:

*We had one long term order where he gave the mother, who had significantly harmed the child, three days a week contact because that's very similar to the Family Law Court where he had worked. We were looking at the primary responsibility going to the father, but he said, 'Yes, mother's harmed the child, but the Family Law Court would say she could have the children for three days a week so we will do that.'*³⁷⁰

- 13.206 In relation to the selection and term of appointment for Children's Magistrates, the NSW Law Reform Commission recommended an appointment based on Victoria's model, whereby the president of the Children's Court in consultation with the Chief Magistrate determines who is appointed to the Children's Court. It also recommended that appointments should be for a term not exceeding three years (but that reappointments may be made).³⁷¹

- 13.207 In relation to the rotation of Magistrates, the Local Court informed the Inquiry:

*As far as practical, Magistrates rotate through the Children's Jurisdiction on a three-year term. This accords with the policy of rotating Magistrates through metropolitan courts. It is considered that approximately three years is the optimal time for a Children's Magistrate to specialise in children's matters and still obtain objectivity and enthusiasm for the position. The rotation policy also increases the number of judicial officers with an in-depth knowledge and experience in this area.*³⁷²

- 13.208 DoCS recommended that the current practice of rotating Children's Magistrates generally should end as valuable experience built up in the Children's Court is being eroded.

- 13.209 A former Children's Magistrate submitted that the position of Children's Magistrate should be advertised, and should invite lawyers or Magistrates to apply for the position, and that the position should be for three years, with an option to extend for a further two years.³⁷³

- 13.210 The Ombudsman stated that given the distinctive nature of care proceedings, there are strong grounds for the Magistrates that hear care proceedings having a particular commitment to, and considerable experience in, the jurisdiction. The Ombudsman said:

³⁷⁰ Transcript: Inquiry meeting with DoCS staff, CSC Western Region.

³⁷¹ NSW Law Reform Commission, Report 104, *Young Offenders*, 2005, p.205.

³⁷² Submission: Local Court of NSW, p.3.

³⁷³ Submission: B Holborow, p.2.

*We are aware that there is currently significant rotation amongst Children's Court Magistrates and believe that there would be value in considering whether the current practice of regular rotation adequately promotes the development of judicial expertise in this important jurisdiction. In this regard, we believe that it may be useful to compare the system for appointing Children's Magistrates in Victoria with the system in NSW. Our understanding is that there is no legislative restriction on how long Magistrates can be appointed to sit on Children's Court in Victoria.*³⁷⁴

- 13.211 The Local Court advised the Inquiry that in Western Australia, Children's Magistrates are appointed for tenure. The Local Court submitted this is 'not desirable,' and stated:

*Anecdotally, Magistrates who spend extended time in the Children's Court find the extended exposure to care matters can have deleterious effect on productivity and their health.*³⁷⁵

- 13.212 The Inquiry notes that Family Court Judges deal with an equally demanding workload over an often lengthy period. The Inquiry is of the view that s.7(2) of the *Children's Court Act 1987* provides the appropriate qualifications for a Children's Magistrate. It accepts that rotation is desirable to ensure that Magistrates remain objective, however in order to benefit from the experience gained on the bench, rotation should occur after five years, if desired, rather than three years.

Judicial education

- 13.213 According to the Judicial Commission of NSW (the Judicial Commission), judicial education and professional development is not mandatory for judicial officers in NSW. However, participation in programs of education and professional development are strongly encouraged by policies of the various courts, and by the existence of the National Standard for Professional Development for Australian Judicial Officers, which recommends five days of judicial education per judicial officer annually (including self-directed professional development).³⁷⁶

- 13.214 However, the Children's Court advised the Inquiry that:

Attendance by Children's Magistrates at the five days judicial education provided each year, the five days live-in orientation

³⁷⁴ Submission: NSW Ombudsman, Children's Court NSW, p.8.

³⁷⁵ Submission: Local Court of NSW, p.4.

³⁷⁶ Judicial Commission of NSW, *Annual Report 2006/07*, pp.18-19.

*course and the s.16 meetings for Children's Magistrates conducted at least twice per year is compulsory.*³⁷⁷

- 13.215 The Judicial Commission, in conjunction with the Local Court, offers a two day Pre-Bench Workshop for all newly appointed Magistrates. At the Pre-Bench Workshop, new magistrates are provided with the Local Court Bench Book, which contains information on the Care and Protection Jurisdiction.
- 13.216 The Judicial Commission operates a Magistrates Orientation Program annually which is a five day residential program for all new Magistrates. New Magistrates participate in the program once they have had between four and twelve months experience on the Bench.
- 13.217 Each year the Magistrates Orientation Program includes one session specifically relating to the care and protection jurisdiction. In relation to the last three Orientation Programs, these sessions were presented by the Senior Children's Magistrate and academic lawyer, Dr Judy Cashmore. A number of sessions have been offered over the last three years relevant to care proceedings presented by the Senior Children's Magistrate, DoCS, Police and various academics.
- 13.218 The Judicial Commission informed the Inquiry that, relevant to care proceedings, it had published the *Sexual Assault Handbook* and various other papers.
- 13.219 The Local Court has a policy of attaching Magistrates to the Children's Court in Parramatta for three months prior to those Magistrates taking responsibility for a regional circuit for the first time. The Local Court stated:

*Each Local Court Magistrate, upon appointment must undertake a period of service on the country circuit for a minimum of two years and a maximum of five years (subject to the discretion of the Chief Magistrate).*³⁷⁸

*Prior to appointment to a country circuit, every Magistrate must sit for three months, full time in the Metropolitan Children's Court. This usually occurs at Parramatta Court, where there is a spread of work assistance and guidance from experienced Children's Magistrates, in particular the Senior Children's Magistrate.*³⁷⁹

- 13.220 The Inquiry was advised by the Children's Court that during this three month period, the Magistrates are provided with tuition, consisting of:

³⁷⁷ Correspondence: Children's Court NSW, 18 July 2008.

³⁷⁸ Submission: Local Court of NSW, p.3.

³⁷⁹ *ibid.*

*A number of sessions with the Executive Officer where relevant aspects of the Children and Young Persons (Care and Protection) Act, together with the Standard Directions which apply in the Children's Court, Practice Directions and some of the more significant decisions appearing in Children's Law News, are explained and discussed in detail. The Executive Officer provides an outline of the jurisdiction and some of the practices of other parties to the child protection system including the Department, the agencies and the Children's Court Clinic. Various Care files relating to previous cases are examined and discussed.*³⁸⁰

13.221 The Inquiry was advised that during the three month training period, these Magistrates are allocated 'less complex' matters to hear and determine, and are encouraged to discuss these matters with experienced Children's Magistrates.

13.222 DoCS recommended that:

*Identified and publicly available training is required for those Magistrates sitting in the care jurisdiction for the first time.*³⁸¹

13.223 Section 16(1)(c) of the *Children's Court Act 1987* requires the Senior Children's Magistrate to convene a meeting of Children's Magistrates at least once every six months. The Children's Court informed the Inquiry that the Children's Magistrates meet tri-annually for conferences at which they discuss issues and receive training related to the Children's Court jurisdiction.

13.224 The Inquiry has been provided with the program in relation to three conferences held in 2007. In relation to care proceedings, a large range of topics were discussed including intervening in child neglect, DoCS' parental drug testing pilot and discussions on family group conferencing, care circles, reports pursuant to s.82 of the Care Act and the administration of psychotropic medication to children.

13.225 The training regime appears adequate for specialist Magistrates, however, non-specialist Magistrates appear to receive little by way of formal training in the specialist jurisdiction.

A docket system

13.226 The LAC has suggested that the Children's Court adopt a formal docket system, whereby cases are allocated to a single judicial officer for the duration of proceedings (from the first return date through to the final hearing). The LAC submitted that a docket system would ensure that a consistent approach was adopted throughout the course of proceedings, and that:

³⁸⁰ Correspondence: Children's Court NSW, 18 July 2008.

³⁸¹ Submission: DoCS, Operation of courts in the child protection system, p.37.

*This would avoid the current situation whereby interim orders can be made and changed by different magistrates, where leave for the preparation of expert reports might be granted or refused by one magistrate and then the parties subsequently questioned by another magistrate at final hearing as to why there is no expert report, and where section 82 reports and applications for variation / rescission are heard by magistrates who have no knowledge of the reasons behind the underlying orders.*³⁸²

- 13.227 The LAC also submitted that the greater degree of judicial management resulting from the docket system might reduce the level of adversarial behaviour. The Children's Court was of the view that it would not be successful, given the number of registries and specialist Magistrates, and because it had not been successful in other jurisdictions.
- 13.228 While the Inquiry is mindful of the experience recounted by the Local Court in other jurisdictions, it is persuaded of the advantages of consistency in judicial decision making. The Inquiry believes that a trial of a 'docket system' in the Parramatta Children's Court should be undertaken.

Children's Registrars

- 13.229 DoCS stated that Children's Registrars were originally intended to "work in an arrangement akin to the Magellan model," but that this has not occurred.³⁸³
- 13.230 In 2007 there were five specialist Children's Registrars in NSW.³⁸⁴ The Parkinson review of the 1987 Act recommended that 13 Children's Registrars be appointed, and funding was provided for the appointment of nine. The fact that only five Children's Registrars have been appointed has attracted the criticism of the Ombudsman and DoCS.
- 13.231 There is currently one Children's Registrar, and two Acting Children's Registrars, who do not have legal qualifications. The Children's Court advised the Inquiry that it would support a requirement for legal qualification for all future appointments to the position of Children's Registrar.
- 13.232 DoCS stated:

While Children's Registrars were initially all legal practitioners this no longer appears to be the case. If the occupiers of these positions are to conduct ADR or to assume a greater role in

³⁸² Submission: Legal Aid NSW, 20 February 2008, p.117.

³⁸³ DoCS, *Discussion paper on alternatives for hearing and making decisions in child protection matters*, February 2008, p.11.

³⁸⁴ Local Court, *Annual Review 2007*, p.21.

*making consent orders and presiding at directions hearings, then legal qualifications should be a pre-requisite.*³⁸⁵

13.233 The Children's Court stated that, under Attorney General's training budget, Children's Registrars are offered the same training as Local Court Registrars, but are not offered any training in mediation.

13.234 Professor Parkinson, stated:

*I do not think that sufficient advantage has been taken of the opportunities created by the 1998 Act [Care Act] for better dispute resolution processes. The Children's Registrars were a significant innovation....They have proved very effective both in terms of getting consent arrangements by negotiation and ensuring that cases are ready to proceed to trial.*³⁸⁶

13.235 When required, Children's Registrars travel to regional areas to provide assistance in care proceedings. A DoCS officer in a CSC in Northern Region informed the Inquiry that there was a noticeable difference in the way preliminary conferences were run when a Children's Registrar from Sydney had carried out some work in that Region.

*There was a period where we did a lot of preliminary conferences, they were run like a mediation, and they were really successful. We actually had matters dealt with expeditiously because there was a skilled and trained and aware Registrar that would come up from Sydney and run it like a mediation... Now our preliminary conferences do not run the same way, there is often no outcome, and it is another delay in the process. A matter can have three, four, five preliminary conferences before it is finalised and often for no real point other than to check on compliance of documents and things like that.*³⁸⁷

13.236 The Local Court indicated that, when a request is made by a Local Court Magistrate for assistance from a Children's Court Magistrate in care proceedings, "the Senior Children's Magistrate would initially allocate a Registrar to conduct a settlement or directions hearing (or both)."³⁸⁸

13.237 The Inquiry is of the view that sufficient legally qualified and experienced Children's Registrars are necessary to ease the burden of Magistrates in procedural and consent matters throughout NSW, and to perform ADR functions.

³⁸⁵ Submission: DoCS, Operation of courts in the child protection system, p.32.

³⁸⁶ Transcript: Inquiry meeting with Patrick Parkinson, p.4.

³⁸⁷ Transcript: Inquiry meeting with DoCS staff, CSC Northern Region.

³⁸⁸ Submission: Local Court of NSW, pp.2-3.

Conclusion

- 13.238 The Inquiry makes the following recommendations in order to simplify proceedings, improve the quality of the evidence adduced by DoCS, ensure that lawyers appearing in the jurisdiction are appropriately skilled and qualified and act professionally, enhance the standing of the Court and the skills of Registrars and have more cases heard by specialist Magistrates.
- 13.239 While this chapter has not specifically referred to the needs of Aboriginal children and young persons before the Children's Court, the Care Circle project referred to in the previous chapter is an important step in identifying further ways in which the court processes can become less alienating and more meaningful for Aboriginal children, young persons and their families.

Recommendations

Recommendation 13.1

The *Children's Court Act 1987* should be amended to insert a provision similar to s.27 of the *Local Court Act 2007* and the *Children's Court Rules 2000* should be reviewed to ensure that the Rules are consistent with the *Children's Court Act 1987* and the Care Act, and any practice directions or notes that are issued after amendment of the Act should similarly accord with the legislation.

Recommendation 13.2

There should be no requirement, by way of legislation or practice, that DoCS is to file all material relied upon in care proceedings at the beginning of the proceedings.

Recommendation 13.3

Care applications by DoCS under ss.45 and 61 should be made by way of an application filed in the Court supported by a written report which succinctly and fairly summarises the information available to DoCS and contains sufficient information to support a determination that a child is in need of care and protection and any interim orders sought, without any requirement for the filing of any affidavit, unless ordered by the Court in circumstances where establishment is contested. The DoCS file or relevant portion of it should be made available to the parties.

Recommendation 13.4

Section 45 of the *Children and Young Persons (Care and Protection) Act 1998* should be amended to require DoCS to apply to the Children's Court no later than 72 hours after the child or young person has been removed or care assumed.

Recommendation 13.5

The Children's Court should revise its practices in relation to changing hearing dates and moving proceedings between courts, as well as its listing practices for callovers and mentions.

Recommendation 13.6

DoCS caseworkers should be given more specific training and guidance in relation to the nature of care proceedings and in relation to the evidence to be placed before the Court, to ensure its relevance, accuracy and fair balance.

Recommendation 13.7

Guidelines should be developed for DoCS caseworkers based on the Code of Conduct applicable to the Office of the Director of Public Prosecutions.

Recommendation 13.8

A code of conduct should be developed applicable to all legal representatives in care proceedings. Specialist accreditation should be regularly available. Any necessary training or assessment mechanisms should be available on an ongoing or regular basis. A similar regime should also be established for Guardians ad Litem.

Recommendation 13.9

A District Court Judge should be appointed as the senior judicial officer in the Children's Court.

Recommendation 13.10

There should be sufficient specialist Children's Magistrates appointed to permit rural and regional circuits to be held to ensure that the proportion of matters in the care and protection jurisdiction presided over by non-specialist Magistrates is reduced to fewer than 10 per cent.

Recommendation 13.11

A trial of a 'docket system' in the Parramatta Children's Court for matters in the care and protection jurisdiction should be undertaken.

Recommendation 13.12

Registrars of the Children's Court should be legally qualified and alternative dispute resolution trained and sufficient in number to perform alternative dispute resolution and to undertake procedural and consent functions.

14 Interface with family law

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Introduction

- 14.1 As is evident from Chapter 13, there are mechanisms whereby serious allegations of sexual or physical abuse of children in post-separation parenting matters are brought to the attention of child protection agencies such as DoCS, and whereby reports from that agency about the child or young person can be provided to the Family Court.
- 14.2 The reforms brought about under Magellan were necessary in part because of the complexities of a system in which the family law courts, created by Commonwealth legislation, adjudicate private disputes within a family, and in which the child protection agencies and the Children's Courts, created by State legislation, determine matters of public concern about the safety, welfare and well-being of children and young persons.
- 14.3 Formal arrangements between DoCS and the family law courts are in place and consist of an MOU (containing general principles) and a Protocol (containing operational procedures) between DoCS and the Family Court, and a separate MOU and Protocol, in similar terms, between DoCS and the Federal Magistrates Court. Each of the Federal Magistrates Courts and the Family Court exercise jurisdiction under the *Family Law Act 1975*. They are collectively referred to as 'family law courts' in this chapter.
- 14.4 The most significant ways in which the Federal and State systems intersect, for the purposes of this Inquiry, are as follows.
- 14.5 First, DoCS may intervene in family law court proceedings for a number of reasons including where serious allegations of sexual or physical abuse of children have been made, either through the Magellan process as discussed in Chapter 13, or otherwise.
- 14.6 Secondly, an order for contact made by the Children's Court may be registered in the family law courts, and thus become enforceable in accordance with powers exercised by those Courts.
- 14.7 Thirdly, a child or young person may be cared for by a person by virtue of an order of a family law court, in circumstances where the carer is entitled to a supported care allowance from DoCS.

Intervening in family court proceedings

- 14.8 The *Family Law Act 1975* (Family Law Act) provides for mandatory and voluntary reporting to a child protection agency, which for the purposes of this report is DoCS.

- 14.9 If a party to parenting proceedings alleges that a child has been abused or is at risk of being abused, DoCS is notified by a family law court.³⁸⁹
- 14.10 Where an officer or professional in a family law court has reasonable grounds for suspecting that a child has been abused or is at risk of being abused, that person must notify DoCS. Where a person has reasonable grounds to suspect that the child has been or is at risk of being ill treated, or “has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child”, that person may notify DoCS.³⁹⁰
- 14.11 To avoid any inconsistency or overlap in decision making, orders made under the Care Act (that is, orders made under the State system), by virtue of a provision in the Family Law Act, prevail over orders made under the Family Law Act (that is, orders made under the Federal system). In addition, the family law courts cannot make an order in relation to children or young persons under the care of a person under the State welfare law, that is the Care Act in NSW, unless the order comes into effect after the child or young person has left care or, in NSW, DoCS consents.³⁹¹
- 14.12 DoCS may also intervene in proceedings in a family law court, either at the request of the court through the Magellan process as discussed in Chapter 13 or otherwise, or of its own initiative.³⁹²
- 14.13 DoCS will normally intervene in family law proceedings where it does not consider that either parent is a suitable carer or where it does not consider that the protective parent is able to place all relevant material before the court for the benefit of the child.
- 14.14 The Inquiry was informed by the Family Court that in most Magellan cases, DoCS does not intervene. It stated that out of the 82 matters which had been placed in the Magellan program across the two registries in which Magellan had been implemented in NSW (being Sydney and Parramatta) up until May 2008, DoCS had intervened in only nine of these matters. DoCS agrees with these data.
- 14.15 DoCS has informed the Inquiry that there had been 110 requests for it to intervene since July 2007, pursuant to s.91B of the Family Law Act, that is, other than in Magellan cases, and that it had intervened in 82 of those matters. DoCS informed the Inquiry that its involvement in family law cases has increased from 20 matters per year in 2000/01 to 223 in 2006/07.
- 14.16 The Inquiry received a number of submissions from agencies and from individuals stating that DoCS was reluctant to become involved with families who were in family law court proceedings. UnitingCare Burnside, for example,

³⁸⁹ *Family Law Act 1975* s.67Z.

³⁹⁰ *Family Law Act 1975* s.67ZA (2) and (3).

³⁹¹ *Family Law Act 1975* s.69ZK.

³⁹² *Family Law Act 1975* ss.91B and 92A.

informed the Inquiry that DoCS caseworkers tend to 'back away' if a child's parents are involved in family law court proceedings, on the assumption that the child is 'under the attention of the law' and will therefore be safe.³⁹³ The Inquiry was informed by a legal practitioner practising in both family law court proceedings and care proceedings:

*There is a real issue about whether the Department chooses not to intervene in matters. I have had a couple of matters where the experts say that the Department needed to intervene and the Department has said no thanks. We are then left with really dysfunctional parents with kids with absolutely no protective safeguards in place.*³⁹⁴

- 14.17 The Inquiry understands and accepts that notifications arising out of family law disputes are generally reports of concern about the safety of a child in a family setting, and that this does not necessarily mean that DoCS needs to investigate each notification in order to fulfil its statutory function. There are a number of very valid reasons why DoCS may not investigate a notification received from a family law court. First, the report may not be sufficiently serious to justify its intervention. The question in family law proceedings is usually about the competing claims of each parent in relation to where the child will live and with whom they will spend time. These are not the same questions that arise in child protection proceedings.
- 14.18 Secondly, the information provided by the notifier may not disclose sufficient reason to believe the child is at risk of the abuse alleged. While the notifier may have a belief to that effect, the evidence to support that belief may be insufficient.
- 14.19 Thirdly, the reported concern may relate to events some time in the past or the child may currently be in a situation where he or she is no longer exposed to the risk disclosed in the report. The Care Act, at least in relation to its reporting requirements, includes the standard of "current concerns." Thus historic matters, while relevant to family law proceedings, are not sufficient to attract the intervention of the child protection system.
- 14.20 Finally, DoCS necessarily must prioritise the response it makes to reports of risk of harm and, based on the reports under assessment and allocation, the notification from a family law court may not be the subject of an investigation.
- 14.21 In addition, the Family Law Act requires the reporting of many incidents which are not reportable under the Care Act. Under the Family Law Act, the threshold for making a notification is that the child to whom the proceedings relate has been abused or is at risk of being abused. As indicated above, it does not

³⁹³ Submission: UnitingCare Burnside, p.28.

³⁹⁴ Transcript: Inquiry meeting with lawyers specialising in care and protection matters, 12 March 2008, p.48.

require there to be any current concerns about the safety and welfare of the child, as is provided in the Care Act.

- 14.22 Of particular note is the fact that, in the event that the parents have separated and the child can be protected adequately through orders made in family court proceedings, which deny or restrict contact between the offending parent and the child, there will be no need for DoCS to intervene. In other words, if there is a viable carer and the child is in his or her care, then the child will not be in need of intervention under the Care Act.
- 14.23 A final matter of consideration is that family law proceedings are essentially private proceedings and can be resolved by consent at any time. There is no requirement that any consent orders be protective of the child. Under the Care Act proceedings must have the safety, welfare and well-being of the child at their centre.
- 14.24 As can be seen from the discussion above, the issue is not a simple one and must be decided on a case by case basis.
- 14.25 The Inquiry understands that generally the Family Court has no issue with DoCS not intervening, as in most cases, there is one protective parent. However, there have been two cases where the Inquiry was informed that intervention would have been preferred but did not eventuate.
- 14.26 The MOU and the Protocol appear to be comprehensive and sensible. The Inquiry is of the view that if DoCS and the family law courts act in accordance with the terms and spirit of those documents, intervention should take place in appropriate cases. DoCS will always have to prioritise its work and thus make decisions as to when it intervenes.
- 14.27 Pursuant to the Protocol, when the family law court requests that DoCS intervene, DoCS provides the Family Court with a Magellan report. This should be provided whether or not DoCS intends to intervene. Both DoCS and the Family Court are of the view that the provision of reports works well.
- 14.28 Finally, the Inquiry is aware that a 2002 report by the Family Law Council on Family Law and Child Protection recommended that, in order to avoid duplication of effort between the state and federal systems, a decision should be taken as early as possible whether a matter should proceed under the Family Law Act or under child welfare law, with the consequence that there should be only one court dealing with the matter. The report referred to that as the "One Court principle".³⁹⁵ The Inquiry agrees with this approach.
- 14.29 The following case study demonstrates the complexities of the inter relationship of the powers of the Local Court and the Family Court and the role of DoCS and the Police.

³⁹⁵ Family Law and Child Protection, Family Law Council, September 2002.

Case Study 21

The family became known to DoCS in 2005. Between July 2006 and the end of August 2007, the personal history for six year old C records initial assessments of 14 reports to the Helpline, in the context of reports of domestic violence and family law court proceedings. DoCS was told that family law court orders were in place stating that C and her brother B (7) were to reside with their mother, with the father having contact every second weekend and for half of the school holidays.

In March 2007 DoCS received several reports regarding a threat said to have been made by the father of the children. The father was alleged to have told the mother on the telephone, while the children were in his care and able to hear, that “you don’t get much for murder so I’ll put a bullet through each of the children’s heads and then I’ll come and get you.” The father was said to have access to firearms and to have a history of violence toward the mother.

According to Police, a previous AVO taken out by the mother had expired the day before the threat was made. Police told DoCS that the children were “reported to be safe and well in mother’s care,” that the mother was seeking legal advice to amend the family law court orders, and that she had indicated she would not send the children to their next contact visit.

In April 2007, a SAS1 states that the mother rang the allocated caseworker at DoCS, distressed, after the AVO she had sought for herself and the children was not granted. The mother advised the caseworker that the Magistrate in the Local Court refused to grant the AVO because neither Police nor DoCS had investigated the matter. The notes say that the “Magistrate stated that this indicated the threat was not considered serious and thus he decided the AVO was not warranted.”

The caseworker also recorded that the “NM feels helpless now to protect her children as she must allow NF contact as per [family law] orders or risk fine or jail.” The caseworker says that in response to the mother questioning why DoCS did not investigate, she “Advised her that as the children were in her care and that as a result were safe as NF did not have access to them, that there was no risk to them and consequently no investigation took place. Explained further that due to lack of resources, that as she was being a protective parent, that other matters were given priority.”

It appears that DoCS were concerned about the comment attributed to the Magistrate. Email records in the file document efforts by DoCS to confirm that the Magistrate denied the AVO on the grounds stated. One email, which appears to be from a senior manager, states “If the views are as indicated, then there are some other avenues we will need to explore

including judicial review of the decisions being made at that court and for that we'll need [DoCS Director of Legal Services] direction.”

The emails record that a caseworker contacted the Court for verification, and was advised that DoCS could, for a fee, apply for either a copy of the transcript or the Magistrate's file, but that there was 'no guarantee' that the information would be in the transcript. The worker asked whether she should pursue the matter further. The file holds no further information about DoCS investigation of the Magistrate's views.

Later reports to DoCS indicate that the matter was referred to the Magellan project and that the father's access was suspended, and that he was also ordered to attend anger management counselling. An initial assessment in August noted that the father was to have no access until further notice.

Enforcement of certain Children's Court orders in the family law courts

- 14.30 Children's Court orders about residence and contact can be registered under the Family Law Act, in a family law court and then enforced as if they were orders made under that Act.³⁹⁶
- 14.31 Thus, for example, a NSW care order dealing with contact could be registered in a registry of a family law court in NSW or in a different state. Once registered, the order “has the same force and effect as if it were an order made by that court.”³⁹⁷
- 14.32 The Family Law Act contains detailed provisions for enforcing orders dealing with matters such as with whom the child should live and have contact ('parenting orders'). In general, because of the lack of any separate enforcement agency,³⁹⁸ such proceedings are usually brought by a party to the parenting proceedings, who claims that the other party has not complied with the orders.
- 14.33 It should first be noted, however, that enforcement has proved a difficult and frustrating aspect of family law.³⁹⁹ Most parenting orders involve continuing

³⁹⁶ *Family Law Act 1975* ss.70C and 70D.

³⁹⁷ *Family Law Act 1975* s.70E.

³⁹⁸ The Family Law Council has recommended, among other things, “That the Government establish a child orders enforcement agency or in the alternative that the Government provide additional and specified funding to enable the State and Territory Legal Aid Commissions to assist parties to bring applications about serious contraventions of parenting orders before the family courts.” Family Law Council, *Improving Post-Parenting Order Processes: A report to the Attorney-General*, October 2007, www.ag.gov.au/flc.

³⁹⁹ For a detailed consideration, see the Family Law Council, *Child Contact Orders: Enforcement and Penalties*, 1998 www.ag.gov.au/flc. The present Family Law Act includes provisions based on the Council's recommendations, but the 1998 report remains a valuable discussion of the nature of the problems, many of which persist. See also Australian Law Reform Commission, “For the sake of the kids - Complex contact cases and the Family Court,” *Australian Law Reform Commission Report*, 73, 1995.

obligations, and dealing with a particular breach may not ensure compliance in the future. Some of the penalties that might be considered, especially fines and imprisonment, might well have an adverse impact on the children concerned, whose best interests were the basis for the original parenting order. The need for parties to bring enforcement proceedings has also proved a significant difficulty. Parties may be reluctant or unable to undertake further proceedings for enforcement. The Inquiry understands that the lack of enforcement powers in the Care Act is a deliberate recognition of the need to encourage voluntary participation in performing court orders. Thus, enforcement provisions may be unlikely to achieve better long term outcomes for the child.

- 14.34 The Family Law Act, however, contains a number of enforcement provisions. There is an injunction power, a power of arrest, and powers to make location orders (requiring people to provide information about a child's location) and recovery orders (requiring people to return a child, and authorising the police or others to use force if necessary).⁴⁰⁰
- 14.35 There are also proceedings for contravention of orders.⁴⁰¹ The provisions distinguish between more serious and less serious contraventions. In relation to the less serious contraventions, the family law courts can direct the person to a post-separation parenting program, make a further parenting order that compensates a person for the time not spent with a child as a result of the contravention, require the person to enter into a bond, or to make monetary compensation, or pay costs.⁴⁰² In relation to the more serious contraventions,⁴⁰³ the possible orders include a community service order, a bond, a fine, and a sentence of imprisonment for up to 12 months.⁴⁰⁴ In addition, there is a power to deal with a contravention of an order under the Family Law Act that "involves a flagrant challenge to the authority of the court" as a contempt of court.⁴⁰⁵ As well as providing for penalties, the Family Law Act also makes provision for the Court to vary the parenting order that was breached, reflecting the realisation that some contravention proceedings stem from misunderstood or badly drafted orders, or from orders that have become unsuitable for changed situations.⁴⁰⁶
- 14.36 Once an order from a Children's Court has been registered in a family law court, the enforcement provisions sketched above become available. DoCS can register a Children's Court order, and can apply for an enforcement order, the only special requirement being the necessity under s.69ZK of providing the written consent of a child welfare officer. Thus, it appears that there would be

⁴⁰⁰ *Family Law Act 1975* s.68B. The court may "make such order or grant such injunction as it considers appropriate for the welfare of the child" including various restraining and other orders ss.65Q, 67J-67N, 67Q-67Y, 68C.

⁴⁰¹ *Family Law Act 1975* ss.70NAA-70NFJ.

⁴⁰² *Family Law Act 1975* s.70NEB.

⁴⁰³ Defined, in substance as repeated contraventions and contraventions that show a serious disregard of obligations under the parenting order that was contravened: *Family Law Act 1975* s.70NFA.

⁴⁰⁴ *Family Law Act 1975* ss.70NFB-70NFG.

⁴⁰⁵ *Family Law Act 1975* s.112AP.

⁴⁰⁶ *Family Law Act 1975* ss.70NAE, 70NBA.

no difficulty in DoCS making application for any of these various forms of enforcement of a Children's Court order registered in a family law court.

- 14.37 The Family Law Act specifies who can bring applications for a recovery or location order, or an injunction, or contravention proceedings. In each case, the requirements are the same as those in relation to applications for parenting orders, the relevant category being "any other person concerned with the care, welfare or development of the child."⁴⁰⁷
- 14.38 While the representatives of the Family Court with whom the Inquiry had discussions were not aware of these provision being used for care matters, DoCS informed the Inquiry that the procedure has been used by it, particularly in cases where there is risk of interstate flight.

Financial and other assistance from DoCS for non-parent carers who care for children as a result of family law orders

- 14.39 The Inquiry received submissions from carers who were responsible for children following orders made by a family law court rather than the Children's Court. A number of them said that they had been informed by DoCS, or otherwise understood, that they were not entitled to any financial or other assistance from DoCS, because of the absence of a Children's Court order granting them the care of the relevant children.
- 14.40 This is not the case. A supported care allowance can be provided for children and young persons who are in the care of relative or kinship carers, even where the Minister or Director-General has no aspect of parental responsibility. This allowance may be payable for placements resulting from a Children's Court Order, a family law court order and even where there is no court order. It is at the discretion of DoCS and depends, in part, on the likelihood of the child entering OOHC if not for the care currently provided by the relative or kinship carer. Other assistance may also be available pursuant to s.22 of the Care Act. The Inquiry does not suggest that there should be any alterations to this practice.
- 14.41 More needs to be done however to ensure that those carers who may be in need of assistance from DoCS, are aware of DoCS' guidelines, and of its discretion to provide financial support.

Extending the Magellan Project

- 14.42 NSW became part of Magellan in July 2003 and its reach was limited to a small number of postcodes in the Sydney metropolitan area. The Inquiry understands

⁴⁰⁷ Section 67K (location orders); s 67T (recovery orders); and s 69C (all other proceedings under Part VII of the Act, ie the Part dealing with children).

that DoCS imposed this restriction because of other reforms being implemented and because the MOU and Protocol were not yet in place.

- 14.43 Given its recent positive evaluation, the Inquiry is of the view that Magellan should be extended to a significantly greater area of NSW than is currently covered. The Inquiry understands that DoCS proposes to extend its participation in Magellan to the Metro West Region this year and to rural regions by the end of 2009. The Inquiry agrees with this phased approach. It is also noted that Magellan is only available in the Family Court and not the Federal Magistrate's Court, where a significant majority of family law matters are now heard.

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Introduction

- 15.1 Research shows that there is a significant correlation between juvenile participation in crime and rates of reported neglect or abuse, as well as a strong relationship between juvenile offending and homelessness.⁴⁰⁸
- 15.2 Two surveys in this State in relation to juvenile offending have shown that:
- a. 28 per cent of male and 39 per cent of female detainees, and 21 per cent of males and 36 per cent of females subject to community orders had a history of being placed in care⁴⁰⁹
 - b. over 90 per cent of detainees had been suspended from schooling at one time or another, and that three quarters had left school before finishing Year 9.⁴¹⁰
- 15.3 In addition, a study carried out in 2002, found the following:

Sixty-eight per cent of those who appeared in the Children's Court for the first time in 1995 had reappeared in a NSW criminal court at least once within the next eight years. Forty-three per cent of the cohort reappeared at least once in the Children's Court and 57 per cent had at least one appearance in an adult court over this period. ... In other words, 13 per cent of those who appeared for the first time in a Children's Court, in 1995, ended up in an adult prison within eight years. The number of reappearances in court was found to be significantly related to the age at which the juvenile first appeared in court; with youths aged 10 to 14 at their first appearance having significantly more court appearances over eight years than youths who were aged over 14 at their first appearance.

Nearly 70 per cent of the 5,476 juveniles examined in the present study reappeared in court within eight years. These results are fairly consistent with the international literature on juvenile offending One important policy implication of the current findings is that efforts to reduce the risk of reoffending should not be delayed in the belief that most young people making their first appearance in the Children's Court will never reappear in court again.⁴¹¹

⁴⁰⁸ See for example, the studies cited by the Australian Institute of Health and Welfare in its Feasibility Study, *Linking SAAP, Child Protection and Juvenile Justice Data Collection*, June 2008, p.2; NSW Bureau of Crime Statistics and Research, *Social and Economic Stress Child Neglect and Juvenile Delinquency*, 1997.

⁴⁰⁹ Department of Juvenile Justice, Justice Health and University of Sydney, *NSW Young People on Community Orders Health Survey 2003-06: Key Findings Report*, 2006, p.11.

⁴¹⁰ Department of Juvenile Justice, Justice Health and University of Sydney, *NSW Young People in Custody Health Survey: Key Findings Report*, 2003.

⁴¹¹ S Chen, T Matruglio, D Weatherburn and J Hua, "Crime and Justice Bulletin: 'The transition from juvenile to adult criminal careers,'" *NSW Bureau of Crime Statistics and Research, Contemporary Issues in Crime and Justice*, Number 86, May 2005, pp.10-11.

- 15.4 The significant correlation between the high level of offending behaviour and the indicators of risk among young offenders, points to the importance of DoCS, Juvenile Justice and Police, and also those agencies such as Education, Health and Housing who have close contact with families, working together to provide support and interventions to address the factors of neglect, abuse, social and economic distress that contribute to offending behaviour.
- 15.5 Not only is this important for the personal well-being of the adolescents and young persons affected by these negative factors, but it also has ramifications for the community at large, as the following observations of the Bureau of Crime Statistics and Research (BOCSAR) show, in relation to urban areas:
- a. The findings indicate that, assuming other factors remain unchanged, an increase of 1,000 additional neglected children would result in additional 256 juveniles involved in crime. Alternatively, and again assuming other factors remained unchanged, an increase of 1,000 additional poor families would result in an additional 141 juveniles involved in crime.
 - b. The increases in juvenile court appearances resulting from such increases in neglect or poverty would be 466 for each additional 1,000 neglected children or 257 for each additional 1,000 poor families. The increase in criminal offending would be substantially larger given that only a small proportion of offences result in court appearances.⁴¹²
- 15.6 The recently released NSW Criminal Courts Statistics 2007 show a three per cent increase in the number of persons with matters finalised in Children's Courts for that year (up to 9,141).⁴¹³
- 15.7 In the first part of this chapter the sentencing of young offenders is examined, including the availability of diversionary options, and the several programs and strategies that exist which are directed towards preventing anti-social and criminal conduct by young offenders. Issues concerning the management of young offenders once they come under the supervision of Juvenile Justice particularly those who are under the parental responsibility of the Minister, and the programs that then become available for their rehabilitation, are also examined. In the second part of the chapter, consideration is given to those aspects of the adult or general justice system that have an impact on keeping children and young persons safe.

⁴¹² NSW Bureau of Statistics, "Social and Economic Stress Child Neglect and Juvenile Delinquency," 1997, p.viii.

⁴¹³ NSW Bureau of Crime Statistics and Research, "NSW Criminal Court Statistics 2007," August 2008, p.iii.

Juvenile Justice

Release on bail or subject to a bond

- 15.8 One problem which was repeatedly brought to the notice of the Inquiry has been the difficulty in securing accommodation for young people who might otherwise have been released on bail, but cannot be released because they do not have stable accommodation or are unable to return home because of family breakdown or safety or neglect risks.
- 15.9 In the absence of dedicated bail facilities for young people, many have been held remanded in detention for significant periods, with potentially adverse consequences for their prospects of rehabilitation. Particularly difficult to place are those facing sexual offence charges or who have a history of sexual offending. Similar problems can arise where young offenders who, after conviction, are unable to obtain suitable accommodation where that is the subject of a condition in a bond.
- 15.10 Recent statistics show that there is a significant increase in the number of detainees in juvenile detention centres.⁴¹⁴
- 15.11 Juvenile Justice advised the Inquiry that as at 15 June 2008 there were 272 young people in custody on remand, compared with an average daily total of 164 for 2006/07.
- 15.12 Juvenile Justice has advised that:

On any given day, detainees on remand in juvenile detention make up 55 per cent to 60 per cent of the total juvenile detention centre population. This figure is even higher for young women in detention, with around 65 per cent to 75 per cent being on remand. A recent review of remand cases undertaken by Juvenile Justice over a period of three months (the first quarter of 2006/07) found that 90 per cent of these did not meet bail conditions in the first instance and spent an average of eight days in custody. Ninety-five per cent of those remanded during the review period had court imposed bail conditions to 'reside as directed'.

The review also indicates that the 10 – 12 years age group spend an average of 25 days in custody before being able to meet their conditions of bail. Of those young people who were identified as having been involved with DoCS, the average time in custody before meeting their bail conditions was 12 days

⁴¹⁴ Department of Juvenile Justice, *Annual Report 2006/07*, p.18.

compared to seven days for those who had no previous DoCS involvement or where this was unknown.

This situation is particularly worrying when it is considered that about 84 per cent of young people remanded to custody do not go onto receive a custodial order after sentencing.⁴¹⁵

- 15.13 It would seem that Juvenile Justice has no legislative obligation or common law duty to provide or to arrange accommodation for people within this group, and no legislative basis to place children under 16 years of age in accommodation other than with their parents or legal guardians or authorised carers (where they are under the parental responsibility of the Minister). It is not funded to provide accommodation services other than within detention centres, although it does from time to time use 'brokerage funds' to purchase accommodation as a step of last resort, where that will assist in preventing those within this group entering custody, in accordance with their bail/case management plan.
- 15.14 It would also appear that, save in the case of those under the Minister's parental responsibility, DoCS cannot be compelled to find accommodation for those within this group.
- 15.15 The nature of the problem is illustrated by two cases. First, there is the case of *Minister for Community Services and Anor v Children's Court of NSW*⁴¹⁶ in which DoCS brought proceedings in relation to the validity in law of a condition included in a bond imposed by the Children's Court requiring the child in question to "reside as directed by the Department of Community Services, - not with your mother unless both the mother and [child] agree."⁴¹⁷ This case was one in which DoCS had made it clear to the Court, both earlier in the proceedings when bail was at issue, and at the time of sentencing, that it did not have the facilities to house the child, nor was it in a position to provide any direction as to where she should go. It was held that the condition was within power, although it did not have the effect of requiring DoCS to provide the accommodation or assistance contemplated.
- 15.16 The second case is that of *Police v Raymond*,⁴¹⁸ which involved a 14 year old boy charged with several offences, but without a prior record. Despite being granted conditional bail in similar terms to that considered in the last mentioned case, his custody continued for some time because of DoCS' inability to find a suitable place of residence for him. Juvenile Justice notified DoCS of his homelessness on several occasions, as did the Magistrate who made a formal declaration that he was homeless. Serious concerns were expressed by the Magistrate concerning the fact of a 14 year old homeless youth being warehoused in a juvenile detention centre. The application of the Department

⁴¹⁵ Submission: Department of Juvenile Justice, p.14.

⁴¹⁶ *Minister for Community Services and Anor v Children's Court of NSW* [2005] 62 NSWLR 419.

⁴¹⁷ *Minister for Community Services and Anor v Children's Court of NSW* [2005] 62 NSWLR 419 at [16].

⁴¹⁸ *Police v Raymond* [2007] CLN 3.

to revoke the condition, which would have permitted his release, was declined. This left DoCS in the position of endeavouring to find some temporary accommodation, although still without any statutory obligation to do so.

- 15.17 One of the Inquiry's case studies highlights this issue.

Case Study 22

A was born on 18/4/91. Her mother was 14 years old. She lived with her maternal grandmother and then with her maternal aunt until 2004 when she returned to live with her mother who was getting married and was pregnant. Reports to DoCS commenced on her return to her mother when she was 13 years old. To date there are 95 reports to DoCS. The mother repeatedly reported to DoCS expressing her inability to cope with A's behaviours. She was fearful of A being around her toddler and newborn baby and could not cope with the financial stress of providing A's required ADHD medication. From December 2005 to March 2006 there were a number of incidents of reported assault on the mother by A. In April 2006 A was arrested and held in the custody of the Juvenile Justice. The conditional bail undertaking was that she 'remain in custody until suitable accommodation is found in community eg DoCS/Juvenile Justice.'

The mother stated that A was not able to return home and no placements were able to be located, however a high cost option was available (\$3,200 for weekend with a 1:1 carer in a motel). After consultation with the manager, the DoCS caseworker advised Juvenile Justice that no placement options were available and A remained in detention in Juvenile Justice's care. Juvenile Justice urged DoCS to find a placement as this was 'just an AVO matter so A does not deserve to remain in custody over the weekend.'

- 15.18 Access to bail is of particular significance for young people charged with criminal offences in diverting them from potentially unnecessary contact with a delinquent group, and in limiting the interruption of their education and family connection. The desirability of maintaining members of this group in the community and of involving them in programs and support services while on bail, so as to encourage their successful completion of the bail period, has been recognised by the Youth Justice Board in the UK whose model includes the following standards:
- a. Programs should be developed at the initial bail assessment point, and be individually tailored to the needs of the young person.
 - b. Young persons should have immediate access to programs and support services once they are released on bail. If there is to be an intensive support program, a timely start will improve the young person's retention in the program.

- c. Programs should take a more holistic view of the young person and their needs, and interventions should be focused on promoting a more stable lifestyle.
 - d. Family should be involved when possible.
 - e. Programs should include court support to help the person to comply with their bail conditions. For example court reminder calls, accompanying the young person to court, organising transport when necessary and providing information and advice about the court and bail process.⁴¹⁹
- 15.19 A positive commitment on the part of Juvenile Justice to secure accommodation for young people within the juvenile justice or criminal justice systems who would be allowed their liberty, either pending trial or pursuant to a non-custodial disposition such as a bond or suspended sentence, had they a stable place in which to live, would accord with the requirements of the international instruments to which Australia is signatory.⁴²⁰
- 15.20 It is understood that one such service, 'New Pathways', can provide for a limited amount of accommodation combining residence with treatment but more is obviously needed.⁴²¹ It is also understood that a trial of an integrated case management project is to be conducted out of the Parramatta Children's Court commencing in December 2008 and involving DoCS, Juvenile Justice, Justice Health, and DADHC to respond to the needs of young people before the Courts, who have high level and complex needs and who would normally be bailed if they had suitable accommodation or placement options. This, the Inquiry believes, is a commendable initiative which should be expanded, if found upon evaluation to be effective.
- 15.21 It has, however, been pointed out that the trial will only target a very small number of people (five at any one time), and that it does not immediately address the more systemic issues which are apparent, as a result of the fact that Juvenile Justice clients are often excluded from accessing the limited accommodation services including SAAP funded services (see Chapters 17 and 20) which are available to adolescents and young persons, due to their complex needs and high risk rating. Among those particularly likely to be excluded are those with a history of sexual offending and those charged with property damage and serious behavioural offences, leaving as the only available option, at this stage, a detention centre 'placement'.
- 15.22 The Inquiry considers that it would be helpful to establish an after hours bail placement service similar to Victoria's Central After Hours and Bail Placement Service, that is available to young people aged 10-18 years, who are at risk of

⁴¹⁹ G Denning-Cotter, "Bail Support in Australia," *Indigenous Justice Clearinghouse*, April 2008.

⁴²⁰ The United Nations Convention on the Rights of the Child, 1989, Article 20; and the UN Standard Minimum Rule for the Administration of Juvenile Justice Rule 24.

⁴²¹ This program is run by Youth off the Streets and caters for moderate to high risk male adolescents aged 13 to 18 years. It has recently been extended to include young people with an intellectual disability and is to be the subject of an evaluation commissioned by DoCS which is to start by the end of 2009.

being remanded in custody, or who require bail accommodation; or similar to Queensland's Conditional Bail Program and Youth Bail Accommodation Support Service.⁴²²

- 15.23 The difficulties in securing the release on bail of young Aboriginals has been particularly problematic. It needs to be addressed, as a matter of urgency, given the disproportionately high number of Aboriginal children and young people who come into contact with the juvenile justice system. The intensive Bail Support Program recently introduced in NSW may prove to be beneficial in this respect if it can be extended to rural areas.⁴²³
- 15.24 It is only in its early stages and seemingly the subject of limited funding, but it does have the advantage of using the window between arrest and sentencing to address the factors behind offending and to open up opportunities for diversion.

Sentencing and diversion of juvenile offenders

- 15.25 HREOC has noted the commitment of Australia to introduce diversionary measures for juvenile offenders in accordance with the provision of the *UN Convention on the Rights of the Child*, as elaborated upon by other United Nations rules and guidelines.⁴²⁴
- 15.26 HREOC noted that:
- Indigenous juveniles are particularly vulnerable to being trapped in a cycle of contact with the criminal justice process. Yet studies show that Indigenous juveniles are less likely than non-Indigenous youth to benefit from mechanisms, such as conferencing, to divert juveniles from custody... Similarly, there is evidence that Indigenous children have not received the benefit of police cautioning at the same rate as the general youth population.*⁴²⁵
- 15.27 HREOC also drew attention to the recommendations of the Royal Commission into Aboriginal Deaths in Custody concerning the desirability of providing a wide range of non-custodial options for young Aboriginal juvenile offenders.⁴²⁶
- 15.28 This is an area where Police through their Youth Liaison Officers have a role in activating interventions under the *Young Offenders Act 1997* (the Young Offenders Act); in organising programs that can target the behaviour of young offenders to divert them from the criminal justice system or to assist them in not re-offending; in identifying young people whose risk taking behaviour, family

⁴²² G Denning-Cotter, 2008, op. cit.

⁴²³ *ibid.*

⁴²⁴ The Human Rights and Equal Opportunity Commission, *Human Rights Brief No. 5 Best Practice Principles for the Diversion of Juvenile Offenders*, 2001.

⁴²⁵ *ibid.*

⁴²⁶ *ibid.*, p.6.

situation or previous contact with Police indicate that they are at risk of becoming persistent offenders; and in referring them to relevant services. It is also an area where other agencies, including DoCS, Health and Juvenile Justice have an important role to play, and for which the provision of assured funding for relevant programs is of considerable importance.

The Young Offenders Act

- 15.29 The Young Offenders Act provides an opportunity for offenders aged 10-18 years who have committed certain categories of offences⁴²⁷ to be dealt with by Police outside of the court system,⁴²⁸ in a variety of ways that fall short of the criminal sanctions that might otherwise be attracted, including warnings, cautions and youth justice conferences.
- 15.30 Under the Young Offenders Act, the level and type of intervention will be determined on the basis of a number of factors, including the seriousness of the offence, the harm to the victim, the degree of violence and any previous offending history.
- 15.31 The Young Offenders Act has been the subject of evaluation by the NSW Law Reform Commission,⁴²⁹ by the BOCSAR on three occasions⁴³⁰ and by the Sydney Institute of Criminology.⁴³¹ Generally these evaluations concluded that the Young Offenders Act has introduced a successful scheme for diverting young offenders from court.
- 15.32 The Ombudsman has been actively involved in encouraging Police in relation to the effective use of diversionary options, including the use of community members to issue cautions, securing access by offenders to legal advice, and developing a Youth Liaison Officer training package. In a submission to the Inquiry the Ombudsman advised:

*We found significant discrepancy in the use of diversionary options between commands, and on occasion, between different sectors within the same command. This suggests that use of the [Young Offenders] Act depends very heavily on the views of an individual officer rather than the application of more general criteria. In our view, this issue should be closely monitored by NSW Police to identify how referral rates might be improved.*⁴³²

⁴²⁷ As specified in s.8 of the *Young Offenders Act 1997*.

⁴²⁸ *Young Offenders Act 1997* s.3.

⁴²⁹ NSW Law Reform Commission, Report 104, *Young Offenders*, 2005.

⁴³⁰ An Evaluation of the NSW Youth Justice Conferencing Scheme (2000); Reducing Juvenile Crime: Conferencing Versus Court (2002); and Reoffending among young people cautioned by Police or who participated in a Youth Justice Conference (2006).

⁴³¹ J Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997*, Institute of Criminology, Monograph 22, 2005.

⁴³² Submission: NSW Ombudsman, *Young People at Risk*, pp.19-20.

- 15.33 The Inquiry is of the view that this option is an important component of a criminal justice system that can provide an early brake upon an emerging pattern of anti-social activity or criminality, and that can also pave the way for access to relevant programs, particularly at the conferencing stage. It is of the view that the concerns of the Ombudsman need to be addressed.

Youth Conduct Orders

- 15.34 A trial of the use of youth conduct orders to be made by the Court, as an alternative to dealing with cases under the existing provisions of the Young Offenders Act, has been announced, which is to commence from December 2008, in the New England, Campbelltown and Mt Druitt Local Area Commands. The NSW Attorney General has announced that:

Orders can include strict limitations on a juvenile's movement and behaviour, including curfews, school attendance requirements and non-association orders so they don't mix with bad influences or gang members.

Offenders will also undergo intensive case management with their families, forcing them to confront issues like drug and alcohol dependence.

They can also be referred to treatment for mental health problems and their families may be given extra help with parenting support and housing.

*The aim is to get young offenders to work with their families in addressing the causes of their anti-social behaviour before they graduate into career criminals.*⁴³³

- 15.35 The Inquiry welcomes this initiative, which may provide greater rigour to the diversionary regime already mentioned.

The Youth Drug and Alcohol Court

- 15.36 Another route for diversion, and for addressing the circumstances that give rise to juvenile offending, involves referral to the Youth Drug and Alcohol Court, an initiative that grew out of the 1999 NSW Drug Summit, that has been trialled in western Sydney since 2000, and is being expanded to central and eastern Sydney. It operates within the legislative framework of the *Children (Criminal Proceedings) Act 1987*.
- 15.37 Program funding is provided by the NSW Government and by the Commonwealth Government through the National Illicit Drug Diversion Initiative.⁴³⁴

⁴³³ Attorney General's Department of NSW, Media Release, 18 July 2008.

- 15.38 An evaluation by the Social Policy Research Centre of the University of New South Wales of the first two years of the program suggested that it was having an important positive impact on the lives of many participants and recommended that it:

*should continue and possibly be expanded to selected other geographical areas subject to a number of issues being addressed.*⁴³⁵

Indigenous youth sentencing

- 15.39 An area requiring particular attention is that of young Aboriginal offenders who represent almost 50 per cent of the juveniles who are in detention pursuant to control orders,⁴³⁶ and approximately 33 per cent of young offenders subject to community supervision.⁴³⁷ This group is particularly prone to homelessness and violence or abuse, and its members tend to enter the juvenile justice system in early adolescence and often remain with the criminal justice system into adulthood.
- 15.40 The Ombudsman has pointed out that:

In 2004, the police undertook an analysis of Aboriginal offenders aged 10 and 11 years. The review examined criminal charges against 10 and 11 year old Aboriginal and Torres Strait Islander offenders in the six months to 31 December 2003.

It identified 23 children who were charged with a total of 91 offences in this period. Analysis of police information relating to the 23 children charged found that:

- a. Every child charged had child/young person at risk reports, and 15 of the 23 had five or more reports of this nature.*
- b. All 23 had been the subject of DoCS referrals, and 16 of the 23 had been the subject of DoCS referrals on five or more occasions.*
- c. At age 10 or 11, every child charged with an offence in the six month review period had previously been charged.*
- d. Every child had faced between two and 53 charges before this six month period.*

⁴³⁴ Lawlink NSW: Youth Drug and Alcohol Court, www.lawlink.nsw.gov.au/lawlink/drug_court.

⁴³⁵ Social Policy Research Centre, University of New South Wales Evaluation of the New South Wales, *Youth Drug Court Pilot Program, Final Report*, December 2003 (Revised March 2004), pp.v-vi.

⁴³⁶ Department of Juvenile Justice, *Annual Report 2006/07*, p.45; showed that the average daily number of young people in custody for the year was 331, of which 159 were of Aboriginal and/or Torres Strait Islander background: Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2006/07*, p.52.

⁴³⁷ Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2006/07*, p.32.

e. *In the six month period reviewed, one child accrued a further 23 charges.*⁴³⁸

- 15.41 The Ombudsman has been conducting reviews of the measures that Police Local Area Commands across NSW have introduced to implement the Police's Aboriginal Strategic Directions Policy, the aim of which is to improve criminal justice outcomes for Aboriginal communities and to make positive changes in the relationships between Police and those communities. In particular, it has looked at diversion strategies, and other activities operated through initiatives having a relevance for the broader community, such as those provided through the Police Community Youth Clubs.
- 15.42 In general, the Ombudsman has reported favourably on the Police response in its more recent reviews during 2006 and 2007, and has noted the replacement of ad hoc activities with properly planned strategies. The Inquiry considers that continuity of implementation of such strategies across all Local Area Commands is important.
- 15.43 Strategies which improve relations between Police and Aboriginal communities, and the use of the several opportunities that exist for diversion, including those available under the *Young Offenders Act 1997*, are particularly important for Aboriginal youth whose contact with Juvenile Justice is likely to have a long term negative impact. The need for these kinds of responses is only part of the solution. Until the several criminogenic factors, and general background of disadvantage and isolation from mainstream services elsewhere discussed in this report are met, there is likely to continue to be a disproportionate representation of Aboriginal youth in the juvenile justice and care and protection domains.
- 15.44 The Inquiry notes that in Victoria, the Koori Youth Justice Program established in 1992, has now been expanded to most of the State. It is staffed by custodial Koori workers and community Koori workers employed by community organisations. It has a role that is preventative, as well as responsive in relation to offenders subject to supervision or diversion following their appearance in Court.⁴³⁹
- 15.45 It is the role of Koori Youth Justice workers to develop Aboriginal cultural support plans and to provide support for clients and their families, in addressing and planning suitable goals.⁴⁴⁰
- 15.46 Associated Programs in Victoria include the Koori Intensive Bail Support Program, the Koori Early School Leavers and Youth Employment Program, and the Koori Pre and Post Release Program, each of which is focused upon diverting young Aboriginal people from the youth justice system, and

⁴³⁸ Submission: NSW Ombudsman, *Young People at Risk*, p.14.

⁴³⁹ Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2006/07*, p.112.

⁴⁴⁰ *ibid.*

responding to the need to provide rehabilitation opportunities for those who do enter that system.⁴⁴¹

- 15.47 The Inquiry is of the view that consideration could usefully be given to the development of a similar model in NSW, involving Juvenile Justice and Aboriginal Affairs. It could take its place within the structure of the Interagency Plan, and build upon those programs and strategies that have currently been introduced for the purpose of reducing the disturbing over representation of Aboriginal Youth in the group of young persons subject to community supervision or detention. It would need to satisfy the principles for a culturally appropriate program identified in Chapter 18 of this report, and an assessment of its viability in this respect would be assisted by a careful study of the Koori Youth Justice Program.

Cooperation between DoCS and Juvenile Justice

- 15.48 Serious problems can arise in those cases where a child or young person in statutory care comes into conflict with the criminal law and becomes subject to the control or supervision of Juvenile Justice.⁴⁴²
- 15.49 Clearly there is a need for Juvenile Justice and DoCS to have a cooperative framework to ensure that those within this group who are in care, but in detention or under supervision, have their needs met and their prospects of rehabilitation sufficiently addressed.
- 15.50 The removal by DoCS of the Specialist Adolescent District Officers who had a responsibility to work with this group among others, and to ensure that their needs were met, appears to have been unfortunate, for this reason.
- 15.51 Juvenile Justice drew attention to the desirability of a shared client database being established, that would permit a better linkage between DoCS and Juvenile Justice, and strategies for interventions for those who are most at risk of being entrenched in the criminal justice system. The provision of a systems interface between the client databases of DoCS and Juvenile Justice would seemingly allow the two agencies to plan their services more effectively, improve case management, allow for a useful exchange of information and permit Juvenile Justice to prepare better informed background reports of the kind that are required for sentencing purposes. It might also enable each agency to provide more meaningful assistance for young people who are appearing before the courts, sometimes at a point where they are not technically a client of either agency. The Inquiry considers that there is considerable force in the submission of Juvenile Justice in support of the introduction of such a capacity.

⁴⁴¹ *ibid.*

⁴⁴² *HA v Minister for Community Services* [2003] NSW ADT 149. Case determined under the 1987 Act, but illustrative of the challenging issues involved for DoCS, carers and the ADT in these cases.

- 15.52 An allied suggestion of Juvenile Justice was to the effect that there be an allocated caseworker at the DoCS Helpline to deal with Juvenile Justice calls, or at least that Juvenile Justice be added to the Police and Education on the priority list for a response. This, it suggested, could be of considerable value in relation to those young people who are brought before Bail Courts during the weekends, who present with care and protection issues, but who are not subject to the parental responsibility of the Minister. Currently, it was suggested, DoCS is slow to respond to those involved in those cases, resulting in them being effectively assigned to the responsibility of Juvenile Justice and detained in a Juvenile Justice facility.
- 15.53 The Inquiry notes that the 2004 MOU between DoCS and Juvenile Justice, which was supported by formal local protocols between the Regional Directors of the two agencies, determines each agency's respective roles and responsibilities for young people aged 10 years or above who are under the parental responsibility of the Minister, and who are subject to the effective control of Juvenile Justice by reason of their offending. The MOU and protocols are due for review but this has not occurred. The Inquiry considers that this requires urgent attention.
- 15.54 Juvenile Justice also suggested that DoCS and Juvenile Justice work together in addressing those cases where one or other of the agencies becomes involved because of a conflict between a juvenile and his or her family, which may result in proceedings for a breach of an AVO attracting Juvenile Justice's jurisdiction, or a risk of harm notification to DoCS. This could be addressed by the preparation of a Parent Responsibility Contract in which each agency contributes its specialist skills to defusing the conflict and addressing any ongoing issues, or by referral to an external DoCS funded agency similar to the procedure adopted by the Queensland Referral for Action Intervention Service model.
- 15.55 The Inquiry notes that there is a current project between DoCS and a number of other Departments including Juvenile Justice to address DoCS response to Juvenile Justice calls. DoCS advised the Inquiry, and the Inquiry agrees, that there is a clearly different perspective between the relevant departments as to whether a child is, indeed, in need of care and protection. The Inquiry understands that as part of this project, Juvenile Justice has been party to inquiries which have established that there are less than 20 young people a year who fall into the group who are the subject of these calls. In light of this relatively low number, the Inquiry does not agree with the Juvenile Justice suggestions that there be an allocated caseworker at the Helpline to deal with such calls. This does not, however, mean that the interests of those within this group, can be neglected, or that joint work should not be undertaken.
- 15.56 Worthy of consideration, is the suggestion of Juvenile Justice that a juvenile offender compact be established, involving in addition to Juvenile Justice, Department of Corrective Services, Education, Health, DoCS, DADHC, Police and Attorney General's, that would better align the policies of each department.

- 15.57 As envisaged by Juvenile Justice, the compact would establish a set of principles under which agencies would co-operate in servicing and prioritising young offenders. The principles would include recognition that:
- a. the reduction of re-offending requires a multi-agency approach
 - b. the needs of Aboriginal children and young persons require particular attention
 - c. there is a need to target the group of young offenders at highest risk of future offending namely 10-14 year old Aboriginal males
 - d. pre-court/detention and post order/detention are areas for the focus of agencies' interventions.
- 15.58 Juvenile Justice proposes that for each agency, specific services, strategies and target groups would be clearly defined in this compact. These would be developed through consultation with each agency and would be supported by performance measures to assess the ongoing efficacy of the compact.

Reducing the risk of re-offending

- 15.59 Juvenile Justice has a core responsibility to work with offenders under its supervision in reducing their risk of re-offending and in addressing the underlying issues that contribute to such conduct. It has, however, pointed out, in a submission to the Inquiry, that little headway will be made unless the wider welfare and support needs of this group, whose members predominantly come from backgrounds of neglect and disadvantage, are met.
- 15.60 Therein lies the challenge. Having regard to the average length of community supervision for juveniles, and the average length of detention pursuant to a control order, of six months, Juvenile Justice has only a short period of time to work with these people. It follows that intensive support from other agencies is essential during this period, which can then lead to ongoing assistance or casework, so as to give those within this group a positive redirection.
- 15.61 Juvenile Justice has advised that it finds that other agencies, both government and non-government, tend to withdraw their services and to decrease the level of support once young people come under Juvenile Justice supervision, most likely in the belief that Juvenile Justice will be able to provide the necessary support, or otherwise out of a reluctance to take on complex high needs clients who may be difficult to engage, or because of the potential occupational health and safety risks to their staff.
- 15.62 Juvenile Justice has, however, recognised the need for it to adopt innovative strategies. As noted in its Annual Report for 2006/07 it now has:

A range of programs and interventions within both the custodial and community environments that are designed to address the needs of young offenders. These include offending behaviour programs, such as Targets for Effective Change, a program

*from the United Kingdom, that uses strategies that research has shown are effective in reducing reoffending. They also include counselling and group-work programs that focus on young offenders' alcohol and other drug issues, sex offenders and violent offenders and programs specific to Aboriginal young people.*⁴⁴³

15.63 It added that:

*A priority for the Department is addressing the high numbers of Aboriginal young offenders, and young offenders aged between 10-14 years. To address the needs of these groups, the Department is enhancing current strategies and developing new programs to provide effective interventions. Initiatives such as the Intensive Supervision Program will have a clear focus on young Aboriginals in the 10-14 age range.*⁴⁴⁴

15.64 Among the services provided from Juvenile Justice Community Offices are specialised programs that deliver interventions such as the Sex Offender Program and Violent Offenders Program, Alcohol and Drug Abuse Counselling, and case management and networking, aimed at linking offenders with community support services.⁴⁴⁵ Not all of these programs are available within the eight Juvenile Justice Centres now under the control of Juvenile Justice although specialist and psychological services are available of a generic kind involving educational, vocational, recreational and personal development programs.⁴⁴⁶ It is understood that the Sex Offender Program is only available to offenders under supervision in the community. Clearly this limits the capacity of such programs to address the behavioural problems of those who need them.

15.65 Of potential value in this respect is the proposal of Juvenile Justice to introduce an Intensive Supervision Program in two pilot sites (the Hunter area and western Sydney) that will involve intensive work with children and young persons and their families, involving multi-systemic therapy over a period of four to six months. It will deal with a range of issues including substance abuse, re-engagement in education and vocational pursuits, health and welfare issues, housing needs, family conflict and negative peer pressure, for those juveniles with a history of committing serious offences and/or repeat offending, or whose severe anti-social behaviour puts them at risk of incarceration. The interventions are to be delivered both at home or in community settings and address parenting practices, family relationships, substance abuse problems,

⁴⁴³ Department of Juvenile Justice, *Annual Report 2006/07*, p.34.

⁴⁴⁴ *ibid.*

⁴⁴⁵ *ibid.*

⁴⁴⁶ The Kariiong Juvenile Correctional Centre for the more serious offenders aged 16 and above and those whose behaviour while in detention has required their transfer to a more secure facility, is now within the responsibility of the Department of Corrective Services.

education, improved group associations and the establishment of a suitable network of support.⁴⁴⁷

- 15.66 A unit is to be established to oversee the program and to manage the development of similar evidence based programs.⁴⁴⁸ It is understood that this program has been successfully used in New Zealand, the USA, Canada and a number of European countries, that up to 70 families will be targeted each year for the four years of its current life, and that it will draw upon the cooperative support of other agencies including DoCS, Police and Health. It is expected to be of particular value for an Aboriginal target group.⁴⁴⁹
- 15.67 The Inquiry considers this to be a program that should be actively supported and expanded if found, after evaluation, to be successful; and in this respect it notes that particular attention has been given to ensuring that this intervention is appropriate for young Aboriginals with a Juvenile Justice history.
- 15.68 One further matter of relevance for those leaving juvenile justice custody is the requirement for Juvenile Justice to develop a Post Release Support Plan, in compliance with the requirements of the Department's Post Release Support Program. It includes a structured 12 week program designed to achieve an overall reduction in the number of clients who re-offend after release from a juvenile justice centre.⁴⁵⁰ It is further enhanced with a brokerage system that supports clients without ready access to a Post Release Support Provider and, in particular, clients in rural and remote areas. This Program is funded through the Department's Community Funding Program.
- 15.69 Also funded under the Community Funding Program are the following programs:
- a. Accommodation Support Programs that assist young people in securing and maintaining appropriate accommodation, in developing living skills and in providing case management services.
 - b. Local Offender Programs that assist young persons at risk of offending or reoffending to access educational and vocational pathways.
 - c. Alcohol and Other Drug Programs that aim to increase the capacity of young persons to effectively manage their lives and achieve a sustained reduction in their levels of substance use. The Department currently funds two types of programs – a Family Counsellor Program in metropolitan Sydney and two eight-bed rural residential drug rehabilitation services at Dubbo and Coffs Harbour managed by the Ted Noffs Foundation. Residential drug rehabilitation services aim to provide an intensive treatment program for substance misusing young persons located close to their homes and families.

⁴⁴⁷ Department of Juvenile Justice, *Annual Report 2006/07*, p.39.

⁴⁴⁸ *ibid.*, pp.39–40.

⁴⁴⁹ NSW Youth Action Plan, *Progress Report as at 30 June 2007*, pp.19–20.

⁴⁵⁰ Department of Juvenile Justice, *Annual Report 2006/07*, p.43.

- d. The Employment Skilling Program that assists young people subject to a supervised court order by providing access to relevant education, vocational training and employment pathways, and by helping them to establish and maintain positive links with the community.
 - e. The Children's Visiting Legal Service (Legal Aid Commission) that provides legal assistance to detainees.⁴⁵¹
- 15.70 The Inquiry has been advised that 39 non-government organisations are funded through Juvenile Justice's Community Funding Program. Funding for 2007/08 was \$5.7 million and the budget for 2008/09 is \$5.9 million.
- 15.71 An additional program of value is the Juniperina Shared Access Trial negotiated between Housing, Juvenile Justice, DoCS and Justice Health, (see Chapter 7).

Justice Health Program

- 15.72 Commonly, young offenders have mental health issues, including personality disorders, that need to be addressed before they become entrenched. Juvenile Justice has informed the Inquiry that a significant number of those in detention have significant mental health or personality disorder issues, a circumstance that tends to be aggravated where, as is commonly the case, their parents also have history of criminal offending or of mental illness, or are in custody.
- 15.73 Justice Health has an important role to play in this area, both in arranging assessments and reports to the court, and in linking these people to mental health services and other agencies as well as services for those exiting juvenile detention through its Community Integration Team. DoCS should also play a role, as part of its responsibility in providing assistance to those under the parental responsibility of the Minister, by engaging Justice Health, in those cases.
- 15.74 As noted in the NSW Youth Plan Progress Report as at 30 June 2007:

Justice Health has received \$1.2 million recurrent funding to provide services for clients 10-18 years old who have come in contact with the criminal justice system and have an emerging mental illness and/or drug and alcohol problems.

The service comprises four main components: community based assessments and linkage to appropriate community services; court liaison and diversion; discharge planning for young people in custody and for some young people occupying mental health inpatient beds; and case management of a small number of clients. The service has commenced in Western Sydney area and will expand to the Central Sydney area and a regional area yet to be determined. Results from the first four

⁴⁵¹ *ibid.*, pp.36-37.

*months of operation of this service indicated that of 44 clients referred to assessment via court diversion 14 cases were diverted into treatment, with all criminal matters dismissed, with a further 11 diverted into treatment with treatment compliance as a condition of their bail.*⁴⁵²

Participation of DoCS in cases within the Juvenile Justice system

- 15.75 Relatively few cases are reported to DoCS by Magistrates sitting in the criminal jurisdiction of the Children's Court.⁴⁵³
- 15.76 The Children's Court, in its submission to the Inquiry, submitted that a power should be conferred on the Court to require the Director-General of DoCS to provide courts with reports on the care and protection issues of a child or young person brought before them in proceedings of this kind, and on the actions which the Department proposes to take concerning them, or to give an explanation of why no action is to be taken.
- 15.77 While the NSW Ombudsman accepts that there would be merit in the Children's Court receiving timely information from DoCS in relation to those appearing before it, about whom a Magistrate has concerns, it suggests that such referrals should be limited to cases where "a high risk of harm appears to exist."⁴⁵⁴
- 15.78 The NSW Law Reform Commission considered this point in its 2005 Report on Young Offenders. The Commission noted that:

*... the relationship between the Children's Court, DoCS and Juvenile Justice in care matters that come before the court seems to be problematic. ... it is not always clear who has, or should have, responsibility for the young person before the Court. Nor is it always clear what services and resources are available and who has the authority to utilise these in a particular matter. Benefits would flow to young people caught up in the criminal justice system if the ambiguities in the Court/departmental interrelationships were resolved and if there were greater cooperation between these bodies in matters before the Court. Such cooperation should extend to providing the Court with the information it needs to make the most appropriate orders in respect of the young offender.*⁴⁵⁵

⁴⁵² NSW Youth Action Plan, *Progress Report as at 30 June 2007*, p.16.

⁴⁵³ Submission: NSW Ombudsman, *Young People at Risk*, p.20, NSW Ombudsman noted that only 32 cases of this kind were reported in 2005.

⁴⁵⁴ *ibid.*

⁴⁵⁵ NSW Law Reform Commission, Report 104, *Young Offenders*, 2005, at 8.141.

15.79 It recommended that:

*A Protocol should establish which department or departments has responsibility for a young person appearing before the Children's Court in a criminal matter who is in need of care and protection and/or bail or crisis accommodation. The Protocol should promote co-operation in such matters between the Children's Court, the Department of Juvenile Justice and the Department of Community Services, in the child's best interests.*⁴⁵⁶

15.80 The Law Reform Commission noted that the Children's Court currently has the power under s.7 of the *Children (Protection and Parental Responsibility) Act 1997*, when exercising criminal jurisdiction, to require the attendance at court of the young offender's parents.⁴⁵⁷ The Children's Court submitted to the Commission that this power should be extended to apply to the Director-General of DoCS or his or her delegate. Currently, s.3 of the *Children (Protection and Parental Responsibility) Act 1997* specifically excludes the Minister and the Director-General of DoCS from the definition of 'parent' under the Act. The Commission's view was as follows:

*The Commission sees the merit and logic of the Court's submission. However, amendment of the definition of 'parent' in the Children (Protection and Parental Responsibility) Act 1997 (NSW) to include the Minister and the Director-General of DoCS would have consequences in many different areas of parental rights and responsibilities, extending far beyond sentencing. Accordingly, it would not be appropriate for the Commission to recommend this change in this review. This is particularly so given that the submission was made late in the review and we have not had the opportunity to consult widely on it. We do, however, recommend that Parliament consider the issue and the Children's Court's submission, at the least in relation to DoCS' attendance in court in criminal proceedings where the young offender is subject to a care order.*⁴⁵⁸

15.81 The Inquiry does not consider it appropriate for the Children's Court to have an own motion power of the kind suggested, as this would be inconsistent with its role as a court of law charged with the determination of cases brought before it. To confer upon the court an own motion or supervisory role would cross the appropriate boundaries within which the two institutions, one judicial and the other administrative, need to function.

⁴⁵⁶ *ibid.*, at Recommendation 8.7.

⁴⁵⁷ *ibid.*

⁴⁵⁸ *ibid.*, at 8.144.

- 15.82 However, the Inquiry does agree that, if requested by the Court, DoCS should provide relevant information within its possession that might assist in the sentencing young people before the Children's Court in relation to a criminal offence which, it might be expected, would identify any ongoing care and protection issues that might need to be taken into account in the exercise of the court's sentencing discretion. It can exercise its s.248 power for that purpose.

Conclusion

- 15.83 It is recognised that there is a clear distinction between the child protection and criminal justice systems which needs to be maintained. On the other hand, coming within the juvenile justice or criminal justice system should not exclude a young offender from long term services from DoCS and other human service agencies. Nor should a shortage of refuges or other forms of accommodation result in young people, who cannot live safely with their families, being remanded in custody unnecessarily, pending trial.
- 15.84 There are important strategies and trials that are designed to prevent young people from becoming engaged with the criminal justice system, including the Redfern Waterloo Case Coordination Project, the New Street Adolescent Service, the Anti-Social Behaviour Project, the Project Energy Scheme in the Illawarra Local Area Command, and the Tirkandi Inaburra Project for Aboriginal boys aged between 12 and 15 years, who have potential but are beginning to get into trouble, some of which are discussed elsewhere in this Report.
- 15.85 These initiatives need to be encouraged. The long term consequences of acquiring a record as a juvenile, or of being detained in a detention centre, in terms of future employability and rehabilitation, are such that every possible alternative should be made available. This has a particular significance for those young people who, through no fault of their own, have suffered that degree of abuse, neglect and poor parenting that might call for care and protection intervention or that might otherwise heighten their risk of drifting into criminal behaviour.
- 15.86 For those who do become the subject of interest by both DoCS and Juvenile Justice, the case for extensive joint intervention including Health is compelling.

Adult justice system and child protection

Role of NSW Police Force

- 15.87 Police officers have a substantial role in the area of child protection, arising under the Care Act and the general criminal law, including;
- a. the investigation and prosecution of those offenders who are responsible for the infliction of physical harm upon young people, or for their sexual

- assault, or for their neglect, as well as those involved in child pornography and child prostitution offences
- b. attending domestic violence incidents and investigating drug offences or responding to disturbances involving mentally ill persons, which may leave them with reasonable grounds to suspect that young people who are associated with those involved in such events are at risk of harm from abuse or neglect and with a resulting obligation to notify DoCS
 - c. delivering or coordinating crime prevention and diversionary/support programs that are aimed at identifying and diverting young people from offending or becoming the victims of crime
 - d. arranging activities for young people through the Police and Community Youth Club network and similar services
 - e. assisting DoCS staff in the removal of young people who are suspected of being at risk, and in cases of emergency acting on their own volition to remove such persons, pending DoCS engagement in the case,⁴⁵⁹ and to refer them to emergency, interim placements
 - f. seeking AVOs in the name of the child or young person where that is considered necessary for their protection, and enforcing them when breaches come to notice
 - g. reporting to DoCS where there are reasonable grounds to suspect that a child or young person is at risk of harm,⁴⁶⁰ or is homeless,⁴⁶¹ or where there are concerns for the possibility of future harm to an unborn child⁴⁶²
 - h. assisting with the provision of the information required for working with children checks
 - i. locating missing young people, including those who have run away from a placement, and responding to abandoned or unsupervised children, as well as those who are left unattended in motor vehicles
 - j. presenting children believed on reasonable grounds to be in need of care and attention, to a medical practitioner⁴⁶³
 - k. investigating persons suspected of posing a risk to young people, operating the scheme for the registration of certain offenders who pose risks of that kind, and seeking Offender Prohibition Orders concerning persons within this group
 - l. reporting to the Coroner in relation to child deaths where the death has occurred under any of several defined circumstances, and to carry out investigations into any such death where directed by the Coroner, or upon its own motion

⁴⁵⁹ *Children and Young Persons (Care and Protection) Act 1998* ss.43.

⁴⁶⁰ *Children and Young Persons (Care and Protection) Act 1998* ss.24 and 27.

⁴⁶¹ *Children and Young Persons (Care and Protection) Act 1998* ss.120 and 121.

⁴⁶² *Children and Young Persons (Care and Protection) Act 1998* s.25.

⁴⁶³ *Children and Young Persons (Care and Protection) Act 1998* s.173.

- m. participating in the work of the Child Death Review Team, including the provision of records required to inform research undertaken by that team.

Child Protection and Sex Crimes Squad

- 15.88 This is a statewide Specialist Child Protection Squad that includes the Sex Crimes Team and the JIRTs. It is structured to carry out investigations into serious or serial child and adult sex crimes, as well as serious child physical assault cases, child pornography and grooming offences, female genital mutilation and protracted or complex child prostitution cases and to provide support for Local Area Command investigations. It administers the Child Protection Register, and maintains a proactive intelligence and surveillance capacity to support squad and Local Area Command investigations. Its Child Exploitation Unit investigates child sex offender activities on the internet and related computer and telecommunications devices and it is the liaison point for national and international investigations into this area of activity. It also provides forensic examinations of computers and hard drives suspected of being used for the manufacture or distribution of child pornography.

Joint Investigation Response Teams

- 15.89 JIRTs comprise representatives from Police, DoCS and Health, that investigate cases involving the sexual assault and serious physical abuse and neglect of children and young persons upon referral from DoCS. Their principal concern is with victims aged under 16 years. Their role has been examined in Chapter 8.

Specialist support positions

- 15.90 The response of these units in relation to child protection issues is supported by the presence of a number of specialist positions.
- a. Domestic Violence Liaison Officers are stationed within Local Area Commands, with a responsibility to support and monitor the policing response to family and domestic violence, ensure protection orders are sought for victims including young people, monitor family and domestic violence-related 'child at risk' reports made to the DoCS, and support JIRT police officers in applications for AVOs through the courts.
 - b. The Inquiry was advised that a Domestic and Family Violence Team is to be established under the authority of the Deputy Commissioner, Field Operations, to provide a corporate monitoring role of domestic violence incidents, and their management by Police.
 - c. Youth Liaison Officers work with young people, their families and community members to reduce and prevent crime, to enhance positive relationships between young people and Police, and to promote a safer shared public environment.
 - d. Police and Community Youth Club Youth Program Officers are based in 59 Police and Community Youth Clubs across the State, and their task is to

deliver programs and interventions for young offenders, young people at risk of offending, and youth crime hotspots, that are aimed at addressing risk factors, and building protective factors and resilience in those within this group.

- e. School Liaison Police Officers implement educational programs and crime prevention workshops at high schools, that are aimed at addressing youth crime, supporting victims of crime, and developing mentoring schemes.
 - f. Aboriginal Community Liaison Officers assist operational police officers to develop, implement and monitor programs that are designed to establish positive relationships between Aboriginal communities and Police.
 - g. Ethnic Community Liaison Officers are unsworn officers who assist operational police officers in building closer relationships with local communities from diverse cultural and linguistic backgrounds.
 - h. Child Protection Regional Liaison Officers have a coordination role and a potential for direct involvement in the Child Protection Watch Team strategy.
- 15.91 Police in its submission to the Inquiry has argued for retention of the tiered approach mentioned above. The Inquiry does not see any reason to depart from that structure, or to question the establishment of the specialist positions mentioned, each of which has the potential to add value to the contribution provided by Police in protecting children and young people.

Additional protective powers

- 15.92 In addition to their capacity to charge those who commit offences under the general criminal law against young people, the Police have power to apply for Apprehended Domestic or Personal Violence Orders on their behalf under the *Crimes (Domestic and Personal Violence) Act 2007*; and for Child Protection Prohibition Orders that prohibit persons who are registered under the *Child Protection (Offenders Registration) Act 2000*, and who pose a risk to the lives or sexual safety of children, from engaging in specified conduct, under the *Child Protection (Offenders Prohibition Orders) Act 2004*.
- 15.93 Specific protection is also provided for young people following the successful prosecution by Police of those who are involved in certain sexual and violence offences, as a result of the registration regime established under the *Child Protection (Offenders Registration) Act 2000*, which requires such offenders to provide Police with personal information, including the details of any children and young persons with whom they reside or have regular unsupervised contact. Compliance with these requirements is now enhanced by the establishment of the Child Protection Watch Team Project which has multi-agency involvement and has been the subject of a positive evaluation.
- 15.94 Consequences arise in relation to the capacity of those offenders thereafter to work with children and young persons, by reason of the provisions of the CCYP

Act.⁴⁶⁴ Additional protection is provided by the power of the Supreme Court, on the application of the State, to order the extended supervision or continuing detention of certain classes of sex offenders.⁴⁶⁵

15.95 Apart from the general criminal law, the Care Act creates the following several specific offences which are designed to protect young people:

- a. A person intentionally takes action that has resulted in or appears likely to result in the physical injury or sexual abuse of a child, or young person, or in the child or young person suffering emotional or psychological harm such that their emotional or intellectual development is or is likely to be significantly damaged, or in their physical development or health being significantly harmed.⁴⁶⁶
- b. A person without reasonable excuse, neglects to provide adequate and proper food, nursing, clothing, medical aid or lodging for a child or young person in his or her care.⁴⁶⁷
- c. A person without lawful excuse removes or causes or procures a child or young person to be removed from the care of the person into whose care and protection or care responsibility they have been placed.⁴⁶⁸
- d. A person tattoos any part of the body or a child or young person without the written consent of a parent of that child.⁴⁶⁹ The definition of tattooing has now been extended to include other procedures including body piercing.
- e. A person leaves a child or young person in the person's care in a motor vehicle without proper supervision for such period or in such circumstances that they are likely to become emotionally distressed and their health becomes or is likely to become permanently or temporarily impaired.⁴⁷⁰

15.96 For each of these offences under the Care Act the maximum penalty is 200 penalty units (\$22,000). The need for these offences under the Care Act is obvious. The issue which arises, however, is whether they should be punishable by imprisonment as an addition to, or as an alternative to, a court imposed penalty. The Inquiry notes that in a response to the DoCS Discussion Paper, the Police Ministry proposed an amendment of these provisions so as to allow a term of imprisonment to be imposed for up to six months. The Inquiry does not agree, at least in relation to the prosecution of parents, since imprisonment is only likely to exacerbate any underlying risk issues.

⁴⁶⁴ *Commission for Children and Young People Act 1998* Part 7.

⁴⁶⁵ *Crimes (Serious Sex Offenders) Act 2006* Parts 2 and 3.

⁴⁶⁶ *Child and Young Persons (Care and Protection) Act 1998* s.227.

⁴⁶⁷ *Child and Young Persons (Care and Protection) Act 1998* s.228.

⁴⁶⁸ *Child and Young Persons (Care and Protection) Act 1998* s.229.

⁴⁶⁹ *Child and Young Persons (Care and Protection) Act 1998* s.230.

⁴⁷⁰ *Child and Young Persons (Care and Protection) Act 1998* s.231.

Diversion and crime reduction strategies

Pre-trial diversion of adults charged with child sexual assault

- 15.97 A critical aspect of law enforcement in relation to the protection of young people from sexual and physical abuse is the provision of diversionary programs which can address the offending behaviour of adults and reduce the risk of its repetition. There are some useful initiatives in this respect, which the Inquiry considers should be encouraged and made more widely available.
- 15.98 Among their duties Police have a responsibility to provide information to arrested adults concerning the Pre-Trial Diversion of Offenders (Child Sexual Assault) Program, the Cedar Cottage Program, established under the *Pre-Trial Diversion of Offenders Act 1985*.
- 15.99 The Cedar Cottage Pre-Trial Diversion of Offenders (Child Sexual Assault) Program provides therapy for sexual offenders who plead guilty to abusing a child in their care. Offenders are referred to the program by Police or the courts and receive an eight week intensive assessment to decide if they will be accepted. Participants then attend group and individual therapy sessions for a minimum of two and a maximum of three years. Victims and families are also provided with individual and group therapy sessions.⁴⁷¹
- 15.100 An evaluation of the program found a sharp drop in estimated lifetime re-offending rates from 13.2 per cent to 7.5 per cent for sexual offences. Non-sexual offending also declined in the treatment group, although not to the same extent.⁴⁷² Those who did not enter the program had an associated lifetime re-offending rate for sexual offences of about 12 per cent, those who participated in the program – even if they did not complete – had an estimated re-offending rate of less than five per cent.⁴⁷³ The authors conclude that:

*the remarkably successful outcomes of this diversion program must be viewed in the context of other comparatively costly prison-based and community based offender treatment programs, most of which are unable to demonstrate any effects of treatment.*⁴⁷⁴

- 15.101 The Inquiry understands that Health, which administers the program intends to give consideration to possible legislative change to broaden the criteria for access, and to the conduct of further research. In the meantime the Inquiry is of the view that the program should be maintained and that additional efforts

⁴⁷¹ J Goodman-Delahunty and J Pratley, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes*, July 2008, p.ii.

⁴⁷² *ibid.*

⁴⁷³ *ibid.*, p.iv.

⁴⁷⁴ *ibid.*, p.v.

should be made by Police, the DPP and the defence Bar to make its availability known and understood by potential participants.

- 15.102 The Inquiry does, however, note that Health has concerns about DoCS ceasing its involvement with a family once an offender has been referred to Cedar Cottage, and that it also has similar concerns about DoCS limiting its involvement in the case of young persons referred to the New Street Program.⁴⁷⁵ The Inquiry understands Health's concern, but is also mindful of the prioritisation process which DoCS inevitably must follow.

Other Diversionary Programs Concerning Adults

- 15.103 There are some additional diversionary programs targeted at adults which have relevance for the safety of young people. Where successful they can reduce or eliminate the circumstances within the home that contributed to abuse and neglect in their several forms. Although any detailed consideration of these programs is beyond the scope of this report, the presence and potential value of the following programs in NSW is briefly noted:
- a. The Magistrate's Early Referral into Treatment Program, a Local Court pre-plea diversion program that targets adult defendants with illicit drug abuse problems.⁴⁷⁶
 - b. The Rural Alcohol Diversion Pilot Program directed at adult defendants with alcohol abuse or dependence problems who are offered the opportunity of rehabilitation as part of the bail process.
 - c. The participation of offenders in the Circle Sentencing process and in the Adult Drug Court, that also opens up the possibility of diversion and access to rehabilitation programs or services which may reduce the safety risk of children and young persons living in the same household as the offender. This has a particular significance for those cases where substance abuse has been a major factor in the notification of children at risk to DoCS, since its presence can operate as a significant impediment to restoration.

Department of Corrective Services

- 15.104 The Interagency Guidelines define the child protection role of the Department of Corrective Services (Corrective Services) as the management of offenders in custody (including young offenders held in Kariong Juvenile Correctional Centre) and in the community. The Interagency Guidelines state that one role of Corrective Services is to work with child related offenders to reduce their risk of re-offending, and supervise offenders released into the community on probation or parole. This involves case management of the offender,

⁴⁷⁵ This program is discussed in Chapter 7.

⁴⁷⁶ NSW Health: The Magistrate Early Referral and Treatment (MERIT) Program, *Health Outcomes*, November 2007.

incorporating strategies to minimise risk of harm to the community, including young people with whom the offender may have contact.

- 15.105 The Interagency Guidelines also state that Corrective Services has a responsibility to maintain a victims' register responding to requests from registered victims for information concerning an offender's release from custody, escape or participation in external leave programs from a correctional centre.⁴⁷⁷ Corrective Services reported that in the 11 years from the establishment of the register to 2007, it had provided a service to 2,200 victims of crime.⁴⁷⁸
- 15.106 Corrective Services stated that it established the Child Protection Coordination and Support Unit to ensure these child protection responsibilities were met.
- 15.107 Corrective Services provides or resources a number of programs, projects and interventions to reduce the risk of reoffending and contribute to a safer community.
- 15.108 Programs for offenders in custody include:
- a. drug and alcohol treatment programs
 - b. programs for violent offenders and sex offenders (including a program for female sex offenders)
 - c. mental health programs
 - d. restorative justice conferencing
 - e. facilitation of visits with family and friends to enhance reintegration after release from custody.⁴⁷⁹
- 15.109 Programs and services for offenders being managed in the community include:
- a. Sex offender risk assessments (140 risk assessments and eight assessments under the *Crimes (Serious Sex Offender) Act 2006* conducted in 2006/07).⁴⁸⁰
 - b. Aboriginal specific programs in the community. Corrective Services received \$3.8 million from July 2004 to June 2008 under the *Two Ways Together* Aboriginal Affairs Policy 2003-2012. This funding has been allocated across the following three project locations:
 - i. Lismore and Tabulam – Rekindling the Spirit. Corrective Services reported that:

*Developed in 1998, Rekindling the Spirit targets
Aboriginal males and Aboriginal females and their*

⁴⁷⁷ NSW Interagency Guidelines for Child Protection Intervention, 2006, Appendix 2, p.4-5.

⁴⁷⁸ Department of Corrective Services, *Annual Report 2006/07*, p.22.

⁴⁷⁹ *ibid.*, p.34.

⁴⁸⁰ *ibid.*, p.39.

*families to address the underlying causes of offending behaviour thereby reducing family violence and re-offending. ... In 2006/07, 53 male and 14 female Community Offender Services clients started the program and the Department forged community partnerships to extend the program to Tabulam.*⁴⁸¹

- ii. Dubbo–Yindyama La (Family Violence Project) to develop an inter-agency approach to male perpetrators of violence. Corrective Services reported that in 2006/07, 30 supervised Aboriginal male offenders were referred to the program.⁴⁸²
 - iii. Newtown/Redfern - Walking Together Project. Corrective Services reported that this program addressed problems of loss and lack of cultural identity for urban Aboriginal offenders, and that the program had been revised to more specifically target family violence. It was reported that in 2006/07 Corrective Services developed a parallel program for Aboriginal female offenders to address family violence, emphasising the need to protect children and speaking out against violence towards women and children in the family and in the community, and that during that year, 56 men and 28 women were referred to the programs.⁴⁸³
 - c. Sex offender program maintenance for offenders being released. Corrective Services reported that in 2006/07, 20 additional sex offenders commenced a community based relapse prevention program. It was reported that 14 completed the program, and three were returned to custody and therefore did not complete the program. It was also reported that 47 sex offenders located too remotely to access metropolitan based programs were seen individually.⁴⁸⁴
 - d. The establishment of community based programs for offenders with dual diagnosis (both mental health and drug and alcohol disorders) in 2006/07.⁴⁸⁵
 - e. The Community Compliance Group which targets high risk offenders, primarily sex offenders, and work closely with the families of offenders, is an initiative of Corrective Services.
- 15.110 Corrective Services programs have targeted strategies for Aboriginal people, such as an Aboriginal mentoring program in some facilities. The Aboriginal Support and Planning Unit, established in 1993 after the Royal Commission into Aboriginal Deaths in Custody, was involved in the development of specific policies, resources and programs for Aboriginal inmates, such as the *Aboriginal and Torres Strait Islander Inmate Handbook*.

⁴⁸¹ *ibid.*, p.42.

⁴⁸² *ibid.*, p.42.

⁴⁸³ *ibid.*, p.43.

⁴⁸⁴ *ibid.*, p.44.

⁴⁸⁵ *ibid.*, p.45.

- 15.111 Corrective Services administers a Community Funding Program, which allocated a total of \$2,828,171 to 10 organisations in 2006/07.⁴⁸⁶ Link-Up (NSW) Aboriginal Cooperative received \$74,480 for services to help Aboriginal and Torres Strait Islander Offenders establish and strengthen their family links. SHINE for Kids received \$572,865 from Corrective Services for services to support children of offenders.⁴⁸⁷ This represented 45 per cent of the total SHINE for Kids income for that financial year.⁴⁸⁸

Recommendations

- 15.112 The Inquiry has noted the sentencing options and the range of diversionary or rehabilitation programs in place or subject to trials, which seek to advance the objective of keeping young people out of the criminal justice system and of advancing their rehabilitation once they have offended, and of reducing the extent to which adult offenders pose a continuing threat to the safety of children and young persons. The overall structure appears to the Inquiry to be comprehensive and adequate, and it does not see it as necessary to do more than express its general support for the current system.

Recommendation 15.1

An after hours bail placement service should be established by the Department of Juvenile Justice similar to the Victorian Central After Hours and Bail Placement Service, that is available to young people aged between 10 and 18 years, who are at risk of being remanded in custody, or who require bail accommodation; or similar to the Queensland Conditional Bail and Youth Program Accommodation Support Service.

⁴⁸⁶ *ibid.*, p.133.

⁴⁸⁷ *ibid.*, pp.45 and 133.

⁴⁸⁸ SHINE for Kids, *Annual Report 2006/07*, p.15.

Part 4 Out-of-home care

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Overview

- 16.1 Removing children and young persons from their family can only occur where it is necessary to protect them from the risk of serious harm. The safety, welfare and well-being of the child or young person removed is paramount over the rights of the parents.
- 16.2 While these principles governing the removal of children and young persons are apparently straightforward, their application is not. There is little reliable research that tracks children and young persons through OOHC. Performance assessment of the OOHC system is presently based on process rather than on measured outcomes. As a result little is known of the long term outcomes for children and young persons in OOHC and there is relatively little to guide one when reviewing practices in NSW.
- 16.3 It is however noted that progress is being made. DoCS is implementing, in conjunction with non-government organisations, an OOHC minimum data set which will collect information on such things as school attendance, suspensions from school and medical assessments.
- 16.4 A longitudinal study commissioned by DoCS of children and young persons in OOHC is in progress to enable a better understanding of their backgrounds and characteristics, and of how these factors influence outcomes.
- 16.5 Additionally, in November 2007, DoCS engaged Ernst & Young to undertake an evaluation of the OOHC program.
- 16.6 The NSW OOHC service system is complex and involves a range of stakeholders including children and young persons, their families/carers and government and non-government agencies. Designated agencies, including DoCS, provide placement, supervision and support services and are responsible for the authorisation of carers who have responsibility for the daily care and control of the child or young person whilst in OOHC.
- 16.7 The Care Act, the Regulations and the *Adoption Act 2000* set the legislative framework for the provision of OOHC placement and support services in NSW.
- 16.8 A number of provisions of the Care Act have not been proclaimed and as a result, the foster provisions of the 1987 Act have not been repealed. While there are some exceptions, this means that care orders by the Children's Court are regulated by the Care Act and other arrangements are regulated by the 1987 Act. This is discussed later in this chapter.
- 16.9 Section 135 of the Care Act defines OOHC as residential care and control of a child or young person at a place other than their usual home, for a period in excess of 14 days, by a person other than a parent or relative⁴⁸⁹ where the care

⁴⁸⁹ Except where the Minister has parental responsibility or the Director-General has care responsibility.

and control is provided under an order of the Children's Court or where the child or young person is a protected person as defined by that section.

- 16.10 Clause 17 of the Regulations and s.135(2) of the Care Act exclude certain arrangements from the definition of OOHC. Otherwise cases answering the description in the preceding paragraph constitute statutory care.
- 16.11 DoCS provides support to children and young persons placed with relative/kinship carers, or in voluntary care, where there has not been statutory intervention or a related court order. The purpose of its extended 'definition' is to prevent the unnecessary entry of children into statutory OOHC. Section 161(2) of the Care Act provides a broader definition of OOHC for the purpose of allowances than does s.135.
- 16.12 DoCS both funds and provides OOHC services to children and young persons. The OOHC service system is mixed, with DoCS as the largest service provider delivering services to around 85 per cent of all children and young persons in OOHC, with the remaining 15 per cent comprising those in non-government general foster care, that is care by persons other than relatives or kin, or in residential care. They include the children and young persons with high and complex needs who are catered for in more intensive non-government organisation placements.
- 16.13 All OOHC systems nationally, including NSW, have experienced a substantial increase in the number of children and young persons entering care in recent years. Not only has the need for these services increased, but many of those entering OOHC are presenting with increasingly complex needs and challenging behaviours.⁴⁹⁰ The task of meeting this demand is placing the NSW OOHC system under considerable pressure. All Australian jurisdictions are confronting similar challenges.
- 16.14 In December 2002, approximately \$617 million was allocated in additional funding to increase the number, type and quality of OOHC services for children and young persons as part of the DoCS Reform Package. Approximately 75 per cent of this funding was to be provided in the last three years of the Reform Package. A significant proportion is still subject to the finalisation of the 2007 expression of interest process for new OOHC services. This means that many of the new services identified to meet the demand for placements and supports have yet to commence. DoCS anticipates that these new services will be in 2008/09. It is unclear from the information provided by DoCS how many new places will result from this funding and whether this will be adequate to meet the anticipated demand.

⁴⁹⁰ C Smyth and T Eardley, "Out of home care for children in Australia: A review of literature and policy. Final Report," *Social Policy Research Centre, University of New South Wales*, February 2008, p.3.

Key provisions/concepts

- 16.15 OOHC is generally regulated by Chapter 8 of the Care Act. Section 134(1)(c) of the Care Act provides that one of the objectives is to clarify the roles and responsibilities of those involved in the provision of OOHC by distinguishing between:
- a. care responsibility – the daily care and control of a child or young person
 - b. supervisory responsibility – the supervision of those who have care responsibility, and
 - c. parental responsibility – all the duties, powers, responsibilities and authority which by law, parents have in relation to their children.
- 16.16 These categories are not necessarily exclusive of each other. As outlined below, care decisions may be made by more than one body, such as a person with parental responsibility, the designated agency and the authorised carer.

Entry into care

- 16.17 The entry of a child or young person into the OOHC system can occur through multiple pathways:
- a. a request from a parent to a designated agency, DoCS or DADHC for a voluntary care placement
 - b. DoCS initiated non-statutory(supported) care (mostly relative/kinship care)
 - c. DoCS initiated statutory care through an order of the Children’s Court that the child or young person is in need of care and protection
 - d. answering the description of a protected person, as defined by s.135(4) of the Care Act.

Parental responsibility

- 16.18 Under s.79(1)(b) of the Care Act, if the Children's Court finds that a child or young person is in need of care and protection it may make an order placing the child or young person under the parental responsibility of the Minister. Where such an order is made the Court must determine which aspects of parental responsibility (if any) are to be the responsibility of others or are to be exercised jointly with the Minister pursuant to s.81 of the Care Act.
- 16.19 The Court may make an order under s.79(1)(a) allocating parental responsibility, or specific aspects of parental responsibility, to either:
- a. one parent to the exclusion of the other parent (in which case the child or young person is not in OOHC)
 - b. one or both parents and the Minister or others jointly

- c. another suitable person (for example the Court has to date placed some Aboriginal children under the parental responsibility of the principal officers of specialist Aboriginal designated agencies).
- 16.20 A parent may retain specific aspects of parental responsibility (for example contact and religious upbringing), while parental responsibility in relation to residence may be allocated to another person. In cases where the parent does not have (at least) parental responsibility for residence, the child or young person will be in OOHC, unless one of the specific exemptions in s.135(2) of the Care Act or clause 17 of the Regulations applies.
- 16.21 The parental responsibility of the Minister is delegated to the Director-General, with the exception of certain residual powers of guardianship. Aspects of parental responsibility, other than those residual powers may be delegated to the principal officer of a designated agency and then sub-delegated to other authorised carers.⁴⁹¹ The delegate may also, in some situations, arrange for others to perform care tasks while still retaining care responsibility.
- 16.22 Section 164 of the Care Act provides that the Minister is responsible for the provision of accommodation for any child or young person for whom the Minister has sole parental responsibility or parental responsibility in relation to residence.

Supervisory responsibility

- 16.23 Section 138 of the Care Act provides that arrangements for the provision of OOHC may only be made by a designated agency or by the Children's Guardian. Section 140 of the Care Act provides that a designated agency is responsible for supervising the placement of a child or young person that the agency has placed in the OOHC of an authorised carer. That responsibility extends, *inter alia*, to giving directions to authorised carers.
- 16.24 Section 141 of the Care Act requires DoCS to supervise the placement of a child or young person in OOHC if another designated agency ceases to be able to fulfil its responsibilities in relation to the child or young person.
- 16.25 Section 139 of the Care Act defines a designated agency as a department of the Public Service, or an organisation that arranges the provision of OOHC, if the department or organisation is accredited for the time being in accordance with the regulations.
- 16.26 Clause 36 of the Regulation provides for accreditation by the Children's Guardian of a department or organisation as a designated agency if the agency satisfies accreditation criteria.

⁴⁹¹ *Children and Young Persons (Care and Protection) Act 1998* s.157.

Care responsibility

- 16.27 All foster carers and relative/kinship carers (where the Minister has parental responsibility or the child or young person is in the care of the Director-General by order of the Children's Court) must be authorised.
- 16.28 Sub-sections 157(1)(a)-(d) of the Care Act provide that an authorised carer of a child or young person has authority to consent to certain medical or dental treatments or other activities involving a person in care, while sub-section 157(1)(e) gives the authorised carer general authority "to make other decisions that are required in the day to day care and control of the child or young person."
- 16.29 Section 157(3) provides that the exercise by authorised carers of these functions is subject to any written direction given by the designated agency that placed the child or young person in the daily care and control of the authorised carer, or given by the Children's Guardian.
- 16.30 This means that the designated agency with supervisory responsibility can determine the extent to which authorised carers exercise daily care and control of children and young persons in their care. This enables the designated agency to have daily care and control in respect of specified matters, with daily care and control in respect of other matters being left to the authorised carer.⁴⁹²

Permanency planning

- 16.31 A key principle of the Care Act requires that safe and stable permanent placements be secured for children and young persons in OOHC as early as possible⁴⁹³. Section 78A specifies the need for permanency planning for those who enter OOHC and requires the making and execution of a plan that aims to provide a child or young person with a stable placement that offers long term security.
- 16.32 Where an application is made by the Director-General to the Children's Court for a care order, s.83 of the Care Act requires the Director-General to assess whether there is a realistic possibility of the child or young person being restored to his or her parents. Section 84 specifies the matters to be dealt with in a permanency plan that involves restoration.
- 16.33 If a child or young person cannot be reunited with his or her family, decisions about long term placement, including adoption, must happen as early as possible.⁴⁹⁴ If the child or young person cannot be returned to his or her family

⁴⁹² Children's Guardian, *Proposed regulatory amendments for the assessment and authorisation of carers and principal officers of designated agencies*, October 2007, pp.9-10.

⁴⁹³ *Children and Young Persons (Care and Protection) Act 1998* s.9(f).

⁴⁹⁴ DoCS, *Child protection and out-of-home care caseworker policy manual*, p.93.

a permanency plan that identifies other suitable options of caring for the child or young person must be developed.⁴⁹⁵

Review

- 16.34 Section 150 of the Care Act requires placements of children and young persons in OOHC pursuant to an order of the Children's Court to be reviewed by the designated agency supervising the placement, for the purpose of determining whether the safety, welfare and well-being of the child or young person is being promoted by the placement. The review is to be undertaken within the timeframes respectively specified by s.150(2) (a) and (b) of the Care Act and/or when there are changes in the circumstances of the placement.⁴⁹⁶

Types of care arrangements

- 16.35 Short to medium term OOHC placements are usually required when a child or young person requires a placement because of a temporary care agreement or pending the outcome of action in the Children's Court. At the time that the placement is arranged the outcome for the child or young person may not be clear.
- 16.36 Long term foster or relative/kinship care, permanent care, or adoption are considered for children or young persons who are placed in care under an order of the Children's Court for a period longer than 12 months, where restoration is unlikely.
- 16.37 Children and young persons who enter OOHC may be in voluntary care, temporary care, or supported care placements, in addition to statutory care placements as defined earlier.
- 16.38 Voluntary care refers to care arrangements when an agency responds to a family's request for assistance by providing a placement away from the usual home of the child or young person. In this instance, there is no Children's Court order to reassign parental responsibility, so the parent keeps the decision making role. The statutory provisions in relation to voluntary care including the unproclaimed provision of the Care Act are dealt with at the end of this chapter.
- 16.39 DoCS does not arrange these placements and it only becomes involved if there are grounds for making a report that the child in voluntary care is at risk of harm. Currently DoCS stipulates that agencies should supply no more than two per cent of their DoCS funded placements as voluntary care on a care day's basis.
- 16.40 Temporary care is a voluntary form of OOHC specified under s.151 of the Care Act and is usually provided by a relative, kinship or foster carer. DoCS can

⁴⁹⁵ DoCS, *Permanency Planning Policy*, Executive Summary, p.1.

⁴⁹⁶ *Children and Young Persons (Care and Protection) Act 1998* s.150 (2) (c) and (d).

organise temporary care where a child or young person is assessed as in need of care and protection. This occurs when particular circumstances of the placement are part of an approved case plan to support the family to resolve issues of a child's or young person's safety, welfare or well-being. Temporary care of a child or young person may only be arranged either:

- a. with the consent of a parent, or
- b. without parental consent if the parents of a child or young person cannot be reasonably located.

16.41 These arrangements are for a period of up to three months after which DoCS can renew the arrangement for a further three months if the child or young person is still in need of care and protection. These arrangements cannot be made or renewed if the child or young person has, during the previous 12 months, been in temporary care for a period exceeding six months.⁴⁹⁷ A case plan is to be developed as part of these arrangements and should address the restoration of the child or young person upon leaving this form of care. DoCS is required to keep parents or usual carers informed about the whereabouts of a child or young person placed into temporary care.⁴⁹⁸

16.42 Supported care is a voluntary arrangement whereby a child or young person lives with either:

- a. a relative or kinship carer, if the carer has parental responsibility via a Children's Court or Family Court order and they receive the Supported Care Allowance
- b. a relative or kinship carer, after a child protection intervention but where there is no court order and the carer receives the Supported Care Allowance
- c. a non-relative who has parental responsibility via a Family Court order and the carer receives the Supported Care Allowance.

16.43 Statutory care as defined earlier can include relative or kinship care where the Minister has parental responsibility for the child or young person as a result of an order of the Children's Court.

Adoption

16.44 Adoption can become part of the case plan for a child or young person at any time after the decision not to pursue restoration has been made. Casework in relation to adoption involves working with the authorised carers, the child or young person and the birth parents. Adoption orders are granted by the NSW Supreme Court. The important issues for the Supreme Court include whether an adoption order is in the best interests of the child or young person, what attachments have been formed between the child or young person and the

⁴⁹⁷ *Children and Young Persons (Care and Protection) Act 1998* s.152(4).

⁴⁹⁸ *Children and Young Persons (Care and Protection) Act 1998* s.154(2)(c), and see also s.51.

proposed adoptive parents and the views of the birth parents of the child or young person regarding consent to the adoption.

- 16.45 Other types of adoptions, including local, special needs and inter-country adoptions are discussed later in this chapter.

Financial support

- 16.46 To support these placements, DoCS provides financial support for children and young persons who are unable to live with their parents, by way of allowances and extra financial support payments; that is payments for special expenses not included in the standard allowances.

- 16.47 Section 161 of the Care Act provides the legislative basis for these payments.

- 16.48 The type of allowance available for the care of a child or young person depends on the care arrangement and placement category:

- a. A statutory care allowance is provided for the care of children and young persons who are in the parental responsibility or care of the Minister or Director-General and are placed with an authorised carer. This allowance may also be payable where the Minister has shared parental responsibility with another person but the Minister has parental responsibility for residency of the child or young person. This allowance may also be payable where a Children's Court Order has allocated parental responsibility to an agency or a non-relative carer, where such person has been authorised.
- b. A supported care allowance is provided for the care of children and young persons in the care of relative or kinship carers, where the Minister or Director-General has no aspect of parental responsibility, or where shared parental responsibility is between a relative and the Minister, but where the Minister does not have parental responsibility for the residency of the child or young person. This allowance may be payable in relation to placements subject to a Children's Court Order, a Family Court Order or where there is no court order.

- 16.49 There is an assessment process to determine the level of allowance paid to a carer, according to the level of care required, which in turn depends on whether the child or young person has high or complex needs.

Data relating to OOHC

Children and young persons in OOHC

Number of children and young persons in OOHC

- 16.50 There were 14,667 children and young persons in OOHC in NSW as at 30 June 2008, compared with 9,273 at 30 June 2002. Since 30 June 2002, the number of children and young persons in OOHC in NSW has increased by 58.2 per cent. Since 2002, the most significant annual increase in the OOHC population in NSW was 19.7 per cent from 30 June 2006 to 30 June 2007.
- 16.51 While the total number of children and young persons in OOHC at 30 June 2008 was available and known at the time of compiling the data in this chapter, detailed data on children and young persons in OOHC throughout 2007/08 had not been finalised. Therefore the detailed data provided in this chapter are based on children and young persons in OOHC as at 31 March 2008 rather than 30 June 2008. Similarly, any 2007/08 OOHC data relate to the period 1 April 2007 to 31 March 2008 rather than 1 July 2007 to 30 June 2008.
- 16.52 The number of Aboriginal children and young persons in OOHC in NSW increased by 90.1 per cent between 30 June 2002 and 31 March 2008. The number of Aboriginal children and young persons in OOHC as a proportion of the OOHC population has also risen from 25.3 per cent as at 30 June 2002 to 31.3 per cent as at 31 March 2008.

Table 16.1 **Children and young persons in OOHC as at 30 June, 2002 to 2007 and 31 March 2008**

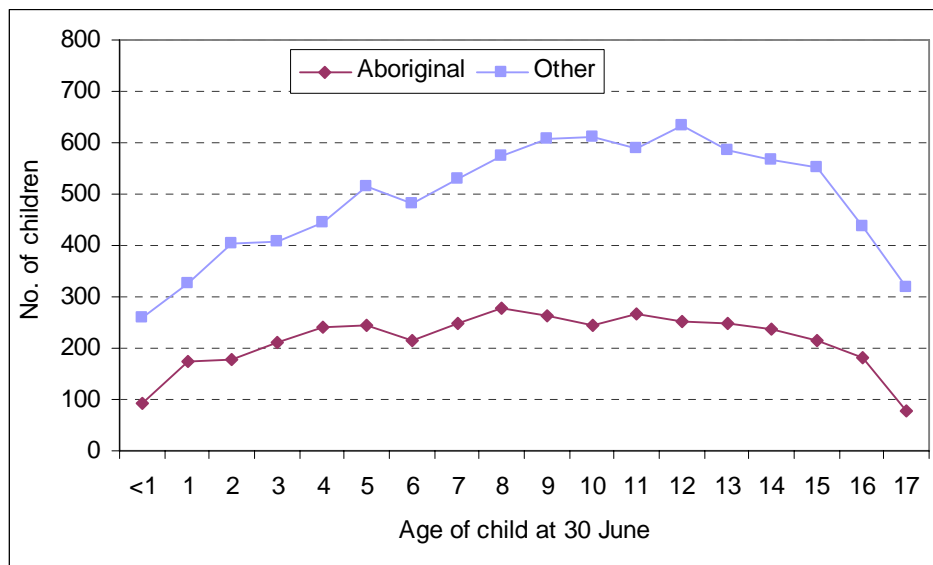
	2002	2003	2004	2005	2006	2007	2008
Aboriginal children and young persons in OOHC	2,345	2,706	2,703	2,686	3,033	3,865	4,458
Aboriginal children and young persons in OOHC as a percentage of the OOHC population	25.3%	26.9%	26.1%	26.8%	28.6%	30.4%	31.3%
Non-Aboriginal children and young persons in OOHC	6,576	7,031	7,281	7,271	7,562	8,822	9,761
Not entered	352	322	353	84	28	25	25
Total number of children and young persons in OOHC	9,273	10,059	10,337	10,041	10,623	12,712	14,244
Percentage change from previous year	-	8.5%	2.8%	-2.9%	5.8%	19.7%	12.1%

- 16.53 The number of children and young persons in OOHC in each age group as a proportion of all children and young persons in OOHC remained relatively

steady from 30 June 2002 to 31 March 2008. There has been a slight increase in children aged less than one year in OOHC as a proportion of all children and young persons in OOHC, rising from 2.6 per cent as at 30 June 2002 to 3.1 per cent as at 31 March 2008.

- 16.54 While the total number of children and young persons in OOHC increased by 12.1 per cent from 30 June 2007 to 31 March 2008, the number of children in OOHC aged less than one year increased by 23.6 per cent. There was a 15.5 per cent increase over the same period for children aged 1-2 years and 21.3 per cent in young persons aged 16-17 years.
- 16.55 As at 31 March 2008, 43.4 per cent (6,182) of children in OOHC were aged 5-11 years and 25.7 per cent (3,657) were aged 12-15 years.
- 16.56 The pattern of children and young persons in care by age does not appear to differ greatly by reference to Aboriginality, as shown in Figure 16.1. The numbers for both Aboriginal and non-Aboriginal children and young persons tend to increase with age until around seven years and then flatten out until around 15 years when a sharp decrease occurs.⁴⁹⁹

Figure 16.1 **Number of children and young persons in OOHC by age and Aboriginality as at 30 June 2007**⁵⁰⁰



Note: 'non-Aboriginal' includes 'not stated'

Rate of children and young persons in OOHC

- 16.57 The rate of children and young persons in OOHC per 1,000 of the NSW 0-17 years population increased from 5.9 per 1,000 as at 30 June 2002 to 9.1 per 1,000 as at 30 June 2008. During this period the most significant increase was

⁴⁹⁹ DoCS, *What DoCS data tell us about Aboriginal clients*, December 2007.

⁵⁰⁰ *ibid.*

from 30 June 2006 to 30 June 2007 when the rate rose from 6.7 to 8.1 per 1,000.

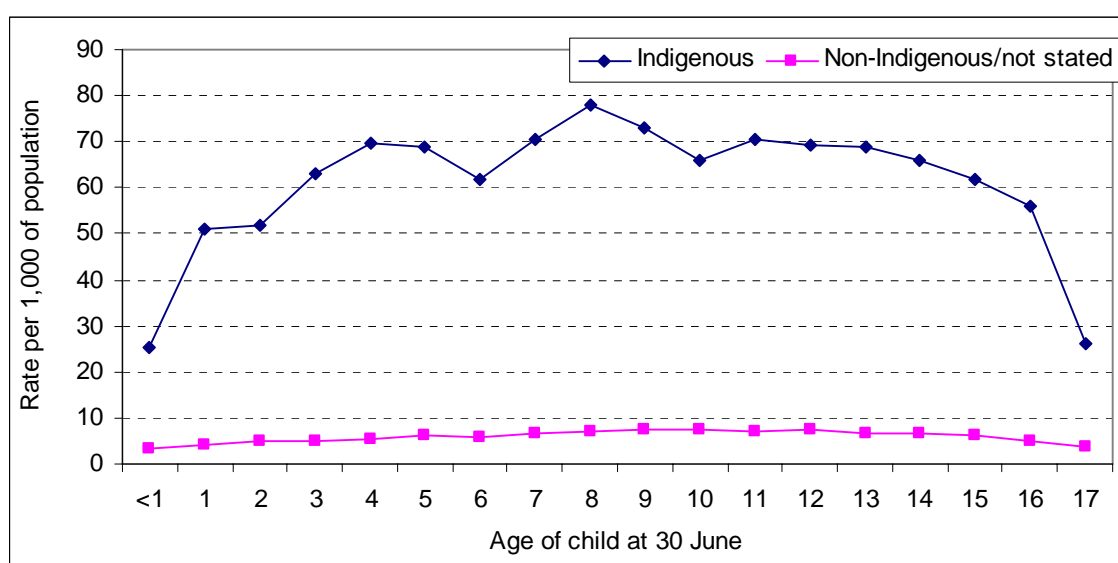
- 16.58 The rate of Aboriginal children and young persons in OOHC per 1,000 of the NSW Aboriginal 0-17 year population is significantly higher than for all children and young persons in the State. The rate increased from 41.9 per 1,000 as at 30 June 2002 to 61.4 per 1,000 as at 30 June 2007. During this period the most significant increase was from 30 June 2006 to 30 June 2007 when the rate rose from 48.2 to 61.4 per 1,000.
- 16.59 At 30 June 2007, the rate of Aboriginal children and young persons per 1,000 in OOHC in NSW was almost eight times higher than the rate for all children and young persons in OOHC. It was 10 times higher than for non-Aboriginal children and young persons.

Table 16.2 **Rate of children and young persons in OOHC per 1,000 population as at 30 June, 2002 to 2007**

	30 June 2002	30 June 2003	30 June 2004	30 June 2005	30 June 2006	30 June 2007
All children and young persons in OOHC	5.9	6.4	6.5	6.3	6.7	8.1
Aboriginal children and young persons in OOHC	41.9	48.3	42.9	42.7	48.2	61.4

- 16.60 As shown in Figure 16.2, the rates of Aboriginal children and young persons in care as at 30 June 2007 are greater than those for other children across all age groups. The difference in rates of children in care by Aboriginality is generally far greater for those aged from 4-15 years.⁵⁰¹

Figure 16.2 **Rate of children and young persons in OOHC by age and Aboriginality per 1,000 population, at 30 June 2007⁵⁰²**



⁵⁰¹ *ibid.*

⁵⁰² *ibid.*

Children and young persons entering OOHC

- 16.61 In the 12 months to 31 March 2008, 4,686 children and young persons entered OOHC in NSW, which was an increase of 0.8 per cent on the 4,648⁵⁰³ children and young persons who entered OOHC in 2006/07.⁵⁰⁴ While there was a 6.9 per cent increase in children and young persons entering care from 2002/03 to 2007/08, the numbers of children and young persons remaining in care longer has significantly increased in this period.

Table 16.3 **Number of children and young persons entering OOHC, 2002/03 to 2007/08**

<i>Year</i>	<i>Entry into Care</i>
2002/03	4,382
2003/04	N/A
2004/05	3,479
2005/06	3,681
2006/07	4,648
2007/08 (1 April 2007 to 31 March 2008)	4,686

- 16.62 Of the children and young persons who entered care in 2006/07, around 30 per cent (1,380) were Aboriginal. For every 1,000 Aboriginal children and young persons in NSW in 2006/07, 22 entered care. This compares with a rate of two per 1,000 for non-Aboriginal children and young persons entering care in 2006/07.
- 16.63 In 2006/07, of the 4,648 children and young persons who entered OOHC, 70.6 per cent entered care for the first time, while the remaining 29.4 per cent had an OOHC history before re-entering care.

Age at entering OOHC

- 16.64 In 2006/07, children aged less than one year had the highest rates of entry to care. For every 1,000 children in NSW aged less than one year, around seven entered care. The rate is around 50 per 1000 children for Aboriginal children aged less than one year and around five per thousand for other children aged less than one year.
- 16.65 While the proportion of children and young persons entering care in 2006/07 generally decreased with age, there was an increase for children at 14 years of age.⁵⁰⁵
- 16.66 The age distribution of children and young persons entering OOHC for the first time was different from that of children and young persons re-entering care, as

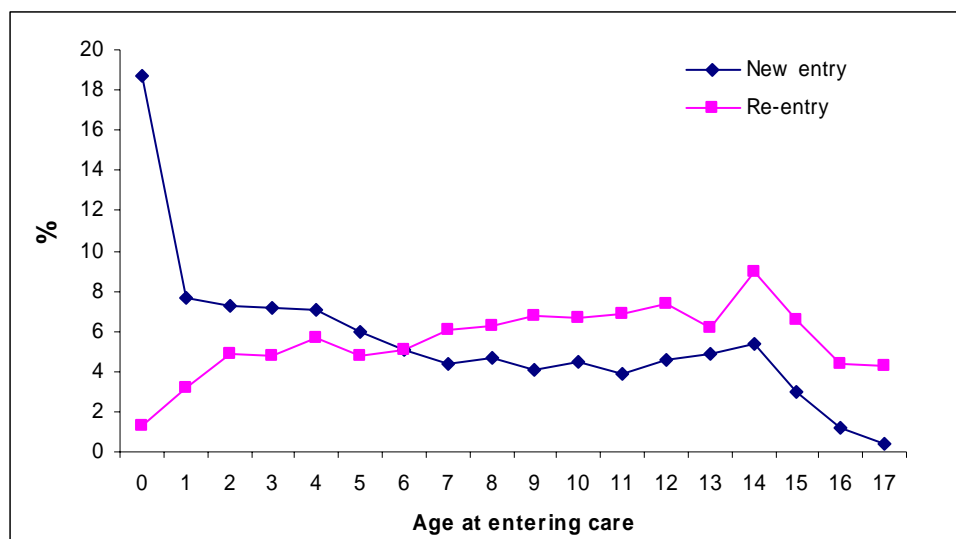
⁵⁰³ This figure varies slightly from that used in DoCS annual reporting for 2006/07 (4,658) due to a different data source being used for a detailed analysis of entries.

⁵⁰⁴ DoCS, *Analysis of children and young persons who entered OOHC in 2006/07*, June 2008.

⁵⁰⁵ *ibid.*

shown in Figure 16.3. 53.9 per cent of new entry children and young persons were aged less than six years compared with 24.5 per cent of re-entry children and young persons. Further, 18.7 per cent of new entry children and young persons were aged less than one year compared with 1.3 per cent of re-entry children and young persons. Re-entry children and young persons were more likely to be aged over six years than new entry children and young persons.⁵⁰⁶

Figure 16.3 **Children entering OOHC in 2006/07 by OOHC history: percentage accounted for by each age group**⁵⁰⁷



- 16.67 Aboriginal children and young persons accounted for 28.7 per cent (1,346) of all those entering OOHC in the twelve months to 31 March 2008. There were no marked variations across the age groups, although Aboriginal children aged less than one year accounted for 29.8 per cent of all children entering care aged less than one year and Aboriginal children aged 1-5 years accounted for 29.5 per cent of children entering care aged 1-5 years.

Time between first report and first entry to OOHC

- 16.68 Table 16.4 shows that for children and young persons entering OOHC for the first time in 2006/07, the average number of days from the time of their first report and entering care was 1,284 days, or 3.5 years. Of these, half entered care within 938 days (2.6 years) of their first report. So in 2006/07, the majority of children and young persons entering OOHC had a long child protection history.⁵⁰⁸
- 16.69 For children aged less than one year at entry to care, the median time that elapsed between the first report and entry into care was 144 days while for children and young persons aged 13-17 years, it was 2,139 days (5.9 years).

⁵⁰⁶ *ibid.*

⁵⁰⁷ *ibid.*

⁵⁰⁸ *ibid.*

The median time that elapsed for children aged 6-12 years was similar to that of children and young persons aged 13-17 years.⁵⁰⁹

Table 16.4 **Time from first report to entering OOHC 2006/07 based on new entry children and young persons who had a child protection history**

<i>Age at entering care</i>	<i>No of children and young persons</i>	<i>Average waiting time (days)</i>	<i>Median waiting time (days)</i>
<1 year	570	164	144
1-5 years	1,093	916	850
6-12 years	972	1,917	2,004
13-17 years	442	2,246	2,139
Total	3,077	1,284	938

Re-entry to OOHC

16.70 Table 16.5 shows the previous OOHC experience of children and young persons who re-entered care in 2006/07. Older children and young persons were more likely to have had more OOHC episodes and to have stayed longer in OOHC than younger children. Over half of the 13-17 year olds who re-entered OOHC had been in care two or more times previously. This group had spent an average of 1,390 days in care previously.

Table 16.5 **Children and young persons re-entering OOHC in 2006/07, by OOHC history**

<i>Age at entering OOHC</i>	<i>No of children and young persons</i>	<i>% with 1 previous episode in OOHC</i>	<i>% with 2+ previous episodes in OOHC</i>	<i>Average no. of previous care episodes</i>	<i>Average no. of days in previous care</i>
<1 year	18	100.0	0.0	1.0	68
1-5 years	317	61.8	38.2	2.0	184
6-12 years	617	52.5	47.5	3.3	541
13-17 years	414	43.7	56.3	3.0	1,390
Total	1,366			2.9	709

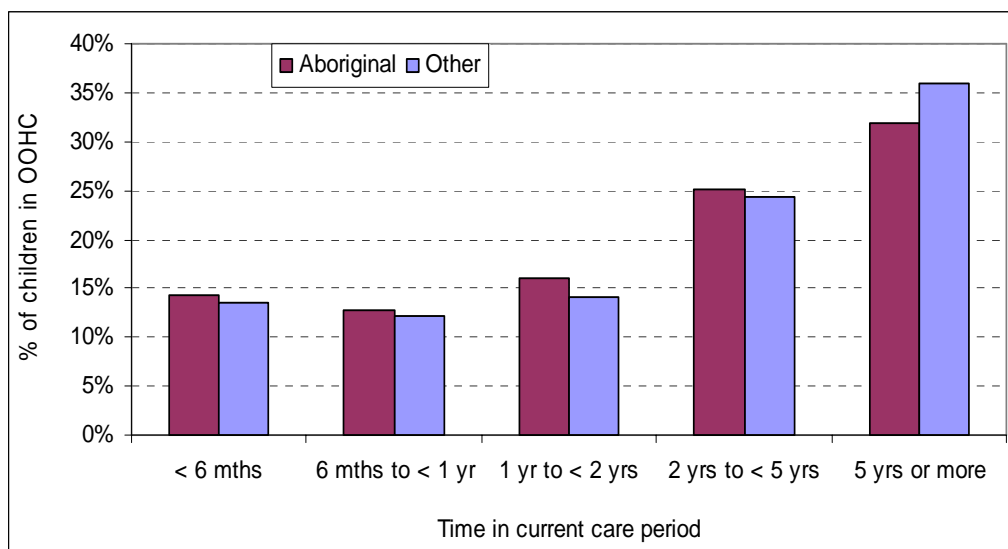
Time spent in OOHC

16.71 Some children and young persons remain in OOHC for short periods of time prior to returning home, while others remain in OOHC for long periods of time, possibly until they reach 18 years. As at 30 June 2007, 32 per cent of Aboriginal children and 36 per cent of the remainder had spent at least five years in their current care period.⁵¹⁰

⁵⁰⁹ *ibid.*

⁵¹⁰ *ibid.*

Figure 16.4 **Time spent in care during current care period for children and young persons in care as at 30 June 2007**⁵¹¹



Summary

- 16.72 Of the children and young persons who entered care in 2006/07:
- 70.6 per cent were entering care for the first time
 - those entering care for the first time were more likely to be aged less than six years than children and young persons who were re-entering care
 - the likelihood of them having been reported before entering OOHC was similar for both new entry and re-entry children and young persons
 - half of the children and young persons who entered care for the first time received their first report when they were aged less than one year
 - older children and young persons were more likely to have been in OOHC previously than younger children and to have had a longer previous period in OOHC before re-entering care.

Care arrangement

The proportion of children and young persons in OOHC under statutory care arrangements increased slightly from 60.3 per cent at 30 June 2005 to 63.4 per cent as at 31 March 2008.

The proportion of children and young persons in relative or kinship care, but under no care order, increased from 10.0 per cent at 30 June 2005 to 16.2 per cent at 31 March 2008. The proportion of these children and young persons whose legal status was parental responsibility to a relative decreased from 21.6 per cent at 30 June 2005 to 15.1 per cent at 31 March 2008.

⁵¹¹ *ibid.*

Table 16.6 Children and young persons in OOHc by care arrangement as at 30 June, 2005-2007 and 31 March 2008

<i>Care arrangement</i>	<i>30 June 2005</i>		<i>30 June 2006</i>		<i>30 June 2007</i>		<i>31 March 2008</i>	
	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>
<i>Statutory care</i>								
Parental responsibility to the Minister	5,723	57.0	6,402	60.3	7,790	61.3	8,843	62.1
Parental responsibility to non-relative	149	1.5	142	1.3	144	1.1	133	0.9
Parental responsibility to agency	83	0.8	84	0.8	69	0.5	33	0.2
Interstate ward no transfer	50	0.5						0.0
Detached Refugee/non-citizen child	33	0.3	36	0.3	31	0.2	15	0.1
Protected person	13	0.1	7	0.1	6	0.0	10	0.1
Statutory care sub-total	6,051	60.3	6,671	62.8	8,040	63.2	9,034	63.4
<i>Supported care</i>								
Parental responsibility to relative	2,164	21.6	2,100	19.8	2,102	16.5	2,156	15.1
Relative/kinship care: no order	1,005	10.0	1,180	11.1	1,927	15.2	2,313	16.2
Temporary care	243	2.4	218	2.1	180	1.4	189	1.3
Care responsibility of DG Removal/Assume	84	0.8	167	1.6	257	2.0	195	1.4
Parents	71	0.7	64	0.6	77	0.6	123	0.9
Emergency care & protection order	10	0.1						
Pre Adoption Care responsibility of DG	2	0.0	4	0.0	4	0.0	3	0.0
Supported care sub total	3,579	35.6	3,733	35.1	4,547	35.8	4,979	35.0
Other voluntary care arrangements	236	2.4	139	1.3	96	0.8	84	0.6
Not specified	175	1.7	80	0.8	29	0.2	147	1.0
Total	10,041	100	10,623	100	12,712	100	14,244	100

The proportion of Aboriginal children and young persons in OOHc who were in statutory care increased from 52.9 per cent (2,044) at 30 June 2007 to 54.8 per cent (2,443) at 31 March 2008. This is significantly lower than for non-Aboriginal children and young persons in OOHc, of whom 67.4 per cent (6,591) were in statutory care at 31 March 2008.

Of the 1,932 Aboriginal children and young persons under supported care arrangements at 31 March 2008, 56.4 per cent (1,090) were in relative or kinship care but under no care order, and for 36.7 per cent (710), parental responsibility was assigned to a relative. This compares to 40.1 per cent (1,223) and 47.5 per cent (1,446) respectively for the 3,047 non-Aboriginal children and young persons under supported care arrangements.

The proportion of children and young persons under finalised care orders decreased from 77.2 per cent at 30 June 2005 to 69.6 per cent at 31 March 2008. Over the same period, the proportion of children and young persons in OOHC under no care and protection orders increased from 12.4 per cent to 18.0 per cent. Over this period, the proportion of children and young persons under no care and protection orders who were Aboriginal remained steady at around 45 per cent.

Service provider

- 16.73 The proportion of children and young persons in OOHC with a legal status of parental responsibility to the Minister who were placed with an NGO OOHC service provider increased from 17.1 per cent at 30 June 2003 to 21.8 per cent at 31 March 2008. In relation to the OOHC placement provider, there are significant variations between Aboriginal and non-Aboriginal children and young persons. While proportionately more non-Aboriginal children and young persons were in NGO placements at 31 March 2008 compared with 30 June 2003 (22.3 per cent compared with 14.9 per cent), the opposite has occurred for Aboriginal children and young persons. At 31 March 2008, 20.5 per cent of Aboriginal children and young persons in OOHC were in NGO placements compared with 27.1 per cent at 30 June 2003.

Table 16.7 **Number of children and young persons in OOHC with a legal status of parental responsibility to Minister, by placement provider and Aboriginality as at 30 June 2003 and 31 March 2008**

	<i>Aboriginal</i>		<i>Non-Aboriginal</i>		<i>Total</i>	
	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>
<i>30 June 2003</i>						
DoCS placement	625	72.9	3,287	85.1	3,912	82.9
NGO placement	232	27.1	576	14.9	808	17.1
Total	857	100	3,863	100	4,720	100
<i>31 March 2008</i>						
DoCS placement	1,870	79.5	5,005	77.7	6,875	78.2
NGO placement	481	20.5	1,440	22.3	1,921	21.8
Total	2,351	100	6,445	100	8,796	100

Note: 'non-Aboriginal' includes 'not stated'

Placement type

- 16.74 At 31 March 2008, 51.2 per cent of children and young persons in OOHC were placed in relative or kinship care and 37.1 per cent were placed in foster care.
- 16.75 A relatively small proportion (2.4 per cent) of children and young persons in OOHC were in residential care at 30 June 2007 and 31 March 2008. Proportionately, even less Aboriginal children and young persons were in residential care at those dates (1.4 per cent).

Table 16.8 All children and young persons in OOHC by placement type as at 30 June 2007 and 31 March 2008

<i>Placement type</i>	<i>30 June 2007</i>		<i>31 March 2008</i>	
	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>
Parents	611	4.8	802	5.6
Relative & Aboriginal Kinship Care	6,497	51.1	7,290	51.2
Non related person	350	2.8	274	1.9
Foster care	4,741	37.3	5,289	37.1
Supported accommodation	79	0.6	75	0.5
Residential care	309	2.4	344	2.4
Independent living	125	1.0	163	1.1
Not specified	0		7	0.0
Total	12,712	100	14,244	100

16.76 Of the 1,660 children and young persons who entered care in 2006/07 and were placed in relative/kinship care, 29.0 per cent were in statutory care and 62.5 per cent were in supported care. Proportionately, there were fewer children and young persons entering relative/kinship care under care orders in 2006/07 than in 2004/05, when they accounted for 38.3 per cent of children entering relative/kinship care.

16.77 As at 31 March 2008, proportionately more Aboriginal children and young persons in OOHC were placed in relative/kinship care than non-Aboriginal children and young persons in OOHC: 62.8 per cent compared with 45.9 per cent. Proportionately fewer Aboriginal children and young persons in OOHC were placed in foster care than non-Aboriginal children and young persons in OOHC: 28.8 per cent compared with 40.9 per cent.

Table 16.9 Aboriginal children and young persons in OOHC by placement type as at 30 June 2007 and 31 March 2008

<i>Placement type</i>	<i>30 June 2007</i>		<i>31 March 2008</i>	
	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>
Parents	133	3.4	195	4.4
Relative & Aboriginal Kinship Care	2,469	63.9	2,799	62.8
Non related person	68	1.8	54	1.2
Foster care	1,102	28.5	1,284	28.8
Supported accommodation	11	0.3	12	0.3
Residential care	53	1.4	64	1.4
Independent living	29	0.8	49	1.1
Not specified	0		1	0.0
Total	3,865	100	4,458	100

16.78 Of the 7,290 children and young persons in relative/kinship care at 31 March 2008, over two thirds (4,980) were under a care order.

High Needs Kids

- 16.79 As at 30 June 2008, there were 583 children and young persons in OOHC that were classified as High Needs Kids.⁵¹²
- 16.80 As at 30 June 2008, 38.4 per cent of High Needs Kids were in funded placements. The remaining placements were funded through allowances and extra financial support payments. It would appear that High Needs Kids and young persons in program funded placements cost approximately 35 per cent more than those whose placements were paid through allowances and extra financial support payments.
- 16.81 Caution should be exercised when comparing the cost of program funded placements with placements paid through allowances and extra financial support payments. The latter are often used where there is a shortage of funded general foster care placements resulting in a broader range of needs in this group, some of which are below the threshold for the high needs funded placements and others above the needs threshold. The costs for High Needs Kids in funded placements include all costs for the child, including allowances and extra financial support payments, and all caseworker operational and management costs. This is not the case for placements paid through allowances and extra financial support payments, which do not include the costs of the DoCS caseworker and management and operating costs.

Table 16.10 Number and cost of High Needs Kids placements as at 30 June 2007 and 2008

	30 June 2007			30 June 2008		
	Funded placements	Paid through allowances & extra financial support payments	Total	Funded placements	Paid through allowances & extra financial support payments	Total
Number of placements	224	298	522	224	359	583
Average annual cost per placement	\$144,220	\$89,531		\$148,871	\$97,119	
Total annual cost	\$32.3 million	\$26.7 million	\$59.0 million	\$33.3 million	\$34.9 million	\$68.2 million

Number of OOHC placements

- 16.82 The following table outlines the number and percentage of placements for children and young persons in OOHC for the period June 2005 to June 2007. The data have remained fairly steady over the four years, with almost half of all

⁵¹² DoCS commonly refers to children and young persons in OOHC with high and complex needs as 'High Needs Kids'. It is a term the Inquiry uses in this chapter to refer to this cohort of children and young persons.

children and young persons having only one OOHC placement and a further one quarter having had two placements.

Table 16.11 **All children and young persons in OOHC by number of placements as at 30 June, 2005 to 2007 and 31 March 2008**⁵¹³

<i>Number of distinct placements</i>	2005		2006		2007		2008	
	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>
1	4,599	45.9	4,996	47.1	6,164	48.6	6,876	48.5
2	2,564	25.6	2,567	24.2	2,996	23.6	3,408	24.0
3	1,300	13.0	1,323	12.5	1,533	12.1	1,698	12.0
4 or more	1,563	15.6	1,718	16.2	2,000	15.8	2,200	15.5
Total	10,026	100	10,604	100	12,693	100	14,182	100

Note: this data does not include children and young persons in a placement of less than 7 days.

- 16.83 Over the four years from 2005 to 2008, Aboriginal children and young persons were slightly less likely to have multiple placements than other children.

Table 16.12 **Aboriginal children and young persons in OOHC by number of placements as at 30 June, 2005 to 2007 and 31 March 2008**⁵¹⁴

<i>Number of distinct placements</i>	2005		2006		2007		2008	
	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>
1	1,303	48.6	1,542	50.9	2,060	53.4	2,368	52.9
2	655	24.4	695	23.0	839	21.7	960	21.5
3	298	11.1	334	11.0	406	10.5	499	11.2
4 or more	425	15.9	457	15.1	554	14.4	647	14.5
Total	2,681	100	3,028	100	3,859	100	4,474	100

- 16.84 Table 16.13 shows that the likelihood of multiple placements increases with the length of time a child or young person remains in OOHC. For instance, at 31 March 2008, 21.8 per cent of children and young persons who had been in OOHC for between one and two years had been in three or more placements. By comparison, 41.5 per cent of children and young persons who had been in OOHC for five years or more had been in three or more placements.

⁵¹³ The total numbers for each year are slightly different to the data on the number of children in OOHC provided in other data.

⁵¹⁴ The total numbers for each year are slightly different to the data on the number of children in OOHC provided in other data.

Table 16.13 **Children and young persons in OOHC by number of placements and length of time in care, 31 March 2008**

Number of distinct placements	Length of time in OOHC					
	<1 month	1 month to <6 months	6 months to <1 year	1 year to <2 years	2 years to <5 years	5 years or more
1 placement	305	1,153	914	1,328	1,518	1,658
2 placements	13	337	346	683	876	1,153
3 placements	3	71	151	292	468	713
4 or more placements	0	7	70	267	577	1,279
Total	321	1,568	1,481	2,570	3,439	4,803

16.85 As at 30 June 2007, a lower percentage of children and young persons in foster care had been in only one placement compared with children in other types of OOHC placements. The data also indicate that children and young persons placed in DoCS foster care are less likely to have multiple placements than children placed in NGO foster care.

16.86 However DoCS advises caution when examining the data in the table. A child or young person placed with an NGO may have had a prior placement with DoCS in the current care period or vice versa. The table classifies the placement type (that is, DoCS or NGO) according to the current placement in the care period.

Table 16.14 **Children and young persons in OOHC by number of placements and by NGO foster care and DoCS foster care, as at 30 June 2007**

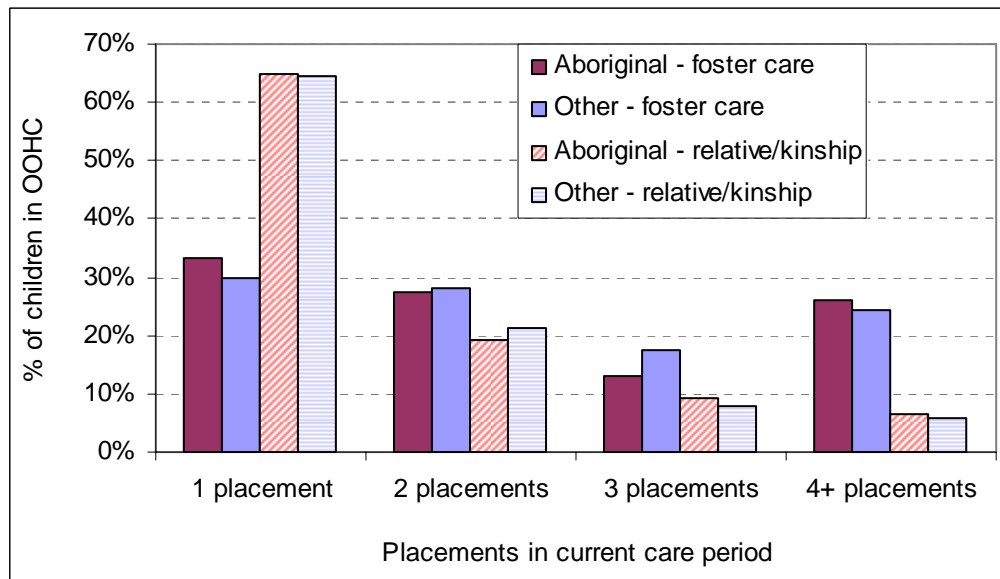
	NGOs foster care		DoCS foster care		Total foster care		Other		All children	
	No	%	No	%	No	%	No	%	No	%
1 placement	396	26	1,041	33	1,437	31	4,727	59	6,164	49
2 placements	385	25	931	30	1,316	28	1,680	21	2,996	24
3 or more placements	752	49	1,177	37	1,929	41	1,604	20	3,533	28
Total	1,533	100	3,149	100	4,682	100	8,011	100	12,693	100

Note: 'Other' category includes relative and kinship care, residential care, supported accommodation and independent living

16.87 Figure 16.5 shows that the stability of placements is quite different for those children and young persons in foster care when compared with those in relative or kinship care. Children and young persons in relative or kinship care are more likely to have had only one placement, with little difference between Aboriginal and non-Aboriginal relative or kinship care.⁵¹⁵

⁵¹⁵ DoCS, *What DoCS data tell us about Aboriginal clients*, December 2007.

Figure 16.5 **Number of placements in current care period for children and young persons in OOHC by type of care and Aboriginality as at 30 June 2007**⁵¹⁶



Allocation of OOHC cases

16.88 As at 31 March 2008, 63.8 per cent of children and young persons in OOHC had an allocated caseworker, 2.7 per cent of OOHC cases had an allocation status of 'unallocated' and 33.4 per cent of cases were categorised by DoCS as being considered for allocation on a 'resubmit' basis.⁵¹⁷ When taking the latter two categories into account, 36.1 per cent of children and young persons in OOHC do not have an allocated caseworker to undertake full case management.

Table 16.15 **Children and young persons in OOHC by allocation as at 31 March 2008**

Allocation status	Children and young persons	
	No	%
Allocated	9,086	63.8
Resubmit	4,753	33.4
Transfer	23	0.2
Unallocated	381	2.7
Not Stated	1	0.0
Total children and young persons in OOHC	14,244	100

Note: this data is predicated on the assumption that all NGO provided placements have allocated caseworkers.

⁵¹⁶ *ibid.*

⁵¹⁷ Defined as "a workload management strategy and means that no work is being undertaken in the current period, although the cases may be subsequently allocated to ensure payments are made or if a crisis occurs." DoCS letter to Children's Guardian, 10 March 2008.

- 16.89 As at 31 March 2008, 78.5 per cent (7,088) of the 9,034 children and young persons in statutory care had an allocated caseworker.⁵¹⁸ Of the 7,044 children and young persons in DoCS statutory care, 72.4 per cent had an allocated caseworker. 93.7 per cent of children in DoCS statutory care aged less than one year and 82.5 per cent of children aged 1-2 years had an allocated caseworker. Allocation rates generally dropped for children older than two years.
- 16.90 As at 31 March 2008, 35.9 per cent (1,788) of the 4,979 children and young persons in supported care had an allocated caseworker. Of the 4,811 children and young persons in DoCS supported care, 33.7 per cent had an allocated caseworker. 81.6 per cent of children in DoCS supported care aged less than one year, and 59 per cent of children aged 1-2 years had an allocated caseworker. Allocation rates dropped progressively as children got older.

Leaving care

- 16.91 In 2007/08, children aged 5-11 years represented 29.4 per cent of all children and young persons who left care. This was followed by children aged 12-15 years at 24.2 per cent and young persons aged 16-17 years at 19.6 per cent.

Table 16.16 Children and young persons exiting care by age and Aboriginality during 2006/07 and 1 April 2007 to 31 March 2008

Age group	2006/07			2007/08		
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total
<1 year	38	122	160	38	121	159
1-2 years	77	187	264	77	222	299
3-4 years	68	217	285	69	193	262
5-11 years	200	600	800	180	616	796
12-15 years	174	505	679	198	457	655
16-17 years	94	369	463	121	408	529
Not stated	2	2	4	0	3	3
Total	653	2,002	2,655	683	2,020	2,703

Note: 'non-Aboriginal' includes 'not stated'

⁵¹⁸ The data is based on the assumption that all NGO cases are allocated.

Cost of care

Table 16.17 **Average cost children and young persons in OOHC 2006/07 and 2007/08**

	2006/07	2007/08
Average cost per day – supported care allowance	\$28.65	\$32.98
Average annual extra financial support payments children and young persons in supported care	\$1,077	\$523
Average cost per day – statutory care allowance	\$33.48	\$29.75
Average annual extra financial support payments children and young persons in statutory care	\$6,554	\$9,327

- 16.92 The average cost for children and young persons in OOHC generally increases with age, whether the child or young person is in statutory or supported care.

Table 16.18 **Average cost per day for care allowances by age, 2007/08**

Age	Supported Care		Statutory Care	
	Average cost allowance per day per child	Average cost contingencies per annum per child	Average cost allowance per day per child	Average cost contingencies per annum per child
<1	24.59	1,225	25.59	2,732
1	26.42	1,393	26.90	4,495
2	27.04	961	26.62	5,317
3	27.46	786	26.47	5,997
4	27.52	814	27.34	5,722
5	29.13	758	28.52	5,042
6	30.85	405	30.66	6,235
7	31.41	407	31.86	4,491
8	30.61	254	31.12	5,205
9	31.07	528	30.88	6,667
10	31.47	346	31.05	6,669
11	31.35	346	30.87	9,808
12	31.28	401	29.44	15,777
13	30.59	949	29.19	16,239
14	36.23	473	31.30	18,843
15	41.39	385	31.34	21,922
16	41.90	446	33.61	15,056
17	41.34	379	30.47	21,491
Total	32.98	523	29.75	9,327

Data summary

- 16.93 The number of children and young persons in OOHC and the rate of children and young persons in OOHC has increased each year since 2002, with the most significant increase occurring between 30 June 2006 and 30 June 2007.

- 16.94 The extent of the increase in the number of Aboriginal children and young persons in OOHC and the rate of their entry into OOHC is greater than for non-Aboriginal children and young persons in OOHC.
- 16.95 There has been a moderate increase in the number of children and young persons entering care since 2002, however, there has been a significant increase in the numbers of children and young persons in OOHC remaining in care longer.
- 16.96 Nearly two thirds of all children and young persons in OOHC are under statutory care arrangements and just over half of Aboriginal children and young persons in OOHC are in statutory care arrangements.
- 16.97 About one half of children and young persons in OOHC were placed in relative or kinship care and over one third in foster care. A small number were in residential care.
- 16.98 More Aboriginal children and young persons in OOHC were in relative/kinship care than non-Aboriginal children and young persons.
- 16.99 There has been little change in the number of placements per child over the last four years, with almost half of all children and young persons having only one OOHC placement and a further one quarter having had two placements. Aboriginal children and young persons in OOHC were slightly less likely to have multiple placements.
- 16.100 Children and young persons in statutory care were about twice as likely to have a caseworker allocated than children and young persons in supported care.
- 16.101 The average cost of children and young persons in supported care has increased between 2006/07 and 2007/08 while it has decreased for children and young persons in statutory care. Extra financial payments for the former have halved and increased by half for the latter.

Research

- 16.102 It is well recognised nationally and internationally that children and young persons in OOHC are a vulnerable and at risk group in the population. Research indicates that those entering OOHC have poorer outcomes than the average child or young person. They have been identified as having increased developmental, behavioural, emotional and mental health issues and are less likely to access continuous education, treatment and medical care as a consequence of multiple placements, changes in caseworkers or alternating periods of placement at home and in OOHC.
- 16.103 The findings of research about the effectiveness of children and young persons in OOHC services, including foster care, compared with children and young persons remaining at home are mixed. Some studies show that children and

young persons who are in stable OOHC are better off remaining in care,⁵¹⁹ while other studies have found that going into care fails to have a remedial effect for many and may in fact have adverse outcomes.⁵²⁰

Permanency planning

- 16.104 Permanency planning is a relatively recent area of development in Australian child protection, having been introduced in 2003. Evidence derived from neuropsychological and attachment research⁵²¹ clearly identifies the need for children to have security and continuity of attachment in order to develop optimally.
- 16.105 A rupture of attachment ties is a traumatic event in a child's life, with major short term and long term consequences such as cognitive problems, psychological and behavioural problems, and delays in development.⁵²²
- 16.106 A study from Illinois demonstrated that maintaining family and community links, by placing children with relatives and/or placing siblings together and by maintaining the child in his or her community, leads to increased placement stability.⁵²³ According to this study, a child "placed in such a setting is over 60 per cent less likely to experience a placement move than a child placed with a non-relative caring for at least one other non-related foster child."⁵²⁴
- 16.107 Expert opinion is that for younger children in particular, a decision about restoration should not take longer than six months. Similar timeframes have been recommended and/or implemented in other jurisdictions in Australia, the UK and USA.⁵²⁵
- 16.108 Research undertaken in South Australia to identify factors and strategies which might reduce instability and delay in the care system, found that:

children's social and family background factors influenced placement trajectories. Infants entering the care system come from families with multiple difficulties and co-occurring problems. In particular, parental substance misuse and neglect

⁵¹⁹ J Barber and P Delfabbro, *Children in foster care*, London, Routledge, 2004, cited in Submission: Cashmore, Scott and Calvert, 26 February 2008, p.19.

⁵²⁰ J Doyle, "Child protection and child outcomes: measuring the effects of foster care," *American Economic Review*, in press, 2007, C Lawrence, E Carlson and B Egeland, "The impact of foster care on development," *Development psychopathology*, 18, 2006, cited in Submission: Cashmore, Scott and Calvert, p.19.

⁵²¹ J Shonkoff and P Phillips, *From neurons to neighbourhoods: the science of early childhood development*, National Academy Press, Washington, 2000.

⁵²² Fahlberg, *Attachment and Separation*, BAAF, 1982, Gauthier Y, Fortin G & Jeliu G, "Clinical application of attachment theory in permanency planning for children in foster care: the importance of continuity of care," *Infant Mental Health Journal*, 25 (4), 2004, 379-396, cited in DoCS, *Permanency Planning Guidelines Good Practice Guidelines*, May 2007, p.42.

⁵²³ A Zinn, J DeCoursey, R George, M Courtney, "A study of placement stability in Illinois," *Chapin Hall Center for Children, University of Chicago*, 2006, cited in DoCS, *Permanency Planning Guidelines Good Practice Guidelines*, May 2007.

⁵²⁴ DoCS, *Permanency Planning Guidelines Good Practice Guidelines*, May 2007, p.42.

⁵²⁵ DoCS, *Permanency Planning Policy*, (undated), p.3.

*were found to be increasingly more common. These same factors and parental intellectual disability significantly decreased the likelihood of successful reunification.*⁵²⁶

- 16.109 The study also found that almost 40 per cent of children and young persons who had been placed in protective care, who were subsequently placed back home still had at least one social or family risk factor present and approximately one in ten had three or more risk factors present. Subsequent abuse was confirmed in 26 per cent of these cases.⁵²⁷
- 16.110 A supplementary study, *Children with Multiple Care and Protection Orders* found that multiple 12 month orders appear to be associated with lengthy restoration processes. The study indicated that the restoration process requires good assessment and planning, family compliance with case plans and family readiness to safely reassume the ongoing responsibility for their child(ren). For some families, making the required progress can be slow and may necessitate ongoing service assistance and close monitoring, even after a child's return to the family home.⁵²⁸
- 16.111 The authors state that to ensure a child's stability, to enable them to form secure attachments, and to have their development proceed accordingly, reunification attempts should not go on indefinitely. As such, reunification needs to be targeted, time limited and subject to change if parents do not demonstrate significant progress for their child's developmental and emotional needs.⁵²⁹
- 16.112 The Certainty for Children in Care study highlights that:

establishing cause and effect in relation to this placement stability was difficult given that a cluster of inter-related factors are involved... it is unclear to what extent the interaction between child and carer characteristics played a role. The children who had experienced placement stability were generally better adjusted and had fewer conduct problems than other children in care. Thus, while it may seem logical to conclude that stability itself led to these better psychosocial outcomes, it may also be the case that these children were better adjusted or less 'damaged' when they came into care...(and) although carer characteristics were identified as being very important in influencing placement outcomes for

⁵²⁶ P Delfabbro, H Jeffreys, N Rogers, R Wilson and M Borgas, "Certainty for Children in Care: A study into the placement history and social background of infants placed into South Australian Out-of-home Care 2000-2005", *South Australian Department for Families and Communities*, July 2007, p.28.

⁵²⁷ *ibid.*

⁵²⁸ P Delfabbro, H Jeffreys, N Rogers, R Wilson and M Borgas, "Certainty for Children in Care: Children with multiple Care and Protection Orders: Placement History, decision making and psychological outcomes," *South Australian Department for Families and Communities*, July 2007, p.39.

⁵²⁹ *ibid.*

*stable children, it is not clear what aspects of parenting were specifically influential in the cases identified.*⁵³⁰

- 16.113 Several factors are linked with placement disruption. For example, it is more likely that the child is older, that their birth families are from economically and socially marginalised ethnic minorities, that they have health and behavioural problems and that they are separated from their kin. Research suggests that the first six to seven months of a placement is the period of highest vulnerability to placement movement.
- 16.114 Although the evidence is not yet conclusive, it is generally agreed that maintaining safe contact between children and birth families and/or wider kinship networks is an important step towards continuity. In addition to safety, the research data that exist indicate that the quality of the contact is of equal importance to safety.
- 16.115 The participation of children and young persons and their representation in decisions that affect their long term welfare and well-being is also crucial. Willingness to join a new family, and the degree to which their wishes are heard and acted upon, are factors logically connected to placement outcomes, particularly the risk of disruption. Bessell and Gal, however, note that the literature reveals the absence of children's participation in decisions made about them, once they enter the care and protection system.⁵³¹ Given that children identify their participation in decisions affecting them as one of their central needs, they suggest that workers must find ways which empower children to participate.⁵³²
- 16.116 There are no identifiable trends in the research that specify the characteristics of potential good adoptive or foster carers. A more systematic approach to identifying carer suitability and readiness for committed and sensitive care giving relationships may decrease the number of placement disruptions.
- 16.117 Fernandez states that:

*placement instability is the outcome of poor initial decisions and lack of support to foster carers. Strengthening professional decision making to ensure children are less likely to move, and investing in the support of carers are important for improving stability.*⁵³³

⁵³⁰ P Delfabbro, H Jeffreys, N Rogers, R Wilson and M Borgas, "Certainty for Children in Care: Children with Stable Placement Histories in out-of-home care," *South Australian Department for Families and Communities*, July 2007, p.45.

⁵³¹ S Bessell and T Gal, "Forming Partnerships: The Human Rights of Children in Need of Care and Protection", *Crawford School of Economics and Government, Australian National University*, 2007, p.4.

⁵³² *ibid.*, pp.12 and 16.

⁵³³ E Fernandez, "Unravelling Emotional, Behavioural and Educational Outcomes in a longitudinal study of children in foster care," *British Journal of Social Work*, April 2007, p.14.

She also adds that planned monitoring as well as services to deal with transitions and disrupted attachments are crucial.

16.118 Thoburn concludes that:

*for children who cannot be safely brought up by their birth parents, a sense of permanence and confidence in being a full member of the family they are living with are essential to their long-term well being.*⁵³⁴

Health

16.119 International studies show that children and young persons entering OOHC have a high prevalence of acute and chronic health problems and developmental disabilities.⁵³⁵

16.120 Research also indicates that once in OOHC they have significantly poorer health outcomes in relation to visual defects, dental health, hearing impairments, speech development, completed immunisations, mental, emotional and behavioural health.

16.121 A study undertaken by the Child Protection Unit at Sydney's Children Hospital in 2005, (of the health needs of children living in OOHC in NSW), showed rates of physical, developmental and emotional health problems that are higher than the rates for health problems reported in the general community of Australian children.⁵³⁶

16.122 This evaluation of the first 122 children seen by the OOHC health screening clinic at Sydney Children's Hospital Child Protection Unit found that only three per cent of these children were free of health problems; 25 per cent had incomplete immunisation; 30 per cent had an abnormal vision screen; 28 per cent had an abnormal hearing test; 30 per cent had dental problems; 60 per cent needed referral to development assessment following the Australian Developmental Screening Test; 33 per cent showed speech delay (45 per cent of the under fives showed speech delay); and 54 per cent had behavioural or emotional health problems.⁵³⁷

16.123 The financial risks in the longer run for state health authorities associated with the provision of identified specialist services are considered to be significantly outweighed by the costs (ethically and financially) of providing appropriate early treatment. Outcomes from research show that young persons with high support

⁵³⁴ J Thoburn, 2007, *Routes to permanence for children who have experienced deprivation and family violence, some messages from research*, paper to Centre for Research on Community and Children's Service, International Conference, Overcoming Violence and Poverty, August 2007, p.17.

⁵³⁵ Royal Australasian College of Physicians Paediatric Policy, "Health of children in 'out-of-home' care," 2006, p.14.

⁵³⁶ D Nathanson and D Tzioumi, "Health Needs of Australian Children living in out-of-home care", *Journal Paediatrics and Child Health*, Vol 43, pp.695-699.

⁵³⁷ *ibid.*, p.696.

needs who have left the formal care system are likely to cost governments “on average \$2.2 million over the life course from age 16 up to 60, with an overall estimated average cost per annum of \$50,000.”⁵³⁸

Mental health

- 16.124 Several recently published Australian studies have examined the mental health and well-being of children and adolescents in care.
- 16.125 Sawyer et al sampled children and adolescents in foster care in Adelaide. They found that 61 per cent of children and adolescents living in foster care scored in the clinical range for behaviour problems on care-giver reports on a standardised checklist. The proportion of children in foster care with problems on the externalising syndrome scales (such as ‘attention problems’, ‘aggressive behaviour’ and ‘delinquent behaviour’) was six to seven times that of children in the community group. Adolescents in foster care also scored significantly higher on a depression scale than those in the community. The difference between groups on depression scores was particularly marked for boys.⁵³⁹
- 16.126 Osborn and Delfabbro conducted a case file study in four Australian States (South Australia, Western Australia, Queensland and Victoria) examining children in OOHC with two or more placement breakdowns.⁵⁴⁰ The total sample had experienced a range of 2-55 placements during their time in OOHC. Just under half of the total sample had experienced at least one relative care placement, and more than half had experienced at least one residential/group care placement.⁵⁴¹
- 16.127 Results from this study showed that almost three quarters of the children came from households with a history of domestic violence or physical abuse; two thirds had parents with substance abuse problems; and almost three in five had been neglected. Half the sample had parents with mental health problems, significant financial problems, or homelessness. The majority of the children and young persons had suffered physical abuse (73.4 per cent), sexual abuse (65.9 per cent) and neglect (58.2 per cent). Low levels of family contact and poor social functioning were evident in the children across the states. Almost three quarters of the children were attending school or TAFE/apprenticeship

⁵³⁸ Morgan Disney and Associates and Applied Economics, *Transition from Care: Avoidable Costs to Governments of Alternative Pathways of Young People Exiting the Formal Child Protection Care System in Australia, Volume 1, Summary Report*, November 2006, cited in Health, Community and Disability Services Ministers’ Conference paper, *Medicare benefits schedule item number for health checks of children in out-of-home care*, 23 July 2008, p.4.

⁵³⁹ M Sawyer, J Carbone, A Searle and P Robinson, “The mental health and well-being of children and adolescents in home based foster care,” *NWA*, 2007, 186, p.181-184.

⁵⁴⁰ A Osborn and P Delfabbro, “National comparative study of children and young people with high support needs in Australian out-of-home care,” *Final Report, Adelaide, South Australia, University of Adelaide*, 2006 cited in DoCS, *Models of service delivery and interventions for children and young persons with high needs*, September 2006, p.2.

⁵⁴¹ DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.2.

programs, of these 34 per cent had been suspended and 12.7 per cent had been excluded.⁵⁴²

- 16.128 Similar to Sawyer et al, the study by Osborn and Delfabbro found that almost 60 per cent of the children were in the abnormal clinical range for emotional and behavioural functioning.⁵⁴³
- 16.129 The Children in Care Study⁵⁴⁴ stated that those in the study had exceptionally poor mental health and social competence, relative to the general population and to other populations of children in care. More than half the boys and girls in the study were reported to have clinically significant mental health difficulties. They presented with complex disturbances, including multiple presentation of conduct problems and defiance, attachment disturbance, attention-deficit/hyperactivity and trauma related anxiety.⁵⁴⁵
- 16.130 The RANZCP stated that a key finding of this study was that:

*children who were placed in care before the age of seven months had fewer attachment problems than children entering care at older ages. The risk for attachment and mental health problems rose to moderate in children who entered care between seven and 30 months of age and increased further for those placed after the age of 30 months.*⁵⁴⁶

- 16.131 Age at entry into care appears to be a strong predictor of children's mental health outcomes. Several studies have now reported that older age entry into OOHC is associated with poorer mental health outcomes. However, further analysis has showed that the poorer mental health of older children in care is largely attributed to later placed children entering care with high levels of pre-existing disturbance. Many children in OOHC have experienced a number of adverse and stressful events prior to care entry.⁵⁴⁷
- 16.132 This is consistent with attachment theory. By age three, the most critical aspects of attachment development are either successfully negotiated or have led to aberrant development. Attachment theory suggests that children who enter care before the age of six to nine months are likely to develop normal, secure attachments to their foster or kinship carers. The Children in Care Study's findings are consistent with this expectation, that children who entered

⁵⁴² A Osborn and P Delfabbro, 2006, op. cit., cited in DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, p.2.

⁵⁴³ The Royal Australian and New Zealand College of Psychiatrists, *The Mental Health needs of children in out-of-home care*; A report from the expert working committee of the Faculty of Child and Adolescent Psychiatry, Melbourne, 2008, p.10.

⁵⁴⁴ M Tarren-Sweeny and P Hazell, "Mental health of children in foster and kinship care in NSW," *Journal of Paediatrics and Child Health*, Volume 42, 2006, pp.89-97.

⁵⁴⁵ *ibid.*, p.96.

⁵⁴⁶ The Royal Australian and New Zealand College of Psychiatrists, *The Mental Health needs of children in out-of-home care*; A report from the expert working committee of the Faculty of Child and Adolescent Psychiatry, Melbourne, 2008, p.9.

⁵⁴⁷ DoCS, *Research to Practice Note, 2007, Mental Health of Children in OOHC in NSW*, p.2.

care prior to seven months had significantly better mental health and fewer attachment problems than children entering care at older ages.⁵⁴⁸

- 16.133 Placement security can influence the development and well-being of children in care. In the study, placement security or longevity was a strong predictor of mental health outcomes for children after controlling for age at entry into care and anticipated placement breakdown. This is consistent with emerging research, which demonstrates a strong relationship between placement instability and high mental health service usage by children in care.⁵⁴⁹
- 16.134 This study also showed that children living in alternate care, whether placed with relatives or foster parents, are disadvantaged compared with children in the general population in regard to their prior exposure to adversity, subsequent development and mental health problems.

Education

- 16.135 There is little published Australian data on the educational performance of children and young persons in OOHC.
- 16.136 Research that has been undertaken into the education experiences of children and young persons in care shows that those in care are less likely than their peers to continue their education beyond the minimum school leaving age. They are likely to attend a large number of different schools and to experience substantial periods of absence from school.⁵⁵⁰ Educational disruption was frequently a direct result of children and young persons in care having to change school as a result of a placement change.⁵⁵¹ They also appear to have a significant risk of being suspended or expelled because of behavioural problems or truancy.
- 16.137 DoCS stated that children and young persons in statutory OOHC “are at significantly higher risk of poor educational achievement, unemployment, homelessness, substance abuse and mental health problems” and that early identification and timely provision of government services, including education intervention programs and services were needed to reduce these risks and ensure positive outcomes.⁵⁵²
- 16.138 Research confirms that the educational outcomes of those in OOHC are poor. This is related to the impact of a poor start in life, low expectations of education

⁵⁴⁸ DoCS, *Children in Care Study, 2005, Mental Health of Children in OOHC in NSW*, p.3.

⁵⁴⁹ R Newton, A Litrownik, J Landsverk, “Children and youth in foster care: disentangling the relationship between problem behaviours and number of placements,” *Child Abuse and Neglect*, 24(10), 2000, pp.1363-74, D Rubin, E Alessandri, C Feudtner, D Mandell, A Localio, T Hadley, “Placement stability and mental health costs for children in foster care,” *Pediatrics*, 113(5), 2006, pp.1336-41, Fernandez, “Unravelling Emotional, Behavioural and Educational Outcomes in a longitudinal study of children in foster care,” *British Journal of Social Work*, April 2007, p.2.

⁵⁵⁰ CREATE Foundation, *Education Report Card, 2006*, p.30.

⁵⁵¹ *ibid.*, p.6.

⁵⁵² DoCS, *Child protection and out-of-home caseworker policy manual*, p.95.

in birth families, the impact of multiple placements and schools attended and limited additional support provided to them within the school system. While 80 per cent of children and young persons living at home with their families in NSW complete their HSC, less than 36 per cent of children and young persons in care complete this milestone.⁵⁵³

16.139 Further, Cashmore et al found that:

*four to five years after leaving care young people were much less likely than their peers to be in full-time work and/or education. Many had a history of part-time and casual work in poorly paid and low skills jobs, and over half the young women had children. Those who had completed Year 12, however, were more likely to be employed or studying, and to be faring well across a number of areas compared with those that did not complete Year 12. The more stable and secure they had been in care, the more years of schooling they completed, the better they were faring 4-5 years after leaving care.*⁵⁵⁴

16.140 The CREATE Foundation Report Card on the education of children and young persons in OOHC in 2006 found a number of key challenges faced by this group and noted that those in care were:

- a. much less likely to continue within mainstream education beyond the period of compulsion
- b. much more likely to be older than other children and young persons in their grade
- c. on average likely to attend a larger number of primary and high schools than other students
- d. likely to miss substantial periods of school through changes of placement.⁵⁵⁵

High needs children and young persons

16.141 Children and young persons in OOHC who have high needs generally present with complex and multiple problems, including significant histories of abuse, serious mental health issues, 'challenging' behaviours, intellectual and learning disabilities, histories of school suspension/expulsion, and difficult familial relationships.⁵⁵⁶

⁵⁵³ J Cashmore and M Paxman, "Longitudinal Study of Wards Leaving Care," *Social Policy Research Centre, University of New South Wales*, January 1996, p.116.

⁵⁵⁴ J Cashmore M Paxman and M Townsend, "The Educational Outcomes of Young People 4-5 years After Leaving Care: An Australian Perspective," *Adoption and Fostering, Volume 31, Number 1, 2007*, p.50.

⁵⁵⁵ CREATE Foundation, *Education Report Card, 2006*, p.30.

⁵⁵⁶ DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.iii.

- 16.142 A recent Australian study of children and young persons with high needs in OOHC found that the majority had suffered physical abuse (73.4 per cent), sexual abuse (65.9 per cent) and neglect (58.2 per cent).⁵⁵⁷
- 16.143 Osborn and Delfabbro found that most children and young persons with high needs first came into contact with the child welfare system at around the age of three years but usually did not finally enter care until four years later.⁵⁵⁸ Their study also showed that children within this high needs population are usually aged around 12-13 years and have typically experienced 10 or more previous placements. On average, these children had been in the care system for five years.
- 16.144 Children and young persons with high needs are often involved in two or more service systems.⁵⁵⁹ Figures from the 1996 US National Adolescent and Child Treatment Study indicate that agency contact was, in order of frequency, mental health (93 per cent), juvenile justice (80 per cent), school based special education (71 per cent) and child welfare (69 per cent).⁵⁶⁰ Walrath et al found that re-contact with any agencies or services after six years was high, with four out of 10 adolescents being re-arrested and 75 per cent being readmitted to a mental health placement or juvenile correction facility.⁵⁶¹
- 16.145 The frequency, intensity and duration of the behaviours and the complexity of the needs of these children and young persons present difficult challenges for carers and service providers and can lead to multiple, crisis related placement changes that often exacerbate underlying behavioural and emotional issues
- 16.146 Families of children and young persons with high needs are often characterised by low self-esteem, poor impulse control, aggressiveness, anxiety and depression. Adverse environmental conditions such as poverty, unemployment, poor nutrition and lack of social supports often interact with parent and child factors to increase stress.⁵⁶²
- 16.147 Research has suggested that almost three quarters of this high needs group came from households with domestic violence or physical abuse, two thirds had parents with substance abuse problems and half had parents who had

⁵⁵⁷ A Osborn and P Delfabbro, 2006, op. cit., cited in DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.2.

⁵⁵⁸ A Osborn and P Delfabbro, 2006, op. cit., cited in DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006.

⁵⁵⁹ A Muscat, A Baron, A M Baron and N Spencer, "The care and health needs of children in residential care in the Maltese Islands," *Child: Care, Health and Development*, 27, 2001, pp.251-262, cited in DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.3.

⁵⁶⁰ J Howell, M Kelly, J Palmer, R Mangum, "Integrating child welfare, juvenile justice and other agencies in a continuum of services," *Child Welfare* 83(2), 2004, cited in DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.3.

⁵⁶¹ C Walrath, D Mandell and P Leaf, "Responses of children with different intake profiles to mental health treatment," *Psychiatric Services: A journal of the American Psychiatric Association*, 52(2), 2001, cited in DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.3.

⁵⁶² DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.3.

significant mental health issues and/or parents who were unable to provide adequate housing.⁵⁶³

- 16.148 A number of models of service delivery have been developed for children and young persons with high needs. These are typically intensive, multi-faceted interventions involving a network of professionals working in collaboration with the child or young persons and their foster carers and birth families.⁵⁶⁴

Residential care

- 16.149 The decrease in residential care over the past two decades has resulted in a limited availability of flexible, high quality residential services for children and young persons with high needs. Early research on residential care generally reported poor outcomes for children and young persons, and the experience has been one of a decline in residential facilities throughout the western world with an increase in alternative forms of care. For instance, in Australia in 1983, approximately 40 per cent of those in OOHC lived in some form of residential care. In 2008, less than three per cent of the total care population were residing in this form of care in NSW.
- 16.150 More recent research findings have however found that some young persons can benefit from an appropriate residential placement, particularly when it is time limited, has a therapeutic component and is part of a plan for transition to a more 'normalised' care environment.⁵⁶⁵
- 16.151 Delfabbro et al note that many forms of residential and group care options that were previously thought to be very restrictive can actually be less restrictive than home based care environments. The authors conclude that the elements that characterise care (for example, levels of discipline, routine, autonomy and free time), rather than the type of care (foster or residential), determine how restrictive the placement will be for the child or young person. The implication of this research is that greater effort needs to be put into establishing the optimal characteristics of care, rather than the ideal placement type, that will result in the best outcomes for children. Delfabbro and colleagues argue that the care continuum should be re-evaluated and residential care be considered as an option when children first enter care, where they can be assessed and receive appropriate treatment services.⁵⁶⁶ As Cashmore and Gilligan note:

⁵⁶³ *ibid.*, p.2.

⁵⁶⁴ *ibid.*, p.3; L Bromfield and A Osborn, "Getting the Big Picture': A Synopsis and Critique of Australian Out-of-Home Care Research," *Australian Institute of Family Studies*, No 26, 2007, p.29.

⁵⁶⁵ DoCS, *Models of service delivery and interventions for children and young persons with high needs*, *Literature Review*, September 2006, p.3.

⁵⁶⁶ P Delfabbro, A Osborn, and J Barber, "Models of service for children in out-of-home care with significant emotional and behavioural difficulties," *Developing Practice*, 14, 2005 cited in L Bromfield and A Osborn "Getting the Big Picture': A Synopsis and Critique of Australian Out-of-Home Care Research," *Australian Institute of Family Studies*, No 26, 2007, p.29.

*The question is not just about whether certain forms of residential care 'work', but also being able to say why and under what conditions.*⁵⁶⁷

- 16.152 Underpinning most successful service interventions for high needs children and young persons and indeed others in OOHC are strong case management, integrated multi-agency working, and highly skilled staff and carers who receive expert supervision, ongoing training and support.

Therapeutic foster care

- 16.153 There is a recognised need for specialised models of therapeutic foster care to address the limited number of placement options for children and young persons with challenging emotional and behavioural difficulties.
- 16.154 Therapeutic foster care is an intensive, family based therapeutic approach for children and young persons with serious emotional and behavioural disorders and for particular groups of children (like siblings) that require a more complex caring role. Intensive foster carers have specialised training and support requirements and receive a higher level of reimbursement than general foster carers.⁵⁶⁸ Based on current evidence, therapeutic foster care is a 'promising' intervention for children and young persons experiencing mental health problems, behavioural problems and problems of delinquency.⁵⁶⁹ Therapeutic foster care appears to be most successful for children under the age of 14 years and for boys rather than girls, with previous OOHC placement as the most significant predictor of impairment and change in mental health status over time.⁵⁷⁰

Multi-systemic therapy

- 16.155 Multi-systemic therapy is an intensive, goal oriented, time limited (typically three to six months) home and family focused treatment approach designed to equip children and young persons and their carer families with the skills to function more successfully in their community environment. Several reviews have classified multi-systemic therapy as a 'probably efficacious' treatment according to the criteria for empirically supported treatments.⁵⁷¹
- 16.156 Bor argued, in a submission to the Inquiry, that the case for applying multi-systemic therapy to child abuse and neglect is strengthened because correlates of child abuse and neglect are similar to correlates of antisocial and aggressive

⁵⁶⁷ J Cashmore and R Gilligan, "Residential Care," *International Handbook on Child Research* (unpublished).

⁵⁶⁸ DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, pp.10-17.

⁵⁶⁹ G M McDonald and W Turner, "Treatment Foster Care for improving outcomes in children and young persons," *Cochrane Database of Systematic Reviews, Vol 1*, 2008, p.38.

⁵⁷⁰ DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, pp.15 and 20.

⁵⁷¹ *ibid.*, p.iv.

behaviours. Queensland Health has proposed a trial of multi-systemic therapy as part of the Department of Child Safety's response to the Report of Crime and Misconduct Commission into Child Protection. Pilot projects are being undertaken in Brisbane. Juvenile Justice is soon to commence a trial of multi-systemic therapy.

Service coordination

- 16.157 The term 'wraparound services' had its origins in American programs originally developed for children and young persons with significant mental health and behavioural difficulties. These services were characterised by comprehensive, coordinated, community based service delivery programs. The term is used in a broader sense in Australia to refer to the individualised services which address the needs of the child or young person in care, as identified through the assessment and case planning process.⁵⁷²
- 16.158 Major transition points or milestones in the life of a child or young person are likely to provide the clearest signal of the need to consider or reconsider whether additional support services are required. These critical periods may typically include entry into a new placement, commencing school (primary and secondary), the onset of puberty, leaving school, leaving care and commencing employment. Services that have been identified as priority supports needed for children and young persons in care include:
- a. respite care
 - b. psychological and counselling services (including behaviour management support)
 - c. specialist medical and allied health services
 - d. educational support services.⁵⁷³
- 16.159 Studies examining outcomes of 'wraparound services' for children and young persons show improvements in school performance and psychological and behavioural functioning. However, 'flexible' and 'individualised' nature and grassroots development of such services makes rigorous evaluation difficult. As such, there is a lack of empirical evidence to show whether 'wraparound services' work any better than regular services such as individualised therapies.⁵⁷⁴
- 16.160 The Systems-of-Care model developed in the USA represents an attempt to achieve an integrated approach at the broader level of systems and organisations in order to address the multiple service requirements of children and young persons with high needs. This model aims to provide improved

⁵⁷² DoCS, *Out-of-home Care Wraparound Support Services for Children and Young People*, April 2007, p.4.

⁵⁷³ *ibid.*

⁵⁷⁴ DoCS, *Models of service delivery and interventions for children and young persons with high needs, Literature Review*, September 2006, p.v.

organisational and interagency arrangements as a key component of the program logic for delivering services to this target group.⁵⁷⁵

- 16.161 There have been several reviews of the empirical status of the Systems-of-Care model. The consensus has been that there is a growing body of evidence suggesting that Systems-of-Care can lead to improved interagency working. However, the gains for the children and adolescents and their families have been modest. As a result, the evidence is mixed regarding the effectiveness of Systems-of-Care on outcomes for children and young persons with high needs.⁵⁷⁶

*In brief, trends in service provision indicate that residential and specialised models of care are being implemented in Australian States and Territories. However, there is little evidence that these programs are being routinely evaluated ... In addition, there is a recognised need for specialised models of residential or group care and treatment foster care to address the limited number of placement options for children and young persons with challenging emotional and behavioural difficulties.*⁵⁷⁷

- 16.162 Research design limitations have been identified across all services and interventions for children and young persons with high needs. These include limited use of control or comparison groups and lack of valid and reliable outcome measures making evaluation of effectiveness and comparison between studies difficult.⁵⁷⁸

Foster care

- 16.163 In Australian and overseas jurisdictions:

*while the need for foster carers has been rising, there have been decreasing numbers of individuals willing to foster. This has been attributed to the greater participation of women in the workforce, the inadequacy of remuneration provided to carers, increasing expectations of carers, and attrition as existing carers age.*⁵⁷⁹

- 16.164 Bromfield and Osborn state that these and other reasons, such as the challenging behaviours of children in care, and inadequate supports to carers, have also contributed to decreased retention rates for existing carers.

⁵⁷⁵ *ibid.*

⁵⁷⁶ *ibid.*

⁵⁷⁷ L Bromfield and A Osborn "Getting the Big Picture: A Synopsis and Critique of Australian Out-of-Home Care Research," *Australian Institute of Family Studies*, No 26, 2007, p.30.

⁵⁷⁸ DoCS, *Models of service delivery and interventions for children and young persons with high needs*, Literature Review, September 2006, p.v.

⁵⁷⁹ L Bromfield and A Osborn, 2007, *op. cit.*, p.2.

- 16.165 The research indicates that broad based media strategies are effective for awareness raising and stimulating an initial interest in fostering, but are less successful in the conversion of inquiries into actual carers. One of the 'best' recruitment strategies is the use of current and experienced carers to recruit by word of mouth.⁵⁸⁰
- 16.166 A DoCS research report, *Spotlight on Safety* notes that one in three adults surveyed indicated they might at least consider being a foster carer in the future and almost half said they might consider being a respite carer.⁵⁸¹ Other researchers have found that the majority of carers feel they have 'good' or 'just enough support,' however, carers also reported they were often dissatisfied as they did not feel adequately supported by the relevant state or territory government agency, and often experience difficulty in communicating with caseworkers in obtaining approvals for extra financial support payments, and in complying with contact requirements.⁵⁸²
- 16.167 Further, Bromfield and Osborn stated that most carers cease fostering due to a change in their personal circumstances. However, there also appeared to be a link between support and retention, with participants from several studies reporting that they stopped fostering due to burn out, lack of support, adverse effects on their families, and the foster children being difficult.
- 16.168 They suggested that carer retention may be improved if carers are better supported through improved reimbursement packages, increased recognition and involvement (for example, input into decisions regarding foster children), better information about the child, and increased levels of support (such as, access to support services and respite).⁵⁸³
- 16.169 In considering the question whether foster carers should receive a salary, McHugh notes:
- a. the growing professionalism of foster caring; that is, assessment, training and supervision is more highly regulated and rigorous
 - b. carers are no longer simply substitute parents
 - c. fostered children's complex needs and challenging behaviours require highly committed multi-skilled specialist carers
 - d. carer recruitment and retention has become increasingly problematic here and elsewhere.⁵⁸⁴
- 16.170 McHugh argues that as:

⁵⁸⁰ *ibid.*, p.12.

⁵⁸¹ Urbis Keys Young and DoCS: *Spotlight on Safety: Community attitudes to child protection, foster care and parenting*, 2006, p.3.

⁵⁸² L Bromfield and A Osborn, 2007, *op. cit.*, p.12.

⁵⁸³ *ibid.*

⁵⁸⁴ M McHugh, "Should Australian foster carers be entitled to receive a fee/salary wage for caring?" *Social Policy Research Centre, University of New South Wales*, Paper presented at the "ACWA 08 Strong, Safe and Sustainable: responding to children, young persons and families in a civil society", August 2008.

*the older generations of foster carers retire from fostering a wage component may attract a different cohort of younger, qualified persons into fostering, able to meet the challenges of more demanding and difficult placements and, meet their need for an adequate income.*⁵⁸⁵

- 16.171 Ambivalence on the part of carers towards the merits of being paid for caring, and the current income support arrangements for some carers, however, are complicating factors that may impede support for a carer wage. At the present time many foster carers are reliant on government income support payments and associated benefits (for example, Health Care Card, rental assistance). Currently carer subsidy payments are not regarded as income and are not subject to income tax.
- 16.172 McHugh notes that the Productivity Commission's estimates of annual real expenditure on residential OOH per child range from \$150,000 to \$240,000. This is seven to eight times higher than the annual real expenditure on foster care per child (\$21,000–\$29,000).⁵⁸⁶ In comparison with residential care, foster care is far less expensive to government and provides significant cost savings.
- 16.173 The limited research into the experiences of the natural children's foster parents showed that foster children do have an impact on natural children. Foster children encourage positive experiences (such as sharing, responsibility, caring and independence), but these are coupled with the contradictory experiences of loss (such as having to share the attention of parents), resentment and a wish to escape.⁵⁸⁷
- 16.174 Although some carers feel they receive sufficient training, many feel that further training to fully prepare them for the role of caring is a priority. The amount of training undertaken by carers varies, and possibly 20 per cent in a sample surveyed in 2004 had not completed initial training.⁵⁸⁸ Some carers reported that they did not receive any training prior to having children placed in their care. Carers want training that is both practically oriented and nationally accredited, as well as specialist training to enable them to provide therapeutic foster care.⁵⁸⁹
- 16.175 Carer requests for nationally accredited training and specialist training in treatment foster care may be an indication of carers' support for the professionalisation of foster care.⁵⁹⁰ Of the 450 NSW carers surveyed in a study by McHugh et al, 54 per cent thought fostering should be semi-

⁵⁸⁵ *ibid.*

⁵⁸⁶ Productivity Commission, 2007, 15.36, cited in M McHugh, 2008, *op. cit.*

⁵⁸⁷ L Bromfield and A Osborn, 2007, *op. cit.*, p.13.

⁵⁸⁸ M McHugh, J McNab, C Smyth, J Chalmers, P Siminski, P Saunders, "The availability of foster carers: main report," *DoCS and Social Policy Research Centre*, 2004, p.63.

⁵⁸⁹ L Bromfield and A Osborn, 2007, *op. cit.*, p.13.

⁵⁹⁰ *ibid.*

professional, 32 per cent thought it should be professional, and 13 per cent thought it should be voluntary.⁵⁹¹

16.176 The Victorian Centre for Excellence in Child and Family Welfare developed the Foster Care Communication and Recruitment Strategy to strengthen its approach to carer recruitment and retention, and redress the shortage of foster carers across Victoria.⁵⁹² This strategy identifies four points in the life of a carer which can help retain carers:

- a. the period from the time a family contacts the agency until they are approved as a foster carer/family
- b. the period of time between approval as a foster carer and placement of children with them
- c. the period of time after children have been placed in the family
- d. the end of placement support and debriefing.

16.177 The Centre's research found that:

- a. carers are more likely to continue caring when there is a financial package, which implies they want foster care to be more professionalised
- b. 62 per cent of past carers surveyed said they would consider returning to caring if systemic sources of dissatisfaction were addressed
- c. carers stay involved because of positive changes and outcomes for the child, and positive feedback from the child, professionals or parents.⁵⁹³

16.178 Disincentives to become or remain a foster carer included:

- a. lack of information provided about the child
- b. the nature of the child
- c. lack of worker continuity
- d. lack of respite care
- e. interference with personal life
- f. financial drain
- g. perceived lack of trust and respect for the carer role
- h. fear of meeting the child's parents
- i. assessment processes that are perceived to be lengthy and intrusive.⁵⁹⁴

16.179 A significant initiative of the recruitment strategy will be to implement the Best Practice Engagement Project. The Best Practice Engagement Project is a 12

⁵⁹¹ M McHugh, J McNab, C Smyth, J Chalmers, P Siminski, P Saunders, 2004, op. cit., p.69.

⁵⁹² J Higgins "Foster Care Communication and Recruitment Strategy – Best Practice Engagement Project," *Child Abuse Prevention Newsletter*, Vol 16, no. 1, National Child Protection Clearinghouse, Australian Institute of Family Studies, 2008, pp.12-13.

⁵⁹³ *ibid.*

⁵⁹⁴ *ibid.*

month project involving ongoing collaboration and communication between foster care services in Victoria to identify and test potentially good practice ideas in foster care recruitment and retention. The process is being facilitated at both statewide and local levels.⁵⁹⁵

- 16.180 Another area of potential dissatisfaction and loss of foster carers from the system concerns the process for managing allegations which are made against them. This is examined in more detail in Chapter 23.

Kinship care

- 16.181 The increase in the use of kinship care for OOH placements is an international phenomenon that commenced in the late 1980s. The literature suggests this trend is likely to continue and perhaps increase. Despite this, the growth in kinship care is not underpinned by strong outcomes focused evidence. Australian studies have found there is little substantial research on kinship care in Australia.⁵⁹⁶ Furthermore, there is no concrete evidence that this type of care produces better outcomes for children and young persons.⁵⁹⁷

- 16.182 Paxman states that:

*The research literature is limited by methodological problems such as small samples or the sample being part of larger investigations of other topics, and a lack of baseline measures from which progress comparisons can be drawn.*⁵⁹⁸

- 16.183 Barth, Green, Guo, McCrae (in Press) state that the differences between children in kinship care and foster care is complicated as a result of the various selection processes which complicates the interpretation of outcomes in child protection cases.⁵⁹⁹
- 16.184 Listening to children about their experiences and needs is not often reflected in studies, as children tend not to be included as participants.⁶⁰⁰ Research however suggests that essential knowledge about positive and less positive experiences that children have, in different care arrangements, can enable a

⁵⁹⁵ *ibid.*

⁵⁹⁶ J Cashmore and F Ainsworth, "Audit of Australian Out-of-home care research," *Child and Family Welfare Association of Australia and Association of Children's Welfare Agencies*, 2004, p.10, L Bromfield and A Osborn, 2007, *op. cit.*, p.31.

⁵⁹⁷ L Bromfield and A Osborn, 2007, *op. cit.*, p.32.

⁵⁹⁸ M Connolly, "Kinship Care: A selected literature review," *New Zealand: Department of Child, Youth and Family*, 2003 and E Farmer and S Moyers, *Children Placed with Family and Friends: Placement Patterns and Outcomes*, report to the Department of Education and Skills, School for Policy Studies, University of Bristol, 2005 cited in DoCS, *Outcomes for children and young persons in kinship care: an issues paper*, December 2006.

⁵⁹⁹ R Barth, R Green, S Guo and J McCrae, *Kinship care and non-kinship foster care: informing the new debate*, cited in R Haskins, F Wulczyn and M Webb (eds), *Findings from the national survey of child and adolescent well-being*, 2006.

⁶⁰⁰ GS Cuddeback, "Kinship family foster care: A methodological and substantive synthesis of research," *Children and Youth Services Review* 26 (7), 2004, pp.623-639; J Messing, "From the child's perspective: A qualitative analysis of kinship care placements," *Children and Youth Services Review* 28, pp.1415-1434.

better understanding of the dynamics of kinship care.⁶⁰¹ Messing states that recent evidence from children in kinship care has identified that there is a reduction in stigma compared with foster care, due to the reduced trauma associated with separation from parents, and to preservation of the sense of familial relationships.⁶⁰²

- 16.185 In NSW, relative/kinship care is more common than foster care. It is the only State where there are significantly more children and young persons in relative/kinship care than in foster care.⁶⁰³ As discussed earlier in this chapter, a higher proportion of Aboriginal than non-Aboriginal children and young persons are placed in kinship care.
- 16.186 Whilst research into kinship care is in its infancy, it suggests that:
- a. there is no conclusive evidence that those in kinship care are more or less well adjusted than those in foster care
 - b. being placed in kinship care decreases the risk of placement disruption, however, recent longer term studies indicate that stability in kinship care may reduce over time
 - c. it may depend on who the carer is, for example an older grandmother or younger aunts and uncles
 - d. children and young persons placed in kinship care, in comparison with those placed in foster care, tend to remain in care longer, are reunified with their birth families at slower rates, and are adopted at lower rates
 - e. children and young persons placed with relatives are more likely to have contact with birth parents and siblings than their counterparts in foster care
 - f. kinship care placements require the same entitlements to monitoring and support as non-relative foster care placements.⁶⁰⁴
- 16.187 While there is little research in Australia on the characteristics of kinship carers, studies overseas indicate that kinship carers are more likely than foster parents to be single older women, and to be poorer and less educated. Factors that may impact on effective caring include economic disadvantage, stress, health issues and limited parenting skills. Conflict with birth family is a feature of many kinship care placements and this adds to the stress that kinship carers face. Further research is needed to understand the impact of kinship care on the lives of carers and on the outcomes for children and young persons.⁶⁰⁵
- 16.188 Grandparent headed families are increasingly prevalent in Australia and are one of the fastest growing forms of OOHC. Increasingly grandparents are assuming

⁶⁰¹ S Altshuler and J Gleeson, "Completing the evaluation triangle for the next century: measuring child 'well-being' in family foster care," *Child Welfare*, 78(1), 1999 cited in M Connolly, 2003, op. cit., p.16.

⁶⁰² J Messing, op. cit., pp.1415-1434.

⁶⁰³ As at 31 March 2008, L Bromfield and A Osborn, 2007, op. cit., p.32.

⁶⁰⁴ *ibid.*, pp. 31-32; DoCS, *Outcomes for children and young persons in kinship care: an issues paper*, December 2006, p.5.

⁶⁰⁵ DoCS, *Outcomes for children and young persons in kinship care: an issues paper*, December 2006, p.iv.

the full time parental care of their grandchildren because of mental illness and drug addiction of the biological parent(s), or because of the effects of child abuse or neglect, family violence, incarceration, HIV/AIDS and/or parental death.⁶⁰⁶ However, there is little information regarding the characteristics and experiences of Australian grandparent headed families who assume care through the intervention of child protection services or of those who arrange the care of their grandchildren privately.⁶⁰⁷ This “lack of visibility means that there are a substantial number of grandparent headed families who do not receive supervision, support services or financial assistance.”⁶⁰⁸ Evidence suggests that grandparent headed families that arranged care, without the intervention of child protection sources, are relatively more disadvantaged in terms of financial and social services than all other forms of kinship care families and non-relative foster families.⁶⁰⁹

- 16.189 Literature from the USA reveals that assuming full time parenting responsibilities for grandchildren is associated with a number of negative outcomes including psychological distress, poorer physical health and lower social supports.⁶¹⁰
- 16.190 In Australia, Aboriginal carers tend to have higher rates of poverty and disadvantage and are more likely to be experiencing poorer health than their non-Aboriginal counterparts. A key concern for Aboriginal grandparent carers is overcrowding and birth parents living in or regularly visiting the same house.
- 16.191 In addition, the level of services and support provided to relative/kinship and foster placements differ. There is strong evidence that relative/kinship carers receive less training, fewer services and less support than foster carers.⁶¹¹ There is evidence that the assessment of relative/kinship carers often occurs after the child has been placed.
- 16.192 There is general agreement in the literature that kin are less likely to enrol children in additional services and are less likely to be supervised by a statutory agency. Some research shows relative/kinship carers are keen to receive services to help them care for these children but often they are reluctant to request assistance from statutory agencies.
- 16.193 There is some evidence that caseworkers do not feel the same level of services is necessary for relative/kinship placements as for foster placements.

⁶⁰⁶ B Horner, J Downie, D Hay and H Wichmann, “Grandparent-headed families in Australia”, *Family Matters, Australian Institute of Family Studies, No. 76*, 2007, p.77.

⁶⁰⁷ *ibid.*, p.79.

⁶⁰⁸ C Goodman, M Potts, E Pasztor, D Scrozo, “Grandmothers as kinship caregivers: Private arrangements compared to public child oversight,” *Children and Youth Services Review*, 26(3), 2004, cited in B Horner, J Downie, D Hay and H Wichmann, 2007, *op. cit.*, p.78.

⁶⁰⁹ B Horner, J Downie, D Hay and H Wichmann, 2007, *op. cit.*, p.79.

⁶¹⁰ *ibid.*

⁶¹¹ G Cuddeback, “Kinship family foster care: A methodological and substantive synthesis of research,” *Children and Youth Services Review*, 26(7), 2004, pp.623-639, cited in DoCS, *Outcomes for children and young persons in kinship care: an issues paper*, December 2006, p.iv.

- 16.194 A greater understanding of relative/kinship care requires more methodologically rigorous research that could include longitudinal studies that could take into account: baseline data on entry to care to measure pre-existing differences between foster care and kinship care; the use of standardised measures across a number of domains (such as behaviour, child development, school performances, child and family functioning and outcomes as well as a focus on the child's experience); well designed controlled studies; and a multiple informant approach (children, carers, workers, parents, case files). Given the over representation of Aboriginal children in kinship care placements, studies should also include appropriate and culturally sensitive research methods and should canvas the views of Aboriginal children and young persons in care as well as consulting with their carers.⁶¹²
- 16.195 The Inquiry notes that DoCS is undertaking primary research on kinship care in NSW. Stage one of this study, the analysis of historical data on all children and young persons in kinship and foster care is complete. Stage two involves an analysis of 120 case files and telephone interviews with caseworkers of a random sample of children and young persons who have been in care for longer than six months in four placement types (supported kinship care, statutory kinship care – Aboriginal and non-Aboriginal and foster care). A draft report is expected by March/April 2009, which will go some of the way to building an evidence based approach.

Accreditation and monitoring of the OOHC service system

- 16.196 In NSW, the Care Act establishes the Children's Guardian as the agency responsible for the accreditation and monitoring of the designated agencies, that is, the government and non-government organisations that provide OOHC placement and support services to children and young persons. These services include placement, case management, supervision and support. The Children's Guardian reports directly to the Minister for Community Services.⁶¹³
- 16.197 The NSW OOHC accreditation system, which provides a structured means of providing recognition of an organisation's performance against relevant standards, commenced operating in July 2003. The *NSW Standards for Substitute Care Services*, were developed by and for the OOHC sector as optimum standards. It was considered unlikely that any organisation would meet the standards immediately but would do so in time.

⁶¹² DoCS, *Outcomes for children and young persons in kinship care: an issues paper*, December 2006, p.iv; N Richardson, L Bromfield and D Higgins "The Recruitment, Retention and Support of Aboriginal and Torres Strait Islander Foster Carers: A Literature Review," *Australian Institute of Family Studies, National Child Protection Clearinghouse*, 2005, pp.66-67.

⁶¹³ *Children and Young Persons (Care and Protection) Act 1998* s.181.

- 16.198 Accreditation is commonly used in Australia in the health, child and aged care sectors. NSW, however, is the only jurisdiction that has established an OOHC accreditation system. The agencies that are accredited by the Children's Guardian essentially have a licence⁶¹⁴ to provide OOHC services. The Children's Guardian also has a number of other powers common to licensing bodies, including powers to impose, vary and revoke conditions of operation, and to remove or suspend an organisation from the OOHC sector. The Regulation, *inter alia*, provides for ADT review of Children's Guardian decisions concerning the imposition of conditions on, and the suspension or cancellation of, accreditation.
- 16.199 At June 2008, there were 58 government, non-government and private agencies, including DoCS and DADHC, approved as designated agencies to provide foster or residential care to children and young persons in NSW.⁶¹⁵
- 16.200 The provisions regulating OOHC in the *Children and Young Persons (Savings and Transitional) Regulation 2000* were not introduced until July 2003. Clause 22A of this Regulation provides for the interim accreditation of service providers operating immediately before the accreditation scheme commenced.
- 16.201 Designated agencies with interim accreditation were given a choice whether to enter an Accreditation and Quality Improvement Program prior to 30 June 2005 or to apply for immediate full accreditation. The purpose of the Accreditation and Quality Improvement Program is to allow agencies, which were not able to apply for full accreditation, to improve the quality of their OOHC over a period of time. Agencies are issued with a Quality Improvement Certificate and are required to provide a Self-Study Report yearly that demonstrates continuing improvement in the mandatory requirements and core standards, the critical standards and the significant standards.⁶¹⁶ Agencies wishing to remain in the Accreditation and Quality Improvement Program must submit evidence for all mandatory requirements and applicable core standards that have not been met.⁶¹⁷ These agencies must progressively achieve the standard that would entitle them to be accredited as a designated agency by 14 July 2013.
- 16.202 Of the 58 designated agencies, there are currently 21 designated agencies in the Accreditation and Quality Improvement Program, including DoCS and DADHC.⁶¹⁸
- 16.203 Case file audits are conducted to determine whether the agency fulfils its obligations under the Care Act and Regulations. If recommendations are made

⁶¹⁴ A 'licence' is often described as a 'permit to do business which could not be done without the licence' – *Judicial and Statutory Definitions of Words and Phrases*, Vol 5, St Paul, West Publishing, 1904:4138.

⁶¹⁵ Children's Guardian, *Annual Report 2007/08*, p.92.

⁶¹⁶ Children's Guardian, *Out-of-Home Care Accreditation and Quality Improvement Guide for Organisations*, 10 April 2007, p.20.

⁶¹⁷ *ibid.*, p.21.

⁶¹⁸ Office for Children, *Annual Report 2007/08*, p.117.

they must be implemented as a priority.⁶¹⁹ If the case file audits of agencies in the Accreditation and Quality Improvement Program show continued non-compliance or failure to address the recommendations, that agency may be required to apply for accreditation.⁶²⁰

- 16.204 The Children's Guardian has conducted an internal review of the OOHC accreditation and quality improvement system. This report identified the following issues:
- a. The requirement that all OOHC agencies be accredited is different from most other accreditation schemes. Generally, accreditation is not a pre-requisite to enter a particular market, while OOHC accreditation in NSW effectively operates as a form of licence.⁶²¹ As such, the accreditation scheme currently determines entry to the market based on criteria that are founded on optimum standards.
 - b. The OOHC Standards were developed for quality improvement purposes, not for regulation purposes.
 - c. Accreditation systems generally allow for accreditation to be granted where relatively minor performance issues are identified, with conditions imposed to direct further improvement. The system may operate to exclude providers from the market for minor matters that, under most other accreditation schemes, would be addressed within a performance improvement framework.
- 16.205 The report recommends that the *Children and Young Persons (Savings and Transitional) Regulation 2000* be amended to enable the Children's Guardian to accredit an applicant that substantially satisfies the criteria for accreditation, with conditions to be imposed to drive further necessary performance improvement within 12 months of accreditation.
- 16.206 Information provided or heard by the Inquiry indicated overall strong support for the role and functions of the Children's Guardian in providing a framework to improve OOHC policies, procedures, practices and services for children and young persons in OOHC in NSW. The proposed changes to the Accreditation and Quality Improvement Program proposed by the Children's Guardian would support a move to outcomes based performance indicators (where possible); place a stronger focus on performance, rather than conformity; lead to a reduction in the overlap and duplication of aspects of the OOHC Standards; and give a stronger recognition of agency innovation and alternative ways of meeting standards. The Children's Guardian informed the Inquiry:

Broadly speaking, it is to move the system from a pass/fail system into one that is focused on continuous quality

⁶¹⁹ Children's Guardian, *Out-of-Home Care Accreditation and Quality Improvement Guide for Organisations*, 10 April 2007, p.23.

⁶²⁰ *ibid.*, p.24.

⁶²¹ Children's Guardian, *Review of Out-of-Home Care Accreditation and Quality Improvement System and Processes*, October 2007, p.6.

*improvement. It is one that will allow for more flexibility and innovation by services. It will allow the Guardian to take into account other sources of information. At the moment it is a paper-based system. It is our intention that we would undertake site visits and talk to staff and look at requirements ourselves.*⁶²²

- 16.207 The Inquiry supports the recommendations of the internal review.
- 16.208 The Children's Guardian, in exercising the accreditation and monitoring functions may come across information that gives rise to concerns about a community services provider or about the welfare and well-being of a child or young person, or group of children or young persons in care.
- 16.209 In such instances, the Children's Guardian can refer such matters, or complaints received by that office, to the Ombudsman. Similarly where the Ombudsman has concerns about the complaints handling system of a designated agency or of a non-government adoption service provider, a report containing recommendations regarding its systems may be referred to the Children's Guardian and then taken into account in relation to that Office's accreditation role.⁶²³
- 16.210 The Inquiry notes that the Ombudsman and the Children's Guardian have discussed the appropriateness of recognising the Children's Guardian as a relevant agency under Schedule 1A of the *Ombudsman Act 1974* to enable the Ombudsman and Children's Guardian to enter into complaint referral and information sharing arrangements under Part 6 of that Act.
- 16.211 This would remove any uncertainty as to whether the *Care Act* or *Adoption Act 2000* may limit the Children's Guardian authority to pass on complaints information to the Ombudsman.
- 16.212 The Inquiry agrees that these amendments should be made.

OOHC casework by DoCS

- 16.213 One of the key areas of the DoCS Reform Package was to increase its capacity to allocate caseworkers to children and young persons. This package included the establishment of an additional 300 OOHC caseworker positions,⁶²⁴ 50 to work with High Needs Kids (known as intensive support services), a further 50 to assess, authorise, recruit, train and support carers for a period of 12 months, and the remaining 200 to work in generalist OOHC positions.

⁶²² Transcript: Public Forum, Oversight Agencies, 28 March 2008, p.29.

⁶²³ *Ombudsman Act 1974* s.43.

⁶²⁴ 150 under the original package and a further 150 announced in the 2006/07 budget.

- 16.214 When a child or young person becomes the subject of care proceedings, the role of the Child Protection Caseworker (CSC based) includes: assessing the protective intervention required to address the risks to the child or young person; identifying and organising an OOHC placement where required; identifying and assessing relative/kinship carers; and carrying out permanency planning case review and case management until final orders are in place. Once final orders with parental responsibility to the Minister are made, the case is transferred to an OOHC team or identified non-government OOHC service provider.⁶²⁵
- 16.215 The role of OOHC Caseworkers (CSC based) is to support decision making on issues about achieving permanency for the child or young person, to advise and support the Child Protection team to find a long term placement option, to negotiate the handover of case management from the Child Protection team if final orders exceed 12 months, to implement the case plan, to monitor and review it, and to carry out the tasks associated with leaving care.
- 16.216 The transfer of cases from the Child Protection team to the OOHC team is an area of practice still requiring improvement, according to the Ombudsman. Delays in case transfer can mean that required services are not put in place for children and young persons, or for their carers, in a timely manner thereby affecting outcomes.
- 16.217 There was evidence in submissions, case files and other information received by the Inquiry to suggest a lack of matching between the child or young person and the carer, a lack of communication between birth parents, carers, and children and young persons, and a lack of participation of children and young persons. Poor practice in this area leads to a range of problems including placement breakdown, poor outcomes for children and young persons in OOHC and difficulty in attracting and retaining carers.
- 16.218 Submissions, and the Inquiry's case file audit, identified that where DoCS Child Protection staff are attempting to find an OOHC placement for a child or young person there are often a series of inappropriate referrals and placements due to the focus on the crisis rather than on the quality of the placement. The shortage of carers also means that there are less options from which to select. DoCS OOHC staff often become involved in matters too late in the process to get placement matching right in every case.
- 16.219 Key issues raised particularly by non-government services providing placements for children and young persons in OOHC included:
- a. the lack of personal information provided by DoCS caseworkers about a child or young person when placed and the timeliness of this information to ensure their needs and matching with the carer occurred

⁶²⁵ DoCS, *Caseworker policy manual child protection and out-of-home care Draft*, March 2008, p.47.

- b. the failure to provide critical information and documentation of relevance for children and young persons such as their birth certificates, Medicare cards, health status, allergies and the like
 - c. lack of review processes by DoCS as the case manager.
- 16.220 DoCS has also recognised these deficiencies and has informed the Inquiry that it is revising casework practice on care plan reviews to ensure that they specify the issues that should be covered in the review and documented on the file.
- 16.221 DoCS has also commenced a project to identify the information that should be provided to carers at the time a child is placed with them, including information of the kind outlined earlier in this chapter.
- 16.222 Findings from the Ombudsman's Review of Children under five years states that there have been improvements since 2002 in the documentation in care plans of how permanency would be achieved. However, concerns still exist concerning the relationship of the DoCS Child Protection team, the OOHC team and in relation to the handover that is necessary to give effect to these plans.⁶²⁶
- 16.223 Many children and young persons are in care for short periods before being restored to their families. A number of submissions to the Inquiry identified that there is, at times, inadequate preparation, assessment or planning, as well as poor support for the family following the child's return home, where restoration has been identified as a goal for that particular child, or young person. This at times has resulted in the child or young person being returned to OOHC, often repeatedly.
- 16.224 Statistics provided by DoCS indicate that 29.4 per cent (1,366) of children and young persons entering care in 2006/07 had previously been in care.⁶²⁷ Of these children and young persons, they had an average of between 8-26 previous child protection reports. Further, over half of the 13-17 year olds who were re-entering care had on average been in care three times previously with an average of 1,390 days in care. This suggests that the process for assessing the needs of these children and young persons, as well as the capacity of the family to provide adequate and safe care, and then putting in place appropriate supports to enable effective restoration may not have been adequate, or alternatively that the decision concerning restoration may not have been comprehensive. The circumstances of the family may also have changed, and may not been sufficiently taken into account.
- 16.225 There were a number of issues raised concerning the need for concurrent planning for children and young persons entering OOHC. Often when children or young persons are removed from their families they can have multiple placements while the matter is before the court. Wesley Community Services advised the Inquiry:

⁶²⁶ NSW Ombudsman, *Group Review Report: Children under five*, November 2007, pp.14-18.

⁶²⁷ DoCS, *Analysis of children who entered OOHC in 2006/07*, June 2008.

Children come into the care system when they're removed from their families. I believe that we need to start looking for long-term placements immediately. At the moment, various CSCs will not do that, because they say that it's pre-empting the decision of the Court.⁶²⁸

- 16.226 Unfortunately, DoCS does not keep data on the number of children and young persons restored to their families and their outcomes. Thus the Inquiry has largely relied on information from other reviews as well as submissions.
- 16.227 The Inquiry is of the view that the OOHC Caseworker/NGO provider should begin working formally with the child or young person at the time of entry into care to ensure that placement matching and associated functions are progressed. The Child Protection Caseworker should retain case management and responsibility for the development of the care/case plan in conjunction with OOHC Caseworker/NGO/carer/natural family. The discretion permitted by the current DoCS procedure as to whether consultation with the OOHC Caseworker/OOHC provider occurs, should be strengthened to a requirement, where it has been determined there is not a realistic possibility of restoration.

Types of placement and support options for children and young persons in OOHC

- 16.228 There are a range of service models that have been established, or that are being established for children and young persons in OOHC in NSW. OOHC service models include those relating to relative/kinship care, general and intensive foster care, residential care, wraparound services including respite care, supported independent living services, leaving and after care support, and adoption.
- 16.229 Many of these service models are in the process of being established as a result of the DoCS OOHC expression of interest process that occurred in 2007, and as such are not yet available as options for all children and young persons across the State.
- 16.230 There are presently 3,225 relative/kinship carers managed by DoCS, and 7,290 children and young persons were in this type of care as at 31 March 2008.
- 16.231 As at March 2008 5,289 children and young persons were in general foster care. DoCS has approximately 2,100 active carers, which is an increase of 400 on 2004 figures.
- 16.232 There are presently 105 intensive foster carer placements across the State.

⁶²⁸ Transcript: Public Forum, OOHC, 29 February 2008, p.5.

- 16.233 Residential care is provided to a small number of children and young persons who have challenging behaviours and high support needs,⁶²⁹ and continues for as long as is required. This type of care is generally only suitable for those aged 12 years and above. As at March 2008, 2.4 per cent (344) of children and young persons in OOHC were in residential care.
- 16.234 Supported independent living services are provided for young persons with low to moderate support needs who are in transition to independent living. The client group is young persons aged 16-18 years in the parental responsibility of the Minister. As at March 2008, 238 young persons were in either supported accommodation or independent living.
- 16.235 Family preservation services are primarily designed to maintain children and young persons aged from 0-15 years with their family and/or extended family, who are engaged sufficiently with appropriate support networks to prevent them from entering OOHC.
- 16.236 'Wraparound support services' are being introduced by DoCS. These services include respite care, psychological and counselling services, (including behaviour management support) specialist medical and allied health services and educational support services which focus on improving the social, emotional, educational and physical health needs of those in OOHC.⁶³⁰
- 16.237 Information provided to the Inquiry indicates that for a number of children and young persons placement stability remains a significant issue. For children and young persons in OOHC multiple placements, changes in schools, neighbourhoods and communities, irregular contact with their families, loss of friends and multiple changes of workers undermine continuity of care, stability and sense of their security and identity.⁶³¹ The present lack of placement options for children and young persons within their own communities reported to the Inquiry means that some are located in other parts of the State away from local networks and supports. A young woman informed the Inquiry:

*I stayed with some families, rehabs, and I was locked up quite a few times, so a lot of different environments. Because I moved around so much it meant that every time I moved my file would get transferred which meant that sometimes I wouldn't have a DoCS officer for months at a time.*⁶³²

- 16.238 A young man informed the Inquiry:

⁶²⁹ These children and young persons are likely to fall into the category of High Need Kids.

⁶³⁰ DoCS, *Out of home care service model: Wraparound support services*, April 2007, p.4.

⁶³¹ J Cashmore and M Paxman, "Longitudinal Study of Wards leaving Care: four to five years on," *Social Policy Research Centre*, University of New South Wales, 2007, p.7.

⁶³² Transcript: Inquiry meeting with representatives of CREATE Foundation, 2 April 2008, pp.6, 15-20.

*I have been in care 13 years. I have been in and out of 38 families within that 13, 14 years.*⁶³³

- 16.239 A small number of children and young persons in OOHC exhibit extremely challenging and risky behaviours, to themselves and to others. These children and young persons typically have a history of multiple placements, complex or high level casework and support needs and/or challenging behaviours. While these 'High Needs Kids' represented approximately four per cent of those in care (522), in 2006/07, they accounted for around 23 per cent of OOHC budget for contracted care, allowances and extra financial support payments.
- 16.240 In June/July 2002 there were 240 High Needs Kids being cared for through individualised funding arrangements. This number represented 2.6 per cent of the then 9,273 children and young persons in the OOHC system. The management of this high needs group was subject to significant criticism from oversight agencies and other non-government services as many children and young persons were in these placements (often outside their area of origin and thus away from their normal support networks) through Individual Client Agreements, which were both costly, short term, lacked a focus on permanency planning and were not necessarily achieving good outcomes.
- 16.241 In 2002 the Ombudsman reviewed a number of these individual funding arrangements⁶³⁴ and identified several systemic weaknesses including:
- a. the limited capacity of non-government program funded agencies to provide services for children and young persons with high or complex needs, for reasons including negative experiences with contracting in the past, a lack of growth funds in the program and an out of date funding formula not reflective of the real costs of service provision
 - b. the absence of a policy framework for residential care
 - c. the lack of provision of any therapeutic models of care in NSW, whether through residential or foster care/professional care placements.
- 16.242 Most of the recommendations emanating from this report have since been implemented by DoCS.
- 16.243 As noted earlier, data on children and young persons entering care show that older members of this group were more likely to have had more OOHC episodes and to have stayed longer in OOHC than those who were younger. This together with a significant child protection history suggests that they become increasingly more complex and require more intensive supports.
- 16.244 The Inquiry accordingly supports DoCS' direction in providing a greater diversity in types of placements in its current funding reform process including program funding for High Needs Kids. More needs to be done however on reducing

⁶³³ *ibid.*, pp. 7-8, 20.

⁶³⁴ NSW Ombudsman, *Inquiry into individual funding arrangements in out-of-home care*, June 2003, p.iii.

unnecessary multiple placements for this group through improved assessment and matching of children and young persons and carers, as well as supporting foster and kinship carers, especially in relation to managing challenging behaviours.

Aboriginal children and young persons in OOHC

- 16.245 Not only are Aboriginal children and young persons more likely to be placed in OOHC compared with non-Aboriginal children, there is also a shortage of culturally appropriate placements to accommodate these children and young persons.
- 16.246 The Inquiry was told that a lack of safe accommodation for children and young persons is resulting in an increase in the number of Aboriginal and non-Aboriginal children and young persons being placed on remand in detention centres. There was support for the view that a range of safe accommodation models for this group should be available in NSW. While some of the models suggested to the Inquiry are controversial, they included:
- a. boarding school models, including schools managed by small community controlled organisations (not large residentials) to deal with both OOHC and entrenched community issues
 - b. temporary group home style care for Aboriginal children and young persons, incorporating intensive work with the child or young person and his or her family to enable transition back into the care of their family, such as the Safe Families Program in Alice Springs (refer to Chapter 8 for more details).
 - c. Aboriginal community controlled and supported foster and kinship care models, which incorporate fluid care arrangements to facilitate placement, retention and fulfilment of the need for proper cultural instruction of Aboriginal children and young persons.
- 16.247 DoCS informed the Inquiry that a project is currently underway with Juvenile Justice, DADHC, Justice Health, DoCS and Police to examine the issue of a lack of safe accommodation for children and young persons to reduce numbers remanded in juvenile detention. The new approach will be trialled in Parramatta Court.
- 16.248 The AIFS and SNAICC has noted that there is a diverse and large range of programs and interventions that have been designed to tackle this problem.⁶³⁵
- 16.249 In 2005, the AIFS commenced research into the needs of Aboriginal children in OOHC. SNAICC and AIFS then worked together to identify and profile

⁶³⁵ J Higgins and N Butler, "Characteristics of Promising Indigenous Out-Of-Home-Care Programs and Services. Promising Practices in Out-Of-Home Care for Aboriginal and Torres Strait Islander Carers, Children and Young People," Booklet 1, *Australian Institute of Family Studies*, 2007, p.3.

promising programs and services in the OOHC sector for Aboriginal children. They reported that:

*While a few of the profiled programs had been externally evaluated, the majority had not, and the term 'promising' applies to the collection of programs profiled for this project.*⁶³⁶

- 16.250 SNAICC and AIFS identified eleven promising tools and programs, three of which are found in NSW: *Step by Step* Aboriginal assessment tool – (ACWA, in collaboration with the DoCS), *Aboriginal Carers Network* - Carer support group network (AbSec) and *Marungbai* – Leaving and after care service for Indigenous young people (Great Lakes Manning Aboriginal Children's Services, Taree).
- 16.251 The research found that the common characteristics of these projects were as follows:
- a. establishing effective relationships with government departments and NGOs
 - b. developing strategies for seeking project funding approval
 - c. building the profile of the organisation or program
 - d. identifying the organisation's core business
 - e. establishing a collaborative staffing structure so that staff feel empowered
 - f. offering a comprehensive service
 - g. empowering the community, carers and young persons.⁶³⁷
- 16.252 Successful organisations with promising practices for Aboriginal children and young person in OOHC were seen to have had the community on board. They had spent time and effort in consulting and involving community members so that the local community had a sense of ownership over the program. Where this occurred, the local community tended to be more satisfied with the program's services.
- 16.253 In terms of the management styles of the successful organisations that were profiled in the research, all had strong leadership, were clear on core business, and operated within the boundaries of that core business. Each of these organisations had a collaborative teamwork approach with staff within a flat organisational structure.⁶³⁸
- 16.254 Successful organisations were also characterised by strong relationships with external stakeholders, and a respected and influential profile in the community; and each organisation undertook a role in educating the community and other

⁶³⁶ *ibid.*, p.4.

⁶³⁷ *ibid.*, pp.7-18.

⁶³⁸ *ibid.*, p.17.

organisations about more culturally appropriate ways of addressing child protection and OOHC issues for Aboriginal children and young persons.⁶³⁹

- 16.255 In addition, this Inquiry notes the Ombudsman's submission that the current capacity of the Aboriginal OOHC sector is limited, with these services currently only able to place around 200 of the Aboriginal children and young persons in OOHC. The Inquiry supports further consideration of the Ombudsman's suggestion that a review take place of AbSec's current capacity with the view to considering the role it might play in the future through expanding its activities in this area. This is captured in the recommendation made in Chapter 8 concerning the Lakidjeka program.

Djarragun Foster Care Program

- 16.256 The Inquiry heard that the Cape York Institute and Djarragun College have developed a proposal for a school based model of care for children from Cape York, Queensland. The model was developed in response to a lack of Aboriginal foster care in Queensland.
- 16.257 Djarragun College is an Indigenous school located in Gordonvale, Queensland, providing early childhood education for children aged 3-4 years through to post secondary vocational education to students from Cairns, Cape York, Yarrabah and the Torres Strait Islands. School boarding facilities are provided on site for students from Year 8 through to Year 12. Emergency boarding is also provided to primary age students who are not able to live at home. The school has been operating since 2001.⁶⁴⁰
- 16.258 The program envisaged the establishment of a purpose built facility on a separate campus in partnership with the Queensland Department of Child Safety to provide care for 40-50 Cape York children aged 9-12 years. The facility would act in a manner similar to a primary boarding school but with more intensive support provided. Responsibility for the care of each child would be shared between the school and permanently assigned respite parents in a family based environment. The model would cater for children subject to child protection orders and also children accepted through a voluntary referral mechanism.⁶⁴¹
- 16.259 Features of the model include:
- a. delivery of high quality education with small class sizes and individual education plans
 - b. intensive on-campus support including counselling and medical services delivered within a model of 'rigorous health management', which includes

⁶³⁹ *ibid.*

⁶⁴⁰ Cape York Institute and Djarragun College Proposal, April 2008, p.23, provided by Secretariat of National Aboriginal and Islander Child Care.

⁶⁴¹ *ibid.*

- an initial health assessment and access to regular ongoing consultation and specialist care as required
- c. maintenance of a strong connection with culture through placement in an indigenous environment in the school, involvement of family where appropriate with on-site accommodation available, homeland visits for supervised and structured cultural activities, and video and teleconferencing facilities to enable regular contact between children and family members
 - d. 24 hour support through consistent boarding parents for school based care with a ratio of at least one carer to 8 children at all times, and permanent 'respite parents' specifically recruited and making a long term commitment to a particular child, providing for care outside the academic year and for regular weekends visits, and participating in the child's school life through academic, cultural and sporting events.⁶⁴²
- 16.260 The exit program would usually involve transition into the secondary boarding program at Djarragun College.⁶⁴³
- 16.261 In July 2008, the Commonwealth Government committed \$2 million to the project.⁶⁴⁴ In August 2008, ABC media reports quoted the Queensland Minister for Child Safety as supporting the project in principle.⁶⁴⁵ The proposed model appears to be consistent with a number of the principles for promising practices identified in the literature.
- 16.262 The Inquiry agrees that innovative measures are needed for Aboriginal children and young persons to remain connected with their culture while being safe, cared for and educated. Recommendations are made in Chapter 18 on this matter.

Recruitment, training, support and retention of carers

- 16.263 Recruiting, training, supporting and thus retaining foster carers was a key issue before the Inquiry.
- 16.264 Continuity of key relationships with caseworkers is integral to effective intervention and support for children and young persons and their carers. Equally important is the skill level of the caseworker in being able to build a relationship with children and young persons and their carers. Information provided by DoCS indicates that just over one half of children and young

⁶⁴² *ibid.*, pp.8-12.

⁶⁴³ *ibid.*, pp.4-12.

⁶⁴⁴ Media Release: Minister for Department of Families, Housing, Community Services and Indigenous Affairs, 22 July 2008, www.fahcsia.gov.au.

⁶⁴⁵ *State funding for Indigenous foster care program still in doubt*, 12 August 2008, www.abc.net.au.

persons in DoCS OOHC have an allocated caseworker, which ultimately impacts on its ability to support children and young persons and their carers.

- 16.265 Further while the number of those in foster care has increased by six per cent in 2007, the number in DoCS foster care has increased by 12 per cent in 2007, resulting in an increase in the proportion of foster care placements effected through DoCS.⁶⁴⁶
- 16.266 The Inquiry was provided with detail of a raft of changes that DoCS has implemented or proposes to implement, that are designed to increase the numbers of carers and to improve their quality and support.
- 16.267 DoCS has introduced dedicated positions within each of the seven regions, to work in Carer Support teams. These positions are primarily focused on recruiting, training and providing individual support to carers, primarily new non-related authorised carers.
- 16.268 In August 2006, DoCS introduced a centralised telephone line for statewide foster care inquiries, which operates beyond the standard hours of a CSC. However, a recent review undertaken by DoCS showed that 77 per cent of applicants authorised in 2007 went directly to the CSC rather than the centralised telephone line.
- 16.269 Advisory Committees have been established and DoCS intends to provide funds for the provision of peer support services for foster carers in NSW. Standard health care records have been distributed to carers and they also receive newsletters, which are intended to keep them informed of any relevant developments and of any functions which they might wish to attend.
- 16.270 Some of these strategies are reasonably new and it would not be expected that their value would yet be felt by carers. However, the litany of problems reported to the Inquiry suggests that much more needs to be done, or that what has been done needs to be better explained and brought to the attention of carers. Three broad issues, in particular, were brought to notice.
- 16.271 First, DoCS and others noted that the current recruitment, assessment and authorisation processes were cumbersome and needed to be streamlined. DoCS said:

*Delays can be due to DoCS internal processes, screening/probity check timeframes, as well as applicant delays. The current authorisation process is also costly in terms of time and resources because there is a requirement that two trained assessors should be involved in the 'Step by Step' assessment process.*⁶⁴⁷

⁶⁴⁶ DoCS, *Business Process Review: authorisation of foster carers*, March 2008.

⁶⁴⁷ Submission: DoCS, OOHC, p.26.

- 16.272 In a recent review DoCS found that:⁶⁴⁸
- a. only four per cent of applicants who express an interest in foster care are finally authorised
 - b. the average time to complete the authorisation process is 43 weeks
 - c. there is no single management information system to monitor and control the process
 - d. the authorisation process is overly staff intensive, repetitive and confusing
 - e. the current competency based assessment of carers used by DoCS is not well understood by its staff.
- 16.273 Aboriginal carers raised related but different issues. AbSec informed the Inquiry that:
- ... agencies are able to better recruit foster carers. DoCS can't recruit foster carers because they have still got a bad name in the Aboriginal community. You are working for welfare. If you are a carer for DoCS, the Aboriginal community look down on you - "What are you doing working for the welfare?" When they work for an agency, they have not got that stigma.*⁶⁴⁹
- 16.274 Higgins and Butler examined a number of programs that successfully recruited, assessed and trained Aboriginal carers as part of the Promising Practices in OOHC series. They concluded that recruitment of Aboriginal carers works best when: training and support programs provide comprehensive, supportive services to carers; recruitment is conducted by Aboriginal persons through Aboriginal organisations; recruiters use community generated opportunities to reach potential carers; and Aboriginal carers are available to speak to prospective foster carers.⁶⁵⁰
- 16.275 The Ombudsman also reported that word of mouth was arguably the most effective strategy for recruiting Aboriginal carers, and for it to be effective, carers needed to feel well supported and to strongly endorse fostering to others in their community.
- 16.276 Higgins and Butler found that effective assessment and training of Aboriginal carers occurred when assessment and training programs were carer centred and responsive. The most effective assessment tools used a relaxed, conversational style of gathering information, and incorporated community knowledge about a family when assessing a potential carer. Successful training

⁶⁴⁸ DoCS, *Business Process Review: authorisation of foster carers*, March 2008.

⁶⁴⁹ Transcript: Inquiry meeting with representatives of the Aboriginal Child, Family and Community Care State Secretariat, 18 December 2007 p.14.

⁶⁵⁰ J Higgins and N Butler, "Characteristics of Promising Indigenous Out-Of-Home-Care Programs and Services. Promising Practices in Out-Of-Home-Care for Aboriginal and Torres Strait Islander Carers" Booklet 2, *Australian Institute of Family Studies*, 2007, p.36.

programs valued the input of carers and acknowledged the skills and knowledge that carers brought to the caring role.⁶⁵¹

- 16.277 Successful support of Aboriginal carers was found to involve advocacy on behalf of carers when dealing with child welfare agencies; the provision of access to needs based, comprehensive and responsive support, enabled knowledge sharing and skills building, and opportunities for carer unity through support group meetings or community events.⁶⁵²
- 16.278 A recent report by the Ombudsman *Supporting the Carers of Aboriginal Children*, while based on a small sample of 100 carers, found that NSW carers of Aboriginal children and young persons identified a need for regular and appropriate support from caseworkers, improved access to quality training, consistent consultation in compliance with the principles in the Care Act, better cultural support planning and assessment and intervention for the health and education needs of Aboriginal children in OOHC.⁶⁵³
- 16.279 The consistent statements of the need for further support are at times not specific about the actions required. However, the 2004 study of 450 carers in NSW by McHugh et al found:

*All stakeholders viewed the provision of casework to children as a critical component of support for carers. The support carers want from caseworkers is casework itself, stated the NSW FCA [Foster Care Association] spokesperson. They want caseworkers to work with carers and to build up ongoing relationships with children to bring about the best outcomes.*⁶⁵⁴

- 16.280 The Inquiry has three key observations to make about carer recruitment and support. First, DoCS needs to change its processes to reduce the time taken to improve the quality of its screening at each stage, including the entry point, and to train staff in any new processes. DoCS shares this view and is currently progressing the move to an assessment centre approach on similar lines to that employed for caseworker recruitment. If viable in the short term, pending transfer of most OOHC service provisions to the non-government sector (discussed later in this chapter), this strategy should continue. DoCS will also require a short term emergency carer capacity to deal with children and young persons entering temporary OOHC time.
- 16.281 Secondly, it is clear to the Inquiry that relative/kinship carers have received less training and support than other authorised foster carers. DoCS accepted that:

⁶⁵¹ *ibid.*, p.38.

⁶⁵² J Higgins and N Butler, "Comprehensive support for Indigenous carers and young persons. Promising Practices in Out-Of-Home-Care for Aboriginal and Torres Strait Islander Carers," Booklet 3, *Australian Institute of Family Studies*, 2007, p.6.

⁶⁵³ NSW Ombudsman, *Supporting the Carers of Aboriginal Children*, 2008.

⁶⁵⁴ M McHugh, J McNab, C Smyth, J Chalmers, P Siminski and P Saunders, 2004, *op. cit.*, p.76.

*the level of assessment, training and support provided to statutory relative/kinship carers should be broadly at an equivalent level to that provided to un-related authorised foster carers, although it is acknowledged that there may be points of difference between the two carer groups. For example, although the training needs of both groups may have many similarities, relative/kinship carers may require additional input and support around managing family contact issues.*⁶⁵⁵

16.282 Thirdly, the Inquiry is concerned that the communication with and engagement of carers by DoCS caseworkers and their direct line managers do not always reflect DoCS policies and procedures. Examples of problems which were raised with the Inquiry on numerous occasions, included:

- a. poor communication between caseworkers, casework managers and carers
- b. non response to calls or letters
- c. information not being provided to carers about children or young persons in their care including a failure to provide, or a delay in the provision of, essential documents such as Medicare cards, or the Blue Book
- d. non engagement of carers in case conferences and failure to respect their views about children and young persons in their care
- e. months taken to receive payments or approvals for expenses incurred for the child or young person in their care, including the cutting off of allowances where the CSC had overlooked the need for an annual review
- f. failure to allocate a caseworker, or to maintain a continuity in the allocated casework
- g. failure to provide respite.

16.283 A number of OOHC agencies also identified problems in getting DoCS to acknowledge and listen to carers. The CEO of Barnardos informed the Inquiry:

*My experience is my agency has to very strongly advocate to have either the agency's point of view heard or, most particularly, the carer's point of view heard and their experience acknowledged.*⁶⁵⁶

16.284 In contrast, the Ombudsman's 2007 review of 49 children in OOHC under five years found that 75 per cent of all carers, even those without an allocated worker, said they felt well supported by DoCS in meeting the identified needs of the children in their care. A number of these carers were very positive about the support they received from carer support caseworkers.⁶⁵⁷

⁶⁵⁵ Submission: DoCS, OOHC, p.28.

⁶⁵⁶ Transcript: Public Forum, OOHC, 29 February 2008, Louise Voigt, p.12.

⁶⁵⁷ NSW Ombudsman, *Group Review Report: Children Under Five*, November 2007, pp.7-27.

- 16.285 DoCS acknowledged that its relationship with carers required improvement:

*The relationship between DoCS and some carers has been difficult. There are two elements. The first is resources. There are simply not enough DoCS' OOHC caseworkers to provide a satisfactory level of service to carers and children. The second is culture, with the Foster Care Association suggesting that DoCS' caseworkers have a poor attitude to carers.*⁶⁵⁸

- 16.286 Given the increasing numbers of children and young persons in OOHC as well as their placement with relatives or kin, supporting these carers is essential. DoCS cannot do it with its current resources. The recommendations made at the end of this chapter in relation to a gradual transition to NGOs being responsible for more, and ultimately most, children and young persons in OOHC should address this issue in the long term.
- 16.287 Further research on the needs of relative/kinship carers would be useful to identify the support they need and to reduce placement breakdowns caused by any systemic neglect of carers.

Case Management

- 16.288 Case management is a process involving assessment, planning, implementation, monitoring and review to strengthen families and decrease risks to children and young persons and to achieve identified case plan goals.⁶⁵⁹ Case management is meant to ensure that resources and services are mobilised, and coordinated to meet the needs of a child or young person entering and in OOHC.

Children's Guardian audit

- 16.289 A recent case file audit undertaken by the Children's Guardian identified significant differences between the case management practices of DoCS and non-government organisations, and found that children and young persons in non-government agency care were likely to benefit from the more informed and comprehensive case support provided by these agencies, than was the case for children and young persons in DoCS care.

Non-government agencies with case management responsibility were more likely to have case conferences convened to support case planning and review, consider contact arrangements, invite the child or young person and their mother to attend case reviews, have mental health reports and review behaviour management and the use of psychotropic

⁶⁵⁸ Information provided by DoCS to Government, March 2008.

⁶⁵⁹ DoCS, *Case Management Policy*.

*medication, and commenced preparation for leaving care. They were also more likely to identify timeframes for reviews and the completion of tasks, and stipulate the responsibilities of each person or agency.*⁶⁶⁰

16.290 The results are not particularly surprising, although unsatisfactory. The reality is that the additional caseworkers employed by DoCS under the Reform Package, were faced with a 58.2 per cent increase in the numbers of children and young persons in OOHC by 30 June 2008. As a consequence DoCS data show that just over half of the children and young persons in DoCS OOHC placements had an allocated caseworker. Of these, 72.4 per cent in DoCS statutory care placements and 33.7 per cent in DoCS supported care had an allocated caseworker.

16.291 The caseloads for NGOs are about 1:10, with an upper limit of 1:12, compared with 1:19 for DoCS. It is also the case that DoCS as the 'provider of last resort,' cannot turn children and young persons away even if it will provide sub-optimal services.

16.292 While not in response to these findings but of relevance to them, DoCS informed the Inquiry and Cabinet that:

*the high volume, demanding nature of the work currently means that DoCS casework effort is primarily directed towards responding to crisis. As a result all children and young persons in care are not able to receive the comprehensive case management required,*⁶⁶¹

and

*for many children in OOHC DoCS is not able to meet even the most basic requirements of allocating a caseworker and conducting an annual review of the placement.*⁶⁶²

16.293 Given the findings of the Children's Guardian and faced with DoCS data, the Inquiry requested the Children's Guardian to undertake an analysis of the DoCS allocated and unallocated cases examined in her audit. The purpose of the analysis was to examine whether the existing audit findings, in relation to DoCS statutory care cases, were affected by the allocation status of the cases in the sample.

16.294 The results of that analysis showed that of the 1,356 DoCS case files audited by the Children's Guardian, 76 per cent were allocated. Further, while allocated files were between twice and three times as likely to have a current plan or

⁶⁶⁰ Submission: Children's Guardian, p.39

⁶⁶¹ Submission: DoCS, OOHC, p.8.

⁶⁶² Information provided by DoCS to Government, March 2008.

review, than unallocated or 'resubmit' files, the allocated files did not meet the standard set by the audit of 80 per cent compliance with the OOHC Standards.

- 16.295 Further, compliance levels of allocated files progressively declined across the age groups, indicating that young children were being prioritised over adolescents, a similar finding to the April 2008 report, *Australia's Homeless Youth: A Report of the National Youth Commission Inquiry into Youth Homelessness*. Similarly, preparation for leaving care for those aged 15 years and over was non-compliant across all allocation categories, although allocated foster care files were more likely to have information about leaving care when compared with relative/kinship carers.
- 16.296 Just over 55 per cent of all allocated files showed that formally constituted case conferences had occurred. DoCS allocated files, however, reached compliance levels of over 80 per cent for inviting carers and significant others to case conferences.
- 16.297 In relation to Aboriginal Placement Principles, all unallocated files documented the explanation for placements while only six in ten allocated files contained this information.
- 16.298 The Inquiry was surprised that so many of DoCS' cases were allocated in the audit. It was not consistent with the average number allocated, although data provided by DoCS suggest that the allocation rate for those in statutory OOHC is significantly higher than those in supported OOHC. However, when one considers the ratio of caseworkers to children and young persons in OOHC, some of the disparity in the quality of casework with NGOs may be explained.
- 16.299 As at December 2007, the notional average DoCS caseworker caseload was around 26 when caseworker position vacancies are taken into account. Whilst there is no universally accepted formula for calculating caseload, on average, the literature offers support for a caseload of around 15 OOHC cases per worker.⁶⁶³ Research evidence broadly identifies a recommended OOHC caseload range of 12-20 'standard/low need' cases/children per caseworker and five to eight 'intensive/high need' cases/children per caseworker at any given time. Actual caseloads at different government and non-government organisations range from 17-32 cases.
- 16.300 The audit concludes with the Children's Guardian view that serious consideration should be given to gradually transferring the case management of a larger proportion of the OOHC cases to the non-government sector.

⁶⁶³ Submission: DoCS, OOHC, p.18.

Who should be responsible for children in OOHC?

Introduction

- 16.301 There are significant debates nationally and internationally about whether the state or non-government services should primarily deliver OOHC services. Currently, different jurisdictions in the Australia have different approaches. In Queensland, South Australia and Victoria, the department is a regulator, funder and provider. In Victoria, the government case manages a very small percentage of children and young persons, and in the other two states mentioned, the government is responsible for fewer than 50 per cent of children and young persons in OOHC.
- 16.302 The ACT is the only jurisdiction where the government is not an OOHC provider. The ACT department funds OOHC services and monitors these through funding agreements. In Tasmania, the Northern Territory and Western Australia, the department provides OOHC and funds non-government services, monitored through funding or service agreements. In Tasmania and the Northern Territory, contracting of non-government services is limited.
- 16.303 There have been a number of reviews in NSW of OOHC such as the 1992 Ministerial review of *Substitute Care Services in NSW* (the Usher Review) which recommended the gradual transfer of all OOHC services to NGOs, with DoCS only providing services “where a contract with a non-government agency is impossible.”⁶⁶⁴ This was not adopted by the Government at the time because previous DoCS attempts at contracting had resulted in poor performance outcomes, costs were seen to be higher in the non-government sector and concerns were held by the government that non-government services would not take the more difficult to place children. Since that time there have been changes in the contracting arrangements including performance management, and a greater experience in the provision of OOHC by the NGO sector, as well as the introduction of accreditation.

Options

- 16.304 There are a number of possible arrangements for the allocation of decision making responsibility for children and young persons in OOHC.

Scenario A

- 16.305 DoCS has parental responsibility and is responsible for placement and case management and there is no involvement of a non-government agency, other than the provision of identified support services. This arrangement is presently

⁶⁶⁴ NSW Ministerial Review Committee, *A Report to the Minister for Health and Community Services from the committee established to review Substitute Care Services in NSW (Usher Review)*, January 1992.

the most common for children and young persons in DoCS foster and relative care.

Scenario B

- 16.306 DoCS has parental responsibility and is responsible for case management. The non-government agency provides a placement only service with responsibility for ensuring the day to day care by an authorised carer.

Scenario C

- 16.307 DoCS has parental responsibility and case management and the non-government organisation provides placement and casework services.

Scenario D

- 16.308 DoCS retains parental responsibility and a non-government organisation is responsible for case management, placement and casework services. Under this scenario, the agency has responsibility for assessment, case planning, implementation, review, transition and case closure as well as the placement of a child with an authorised carer, or the decision to remove a child or young person from a carer. DoCS retains the key decision making role in restoration decisions, developing and approving the initial care plan and has a role in implementation. DoCS and the agency have joint responsibility for decisions to apply to change court orders and for providing after care assistance. This arrangement applies to only a few of the children and young persons currently in OOHC.

Scenario E

- 16.309 DoCS delegates parental responsibility and transfers case management, placement and casework services to a non-government organisation (while retaining residual powers). Barnardo is the only agency where this has occurred. DoCS and the NGO are jointly responsible for the initial care plan, court applications, records and providing after care assistance. Approximately 300 children and young persons are currently cared for in this way.

Scenario F

- 16.310 The Children's Court assigns parental responsibility to an NGO which is responsible for case management. This matter is dealt with in Chapter 9 where reasons are given for not preferring this option.
- 16.311 DoCS' policy is that case management **will** transfer from DoCS to a non-government agency in circumstances where:
- a. DoCS child protection action is complete and DoCS is not undertaking court action
 - b. final Children's Court orders for sole or shared parental responsibility to the Minister are in place

- c. final Children's Court orders for restoration are in place
 - d. other long term orders such as a supervision order, which places the child or young person under the supervision of the Director-General, are in place. In such cases, prior to the case being transferred, DoCS is to negotiate and agree with the service provider, the initial case plan for the child or young person.
- 16.312 Also part of DoCS' current policy, case management **will not** transfer in cases where the child or young person:
- a. has significantly complex needs
 - b. is assessed as at high risk of immediate or serious harm
 - c. case management requires high level collaboration from other government agencies that is unable to be achieved by a non-government organisation.
- 16.313 Further, agencies with case management are required to:
- a. maintain current and comprehensive essential information about children and young persons to inform decision making
 - b. regularly review placements in accordance with s.150 of the Care Act
 - c. review all behaviour management plans and use of psychotropic medication
 - d. develop plans and conduct reviews according to guidelines provided by the Children's Guardian.⁶⁶⁵
- 16.314 The Inquiry received many submissions addressing the responsibility for children and young persons in OOHC. Most of the non-government service providers' submissions argued that DoCS should not be a provider of OOHC at all. By this, the Inquiry understood that Scenario D or E set out above were preferred. DoCS, on the other hand, was in favour of a mixed service system in which DoCS and non-government services shared the provision of OOHC, in which case management would generally be undertaken by the NGOs, except for a small number of High Needs Kids.
- 16.315 The difference between these positions essentially lies in the proportion of children and young persons who would be cared for by the State or by NGOs respectively. The State, in the form of the Department, prefers it to be mixed, whereas the NGOs want the greater share of the work.
- 16.316 A factor which should not be overlooked is s.141(1) of the Care Act which provides that DoCS is obliged to take responsibility as a 'provider of last resort' where a service provider does not meet the needs of a child or young person or withdraws from service provision for other reasons.

⁶⁶⁵ DoCS, *Case Management Policy*.

Arguments in favour of transferring all or much of OOHC responsibility to the non-government sector

- 16.317 There is an inherent conflict in DoCS being both a provider and a funder of OOHC services.
- 16.318 Casework for children and young persons both entering and in OOHC who are under the management of DoCS can often be neglected due to prioritisation of crisis driven work.

Forensically driven systems are so preoccupied with managing their problematic 'front ends' that precious resources: financial, human and intellectual, are diverted away from the development and maintenance of effective systems of care.⁶⁶⁶

- 16.319 This concurs with feedback provided by DoCS staff when the Inquiry met with CSCs. It is also consistent with the findings of the audit recently conducted by the Children's Guardian.
- 16.320 A transfer of much of the OOHC responsibilities to the non-government sector is not inconsistent with preserving a short term role for DoCS in the delivery of crisis placements. This concurs with findings of the Usher Review which stated:

...that the appropriate, long term role for the Department of Community Services should be to assess and review service needs, negotiate contracts with service providers, and to monitor standards, and to ensure programme and financial accountability on the part of service providers. The Department should not continue to operate as a major substitute care provider. Such activity by the state government seriously compromises its proper assessment, contracting, review and monitoring roles in relation to the provision of services for children who are in need of substitute care services.⁶⁶⁷

- 16.321 NGOs have smaller and less formalised management structures and often have greater capacity to implement reforms and innovative service models more quickly than government agencies.
- 16.322 Of significance to many who made submissions was the experience that, in some cases, clients do not want to deal with a government agency, but are happy to deal with an NGO, which is associated in their minds with the broader community and is seen as a non-judgemental agency that is directed towards providing assistance to those in need.

⁶⁶⁶ Submission: Australian Association of Social Workers, p.29.

⁶⁶⁷ NSW Ministerial Review Committee, *A Report to the Minister for Health and Community Services from the committee established to review Substitute Care Services in NSW (Usher Review)*, January 1992, p.4.

- 16.323 Effective performance management and performance based contracting, such as has been introduced by DoCS will be capable of addressing any current deficiencies in NGO governance, structures and other aspects of their operations.
- 16.324 Finally, the functions of the Children's Guardian and those of the Ombudsman provide additional safeguards for monitoring the standards for the delivery of services to children and young persons in OOHC services.

Arguments against transferring all of OOHC responsibility to the non-government sector

- 16.325 As noted, DoCS has advocated for a mixed service system in which DoCS and non-government services share service provision in OOHC. The advantages of such a system, such as presently exists are that:
- a. it ensures flexibility for services being provided in the most effective and efficient manner by the provider best placed to do so
 - b. it enables DoCS to be an informed purchaser.
- 16.326 Other arguments have been advanced in favour of maintaining the status quo as follows:
- a. to alter the existing system would expose DoCS to higher policy implementation risks if it does not directly manage OOHC
 - b. NGOs can lack economies of scale, efficient and effective infrastructure, management systems or suitably qualified personnel. The provision of more expensive services by NGOs, even if of better quality, could lead to an increase in DoCS under funding its clients
 - c. some objectives of NGOs may differ from those of the Government and where it is difficult to monitor outputs or outcomes, an NGO may render different services from those for which it was contracted
 - d. as they only have responsibility for part of the child protection system, NGOs may not necessarily support policy changes that improve the system as a whole.
 - e. where the outputs or outcomes from services are difficult to observe or measure this can lead to performance problems.

Other factors

- 16.327 Several important factors need to be taken into account in addition to these competing contentions.
- 16.328 First, the OOHC population is projected to increase from the current 14,667 children and young persons to 19,495 by the year 2011/12. Accordingly, NGOs would need sufficient capacity to meet this increased and probably increasing

need. DoCS estimates that once the current OOHC funding reform process is complete, NGO maximum capacity will be 4,063 placements.

- 16.329 Secondly, comparing the cost to the State of OOHC provided by the Department with that provided by NGOs is not simple. There is little difference in the cost per person in general foster care between the two sectors, and that difference is generally accounted for by the higher salaries paid to government workers. However, when one factors in the lower ratios of children or young persons to caseworkers in the NGO sector (about 1:10), DoCS appears to be the cheaper provider. This, however, is misleading as it does not adequately reflect the number of unallocated cases and the poorer quality of casework which inevitably occurs when a caseworker is faced with a greater number of children and young persons.
- 16.330 Thirdly, data provided by DoCS suggest that children and young persons in OOHC have multiple placements whether in DoCS foster care or non-government foster care. In 2006/07, 49 per cent of those in non-government foster care had three or more placements, compared with 37 per cent in DoCS foster care. These figures, however, need to be carefully examined as a child or young person placed with non-government organisation may have had a prior placement with DoCS in the current care period or visa versa.
- 16.331 Fourthly, most OOHC service provision is managed by DoCS and as such the scale of the operation varies significantly between DoCS and NGOs. For example, Barnardos currently provides services to 214 and UnitingCare Burnside to 104 children and young persons. By comparison, as at June 2008 one large DoCS CSC, Campbelltown alone was responsible for 615 children and young persons in OOHC.
- 16.332 Fifthly, there will always be a cohort of seriously disturbed and high needs children and young persons, particularly those in their later years, which NGOs will have difficulty in placing or may be unable to place unless there have specialised places or carers. In addition, there will always be a need to have carers available for short term crisis situations. Unless there is a body of carers, trained and ready to care for this group on DoCS behalf, it may be prevented from delivering an essential part of its statutory function.

Position of the oversight bodies

- 16.333 The Ombudsman and the Children's Guardian are more cautious than the NGOs and suggest a more gradual process. The Children's Guardian recommended the progressive delegation of case management responsibility to NGOs according to their capacity as set out in by DoCS case management policy. She further recommended that DoCS consult her before delegating case management or broader parental responsibility to particular NGOs.
- 16.334 Both the Ombudsman and the Children's Guardian note that when comparing the quality of DoCS casework with non-government service provision,

consideration needs to be taken of caseworker allocation rates. The Ombudsman stated that there may be some merit in DoCS being an informed purchaser of services if it remains a supplier.

We are of the view that a move towards a greater proportion of out of home care placements being under the umbrella of the non government sector needs to be carefully managed and closely monitored. In particular any rapid expansion of individual services – particularly those without well established practice in this field – may pose a risk to the quality of services provided.⁶⁶⁸

and

However, perhaps a more critical issue in relation to whether DoCS should continue to have a role in directly providing these services relates to whether it is realistic and desirable that all children in care could and should be accommodated in the non government sector there is the question as to whether DoCS may need to retain responsibility for certain young persons whose behaviour and/or circumstances places them in need of specialist care services. In this regard we note the improved service delivery arrangements that DoCS has put in place to meet the needs of this group over the past four years.⁶⁶⁹

Inquiry's view

- 16.335 Regardless of whether children and young persons are cared for by the State or by the NGO sector, the increase in the size of the group in care and in the length of their stay in care, and the need for acceptable ratios of caseworkers to children and young persons, inevitably mean that the cost of OOHC will increase.
- 16.336 The Inquiry agrees with the comments of the Usher Review quoted above, and with the caution expressed by the Ombudsman and the Children's Guardian. In its view, there should be a gradual transition to Scenarios D and E with case management for those with complex needs as defined in the policy remaining for the time being with DoCS, along with a close monitoring of the cost benefits of any such progressive devolution of this function. There will always be the need for DoCS to be the provider of last resort.
- 16.337 As is clear from the data, there is an increasing number of children and young persons entering care with significant child protection histories which suggests that managing the complexity of their needs will require experienced staff. This

⁶⁶⁸ Submission: NSW Ombudsman, pp.1-2.

⁶⁶⁹ *ibid.*, p.2.

together with an increasing shift to non-government service provision will need to be accompanied by adoption of a workforce strategy that will attract staff able to support and coordinate services from a range of agencies to meet the needs of those in care.

- 16.338 The Inquiry is satisfied that the safeguards in place with the delegation of parental responsibility to the Principal Officer of Barnardos are sufficient and should be followed in subsequent delegations. Further, it agrees with the Children's Guardian that she should be consulted by DoCS before the Department determines to delegate parental responsibility to any other person or agency, and be heard on the suitability of such a delegation.
- 16.339 The Inquiry also agrees with the Children's Guardian that DoCS' Case Management Policy is sound and clearly spells out appropriate roles and responsibilities in relation to case management functions and the need for case management to sit with the agency providing the direct services to children and young persons in OOHC. As she said:

The 2007 DoCS Case Management Policy outlines the responsibilities of DoCS and non government agencies under particular parental responsibility, case management, casework and placement arrangements. This is an excellent resource and it is hoped it will resolve some of the uncertainties that have traditionally accompanied arrangements where DoCS and a non-government agency share responsibilities for a child or young person in OOHC.⁶⁷⁰

Health screening and assessment

DoCS, Health and the Colleges

- 16.340 DoCS and Health signed a MOU in 2006 aimed at increasing access for children and young persons in OOHC to services provided by Health. The MOU is being implemented at the local level through joint agreements between DoCS Regions and the Area Health Services. The quality of local level working relationships and service capacity varies across the State. An addendum to this MOU is being developed, aimed at meeting the mental health needs of children and young persons in care.
- 16.341 The types of services covered under the MOU include:
- a. identifying referral points in each Area Health Service for community health, drug and alcohol services, and mental health services
 - b. specialist medical, psychiatric and other health assessment services

⁶⁷⁰ Submission: Children's Guardian, p.39.

- c. specialised medical and mental health services, including secure in-patient psychiatric acute care appropriate for children and young persons
 - d. specialist sexual offender services for children and young persons who sexually offend.
- 16.342 Health in its submission to the Inquiry stated that referrals of children and young persons in OOHC are prioritised because the serious health and social inequalities experienced by these children and young persons are recognised as an additional dimension beyond the presenting features of any referral. As such, the referral of a child and young person is “considered ahead of any others where a clinical imperative does not require an alternative prioritisation.”⁶⁷¹ Health further stated that those in OOHC need to have access to a comprehensive primary health assessment, and need to be subsequently linked into the local services best equipped to meet their needs. Information provided to the Inquiry suggests that while policy supports this, practice can at times be variable depending on capacity within Area Health Services.
- 16.343 The Royal Australasian College of Physicians (RACP) has issued a paediatric policy relating to the health of children in OOHC. It states that:
- there are multiple reasons for vulnerability in these children including their high prevalence of abuse and neglect, their greater likelihood of disadvantaged backgrounds, and their increased biological weighting for example, with parents with mental health and drug abuse problems. These factors also contribute to fragmented health care.*⁶⁷²
- 16.344 It stated that there is no unified response or specific policies or recommended standards of health assessment intervention for those in OOHC. RACP has recommended that an assessment of children and young persons should be conducted within 30 days of entering OOHC.⁶⁷³
- 16.345 Other states have acknowledged the need for a health screening process for those who are in OOHC. These states are currently in the process of developing or have implemented a process to undertake health screening for this group with the purpose of identifying any health issues and facilitating appropriate follow up.⁶⁷⁴
- 16.346 Queensland’s Department of Child Safety, with the assistance of Queensland Health, has developed the Child Health Passport to facilitate a baseline health assessment for each person upon entry into care and to provide for annual health checks whilst they remain in OOHC. The process enables health issues

⁶⁷¹ Submission: NSW Health, p.43.

⁶⁷² Royal Australian College of Physicians, *Health of children in out-of-home care: Paediatric Policy*, 2006, p.14.

⁶⁷³ *ibid.*, p.6.

⁶⁷⁴ Health, Community and Disability Services Ministers’ Conference paper, *Medicare benefits schedule item number for health checks of children in out-of-home care*, 23 July 2008, p.5.

to be identified through the health screening process and where there is a need for follow up, this is undertaken by the caseworker who also ensures that health information is shared with a child's carer to enable them to meet any health needs.⁶⁷⁵

- 16.347 In Victoria, under the Looking after Children case practice framework, plans are developed to meet the health needs of children and young persons in OOHC. Plans are reviewed six monthly for children under five years of age and annually for children aged five years or over. Victoria is moving to strengthen this approach through a comprehensive health and well-being assessment when children and young persons first enter care. This will be provided by the combination of a general practitioner, a mental health clinician and a paediatrician.⁶⁷⁶
- 16.348 Western Australia's Departments of Health, Child Protection and Education and Training are working to establish a system that will ensure children and young persons in OOHC have health and education assessments and plans covering physical, mental and dental care. It is envisaged that the assessment model chosen would review physical growth, progress towards developmental milestones and psychological/emotional development.⁶⁷⁷
- 16.349 South Australia has developed Health Standards for Children and Young People under the Guardianship of the Minister. This involves an agreement between the Department of Families and Communities and the Department of Health that Health will provide a comprehensive paediatric assessment upon entry into care.⁶⁷⁸
- 16.350 RANZCP, following a recent review of the evidence regarding the mental health of children and young persons in OOHC, has recommended that every person entering care as part of the entry process, has a multi-model mental health assessment. It was also stated that particular attention should be paid to assessment of those with intellectual disabilities entering care, because of the potential for these disabilities to mask their mental health issues. This assessment should occur within 30 days of entering care.⁶⁷⁹
- 16.351 The RANZCP has concluded that the evidence is 'convincing' that 'chronically' maltreated children can be protected from developing mental health problems if they enter care at a young age. They therefore recommended that in cases where parental incapacity to change makes it clear that reunification is unlikely, permanent care arrangements should be prioritised, especially for children aged under two years.⁶⁸⁰

⁶⁷⁵ *ibid.*

⁶⁷⁶ *ibid.*

⁶⁷⁷ *ibid.*

⁶⁷⁸ *ibid.*

⁶⁷⁹ The Royal Australian and New Zealand College of Psychiatrists, *The Mental Health needs of children in out-of-home care*; A report from the expert working committee of the Faculty of Child and Adolescent Psychiatry, Melbourne, 2008, pp.21 and 24.

⁶⁸⁰ *ibid.*, p. 18.

16.352 The RANZCP supported the establishment of evidence based parent education and home visiting programs to prevent child abuse and neglect, as well as maternal antenatal assessments, and antenatal and postnatal education to improve parental mental health and parenting skills.⁶⁸¹

16.353 RANZCP noted that Aboriginal cultural and spiritual factors can impact on how mental health problems develop and may influence how the problems appear and how appropriate and acceptable treatment may be. However, the report also noted that diagnoses based on culturally specific assessments may lead to misdiagnosis with long term consequences. The RANZCP therefore called for development of culturally appropriate tools to assess child development and mental health, and for increased knowledge and understanding of these issues.⁶⁸²

16.354 Further, RANZCP stated:

*Access to competent, comprehensive mental health care needs to be a priority for children in out-of-home care.*⁶⁸³

16.355 DoCS' procedures state:

All children and young persons should undergo a health, developmental and mental health/behavioural assessment within 60 days of entering care. Their case worker is responsible for arranging these assessments which are carried out by a range of medical and allied health professionals.

The physical health/medical component of the assessment should include the following:

- i. completion of a medical history profile of the child and family to understand the health conditions of parents or siblings which may impact on the child's health, welfare and well-being*
- ii. immunisation register check*
- iii. physical examination that checks for growth delay (e.g careful measure of weight, height and head circumference) and signs of malnutrition*
- iv. screening for visual and hearing deficits*
- v. screening for signs of pathological conditions that need further investigation (e.g. foetal alcohol syndrome, fragile X syndrome, physical abnormalities that may be related to past abuse)*

⁶⁸¹ *ibid.*, pp. 18 and 19.

⁶⁸² *ibid.*, pp. 29 and 30.

⁶⁸³ *ibid.*, p.23.

vi. *dental health screening.*

*A developmental assessment component should also be done which covers domains such as general cognitive functioning, language and communication, gross and fine motor functioning and socialisation.*⁶⁸⁴

- 16.356 The mental health/behaviour assessment may be deferred until after the initial shock of being removed from family has subsided and the child or young person has settled into an alternative placement.⁶⁸⁵
- 16.357 DoCS' policy places responsibility on the caseworker to obtain the child or young person's personal health record (Blue Book), from the parents. If this is not possible the caseworker arranges for the carer to obtain a new one from their local child health centre or hospital. It then becomes the responsibility of the carers to update the Blue Book during the time the child or young person is placed with them. If the child or young person leaves a placement the Blue Book should be returned to the caseworker to ensure that it goes to the next placement or to the parents.⁶⁸⁶

Services

- 16.358 OOHC Assessment Clinics are specialist health and development assessment services for children entering OOHC operating in NSW Health's specialist children's hospitals. The clinics offer medical and psychosocial assessment and referral to allied health assessment (where allied health assessments are not provided at the same time).
- 16.359 The Children's Hospital Westmead Clinic operates from the Child Protection Unit. Children placed under the care of the Minister for Community Services for a period of two years or more, living in the Sydney West Area aged from 0-12 years, with a priority for children aged 0-8 years, may be referred by DoCS for this service.
- 16.360 Sydney Children's Hospital Child Protection Unit Out-of-Home Care Screening Clinic provides a similar service for children in the DoCS Metro Central Region. This service is also for children aged 0-12 years, and targets those in care, under temporary or permanent orders, and gives priority to children aged 0-5 years. An evaluation of this service was published in 2007, and the service has been running since 2005.
- 16.361 The Kaleidoscope Health Screening Clinic for Children in OOHC is the John Hunter Children's Hospital's Out-of-Home Care Screening Clinic, based in the Hunter Child Protection and Family Counselling Service. It is available for

⁶⁸⁴ DoCS, *Child Protection and out-of-home care caseworker policy manual*, p.96.

⁶⁸⁵ *ibid.*, p.97.

⁶⁸⁶ *ibid.*, p.96.

children placed under the care of the Minister for Community Services who are expected to be in long term care and are children aged from 0-12 years.

- 16.362 Similar to the Children's Hospital in Westmead, priority is given by the Kaleidoscope Clinic to children aged 0-8 years. The Clinic provides medical and psychosocial assessment with referral to allied health assessment where indicated. Referrals are taken from DoCS or from the foster care non-government organisation responsible for the child. The service is based at Wallsend in Newcastle. Hunter New England Area Health Service advised the Inquiry that the service had been running since November 2006. Statistics, evaluation, funding information, and the cost of the program in 2006/07 were not available.
- 16.363 KARI Aboriginal Resources is funded by DoCS to deliver foster care services across South West Sydney and to coordinate comprehensive health assessments for Aboriginal children entering OOHC. The KARI Clinic is a partnership between KARI, Sydney South West Area Health Service and DoCS.
- 16.364 The KARI Clinic operates from three locations: Tharawal Aboriginal Corporation premises in Airds, KARI Aboriginal Resources Inc. site in Liverpool, and at the Liverpool Hospital Rainbow Cottage.
- 16.365 The KARI Clinic was evaluated in 2005 by the Centre for Health Equity Training Research and Evaluation. The focus of the evaluation was to establish the extent to which the initiatives of the Clinic had achieved its stated aims, and to examine how it evolved and how it has worked with Aboriginal children and young persons entering care.⁶⁸⁷
- 16.366 It was reported that the KARI Clinic had experienced a range of obstacles. One was that at the time of the evaluation in 2005, the Clinic was said to be "running on goodwill since its establishment ... there was still no formal/written agreement between the partners about the resources to be committed."⁶⁸⁸ Whilst an MOU was in place between the agencies there was no specific reference to resources to be committed from the respective agencies.
- 16.367 Lack of specific funding for this Clinic was said to be a major limitation of the Clinic's operation, as was the fact that it was not seen as an established health service for Aboriginal children, and that it did not have a consistent location or consistent personnel. Lack of specific services such as dental and hearing services was also mentioned by staff as an access barrier for foster carers.⁶⁸⁹
- 16.368 The time taken for the provision of assessments was seen as a further barrier:

The slow response in assessing children was also seen as a result of the limited one a month times allocated for clinical

⁶⁸⁷ Sydney South West Area Health Service, *Final Draft of the 2005 Evaluation Report*, p.ii.

⁶⁸⁸ *ibid.*, p.13.

⁶⁸⁹ *ibid.*, p.14.

*assessments, the transitional nature of Aboriginal families and the clinic not being seen as core business.*⁶⁹⁰

- 16.369 It was also reported that at the time of the evaluation, follow up and treatment for the children assessed had been limited.⁶⁹¹
- 16.370 The evaluation noted that the Clinic had experienced difficulties in accessing and maintaining health care data and information for the children assessed, and noted that the management of health care data and information was one of the challenges of this model.⁶⁹²
- 16.371 It was reported that achievements of the KARI Clinic included the fact that it had provided the opportunity for early identification of the health needs of Aboriginal children in OOH, with children receiving health and developmental assessments. The benefits were believed to have extended beyond the children to their carers, who were said to have experienced improved confidence in caring for foster children, increased knowledge of health behaviours and improved access to health services as a result of their involvement with the Clinic.⁶⁹³ The KARI Clinic was also said to have improved communication and relationships between the interagency partners KARI, Health and DoCS.⁶⁹⁴
- 16.372 Despite the obstacles encountered, it was seen that “the future vision of the KARI Clinic is a transferable model of health care not only for Indigenous children but for all children in OOH.”⁶⁹⁵ It was acknowledged, however, that the model required further work to achieve this goal. In 2008, the Kari Clinic was a winner of the NSW Aboriginal Health Awards for Strengthening Aboriginal Families and Children.

Issues Arising

- 16.373 The issues raised with the Inquiry relating to the health needs of children in OOH fell into three broad categories. First, the need to secure access to comprehensive, multi-disciplinary health and developmental assessments for children entering OOH; secondly, the need for access to routine and specialised services to improve health and development outcomes for children and young persons in OOH and to support their carers; and thirdly, problems with agency and government structures and systems that acted as barriers to improving the outcomes for those in OOH.
- 16.374 The Inquiry heard that there was a widespread understanding of the importance of comprehensive health and development assessments for children entering

⁶⁹⁰ *ibid.*, p.15.

⁶⁹¹ *ibid.*, p.16.

⁶⁹² *ibid.*, p.29.

⁶⁹³ *ibid.*, p.8.

⁶⁹⁴ *ibid.*, p.9.

⁶⁹⁵ *ibid.*, p.30.

OOHC, and that the recommendations of the RACP policy were widely supported. The comprehensive assessment clinics run at the three children's hospitals, and the KARI clinic for Aboriginal children were perceived to be good models. However, access to such services was identified as a problem.

- 16.375 Access to follow up health and developmental interventions was a concern across the State. The Inquiry understands from Health that only an estimated 10 per cent of children entering OOHC had a primary health assessment by NSW Health Services in the period July 2007 to 30 June 2008. This highlights that the MOU has yet to be fully implemented. The Inquiry heard that although health workers were willing, the implementation of the MOU was hampered by a lack of services. A major gap in the availability of speech pathology services was identified. The paucity of services was seen to impact adversely on the children, but also on their carers and their caseworkers. One NGO OOHC service provider said:

The impact for us as an agency is for our caseworkers working with foster families with the children in care, because they're the ones still waiting, waiting, waiting, and we can't give them an answer and we don't have access to make the system work better. So when we were looking earlier today at disruption rates and support, I think that that flow on will make a big difference, if we can improve the access and service delivery.⁶⁹⁶

- 16.376 The Inquiry heard that one pressing issue that hampered agencies in their efforts to meet the health needs of children entering OOHC was the fragmented information systems and poor access to personal and family health information. The Inquiry understands from Health that, following an audit in September 2008, it was identified that there is no standard or consistent approach to the collection of data for health screening and assessment for children in care by Area Health Services other than in the five clinics set up to conduct multi-disciplinary assessments. Further, health information about a child who moves from one area to another can be problematic as the relevant health provider may not be informed of the relocation and the child's health information does not necessarily follow them. One paediatrician in Wagga Wagga informed the Inquiry that a process was needed to ensure that when a child was removed from his or her parents, essential health information was gathered such as whether the child had a condition requiring regular medication. He gave the example of an epileptic child on anti-convulsant medication.
- 16.377 The Inquiry was advised that the presence of an accessible, comprehensive medical record or a transferable record (as recommended by the RACP) would be of huge value in the assessment of these children and young persons, and that even the routine information recorded in the Blue Book would assist in providing a comprehensive assessment of the child's needs. The Inquiry heard that currently, the information systems within Health made it difficult to access

⁶⁹⁶ Transcript: Public Forum, OOHC, 29 February 2008, p.51.

health histories especially where children and young persons had moved into a different health area, and that there were additional problems accessing information from other agencies such as DoCS and DADHC to inform the assessment.

- 16.378 Health informed the Inquiry that there was a national and statewide move toward centralised electronic medical records, but that a functioning centralised record was unlikely to be available for a decade.
- 16.379 Children and young persons have many needs which cannot always be met by one government department or agency. In an attempt to meet these needs in a coordinated manner a range of MOU have been established between various government departments, notably, Health, DADHC and Education. These MOUs state that children and young persons in OOHC are to be given priority for services delivered by these agencies. Information provided by both DoCS, other non-government agencies and through submissions, however, indicates that there is presently a difficulty across NSW and particularly in rural and remote areas in accessing assessment and intervention services. Barnardos advised the Inquiry:

*We are sceptical in the implementation. For example an MOU negotiated by DoCS Director-General with his equivalent in Health to achieve prioritised paediatric assessment was well publicised in the media. However 18 months later conversation with staff at the hospital concerned demonstrates very few children referred by DoCS received the paediatric assessment.*⁶⁹⁷

- 16.380 While the policy and the MOU are clear, presently within the NSW OOHC system there is no guarantee that children and young persons entering OOHC will have their health, developmental and dental needs assessed and followed up in a timely manner. In the 2007 Review of children under five years by the Ombudsman, ongoing concerns were identified about the adequacy of general health and other screening when children enter care. Similar findings were also made in the NSW Ombudsman's 2008 draft report on 35 children aged 10 to 14 years who were in OOHC and who were under parental responsibility of the Minister.⁶⁹⁸
- 16.381 Health in its submission to the Inquiry stated that while DoCS and Health have agreed on a model for comprehensive health assessments, other contract arrangements have been put in place by DoCS. Health strongly recommended that it should become the primary provider of health assessments to children and young persons in OOHC to prevent service duplication, disjointed care and waste of resources. Health stated that it was able to offer statewide

⁶⁹⁷ Submission: Barnardos, pp.17-18.

⁶⁹⁸ NSW Ombudsman, *Review of a group of children aged 10 to 14 in out-of-home care and under the parental responsibility of the Minister for Community Services, Draft*, 12 November 2008, p.8.

assessment services that are linked to treatment services, although it accepted that successful implementation would require additional resources.

- 16.382 As part of the OOHC expression of interest process, DoCS sought tenders for the provision of health assessments for children and young persons, which would suggest that access to these services is currently not being provided in a systematic manner by Health. DoCS is currently in negotiation with Catholic Healthcare to provide health assessments across the seven DoCS regions. The annual cost of this contract is estimated at approximately \$4 million. DoCS advises that this agency will not be contracted for treatment or clinical services. Referrals will be prepared and treatment sought through the usual Health processes or through private practitioners where necessary.
- 16.383 It is unclear whether or not these services contracted by DoCS will compare favourably with the public health models currently available in some locations in NSW. A concern for the Inquiry is how services that are needed following the assessment of children and young persons will be accessed and delivered and by whom. Many submissions and concerns raised during the Inquiry's Public Forums, meetings with DoCS CSC staff highlighted the current lack of required treatment and health services presently available, despite a plethora of well documented MOUs.
- 16.384 There was, however, evidence provided to the Inquiry of successful partnership models in place between some Area Health Services and DoCS, which were providing good results. Health has collaborated with DoCS on a potential service model option for health assessments of children and young persons entering care. As such it is unclear to the Inquiry why negotiations with another service provider (Catholic Healthcare) and not Health are being progressed. It would appear that subject to having sufficient funding, Health would be best placed to provide both assessment and ongoing provision of services, where required, subject to being able to deliver consistently across the State through the various Area Health Services. Health informed the Inquiry:

NSW Health is the best agency to provide these comprehensive health care assessments as it has the expertise, knowledge and skills, within a tiered health care system, ensuring that there is no duplication of services, disjointed care; delays for children nor waste of resources.

Furthermore, the link between the Health assessment process and the referral process to improve access to mental health services for children and young persons in care remains critical given that mental health issues contribute significantly to morbidity in this population.⁶⁹⁹

- 16.385 Recommendations are made at the end of this chapter.

⁶⁹⁹Submission: NSW Health, p.43.

Education

- 16.386 There is an MOU between DoCS and Education in relation to educational services for children and young persons in OOHC. The objectives of this MOU are to:
- a. clarify the roles and responsibilities of the two departments in meeting the needs of children and young persons in OOHC who are attending a NSW government school
 - b. ensure that children and young persons in OOHC receive appropriate support at those stages, or in those circumstances in their school life, where coordinated service delivery through information sharing, or case planning or management is beneficial
 - c. promote information sharing about each department's programs, services and other resources, to facilitate better outcomes for children and young persons in OOHC.
- 16.387 The MOU provides for the development of individual education plans on a case by case basis, as appropriate. It also provides for responding to requests from DoCS, an authorised carer, or a child, or young person in care, for learning support, based on identified need.
- 16.388 Many submissions to the Inquiry raised concerns about children and young persons not getting access to education because of their challenging behaviours resulted in expulsion and suspension from school. While Education's, *Suspension and Expulsion of School Students Procedures* states that "a work program should be provided for the duration of the suspension" information provided to the Inquiry suggests that this rarely happens. UnitingCare Burnside informed the Inquiry:
- In 2007 Burnside had 76 children and young persons 5-16 years old in care ... Thirteen children and young persons in Burnside services, aged between 10 and 16 years, were expelled or suspended from schools in 2007. This represents approximately 17 per cent or almost one in five children placed in our care were in conflict with the school system at this level. The result was approximately 30 months of lost school between the 13 children.... In about 40 per cent of cases no school work was provided.⁷⁰⁰*
- 16.389 In the Ombudsman's review of children aged 10-14 years in OOHC, a number of these children had multiple school placements and histories of poor school attendance and school suspension with many performing below average in relation to literacy and numeracy skills. This draft report also noted that some

⁷⁰⁰ Submission: Burnside, OOHC, June 2008, Attachment: Briefing Paper: Suspension / expulsion of children and young persons in UnitingCare Burnside Out of Home Care Services, 2007, p.19.

children whose academic performance was below average before they entered long term OOHC had made significant improvements as a result of additional support including in-class support, tutoring, and assistance from school counsellors.⁷⁰¹

- 16.390 All Australian jurisdictions have identified the importance of Individual Education Plans. In Victoria, Queensland, South Australia and ACT the intention is for all children in OOHC to have these plans. In NSW, Tasmania, Western Australia and Northern Territory these plans are completed on a needs basis. National and international research confirms that Individual Education Plans are regarded as the best strategy for ensuring an educational focus is maintained throughout the period the child is in care.
- 16.391 The CREATE Foundation has also been conducting research on the education of children and young persons in care. CREATE identified the fundamental areas of immediate action required to support and improve the educational participation and performance of children and young persons in care that have been reported on since 2002. The areas of action include:
- a. ensuring that all children and young persons in care have an individual education plan
 - b. establishing mechanisms that monitor, evaluate and review achievement of outcomes.⁷⁰²
- 16.392 The Inquiry agrees that these actions are required.
- 16.393 DoCS is currently funding research into the educational needs of children and young persons in OOHC to identify how these can be better met. The results of this will be available in early 2009.
- 16.394 DoCS has developed a policy position under which there is a requirement for all children and young persons aged three years and over to have an educational assessment within 90 days of entering care.⁷⁰³ In addition, children aged 3-12 years who are already in care, who have not had such an assessment, will be required to have one completed. For care leavers, as part of their leaving care plan, the need for an educational assessment will be determined on a case by case basis.⁷⁰⁴ The Inquiry supports this policy, subject to education and employment options being examined for all care leavers. DoCS advised that an estimated \$2 million would be required to fully implement this policy.
- 16.395 The implementation of the 'OOHC minimum data set' in NSW will provide information on educational participation, incidences of suspension and expulsion, educational attainment levels and retention rates for children and

⁷⁰¹ NSW Ombudsman, *Review of a group of children aged 10 to 14 in out-of-home care and under the parental responsibility of the Minister for Community Services, Draft*, 12 November 2008, p.9.

⁷⁰² CREATE Foundation, *Report Card on Education 2006*, p.5.

⁷⁰³ DoCS, *Proposed policy position on educational assessment of children in OOHC*, February 2008, p.2.

⁷⁰⁴ *ibid.*, p.3.

young persons in care. The OOHC minimum data set is expected to be implemented by NGOs in March 2009 and in DoCS in July 2009. To date, no data on educational participation and performance are available in NSW. It is unclear from the information provided by DoCS when reporting on this area will commence for both funded and direct OOHC services.

Unproclaimed provisions in the Care Act

- 16.396 A number of key sections of the Care Act have not been proclaimed. Most of these relate to powers of the Children's Guardian with respect to OOHC.
- 16.397 The Children's Guardian believes the current unproclaimed provisions would be unworkable in their current form and are not in the best interests of children and young persons in OOHC. This position was generally supported by others, including DoCS. Those provisions concern voluntary OOHC, dispute resolution, case review, delegation to non-government organisations and the exercise of residual powers of guardianship.
- 16.398 There are however a number of amendments which are sought by the Children's Guardian, which are addressed below.

Voluntary Out-Of-Home Care

- 16.399 Sections 135(1)(c)(ii) and 135(3)(b) effectively exclude some forms of voluntary care from the OOHC definition. In addition, ss.155 and 156 which provide for the monitoring or review of children and young persons in voluntary OOHC remain unproclaimed.
- 16.400 A number of submissions were critical of the consequent absence of regulation of those providing care for these children and young persons, including those provided by the Ombudsman and ACWA.
- 16.401 The Inquiry understands that DoCS has recently consulted extensively on a proposal for a revised scheme for voluntary care. Its purpose is to clearly distinguish between a statutory scheme for OOHC, temporary arrangements which are supported by DoCS, and voluntary care without the involvement of the Courts or DoCS, so as to ensure those in the latter category are not subject to harm. That scheme, which this Inquiry supports, incorporates the following elements:
- a. Limiting the definition of OOHC to apply only to children and young persons in court ordered care or who are protected persons.
 - b. Reclassifying voluntary OOHC into supported care, including short term temporary care arrangements involving and supported by DoCS, and parent initiated and managed voluntary care.
 - c. Requiring for those in voluntary care, if in care for over 90 days, that care is to be provided or supervised by a designated agency which must prepare

care plans which are reviewed annually. If in care for under 90 days and not by a designated agency then the provider of the care should be registered with the Office of the Children's Guardian.

- 16.402 This proposal is primarily directed at children and young persons with disabilities and recognises that the current unproclaimed provisions would capture arrangements where state intervention is not warranted. For example, they could apply to a child or young person staying with friends over school holidays, or to a child or young person with a severe disability who is in respite care frequently.
- 16.403 The Inquiry notes that this proposal has received the support of those most concerned with the voluntary OOHC regulation including DADHC, the Children's Guardian, NCOSS, ACWA and the Ministerial Advisory Council.
- 16.404 The Inquiry is of the view that consideration should also be given to incorporating a formal mechanism for mediation as part of the voluntary OOHC system, to be accessed in circumstances where care-givers become concerned about a parent's ability to act in the best interests of the child or young person and these concerns fall short of a reportable risk of harm. The Inquiry notes that this mechanism has been supported by DADHC and by the Children's Guardian.

Dispute resolution function

- 16.405 The unproclaimed s.183 of the Care Act provides that the Children's Guardian may use his or her best endeavours to informally resolve disputes between various parties that may arise in the administration of the Care Act and regulations.
- 16.406 The Children's Guardian has told the Inquiry that her Office does not have the expertise to resolve disputes concerning the broad administration of the Care Act and Regulations, given its OOHC focus. The Inquiry understands that the intention of the Parkinson review of the 1987 Act was that this function was to be limited to matters arising between carers and DoCS in the context of OOHC.
- 16.407 The Inquiry is of the view that since these provisions were drafted, a more sophisticated complaint handling framework is in place within DoCS, NGOs and the Ombudsman rendering it unnecessary for the Children's Guardian to undertake this work. In addition, greater use of ADR as set out in Chapter 12 should enable these disputes to be resolved by other means.

Case plan/review function

- 16.408 The unproclaimed s.181(1)(d) of the Care Act requires the Children's Guardian to examine a copy of the case plan for each child or young person in OOHC and a copy of each report made following the regular review of the case plan.

- 16.409 The unproclaimed s.150(5) of the Care Act requires copies of each review report to be provided to the Children's Guardian, with reviews to be conducted at least annually. More frequent reviews are required in some circumstances.
- 16.410 The Children's Guardian submitted that given the numbers of children and young persons in statutory care, proclamation of ss.181(1)(d) and 150(5) would require the Children's Guardian to review well in excess of 10,000 case plans/reviews each year.
- 16.411 The Children's Guardian is of the view that the broad monitoring provided for under the Case File Audit Program and in the Accreditation and Quality Improvement Program constitute a better vehicle to ensure the review of children and young persons in statutory care.
- 16.412 Professor Parkinson suggested to the Inquiry that at least annual reviews should be provided to the Children's Guardian:

That they be received by the Guardian, that the Guardian has a register, a record of children in out-of-home care, and ticks off that it has been received. That then is an extra tool for her if she has concerns about a particular child or a particular category of case, to at least have the review on file to be able to look at what has been happening in the last couple of years. It is an obvious management tool.

I would be comfortable if we repealed the provision that they have to examine every report.⁷⁰⁵

- 16.413 The Inquiry agrees with Professor Parkinson's suggestion. Requiring review reports to be forwarded to the Children's Guardian would enable a register to be kept by her Office which can then inform the other statutory functions attaching to it. It will also render more transparent this activity in DoCS. There should not be a statutory requirement that the Children's Guardian examine each report. Nor should there be a requirement for the Children's Guardian to examine every case plan for those in OOHC.

Delegating to non-government agencies

- 16.414 Under s.181(1)(a) the Children's Guardian has the power to exercise, subject to the direction of the Minister, the parental responsibilities of the Minister for a child or young person for the benefit of the child or young person. As this is not proclaimed, DoCS has responsibility for delegating responsibility for decision making to non-government agencies.
- 16.415 The Children's Guardian advised the Inquiry that to proclaim this provision would interfere with:

⁷⁰⁵ Transcript: Inquiry meeting with Professor Parkinson, 27 February 2008, p.5.

*recently established systems for allocating parental responsibility, case management responsibility and casework responsibility. These systems set out in the 2007 DoCS Case Management Policy are linked with current funding systems and should be given an opportunity to be embedded.*⁷⁰⁶

- 16.416 However, the Children's Guardian advised the Inquiry that she believes that her Office held sufficient information relevant to agency capacity to take on additional decision making functions, and that DoCS should consult with the Children's Guardian before delegating responsibility (including case management responsibility) to non-government agencies.
- 16.417 DoCS has agreed with this proposal, although prefers that it be effected otherwise than by legislative amendment.
- 16.418 The Inquiry agrees that DoCS and the Children's Guardian should develop a process whereby consultation occurs before DoCS delegates the responsibility mentioned. In the absence of agreement between them, the Inquiry recommends that the Care Act be amended to require consultation. Provision should be made for those the subject of adverse comment from the Children's Guardian to respond to that comment.

Residual powers of guardianship

- 16.419 By virtue of the fact that the powers of the Children's Guardian to act as the name suggests, have largely remained unproclaimed, s.186, which has been proclaimed, is anomalous.
- 16.420 To grant to the Guardian the non-delegable powers set out in s.186(1)(a) – (f) would not be in keeping with the current role and function of that office. These include:
- a. granting consent to the marriage of a child or young person
 - b. granting permission to remove a child or young person from NSW
 - c. applying for a passport on behalf of a child or young person
 - d. granting consent to medical and dental treatment of a kind prescribed by the regulations
- 16.421 The Children's Guardian submitted to the Inquiry that it would not be in the best interests of children and young persons in OOHC for the Children's Guardian to exercise the non-delegable 'residual powers of guardianship referred to in s.186 of the Care Act.' She recommended that the Care Act be amended to remove the references to the Children's Guardian exercising these residual powers of guardianship. The Inquiry agrees. They are currently exercised by DoCS and by other persons with parental responsibility.

⁷⁰⁶ Submission: Children's Guardian, p.67.

16.422 The Children's Guardian also submitted that non-delegable functions should be set out in the Regulations, and the Children's Guardian should have the:

- a function of monitoring the systems in place for making such decisions;*
- b power to require the Director-General of DoCS to provide such information to the Children's Guardian on the exercise of 'non-delegable' parental responsibility functions, as the Children's Guardian may require; and*
- c power to report and make recommendations to the Minister on systems for making 'non-delegable' parental responsibility decisions and on particular parental responsibility decisions that should or should not be capable of being delegated.⁷⁰⁷*

16.423 A senior officer from the Office of the Children's Guardian explained the proposal in the following way to the Inquiry:

It is appropriate to have an external party involved in that process, but does it respond to an identified crisis or concern? The answer is no. It is a sensible oversight arrangement that really requires some discussion and is likely to have minimum impact on our workloads, but perhaps offer some assurance to the sector that these decisions are not being made unilaterally and are being made in consultation.⁷⁰⁸

16.424 DoCS did not support this proposal. It noted that if the designated agencies are concerned about decisions made by DoCS, there are existing mechanisms including application to the ADT to have the decisions re-considered. In addition, the Children's Guardian's Case File Audit Program provides it with capacity to deal with matters of this type.

16.425 DoCS is subject to considerable oversight by a number of agencies. The Inquiry is of the view that there are sufficient mechanisms in place, including the various functions of the Ombudsman, to address any concerns about the exercise of the non-delegable functions associated with parental responsibility. It does not support the suggestion of the Children's Guardian in this respect.

A 'safety net'

16.426 The Children's Guardian advised the Inquiry of her experience of individual children and young persons in OOH who are not receiving appropriate care and where the regulatory framework does not offer them sufficient protection.

⁷⁰⁷ *ibid.*, p.69.

⁷⁰⁸ Transcript: Inquiry meeting with representatives of the Office of the Children's Guardian, 1 July 2008, p.22.

16.427 The Children's Guardian also noted in her submission to the Inquiry that the Usher Review, the 1997 Police Royal Commission and the Parkinson review of the 1987 Act all identified the need for a body, independent of DoCS and the Courts, to exercise its powers of guardianship in respect of children and young persons under the parental responsibility of the Minister.

16.428 The Children's Guardian sought:

*more targeted special guardianship powers so they are focused on vulnerable children and young persons in OOHC who have not had their care concerns addressed by existing mechanisms, or whose life or safety is in such danger that urgent independent decision making is required....This would see the Children's Guardian taking on a 'safety net' role, ... the Children's Guardian would be the guardian of last resort.*⁷⁰⁹

16.429 Under this model, the Children's Guardian would have the power to "overrule the decision of a designated agency concerning any aspect of parental responsibility,"⁷¹⁰ with s.140 of the Care Act being amended to provide that a designated agency must comply with any written direction of the Children's Guardian to exercise parental responsibility in a particular way.

16.430 It would be also necessary to proclaim s.182 of the Care Act to allow the Children's Guardian to remove a child or young person from a particular care arrangement if the designated agency did not comply with a proposed written direction under s.140.

16.431 The Children's Guardian would, in exercising such decision making powers, need to be able to apply to the Court for the rescission or variation of a care order under s.90(3) of the Care Act. Section 184 of the Care Act would then need to be proclaimed to ensure that the Children's Guardian may make such an application, notwithstanding the Children's Guardian not having been a party to the original proceedings.

16.432 The Children's Guardian and her staff expanded on her submission in the following way:

It is the power to direct an agency, a designated agency, that the Minister's delegated parental responsibility be exercised in a specified way. At the moment, for instance, we would have no power to direct DoCS to find an alternative placement for that child. Once the agency is out of the out-of-home care accreditation system, our formal powers in relation to that agency stop, but because parental responsibility cascades down from the Minister to the Director-General of DoCS and is

⁷⁰⁹ Submission: Children's Guardian, p.64.

⁷¹⁰ *ibid.*, p.70.

then subdelegated on to delegated agencies, if you had the power to direct the Minister's parental responsibility with respect to accommodation be exercised in a particular way, if it had not, after you'd discussed it, managed the issue appropriately, you would be able to issue a legally enforceable direction.

...

If an agency is applying inappropriate restraint practices in respect of one child but is providing good care for the majority of its clients, but they have one child who has special needs who is not being cared for well, you would ask the agency to address those concerns. If the agency did not address those concerns, you would have a power to direct that care be provided in a particular way. If that care were not provided in a particular way, you would have the power to direct the removal of that child and have them placed with a more appropriate agency.⁷¹¹

- 16.433 The Children's Guardian gave a series of examples. The first example was in relation to monitoring the transition of children and young persons from agencies which no longer intend to provide OOHC or are deemed inappropriate to provide that care. She pointed to delays in transitioning particular children and young persons and advised that using her existing power to require information about those children and young persons from DoCS, pursuant to s.185, was not effecting positive change.
- 16.434 Secondly, an example was given in relation to the Children's Guardian receiving information during its case file audits or through the accreditation process of defective management. She made reference to a case of a child who was in short term crisis accommodation for 14 months, without a behaviour management plan, without consent for psychotropic medication, and without case reviews or immunisation records or school reports. She sought reports from DoCS through s.185, which did not result in any appropriate change to the child's situation.
- 16.435 Finally, the Children's Guardian provided an example of the cessation of funding for a service for Aboriginal children and young persons in circumstances where, had she the power, she would have intervened at a much earlier time to protect the children.
- 16.436 DoCS disagreed and advanced two reasons for not adopting the Children's Guardian's suggestion. First, the Children's Guardian accredits agencies and can place conditions on their accreditation. If the placement is in accordance with that accreditation, that should be the end of the Children's Guardian

⁷¹¹ Transcript: Inquiry meeting with representatives of the Office of the Children's Guardian, 1 July 2008, pp.7-8.

involvement. Otherwise, new criteria are being brought into play and added complexity results. Secondly, such a role would permit the Children's Guardian to make decisions without being obliged to consider the budgetary and practical implications for DoCS or for the designated agencies which its funds.

- 16.437 The Inquiry is aware that there are undoubtedly cases where children and young persons in care 'drift;' that is, they are not the subject to active intervention by the Department or designated agency. Their emotional, educational and medical needs may go largely unmet. The current oversight arrangements to ensure the safety, welfare and well-being of the child or young person include: a court order following a hearing (in most cases); being placed in care with an agency which has been accredited and/or is being monitored, or with the Department, each of which would owe statutory obligations; appeal rights in some cases to a Tribunal; and the existence of an external and internal complaint handling body. The existence of these remedies or oversight arrangements tends to dilute the need for the establishment of an independent body with a general authority to exercise a power of guardianship in relation to individual children and young persons under the parental responsibility of the Minister.
- 16.438 While the Inquiry is acutely conscious that the current system does not always result in quality care for all children and young persons who have been removed from their home, it is not persuaded that increasing the oversight in the manner suggested by the Children's Guardian is the solution. The Children's Guardian can and does use s.185 to bring the deficiencies she finds to the attention of DoCS, and/or the Ombudsman.
- 16.439 The Inquiry is of the view that the preferable approach is to equip DoCS and other designated agencies better so that they can respond to the children and young persons in their care, and to the Children's Guardian, when she draws attention to concerns. The Inquiry is particularly concerned that the Children's Guardian should not be empowered to make decisions, with a legislative mandate, which have budgetary implications for DoCS, and which might interfere with the most effective allocation of its resources.

Other proclaimed functions of the Children's Guardian

- 16.440 The Children's Guardian submitted that several other sections of the Care Act are no longer appropriate and should be repealed or amended.
- 16.441 Section 105(3)(b)(iii) of the Care Act if proclaimed would permit the Children's Guardian to consent to the publication or broadcasting of identifying information about children and young persons under the parental responsibility of the Minister, where the Guardian was of the opinion that the publication or broadcasting could be seen to be of benefit to the child or young person.

- 16.442 The Children's Guardian is not a party to care or other court proceedings and has not been involved in case management or case planning for children and young persons under the parental responsibility of the Minister.
- 16.443 The Children's Guardian has accordingly delegated this function to the Director-General of DoCS since it is DoCS that appears in Children's Court proceedings and has a relationship with the Court.
- 16.444 Notwithstanding, the Children's Guardian is still occasionally approached to approve the publication or broadcasting of identifying information concerning children and young persons under the parental responsibility of the Minister.
- 16.445 The Children's Guardian suggests that s.105(3)(b)(iii) should be amended to delete her role in this respect and to authorise the Director-General to consent to such publication or broadcasting. The Inquiry agrees, since the Children's Guardian will not be sufficiently informed to make assessments under s.105(3)(b)(iii).
- 16.446 The Children's Guardian also suggests that s.90(3A) of the Care Act should be amended to remove the requirement that the Children's Guardian be notified of certain rescission and variation proceedings concerning the assignment of parental responsibility. The Inquiry agrees.
- 16.447 Finally, the Children's Guardian submitted that s.141(2) should be amended to require that DoCS be advised, and that it then advise the Children's Guardian, when a designated agency ceases to be able to fulfil its responsibilities in relation to a child of young person, in addition to making an application to the Children's Court to vary the OOHC arrangements. DoCS opposed that submission. The Inquiry understands that s.141 applies in a very few cases where the Minister has delegated parental responsibility to a designated agency. In the event of the application being made to the Children's Court, each interested party would have an opportunity to adduce evidence and make submissions. In light of the Children's Guardian relatively limited role with respect to parental responsibility, the Inquiry sees little reason to amend the section.

The Register

- 16.448 Section 159 of the Care Act has not been proclaimed. It was intended to place an obligation on the Director-General to maintain a register in which there are entered particulars of every child or young person who has been in OOHC for a continuous period of 28 days or more.
- 16.449 In line with the amended definitions of OOHC to statutory care, supported care and voluntary care, the Inquiry can see no reason why a record in the form contemplated by s.159 cannot be kept for at least those children and young persons in statutory OOHC.

Adoption

- 16.450 The Care Act, the Regulation and the *Adoption Act 2000* set the legislative framework for the provision of OOHC placement and support services in NSW, including the process for adoption of a child. Adoption orders in NSW are granted by the Supreme Court.
- 16.451 In other Australian jurisdictions, different courts are responsible for granting an adoption order.
- a. In the ACT, the Supreme Court makes adoption orders.⁷¹²
 - b. In the Northern Territory, the Local Court grants adoption orders.⁷¹³
 - c. In Queensland, the Children's Court grants adoption orders.⁷¹⁴
 - d. In South Australia, adoption matters are handled by the Youth Court of South Australia.⁷¹⁵
 - e. In Tasmania, adoption orders are granted by the Magistrates Court (Children's Division).⁷¹⁶
 - f. In Victoria, the primary responsibility for adoption lies with the County Court.⁷¹⁷
 - g. In Western Australia, the Family Court of Western Australia handles matters relating to children, including adoption.⁷¹⁸
- 16.452 Adoption is the legal process which permanently transfers all the legal rights and responsibilities of being a parent from the child's birth parents to the adoptive parents. It is one of the range of options to be considered in placement planning for children who cannot live with their birth families, that can help to ensure that such children have the stability and continuity of a relationship that is necessary for their well-being and development.
- 16.453 Adoption of children is not a common practice in Australia. According to the AIHW, in 2006/07 there were a total of 568 adoptions of children in Australia. Of these, 71 per cent, were inter-country adoptions. A further 18 per cent were 'known child' adoptions, which were generally adoptions by a step parent to incorporate children into a new family. The remaining 10 per cent were local adoptions.⁷¹⁹ Of the 568 children adopted in Australia in 2006/07, 164 were in

⁷¹² *Adoption Act 1993* (ACT), p.72 Dictionary.

⁷¹³ *Adoption of Children Act 1994* (NT) s.3 and see: www.nt.gov.au/health/comm_svs/facs/adoption/adopting_child_in_nt.pdf

⁷¹⁴ *Adoption of Children Act 1964* (Qld) s.6.

⁷¹⁵ *Adoption Act 1988* (SA) s.4.

⁷¹⁶ *Adoption Act 1988* (Tas) s.3.

⁷¹⁷ *Adoption Act 1984* (Vic) s.5, covers the role of County Court, concurrent Supreme Court jurisdiction, and that matters may be referred to the Supreme Court by the County Court see also www.cyf.vic.gov.au/adoption-permanent-care/adoption.

⁷¹⁸ *Adoption Act 1994* (WA) s.4. See also www.familycourt.wa.gov.au.

⁷¹⁹ Australian Institute of Health and Welfare, *Adoptions Australia 2006/07*, February 2008, p.8.

NSW.⁷²⁰ In 2007/08 in NSW there a total of 125 adoption orders made. Of these, 73 were inter-country adoptions, 22 were adoptions of children by carers, 15 were local adoptions, 10 were step-parent adoptions, three were relative adoptions and two were special case adoptions.⁷²¹

- 16.454 According to Cashmore the main reasons why children in long term OOHC are not being adopted more often include the financial disincentives to adoption for carers, and overloaded caseworkers not having the time and skills or the necessary supervision to ensure that they follow through on developing the necessary plan and preparing the paper work. Also many children in care are living with relatives and adoption is generally not considered a useful or appropriate option. The issue of adoption for Aboriginal children is particularly problematic given the history of the 'stolen generation' and because, as HREOC's *Bringing them Home* report states, the concept of adoption is "incompatible with the basic tenets of Aboriginal society."⁷²²
- 16.455 Following a recent review of the *Adoption Act 2000*, the Inquiry understands that NSW Cabinet has approved reforms to adoption law and practice, which include:
- a. streamlining the processing of inter-country, step parent and relative adoptions with applications being submitted directly to the Supreme Court without the involvement of DoCS
 - b. reforms to adult adoptions
 - c. less prescriptive eligibility criteria (to be included in the *Adoption Regulation 2003*) including removal of a prohibition on accepting applications from persons pursuing fertility treatments and a focus on factors that affect parenting capacity
 - d. greater involvement of Aboriginal agencies in the adoption of Aboriginal children
 - e. reforms to the right to access adoption information, and to the publication of the names of parties to adoption proceedings
 - f. streamlining the processes for children aged 12-16 years who wish to consent to their own, or their child's adoption
 - g. agreement by Cabinet that statutory foster carers should continue to receive the statutory care allowance for children and young persons that have been in their care for a minimum of two years, after the making of an adoption order.
- 16.456 Perhaps reflecting the low numbers of children and young persons adopted in NSW, the Inquiry received few submissions on this issue. From the material

⁷²⁰ *ibid.*, p.9.

⁷²¹ DoCS, *Annual Report 2007/08*, p.259.

⁷²² J Cashmore, "Lessons from the US on Permanency Planning," *Social Policy Research Centre, University of New South Wales*, undated.

reviewed during the course of the Inquiry, there is nothing in the reforms approved by Cabinet which would give rise to any concern by the Inquiry.

- 16.457 However, mindful of the importance of stable relationships for children and young persons unable to live with their families and the emphasis on permanency planning, the Inquiry has considered whether the Supreme Court remains the appropriate forum for adoption applications and orders.
- 16.458 It believes that consideration should be given to transferring jurisdiction to the Children's Court in circumstances where current child protection concerns exist. That would be consistent with the practice in other States and may result in adoption being given more consideration at an earlier stage. The jurisdiction would otherwise remain with the Supreme Court. Any appeal against an order by the Children's Court in relation to adoption should lie to the Supreme Court.

Inter-country adoption

- 16.459 In June 2008, NSW became a signatory to a revised Commonwealth-State Agreement on Inter-country Adoptions. Under this Agreement, the Commonwealth has assumed responsibility for the management and negotiation of inter-country adoption programs. The States and Territories continue to be responsible for day to day approval and processing of these applications including training and assessment of applicants, placement arrangements and post-placement reporting to the child's country of origin.
- 16.460 DoCS reported that the review of the *Adoption Act 2000* had provided an opportunity to examine the Department's ongoing involvement in inter-country adoption court processes.
- 16.461 DoCS informed the Inquiry that in 2005, it conducted a comprehensive internal review of its adoption functions and practices:

*The review concluded that the first order priority role for a State level child protection agency ought to be securing stable and/or permanent placements for children who are in out-of-home care.*⁷²³

- 16.462 As a consequence, DoCS has been investigating ways to reduce the commitment of its resources to adoptions where there are not child protection concerns that fall within NSW jurisdiction.
- 16.463 The Inquiry supports DoCS endeavours in this regard.

⁷²³ Submission: DoCS, OOHC, p.21.

Conclusion

- 16.464 This section collects the principles which the Inquiry believes should underpin OOHC in NSW, the goals to be reached and what needs to be done to achieve these goals. The Inquiry has not costed the recommendations contained in this chapter, however, where DoCS has provided the Inquiry with an estimate of costs, that estimate has been included.

Principles

- 16.465 Children and young persons both entering and in care should be heard and should participate in decisions affecting them.
- 16.466 Decisions and actions should be based on an understanding of how they will affect the children and young persons, particularly in relation to their safety, well-being and development.
- 16.467 Children and young persons require a stable foundation from which their relationships, identity, values, and cultural awareness can develop.
- 16.468 Continuity of attachment ties is essential for the overall development of a young child, and when children and young persons are separated from their birth families, stable foundations must be re-established as soon as possible either with their birth family or with an alternative long term carer or family.
- 16.469 Early decision making about permanency planning, including restoration to family, results in better outcomes for children and young persons, both in immediate terms and for life after care.
- 16.470 All Aboriginal children and young persons in OOHC should be connected to their family and their community, while addressing their social, emotional and cultural needs.
- 16.471 Children and young persons should be assisted to gain regular access to education, health and other services to meet their changing needs and to enable them to grow and develop.
- 16.472 Carers should actively participate in decision making in relation to children and young persons in their care.

Goals

- 16.473 Restoration decisions should not take longer than six months, particularly for younger children.
- 16.474 A continuum of services should be in place that listens to children and young persons, that responds to their changing needs and that minimises changes in

the people who are critical to caring for and working with them, such as carers and caseworkers.

- 16.475 Greater in-depth assessment of children and young persons coming into care through more comprehensive assessment and interventions in the crucial early stages of placements should be part of agency placement and planning processes.
- 16.476 Care arrangements for children and young persons should be based on their assessed needs, and the assessed capacity of carers to meet these needs.
- 16.477 Carers should be provided with timely information about those in their care, their needs, and the type of support they need to flourish in their care.
- 16.478 Children and young persons where possible should be placed with relatives and/or with siblings, and generally should be placed as close as possible to where their family/kinship and support networks are located.
- 16.479 There should be sufficient health and specialist services including dental, psychological, counselling, speech therapy, mental health and drug and alcohol services available to meet the needs of children and young persons in OOHC.
- 16.480 Assistance and supports should be provided to children and young persons in OOHC and to their carers at critical life transition points, such as entering care, moving from primary to secondary school and leaving care.
- 16.481 There should be a system common to all agencies delivering services to children and young persons in OOHC that collects essential health information and monitors their health and educational outcomes. This should include an accessible, comprehensive medical record or a transferable record for children and young persons in care.
- 16.482 Foster, kinship and relative carers should be supported in caring for children and young persons, including managing those with challenging behaviours, to improve the stability of placements. This should include access to regular and planned respite care, behavioural management support, and other evidence based specialist services.
- 16.483 Interventions for high needs children and young persons in OOHC should include strong case management, integrated multi-agency work, and highly skilled staff and carers who receive expert supervision, ongoing training and support.
- 16.484 Young persons should be assisted when leaving care to transition effectively to stable accommodation and to receive further education and/or training and/or employment, so as to maximise their potential for independent living.
- 16.485 NGOs in partnership with other relevant government agencies such as Health, Education and DADHC should deliver OOHC services.

- 16.486 Outcome measures of the performance of the agencies engaged in OOHC work at the local, regional and state level, should be compatible and outcome based, in addition to process focused. These should be available to all agencies delivering OOHC services.
- 16.487 Safe housing for children in care is critical. There should be a mix of low, medium and high intensity accommodation and support services that are flexible in meeting the changing needs of children and young persons in care, including, where appropriate, residential accommodation. Resorting to SAAP services should be avoided for children in care.

Future Demand

- 16.488 As noted in Chapter 5, the data show that the number of children and young persons in OOHC has substantially increased and suggest that without modification of the current care and protection system this pattern will continue. Further, as a result of increasing cases being investigated by an expanded child protection workforce and children and young persons staying in care longer, the number of children and young persons in OOHC is projected to continue to increase. In the longer term strategies to intervene much earlier to help families will reduce the numbers of children and young persons entering OOHC. These strategies are outlined in Chapter 10.
- 16.489 DoCS has developed a funding model which estimates the future OOHC population using past and expected rates of entry into care and length of time of stay patterns in OOHC.
- 16.490 Regardless of whether children and young persons are cared for by the State or by the NGO sector, the increase in the size of the group in care and in the length of their stay in care, and the need for acceptable ratios of caseworkers to children and young persons, inevitably mean that the cost of OOHC will increase
- 16.491 The caseworker ratio to support the placements of children and young persons in care should be between 1:12 and 1:15. DoCS has provided estimated costing to achieve an average of 1:15.

Table 16.19 Projected OOHC population and additional caseworkers (cumulative) required to attain caseloads of 15 and expenditure on care allowances and contingencies for children and young persons in OOHC

	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	Total
Total	14,667	15,605	16,993	18,295	19,495	20,332	21,197	
1:15 Caseload: Additional Caseworkers required	-	300	400	490	550	600	650	650
Extra Caseworkers \$m	-	53	70	86	96	105	114	524
Estimated increase in allowances for additional children in OOHC \$m	-	23	37	56	70	82	94	362

- 16.492 DoCS informed the Inquiry that additional funding over the next six years will be required to make payments to authorised carers (allowances) for every day costs of caring for a child (such as, school clothes, food) as well as extra activities to support a child in OOHC, such as contact with birth parents. This is a result of the increased number of children and young persons in OOHC.

Recommendations

Recommendation 16.1

DoCS OOHC/NGO OOHC caseworkers should become involved with children and young persons in OOHC at an earlier stage than final orders and have a responsibility to identify and support the placement of the children or young people, where it has been determined that there is not a realistic possibility of restoration.

Recommendation 16.2

Over the next three to five years, there should be a gradual transition in the provision of OOHC for children and young persons as follows:

- a. Most children and young persons in OOHC should be supported by one of the two following models:
 - i. DoCS retains parental responsibility and a non-government organisation is responsible for case management, placement and casework services. The agency has responsibility for assessment, case planning, implementation, review, transition and case closure as well as the placement of a child or young person with an authorised carer, and for any decision to remove a child or young person from a carer. DoCS retains

the key decision making role in restoration decisions, developing and approving the initial care plan and has a role in implementation. DoCS and the agency have joint responsibility for decisions to apply to change Court orders and for providing after care assistance.

- ii. DoCS delegates parental responsibility and transfers case management, placement and casework services to a non-government organisation (while retaining residual powers) subject to consultation with the Children's Guardian (see Recommendation 16.15).
 - iii. Children and young persons with significantly complex needs or who are assessed as at high risk of immediate or serious harm or whose case management requires high level collaboration with other government agencies will remain case managed by DoCS.
- b. At an early stage, DoCS should progressively commence the transfer of long term kinship/relative carers to NGOs so as to allow the NGOs to carry out any necessary training and to provide ongoing support for these carers.
 - c. At an early stage, DoCS should progressively reduce its role in the recruitment of foster carers and transfer current long term foster carers to NGOs.

Recommendation 16.3

Within 30 days of entering OOHC, all children and young persons should receive a comprehensive multi-disciplinary health and developmental assessment. For children under the age of five years at the time of entering OOHC, that assessment should be repeated at six monthly intervals. For older children and young persons, assessments should be undertaken annually. A mechanism for monitoring, evaluating and reviewing access and achievement of outcomes should be developed by NSW Health and DoCS.

Recommendation 16.4

NSW Health should appoint an OOHC coordinator in each Area Health Service and at The Children's Hospital at Westmead.

Recommendation 16.5

The Department of Education and Training should appoint an OOHC coordinator in each Region.

Recommendation 16.6

The NSW Government has a responsibility to ensure that all children and young persons removed from their parents and placed in its care receive adequate health treatment. Thus, there should be sufficient health services including speech therapy, mental health and dental services available to treat, as a matter of priority, children and young persons in OOHC.

Recommendation 16.7

The introduction of centralised electronic health records should be a priority for NSW Health. Given that this is likely to take some time, an interim strategy should be developed to examine a comprehensive medical record or a transferable record for children and young persons in OOHC, which should be accessible to those who require it in order to promote or ensure the safety, welfare and well-being of the child or young person.

Recommendation 16.8

Within 30 days of entering OOHC, all preschool and school aged children and young persons should have an individual education plan prepared for them which is reviewed annually by the Department of Education and Training and by the responsible caseworker. A mechanism for monitoring, evaluating and reviewing access and achievement of outcomes should be developed by the Department of Education and Training and DoCS.

Recommendation 16.9

Carer allowances should be reviewed periodically by an independent body and should more closely reflect the actual costs to the carer of providing care, according to the varying categories of need.

Recommendation 16.10

The Memoranda of Understanding between DoCS and respectively, the Department of Ageing, Disability and Home Care, NSW Health and the Department of Education and Training should be revised to reflect the increasing responsibilities of NGOs for the provision of OOHC.

Recommendation 16.11

A common case management framework for children and young people in OOHC across all OOHC providers, should be developed, following a feasibility study on potential models including the Looking After Children system.

Recommendation 16.12

Due to the large numbers of Aboriginal children and young persons in OOHC, priority should be given to strengthening the capacity for Aboriginal families to undertake foster and kinship caring roles.

Recommendation 16.13

There should be sufficient numbers of care options for children and young persons with challenging behaviours that include specialised models of therapeutic foster care.

Recommendation 16.14

DoCS and/or relevant NGOs should receive sufficient funding to service the actual and projected OOHC population to enable an average ratio of one caseworker to 12 children and young persons.

Recommendation 16.15

DoCS should consult with the Children's Guardian before delegating parental responsibility to any person, except in circumstances where DoCS has shared parental responsibility and is delegating to the person with whom it shares parental responsibility. In the event that a mechanism for that to occur has not been introduced to the satisfaction of DoCS and the Children's Guardian within 12 months of the publication of this report, the *Children and Young Persons (Care and Protection) Act 1998* should be amended to require that consultation.

Recommendation 16.16

With respect to the *Children and Young Persons (Care and Protection) Act 1998*:

- i. the proposal set out in the draft Cabinet Minute to introduce a revised scheme for voluntary care should be implemented and the Children's Guardian should receive the additional resources necessary to perform the functions of that office that would apply to those within that scheme
- ii. section 183 should be repealed
- iii. section 181(1)(d) should be repealed
- iv. section 181(1)(a) should be repealed
- v. section 186 should be repealed
- vi. section 105(3)(b)(iii) should be amended to delete reference to the Children's Guardian and to replace it with the Director-General of DoCS
- vii. section 90(3)(b) should be repealed
- viii. section 159 should be proclaimed

Part 5 Specific issues

17 Domestic and family violence and child protection

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Introduction

- 17.1 The report thus far has considered the nature of reports to, and response of, the child protection system to risks of harm in children and young persons. Detailed data about the system appear in Chapter 5 as does research about child protection practices in Chapter 4. Directions for a way forward are suggested in Chapter 10 to address the need for an integrated response to child abuse and neglect from all agencies, in particular Health, Education and Police.
- 17.2 Improvement to case management and case practices are addressed in Chapter 9 which is designed to address the response of DoCS to its increasingly complex client base.
- 17.3 The Inquiry notes that in service provision, research, legislation and policy the terms ‘domestic violence’, ‘family violence’ and ‘domestic and family violence’ are sometimes used differently and at other times interchangeably. The Inquiry recognises that ‘family violence’ is the term preferred by many Indigenous communities. ‘Family’ covers a diverse range of ties of mutual obligation and support, and perpetrators and victims of family violence can include, for example, aunts, uncles, cousins and children of previous relationships⁷²⁴.
- 17.4 For the purposes of this report, the broader term, ‘domestic and family’ violence will generally be used. However, when referring specifically to risk of harm reports ‘domestic violence’ will be used as this reflects the terminology used by DoCS and the Police.
- 17.5 Domestic and family violence is taken to occur when one partner in an intimate relationship attempts by physical or psychological means to dominate and control the other. It is generally understood as ‘gendered violence,’ and is an abuse of power within a relationship or after separation.
- 17.6 Definitions of domestic and family violence are “multiple and shifting.”⁷²⁵ Narrow definitions of domestic and family violence typically refer only to physical and sexual violence but broader definitions encompass threats of abuse (harassment), stalking or psychological or emotional abuse.⁷²⁶
- 17.7 Domestic and family violence “is typically not about one-off incidents of actual violence but a sustained pattern of abusive behaviours and attitudes that may escalate over time,”⁷²⁷ although it is usually an incident that triggers the mandatory report which is made to DoCS.

⁷²⁴ Australian Government’s Green Paper on Homelessness, *Which Way Home?* May 2008, p.89; Violence in Indigenous Communities, National Crime Prevention, 2001, p.1.

⁷²⁵ J Irwin, F Waugh and M Wilkinson, “Domestic Violence and Child Protection: A Research Report,” *University of Sydney*, August 2002, p.19.

⁷²⁶ *ibid.*

⁷²⁷ A Mullender, “What children tell us ‘He said he was going to kill our mum’” in C Humphreys and N Stanley (eds), *Domestic Violence and Child Protection Directions for Good Practice*, 2006, p.56, cited in DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.13,

- 17.8 For a woman, ongoing domestic and family violence may:
- a. mean that her decisions are constantly undermined (by the man)
 - b. make it difficult to access medical care (for bruises, fractures, cuts)
 - c. mean little opportunity for normal social contact for her children and herself
 - d. prevent her from providing her children with strong positive and reliable relationships which are necessary to helping them manage the stress and trauma in their lives
 - e. cause trauma, lessening her capacity to help her children make sense of what is happening during or after a violent incident, than would be the case in other frightening situations
 - f. mean that she experiences hyper-anxiety and alertness.⁷²⁸
- 17.9 As is clear from Chapter 5, domestic violence in the family is the most commonly reported issue in child protection reports. Those reports will usually be made by Police after they have been called to the victim's home. The children and young persons who are the subject of these reports may or may not have been home at the time of the incident, and may or may not have been sighted by Police prior to making the report to DoCS. Upon the basis of existing data, these reports from Police are very unlikely to be treated by DoCS as urgent and are unlikely to be the subject of a detailed investigation. Many of these children and young persons probably do not need statutory intervention but most will benefit from some service offered by the government or non-government sector. How they can best be directed to that service is dealt with in Chapter 10.
- 17.10 In Australia, only three of the eight child protection systems incorporate consideration of child exposure to domestic and family violence within child protection legislation – NSW, Western Australia and Tasmania.⁷²⁹
- 17.11 Domestic and family violence poses a number of challenges for the child protection system as well as for other human services and justice systems. First, while academic commentators caution against the assumption that domestic and family violence is always damaging to children and young persons, they tend to represent a significant minority of commentators. The general weight of the research is that witnessing domestic and family violence is in all cases a form of psychological child abuse.
- 17.12 Secondly, the mother is more likely to be a victim of domestic and family violence rather than a perpetrator, however, it is usually to her protective conduct or lack thereof that the child protection scrutiny is directed.

⁷²⁸ DoCS: *Brighter Futures Practice Resource: Domestic and Family Violence Vulnerability*, August 2008, pp.5-6.

⁷²⁹ KL Nixon, LM Tutty, G Weaver-Dunlop and CA Walsh, "Do Good Intentions Beget Good Policy? A Review of Child Protection Policies to Address Intimate Partner Violence," *Children and Youth Services Review*, 29, 2007, p.1476.

Caseworkers need to have sufficient training and access to resources to navigate an appropriate response in these circumstances.

- 17.13 Thirdly, any effective response to children and young persons residing in a home where domestic and family violence is present, needs to consider that frequently such violence will coincide with drug and alcohol use by one or more carers and, on occasions will also coincide with the presence of mental health issues for one or more carers. Thus, an integrated response involving health expertise and services as well as the potential need for Police to apply for an AVO, is needed. This is addressed in Chapters 9 and 10.
- 17.14 Finally, significant resources are expended by DoCS and Police systems in making and processing reports about domestic violence, even though few of those reports end in interventions designed to reduce the risk of harm to children or young people.
- 17.15 This chapter is concerned with understanding the research base and data on domestic and family violence, and suggesting ways in which reports about domestic violence to DoCS can better be made to increase the likelihood of a positive response for those subject to it.

Statistics

- 17.16 Over the last three years, namely 2005/06 to 2007/08 (preliminary figures) domestic violence has consistently accounted for about a quarter of all reports made to DoCS. Similarly, the Police have consistently made almost three quarters of all domestic violence reports to DoCS over that period of time.
- 17.17 Just under one third of all child protection reports over the last three years have had domestic violence listed as at least one of the reported issues. In numbers alone, over 94,000 reports were received which included domestic violence as a factor in 2007/08 (preliminary).
- 17.18 The most frequently recorded child protection risk factors in reports concerning 55 per cent of all children, known to DoCS, who died in 2007 were domestic violence and parental substance abuse. Further, in 39 per cent of all families, domestic violence and parental substance abuse were the most commonly recorded co-existing risk factors, while in 24 per cent of all families neglect and domestic violence were co-existing risk factors.
- 17.19 As is known from Chapter 5, multiple reports about the same child or young person have significantly increased over the last five years. However, re-reporting by Police within seven days about the same issue is relatively low and, therefore not surprisingly, such short term re-reporting about domestic violence incidents is also relatively low, even though such behaviour tends to be repetitive to the point of becoming an endemic feature of these relationships.

- 17.20 Domestic violence was the primary reported issue in over one quarter of all reports that were referred to a CSC/JIRT for further assessment in 2006/07. However, only 2.5 per cent of these reports were assigned a response time of the less than 24 hours, with the majority (61.1 per cent) being assigned a response time of less than 10 days. Accordingly, domestic violence reports are less likely to be considered urgent by DoCS, perhaps because the information in domestic violence reports is low level and does not warrant a higher priority unless associated with other risk factors.
- 17.21 Further, domestic violence reports by Police were less likely again to be considered urgent by DoCS, with 1.7 per cent being assigned a response time of less than 24 hours and the majority (65.8 per cent) being assigned a response time of less than 10 days.
- 17.22 In both 2006/07 and April 07/ March 08, domestic violence reports were slightly less likely to be referred to a CSC/JIRT for further assessment when compared with all reports so referred in those years.
- 17.23 For the period 1 April 2007 to 31 March 2008, over one quarter of all domestic violence reports were closed and the CSC/JIRT before any secondary assessment. In 2006/07, over one third were so closed.
- 17.24 For the period 1 April 2007 to 31 March 2008, almost one third of all domestic violence reports were closed after a SAS1 was completed and 6.9 per cent were the subject of a completed SAS2. Of those reports that were substantiated, 14.2 per cent had domestic violence as the primary reported issue.
- 17.25 What can be seen from this data is that domestic violence reports were less likely to result in intervention by DoCS. Of the more than 76,000 reports made in April 07/ March 08 about a risk of harm from domestic violence as the primary reported issue, just over 5,000 were substantiated.

Research

- 17.26 It is difficult to accurately estimate the true incidence of domestic and family violence in the community as victims are often reluctant to report such violence to Police or to Health or to seek assistance. However, the Ombudsman's 2006 report, *Domestic Violence: Improving Police Practice*, states that only 14 per cent of women who experienced violence from an intimate partner reported the most recent incident to Police.⁷³⁰ In addition, as noted earlier, there are differing definitions of domestic and family violence, and data collection methods are

⁷³⁰ Australian Institute of Criminology, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence against Women Survey*, 2004 cited in NSW Ombudsman, *Domestic Violence: Improving Police Practice*, December 2006, p.4.

inconsistent.⁷³¹ However, Access Economics has estimated that approximately 1.6 million women in Australia have experienced domestic and family violence in some form since the age of 15 years.⁷³²

- 17.27 Many women are subject to domestic and family violence while they are pregnant, although prevalence estimates vary. Abused women are also at greater risk of experiencing health problems during pregnancy and postnatally. The period leading up to, and just after, birth is one of the most vulnerable periods in human development.⁷³³
- 17.28 Aboriginal women experience domestic and family violence at a considerably higher rate than non-Aboriginal women.⁷³⁴ As with non-Aboriginal women, Aboriginal women under report incidents.⁷³⁵ In NSW, Aboriginal women are four times more likely than the average NSW woman to be a victim of domestic and family violence.⁷³⁶ In NSW in 2002, Aboriginal women reported experiencing domestic and family violence related assault at six times the State average.⁷³⁷ There is also evidence that Aboriginal women are more likely than non-Aboriginal women to suffer serious injury as a result of domestic and family violence.⁷³⁸ Reflecting this research has been the recent requirement to make prenatal reports⁷³⁹ and the introduction by Health of domestic violence screening referred to in Chapter 7.
- 17.29 Research consistently shows that domestic and family violence is nearly always associated with other risk factors as well.⁷⁴⁰ Poverty, substance abuse, child sexual and physical abuse, parental anti-social personality syndrome and other mental conditions including and maternal depression may all co-occur. Learned behaviour and de-sensitisation to the presence of abuse within a family, during childhood, can lead to distorted perceptions of its acceptability and of appropriate response mechanisms.

⁷³¹ J People, "Trends and patterns in domestic violence assaults," *Crime and Justice Bulletin, Number 89*, NSW Bureau of Crime Statistics and Research, October 2005, p.2.

⁷³² Access Economics, *The cost of domestic violence to the Australian economy*, October 2004, p.16, cited in T Drabsch, "Domestic Violence in NSW," *NSW Parliamentary Library Research Service, Briefing Paper 07/2007*, June 2007, p.1.

⁷³³ DoCS, *Responding to Pre-Natal Reports Policy*, August 2007, p.7.

⁷³⁴ T Szirom, D Chung and R Jaffe, *Indigenous Family Violence Phase 1 Meta-evaluation Report*, 2003 cited in DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.7.

⁷³⁵ P Memmott, R Stacy, C Chambers, C Keys, *Violence in Aboriginal Communities*, 2001, Commonwealth Attorney-General's Department (National Crime Prevention) pp.7, 38, 41.

⁷³⁶ J Fitzgerald and D Weatherburn, "Aboriginal Victimization and Offending: The Picture from Police Records," *NSW Bureau of Crime Statistics and research*, December 2001, p.2.

⁷³⁷ NSW Department of Aboriginal Affairs, *Two Ways Together Report Indicators Report 2005*, p.61.

⁷³⁸ Aboriginal and Torres Strait Islander Women's Task Force, "Aboriginal and Torres Strait Islander Women's Task Force on Violence report," *Queensland Government*, 1999; H Blagg, "Crisis Intervention in Aboriginal Family Violence: Summary Report," *Commonwealth of Australia*, 2000, p.8.

⁷³⁹ *Children and Young Persons (Care and Protection) Act 1998* s.25.

⁷⁴⁰ DoCS, "Domestic Violence and its Impact on Children's Development," presentation delivered at the DoCS Fourth Domestic Violence Forum, 24 September 2002, p.2.

- 17.30 The Australian Bureau of Statistics Personal Safety Survey 2005⁷⁴¹ found that 57 per cent of women who experienced violence by a current partner reported that they had children in their care at some time during the relationship, and 34 per cent said that these children had witnessed the violence. The survey also found that nearly 40 per cent of women who experienced violence by a previous partner said that children in their care had witnessed the violence.
- 17.31 Research has also found that the inclusion of women's predictions of 'dangerousness' improves the accuracy of predictions of further assault.⁷⁴² Assessment tools, such as actuarial tools used for domestic and family violence have limited scope for inclusion of individual vulnerabilities and personal circumstances whereas women's assessments do.⁷⁴³
- 17.32 A growing body of international research confirms that domestic and family violence and child abuse frequently co-occur within the same families.⁷⁴⁴ Recent research has shown that rates of co-occurrence of child abuse with domestic and family violence can range from 22-67 per cent.⁷⁴⁵ This is supported by the data analysis in Chapter 5 and highlights the complex environment within which child protection and health workers operate.
- 17.33 Child abuse and neglect in the context of domestic and family violence can occur in a variety of ways: the same perpetrator may be abusing both mother and children, the children may be injured when 'caught in the crossfire' during incidents of adult violence; children may experience neglect because of the impact of the violence and controlling behaviours on the mother's physical and mental health; or children may be abused by a mother who is herself being abused.⁷⁴⁶
- 17.34 Evidence is emerging that cases where both domestic and family violence and child abuse occur represent the greatest risk to children's safety and that large numbers of cases in which children are killed have histories of domestic and family violence.⁷⁴⁷ Of the 114 reviewable child deaths in 2006 in NSW where the children and young persons or their sibling were known to DoCS:

⁷⁴¹ Australian Bureau of Statistics, Personal Safety, Australia, 2005 (Reissue), p.40.

⁷⁴² A Weisz, R Tolman and D Saunders, "Assessing the risk of severe domestic violence. The importance of survivor's predictions," *Journal of Interpersonal Violence*, 15(1), 2000, pp.75-90 cited in DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.49.

⁷⁴³ L Laing, "Risk assessment in domestic violence," *Australian Domestic and Family Violence Clearinghouse Topic Paper*, 2004; A Weisz, R Tolman and D Saunders, 2000, op. cit., pp.75-90 cited in DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.49.

⁷⁴⁴ L Laing, "Domestic Violence in the Context of Child Abuse and Neglect," *Australian Domestic Violence Clearinghouse*, 2003, p.1; DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, pp.16-17.

⁷⁴⁵ L Knickerbocker, R E Heyman, A M Smith Slep, E N Jouriks and R McDonald, "Co-occurrence of child and partner maltreatment: Definitions, prevalence, theory and implications for assessment," 2007, *European Psychologist*, pp.36-44.

⁷⁴⁶ L Laing, 2003, op. cit., pp.1-2.

⁷⁴⁷ *ibid.*, p.2.

*at least one risk of harm report was made in relation to 85 children and/or their sibling(s) in the 12 months prior to the death. In just under half of the reports made (41), domestic violence was the main issue reported.*⁷⁴⁸

- 17.35 Research about domestic and family violence and its effect on parenting has found that children living in households with domestic and family violence have an increased risk of physical abuse.⁷⁴⁹ DoCS has advised that 24 per cent of children who died in 2007 were reported as being at risk from both domestic violence and physical abuse.
- 17.36 Laing cautions against stigmatising children and young persons who have been exposed to violence. Raising their experience of violence as a social issue “inevitably constructs a socially deviant identity for these young people.”⁷⁵⁰ Potentially one of the most damaging aspects of this ‘deviant’ identity, it is suggested, is the belief that these children and young persons will inevitably go on to either perpetrate or suffer violence themselves. Laing, accordingly, challenges the “unthinking acceptance of the cycle of violence”⁷⁵¹ and refers to evidence that abused children do not necessarily become ‘abusers.’
- 17.37 Humphreys argues that statutory child protection agencies have been slow to recognise the contribution of domestic and family violence to many situations of child abuse and neglect.⁷⁵² Historically, child protection intervention has tended to focus on women (mothers), despite the fact that men are estimated to be responsible for around half of the incidents of physical abuse of children and young persons and for the majority of the most serious incidents of physical abuse. Interventions have focused on women, even when their violent male partners are known to have committed the abuse of children and young persons.⁷⁵³
- 17.38 Several reviews undertaken by DoCS in 2007 found that there was little or no contact with the perpetrator following reports of serious domestic violence. In these cases DoCS found that casework in response to domestic violence focused on supports for the victim or encouraging the victim to seek protection through legal orders.
- 17.39 This has led to the proposition that there is often ‘gender bias’ in child protection intervention. It is argued that this gender bias can result in women being held accountable for ‘failing to protect’ their children from the actions of men who use

⁷⁴⁸ NSW Ombudsman, *Report of Reviewable Deaths in 2006, Volume 2: Child Deaths*, December 2007, p.27.

⁷⁴⁹ G Margolin, EB Gordis, AM Medina and PH Oliver, “The co-occurrence of husband to wife aggression, family of origin aggression and child abuse potential in a community sample: implications for parenting,” 2003.

⁷⁵⁰ L Laing, “Children, Young People and Domestic Violence” Issues Paper 2, *Australian Domestic and Family Violence Clearinghouse*, 2000, pp. 21 and 22.

⁷⁵¹ *ibid.*, p.22.

⁷⁵² C Humphreys, “Avoidance and confrontation: social work practice in relation to domestic violence and child abuse,” *Child and Family Social Work*, Vol 4, 1999, pp.77-87 cited in L Laing, 2003, *op. cit.*, p.3.

⁷⁵³ L Laing, 2003, *op. cit.*, p.3.

violence against them, and in a failure to hold men accountable for the effects of their violence on women and children and young persons.⁷⁵⁴

- 17.40 The use of language when recording information concerning domestic violence in child protection cases was also highlighted as a casework practice issue by DoCS. Common ways of recording domestic violence in files included ‘violence between the parents’ and ‘a violent relationship.’ These terms were used even when the father was violent towards the mother. Lamb describes such labelling as “acts without agents” and argues that the way violence is described can minimise the seriousness of this violence.⁷⁵⁵

- 17.41 In fact, Nixon et al, note that:

*women’s perceived inadequacies, including a perceived lack of parenting skills, an inability to protect their children, a lack of awareness of the impact of abuse on children, and an inability to choose non-violent partners, frequently become the focus of child protection intervention.*⁷⁵⁶

Further:

*By making abused women the focus of child welfare intervention, the actual perpetrators are ignored.*⁷⁵⁷

- 17.42 ‘Gender blind’ child protection intervention may place pressure on a woman to leave a relationship in which she is being abused on the threat of removing her children. However, appropriate support may not be provided nor the complexities with which she is struggling recognised.⁷⁵⁸ Humphries notes that separation, where there has been a history of domestic and family violence, is one of the highest risk factors for homicide and serious sexual and physical assault.⁷⁵⁹ The goal, however, of much child protection intervention is often to insist on separation as the only way to ensure the safety of the children and young persons. As Nixon et al state, this is because support of the non-offending parent falls outside the mandate of child protection agencies as their paramount consideration is for the welfare of the child protection agencies.⁷⁶⁰ Balancing the needs of child protection with interventions sensitive to the de-powered position of the abused woman poses challenging dilemmas for statutory child protection services.⁷⁶¹ This highlights the need for good

⁷⁵⁴ *ibid.*

⁷⁵⁵ S Lamb, “Acts without agents: an analysis of linguistic avoidance in journal articles on men who batter women,” 1991.

⁷⁵⁶ KL Nixon, LM Tutty, G Weaver-Dunlop and CA Walsh, 2007, *op. cit.*, p.1473.

⁷⁵⁷ *ibid.*

⁷⁵⁸ L Laing, 2003, *op. cit.*, p.3.

⁷⁵⁹ C Humphreys, “Domestic Violence and Child Protection: exploring the role of perpetrator risk assessments,” *Child and Family Social Work, Vol. 12*, 2007, p.365.

⁷⁶⁰ KL Nixon, LM Tutty, G Weaver-Dunlop and CA Walsh, 2007, *op. cit.*, p.1479.

⁷⁶¹ L Laing, 2003, *op. cit.*, p.4.

casework and effective supervision, quality training and real interagency collaboration.

- 17.43 Professor Reg Graycar, Associate Dean (Postgraduate Research), University of Sydney and Professor Julie Stubbs, Deputy Director, Institute of Criminology, University of Sydney advised the Inquiry that there has been a 'pendulum shift' from a failure to pay attention to domestic and family violence as an issue with respect to children, to a heavy handed over reaction in some cases.
- 17.44 They argued that domestic and family violence cases cannot be dealt with uniformly as a single category and that cases need to be approached on a case by case basis. They cautioned against the presumption that domestic and family violence is always damaging to children. Further the research literature does not provide an adequate definition of exposure to violence and provides little consensus as to the impact of particular forms, types and frequencies of violence on children. This, Nixon et al state, means that the assessment as to whether violence is ongoing and of a serious nature is left to the discretion of individual workers.⁷⁶²
- 17.45 In a submission to the Inquiry, Professor Graycar and Professor Stubbs, cited international research that indicates a wide variation in the responses of children who have been exposed to domestic and family violence. They said that Bragg found that children's responses ranged "on a continuum where some children demonstrate enormous resiliency while others show signs of significant maladaptive adjustment."⁷⁶³ They also cited Edelson's argument:

*against assuming that childhood exposure to violence is automatically a form of child maltreatment and suggests the need to modify child protection services and the expansion of primarily voluntary community-based responses to these children and their families.*⁷⁶⁴

Mills, Huntsman and Schmied also note that whilst there is evidence that supports the conclusion that domestic and family violence has a detrimental effect on children "the fact remains that many children have not been found to be suffering significantly adverse effects."⁷⁶⁵

- 17.46 Some argue that witnessing domestic and family violence is in all cases a form of psychological child abuse, while others argue against automatically defining all child witnesses as victims of child abuse.⁷⁶⁶ Those who caution against

⁷⁶² K L Nixon, L M Tutty, G Weaver-Dunlop and C A Walsh, 2007, op. cit., p.1481.

⁷⁶³ H Bragg, *Child Protection in families experiencing domestic violence*, US Department of Health and Human Services Administration for Children and Families, Office on Child Abuse and Neglect, 2004, cited in Submission: Graycar and Stubbs, 11 February 2008, pp.6-7.

⁷⁶⁴ J Edelson, "Should childhood exposure to adult domestic violence be defined as child maltreatment under the law?" in P Jaffe, L Baker and A Cunningham (Eds), *Protecting Children from Domestic Violence, Strategies for Community Intervention*, 2004 cited in Submission: Graycar and Stubbs, 11 February 2008, p.7.

⁷⁶⁵ DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.8.

⁷⁶⁶ L Laing, 2000, op. cit., p.15.

automatically defining exposure to violence as child abuse argue that this fails to take into account the efforts which women are making to protect their children and to deal with the violence in their lives, and that insensitive child protection intervention may place the woman and her children at greater risk.⁷⁶⁷

17.47 Edleson identifies a need for a standardised measure of children's behaviour that addresses the unique problem of children exposed to domestic and family violence (including a measure of perceived safety).⁷⁶⁸ Other research also suggests the need to develop appropriate diagnostic criteria to measure traumatic symptoms and to accurately assess their impact on preschool aged children.⁷⁶⁹ The Inquiry sees merit in exploring the use of such tools.

17.48 Research indicates that victims of domestic and family violence can continue to be effective parents.

*The majority of victims of domestic violence are not bad, ineffective, or abusive parents, but researchers note that domestic violence is one of a multitude of stressors that can negatively influence parenting. However, many victims, despite ongoing abuse, are supportive, nurturing parents who mediate the impact of their children's exposure to domestic violence. Given the impact of violence on parenting behaviours, it is beneficial that victims receive services that alleviate their distress so they can support and benefit the children.*⁷⁷⁰

17.49 Best practice guidelines typically support maintaining the children in the care of their 'non-offending parent' if possible. For instance, practice guidelines for "Effective intervention in domestic violence and child maltreatment cases" developed on behalf of the US National Council of Juvenile and Family Court Judges have endorsed three core principles:

- a. To ensure stability and permanency, children should remain in the care of their non-offending parent (or parents), whenever possible.
- b. A community service system should have many points of entry, should minimise the need for victims to respond to multiple and changing service providers, have adequate resources to allow service providers to meet family needs and avoid out-of-home placements.
- c. Responses should differ according to the experience and needs of particular families: "Families with less serious cases of child maltreatment

⁷⁶⁷ DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008.

⁷⁶⁸ J Edleson, *The overlap between childhood maltreatment and woman abuse*, 1999, cited in DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, A Literature Review*, Draft, March 2008, p.27.

⁷⁶⁹ AA Levendosky, A Huth-Bocks, M Semel and DA Shapiro, 2002 "Trauma symptoms in preschool aged children exposed to domestic violence," *Journal of Interpersonal Violence*, 17, pp.150-164, cited in DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.27.

⁷⁷⁰ H Bragg, 2004, op. cit., cited in Submission: Graycar and Stubbs, 11 February 2008, pp.6-7.

and domestic violence should be able to gain access to help without the initiation of a child protection investigation or the substantiation of a finding of maltreatment.”⁷⁷¹

- 17.50 It is difficult to argue with the appropriateness of any of these principles.
- 17.51 Australian research suggests that some women victims of domestic and family violence choose not to call the Police because of their concerns about the mandatory child protection reporting provisions.⁷⁷² This may be a particular concern for Aboriginal women. The Office of the Status of Women estimated that only six per cent of families where domestic and family violence is present have contact with statutory services.⁷⁷³ The need for a non-coercive response to domestic and family violence which, where appropriate, is not linked to child protection reporting was raised in the Inquiry’s Public Forum on Assessment Model and Process as it was acknowledged that this kind of link can prevent women from reporting. Munro also confirmed to the Inquiry that there is fear among victims of domestic and family violence that if they report they will get caught up in the child protection system. The system needs to deal with these perceptions because they can indeed be accurate.
- 17.52 Child welfare interventions have been criticised for potentially exacerbating violent situations. Abused women who are already under tremendous stress because of the abuse may be further traumatised by child welfare involvement thus compromising their parenting abilities and reducing their capacity to meet their children’s emotional needs. Children in turn may also experience “severe and long lasting effects” if they are removed from the non-abusive parent.⁷⁷⁴
- 17.53 Other reasons for not reporting domestic and family violence to Police relate to concern about the consequences for their children, the desire to avoid involvement in the criminal justice system and fear of reprisals.⁷⁷⁵
- 17.54 There is therefore debate about whether all children and young persons who are exposed to domestic and family violence should be considered ‘abused’ and hence the possible subject of statutory child protection intervention.
- 17.55 In their international comparative analysis of how the issue of child exposure to intimate partner violence has been addressed within a child protection policy context Nixon et al conclude that legislation or policy decisions that broadly define any children who are exposed to violence in the home as maltreated can

⁷⁷¹ S Schechter and J Edelson, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice*, 1999, cited in Submission: Graycar and Stubbs, 11 February 2008, p.7.

⁷⁷² C Humphreys, “Domestic Violence and Child Protection: Challenging Direction for Practice,” *Australian Domestic and Family Violence Clearinghouse*, Issues Paper 13, May 2007, p.5.

⁷⁷³ Office of the Status of Women, 1998, cited in DoCS, “Domestic Violence and its Impact on Children’s Development,” presentation delivered at the DoCS Fourth Domestic Violence Forum, 24 September 2002, p.2.

⁷⁷⁴ K L Nixon, L M Tutty, G Weaver-Dunlop, and C A Walsh, 2007, op. cit., p.1473.

⁷⁷⁵ N Taylor and J Mouzos, “Community Attitudes to Violence Against Women Survey 2006: A full technical report,” *Australian Institute of Criminology*, November 2006, p.94; S Trally, D Faulkner, C Cutler and M Slatter, “Women, Domestic and Family Violence and Homelessness: A synthesis report,” *Department of Families, Housing, Community Services and Indigenous Affairs*, Commonwealth of Australia, August 2008, p.21.

be problematic as they may further victimise abused women and their children, deter women from seeking help or disclosing abuse for fear of their children being removed, and overwhelm already overburdened child protection systems.⁷⁷⁶

- 17.56 This appears to hold true in NSW. The decision to include exposure to domestic and family violence as a form of child abuse has had significant implications for child protection services. A 2002 study by Irwin, Waugh and Wilkinson found that, consistent with current trends, domestic violence was the most common reason for reporting a child to DoCS but that domestic violence referrals were less likely to undergo an investigative assessment.⁷⁷⁷
- 17.57 Further, Irwin et al's research found that many child protection workers felt ill-equipped to respond to cases involving domestic violence and the inclusion of "exposure to domestic violence as a category of child abuse did not translate into changed practices for many child protection workers."⁷⁷⁸ The need to support better practice and quality training remains relevant today.
- 17.58 This also points to a need for those reporting to exercise their professional judgement about the presence of a significant risk of harm within the terms of the legislation. This is addressed later in this chapter.
- 17.59 At the Public Forum on Assessment Model and Process, DoCS expressed concern that children and families experiencing domestic and family violence who are reported to DoCS "do not yet have the pathways to get effective help ... they get locked in the DoCS system, and to no value to them."⁷⁷⁹
- 17.60 Given the necessity of safety and security as a primary means of helping women and children living with domestic and family violence, a number of practitioners and researchers in this field have given attention to developing and determining the effectiveness of programs for perpetrators of violence. Laing and Bobic, however, emphasise that this is a contentious area.⁷⁸⁰ To date the evidence for the effectiveness of perpetrators programs is weak and some argue that scarce resources are better devoted to supporting women and their children. The National Crime Prevention report *Ending Domestic Violence? Programs for Perpetrators* reviewed programs specifically for male perpetrators of domestic and family violence and concluded that:

Concerns about program effectiveness, and particularly about the capacity of programs to stop men continuing to abuse their partners or ex-partners and their children, have contributed in

⁷⁷⁶ K L Nixon, L M Tutty, G Weaver-Dunlop, and C A Walsh, 2007, op. cit., pp.1469-1470.

⁷⁷⁷ J Irwin, F Waugh and M Wilkinson, 2002, op.cit., p.9.

⁷⁷⁸ *ibid.*, p.10.

⁷⁷⁹ Transcript: Public Forum, Assessment Model and Process, 18 April 2008, p.29.

⁷⁸⁰ L Laing and N Bobic "Economic Costs of Domestic Violence: Literature review," *Australian Domestic and Family Violence Clearinghouse*, April 2002.

*part to the reluctance of many governments to fund perpetrator programs.*⁷⁸¹

- 17.61 This highlights the importance of ensuring that programs for perpetrators work in parallel with programs that engage and support women. It is also imperative that while men are participating in programs women's safety is ensured.⁷⁸²
- 17.62 Little attention seems to be given in perpetrators programs to their relationship with their children and their role as a parent, even though men who perpetrate domestic and family violence are often very limited in their ability to parent effectively.⁷⁸³
- 17.63 Domestic and family violence behaviour change programs in NSW are funded primarily through Corrective Services and partnerships with non-government services. The Inquiry understands that the NSW Government has concerns about the effectiveness and applications of these programs and is currently developing guidelines to ensure that they are consistent with best practice standards and are effective in reducing re-offending and do not place victims at risk. A report is to be provided to the Government by an interagency working group by December 2008.⁷⁸⁴
- 17.64 Evidence does however, exist which shows that integrated domestic and family violence systems are necessary to reduce the rates of violence.⁷⁸⁵ Most research examined by the Inquiry identifies that the best way to protect children subject to domestic and family violence is to support and protect the adult victim, while holding the perpetrator accountable.

The need for an integrated response

- 17.65 The recognition that child abuse and domestic and family violence frequently co-exist, together with that body of evidence that accepts the harmful effects of exposure to domestic and family violence on children, have led to calls for improved collaboration between statutory child protection services and domestic and family violence services. The complexity involved in the 'causes' or risk factors for domestic and family violence and child abuse indicates that there can be no single, simplistic solution: models need to draw on multiple perspectives with a view towards integrating services and intervention approaches as

⁷⁸¹ National Crime Prevention, "Ending Domestic Violence? Programs for Perpetrators," *Attorney General's Department*, Canberra, 1999, p.199.

⁷⁸² EW Gondolf, "Evaluating batterer counselling programs: a difficult task showing some effects and implications," *Aggression and violent behaviour*, 9(6), 2004, pp.605-631, cited in DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.73.

⁷⁸³ DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.73.

⁷⁸⁴ Department of Premier and Cabinet, *Discussion Paper on Domestic and Family Violence*, p.24.

⁷⁸⁵ L McFerran, "Taking back the castle: how Australia is making the home safer for women and children," *Issue paper 14, Australian Domestic and Family Violence Clearinghouse*, July 2007, p.22.

- necessary.⁷⁸⁶ Health care workers, police, teachers, domestic and family violence and child protection workers all play overlapping roles in the prevention and intervention of cases of harmful domestic and family violence.
- 17.66 Leading researchers and policy makers in Australia, the USA and the UK have argued for a more collaborative approach between domestic and family violence and child protection agencies which has as an objective better support for both children and victims.⁷⁸⁷
- 17.67 Laing, however, states that such collaboration faces considerable challenges, given the very different histories, philosophies and structures of these two services.⁷⁸⁸
- 17.68 On one hand, domestic and family violence services:
- a. are community-based, offering services on a voluntary basis to women and children escaping violence
 - b. are ‘woman-centred’ and stress the empowerment of women through respecting their choices and providing information and support.
- 17.69 In contrast, child protection services:
- a. have a statutory base and deal largely with involuntary clients
 - b. focus on children
 - c. deal with women who may be at a very different stage in recognising and dealing with the violence than the women who contact domestic and family violence services.
- 17.70 Laing notes that these differences result in a number of barriers to collaboration:
- a. tensions between the ‘child-centred’ and ‘woman-centred’ philosophies of child protection and domestic and family violence services
 - b. tensions about how best to hold violent men accountable. Child protection services often have little leverage with abusive men. As a result, threats to remove children may not be a concern to the perpetrator of violence, while at the same time, a woman’s fear of losing her children can be utilised by the abusive man as part of his tactics of coercive control.⁷⁸⁹
- 17.71 The Inquiry supports the strategies for building collaboration that have been found to be effective including:
- a. establishing ‘common ground,’ that is, agreement on a common goal of intervention

⁷⁸⁶ DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.60.

⁷⁸⁷ DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008, p.74; C Humphreys, May 2007, op.cit., p.16.

⁷⁸⁸ L Laing, “Evaluation of the Green Valley Domestic Violence Service,” *University of Sydney*, 2005, p.71.

⁷⁸⁹ L Laing, 2003, op. cit., p.6.

- b. understanding the roles of each service system, including the constraints and pressures under which they operate
 - c. cross training to bring together two bodies of expertise
 - d. arranging ongoing consultation between child protection and domestic and family violence workers on a case by case basis to combine the knowledge and experience of each system, and in this way, develop practice knowledge with complex cases.⁷⁹⁰
- 17.72 Chapters 10 and 24 further expand on the Inquiry's views about building the better practice and stronger interagency responses, which are of relevance in particular for the cohort of high risks families which tend to become repeat clients of more than one agency.
- 17.73 A recent literature review undertaken by DoCS provides an overview of strategies and interventions that address both domestic and family violence and child protection concerns.⁷⁹¹
- 17.74 Interventions may include individual counselling, group programs and interventions for mothers and children. The length of interventions also varies considerably, lasting anywhere from six weeks for some group programs to two years for individual counselling.⁷⁹²
- 17.75 Overall fewer interventions designed for children and young persons experiencing domestic and family violence exist than for women experiencing domestic and family violence. Many of those that do target children in the 4-13 year age group. There appears to be a gap in services for programs specifically targeting adolescents.⁷⁹³
- 17.76 Child abuse prevention programs, such as home nurse visitation, have been found to be less effective when domestic violence is present.⁷⁹⁴ Olds found that the presence of such violence had a negative impact on the ability of home visitation schemes to achieve their targeted outcome, noting that "the program had no impact on the incidence of domestic violence, but domestic violence did moderate the impact of the program on child abuse and neglect."⁷⁹⁵
- 17.77 In terms of effectiveness, while many programs undertake before and after client satisfaction surveys, comprehensive program evaluations, including measuring long term impact, are uncommon. Furthermore, due to small sample sizes, the scarcity of control groups and variability in programs, evaluation

⁷⁹⁰ *ibid.*, pp.8-9.

⁷⁹¹ DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008.

⁷⁹² *ibid.*

⁷⁹³ *ibid.*

⁷⁹⁴ L Laing, 2003, *op. cit.*, p.2.

⁷⁹⁵ D Olds, L Sadler and H Kitzman, "Programs for parents of infants and toddlers: recent evidence from randomised trials," *Journal of Child Psychology and Psychiatry*, Vol 48(3), 2007, p.378.

results are not only difficult to compare they often lack the rigour to provide conclusive outcomes.⁷⁹⁶

- 17.78 The recent DoCS review of selected studies provides the following synthesis of ideas about what works in intervention programs for women and children:
- a. The greatest benefits for children and their mothers come from programs that run for both women and children concurrently.
 - b. Timing of the programs is important, intervention is of the greatest benefit once child/family are living free of violence.
 - c. Follow up indicates that ongoing support provides significant benefits for women and children.
 - d. Irrespective of the particular program the act of intervention, with its associated support, expression of care and concern and reduction of family isolation, appear to have an impact on improving the quality of life for many of these families.
 - e. Evidence supports the notion that well planned and appropriately intense interventions, along with inclusion of parenting support to mothers, can help lead to a reduction in children's and women's distress following exposure to intimate partner violence.
 - f. Research has yet to identify which particular program components have the greatest benefit for specific treatment needs.⁷⁹⁷
- 17.79 Much of the recent literature reviewing models of practice explores and/or evaluates 'integrated' or 'coordinated community response' models, as opposed to individual interventions or programs. These models involve the collaboration of a range of services involved in various aspects of supporting women and children experiencing domestic and family violence. "Underpinning these models is the realisation that no single program has the capacity to develop or provide the resources or services required by families experiencing domestic violence."⁷⁹⁸
- 17.80 Integrated models may, for example, may involve any or all of the following: domestic and family violence services; child protection agencies; housing services, Police, correctional services, community, women and child support agencies, and schools. Domestic and family violence is also often just one 'problem' in the lives of these families who may require the resources of multiple services. An integrated model would, as the name suggests, help families access the necessary services in a coordinated and managed way. It has been noted that until recently integrated services have focused mainly on services for

⁷⁹⁶ DoCS, *Domestic Violence: Strategies and Interventions to Support Children and Families, Literature Review*, Draft, March 2008.

⁷⁹⁷ *ibid.*

⁷⁹⁸ *ibid.*

women experiencing violence and have to some extent neglected the needs of children.⁷⁹⁹

- 17.81 UnitingCare Burnside in particular advocated for agencies to provide family based support for families who experience domestic and family violence, rather than referral between agencies that separately provide services for parents, children, young people and perpetrators.
- 17.82 McFerran examines a range of models that allow women and children victims of domestic and family violence to stay in their homes and states:

*the evidence from the ACT, Tasmania and Victoria and the NSW pilots, is that governments and community services now recognise that a state-wide, integrated response ensures the most consistent, accountable and durable outcomes for the greatest numbers of women and children.*⁸⁰⁰

- 17.83 The Australian Domestic and Family Violence Clearinghouse states:

good practice domestic and family violence integrated systems across states and territories can reduce homelessness by supporting women to stay in their homes, enhancing victim safety, reducing secondary victimisation and holding abusers accountable for their violence.

- 17.84 The Clearinghouse further states that “the evidence that integrated programs can provide safety for women experiencing family violence to remain in their homes is compelling.”⁸⁰¹ It is difficult to argue with the proposition that when domestic and family violence forces a woman to leave home this fact is of itself a form of secondary harm that should not be visited on her or her children.
- 17.85 The Inquiry concludes that integrated services which are built on evidence based casework, clear guidelines for intervention, quality training and supervision and effective interagency collaboration form the basis of the appropriate response to domestic and family violence in the child protection context.

NSW response

- 17.86 Priority R1 of the NSW State Plan, reduced rates of crime, particularly violent crime, states that:

⁷⁹⁹ *ibid.*

⁸⁰⁰ L McFerran, “Taking back the castle: how Australia is making the home safer for women and children,” *Issue paper 14, Australian Domestic and Family Violence Clearinghouse*, July 2007, p.22.

⁸⁰¹ Australian Domestic and Family Violence Clearinghouse response to: Australian Government’s Green Paper on Homelessness, *Which Way Home?* May 2008, p.2.

Domestic and family violence is a crime and is a priority area for Government. Our responses need to support the victim, ensure the legal processes are timely, and respond to the causes of domestic and family violence. To achieve this, we will develop and implement a State-wide strategy to deal with the causes and consequences of domestic violence.

The strategy will include programs to facilitate early intervention in high risk situations, provide more options for victims and their children to escape domestic violence, and coordinate services so victims receive integrated police, legal and social assistance. Families at risk of, or suffering from, domestic violence will be able to seek help earlier and be supported through fast-tracked legal proceedings and other support services.⁸⁰²

- 17.87 The State Plan has set a target of reducing the incidence of violent crime against individuals by 10 per cent by 2016.
- 17.88 The achievement of these results is closely linked to a number of other State Plan priorities, including reducing re-offending (R2), increasing participation and integration in community activities (R4), prevention and early intervention (F4) and reducing avoidable hospital admissions (F6).

Whole of government response

- 17.89 Premier and Cabinet have estimated that the cost of domestic and family violence to the NSW economy is approximately \$2.8 billion. This figure includes the cost of support services, police intervention, court services and the pain and suffering of victims. The largest part is spent on mainstream services or core agency business, such as the DoCS Helpline or emergency health services. Only a small proportion is spent on targeted domestic and family violence services, such as the DoCS Domestic Violence Line or Domestic Violence Liaison Officers provided by Police.⁸⁰³
- 17.90 In August 2007, the Government commissioned a review of existing structures for coordinating NSW Government action to address domestic and family violence and violence against women.⁸⁰⁴
- 17.91 As a result of the review the Government is now implementing a new approach to preventing violence against women to enable coordination of strategic policy development, service provision and training.
- 17.92 The new approach involves the following:

⁸⁰² NSW Government: *A New Direction for NSW – State Plan*, November 2006, p.28.

⁸⁰³ Department of Premier and Cabinet, *Discussion Paper on Domestic and Family Violence*, p.11.

⁸⁰⁴ ARTD Consultants, *Coordinating NSW Action Against Domestic and Family Violence*, 8 November 2007.

- a. The establishment of a Violence Prevention Coordination Unit in the Office for Women's Policy, Premier and Cabinet, which will take a leadership role in the development of policy aimed at reducing domestic and family violence. The initial task of this unit will be the development of a statewide strategic framework to ensure that linkages between agencies and programs are strengthened and services are integrated.
- b. The engagement of five statewide project officers in addition to two existing positions to deliver major Government projects in key service delivery agencies. Three of these projects have already been trialled and evaluated, and the Government has committed to either expanding, or making these projects permanent under the new approach. Two of these coordinators are located with DoCS to work on the Staying Home Leaving Violence and the Integrated Case Management projects. Two coordinators are based with Health to work on the Intersectoral Domestic and Family Violence Education and Training project and the Risk Assessment Tool and one coordinator is located with Attorney General's to work on the Domestic Violence Intervention Court Model.
- c. The appointment of nine regional coordinators within Police who are to focus on ensuring the integrated delivery of human services and criminal justice responses. These positions will be expected to establish and maintain a regional coordination network to ensure links between local domestic and family violence service delivery agencies within the region. Regional coordinators will be located at the Police Regional Command Offices in Parramatta, Surry Hills, Bankstown, Newcastle, Coffs Harbour, Wollongong, Wagga Wagga, Dubbo and Tamworth. In addition to the nine regional coordinator positions, Police is establishing 40 additional Domestic Violence Liaison Officers (previously 123 positions)⁸⁰⁵ to be located within Local Area Commands.
- d. The establishment of a new Premier's Council for Preventing Violence Against Women to advise the Premier and facilitate more formal and direct engagement between the non-government sector and the Government.

17.93 The NSW Government has committed the following amounts to specific domestic and family violence projects over four years (2007 to 2011):

⁸⁰⁵ Department of Premier and Cabinet, *Discussion Paper on Domestic and Family Violence*, November 2008, p.18.

Table 17.1 **NSW Government domestic and family violence projects**

Domestic Violence Court Intervention Model	\$8.4m
Integrated Case Management	\$12.0m
Non-government Sector Grants	\$8.0m
Staying Home Leaving Violence	\$5.1m
Court Assistance Scheme	\$2.6m
Indigenous Programs (to be announced)	\$3.6m
Police Equipment	\$0.5m
Total	\$40.2m

- 17.94 In addition, \$8 million will be spent on remote witness facilities that are expected to assist victims of domestic and family violence when giving evidence in prosecutions of perpetrators.
- 17.95 A number of NSW Government agencies have been involved in providing training for practitioners in domestic and family violence, both within their agency and with partner government and non-government agencies. For example, Health funds the Education Centre Against Violence, administered by Sydney West Area Health Service. The centre provides statewide specialised training, consultancy and resource development for Health and interagency workers who provide services to children and adults who have experienced sexual assault, domestic and family violence and/or physical and emotional abuse and neglect. Police and DoCS also provide specialist training for officers and caseworkers in recognising and responding to domestic and family violence.
- 17.96 While work has been done by NSW Government agencies and the non-government sector to improve responses to domestic and family violence, there is not yet an effective coordinated and comprehensive response to this problem in NSW. These responses and services are primarily provided by mainstream services, which largely operate independently of each other.
- 17.97 The Inquiry has been informed that Premier and Cabinet is developing a strategic framework to underpin statewide responses to domestic and family violence. As part of this process, Premier and Cabinet has developed a discussion paper on domestic and family violence which will form the basis for feedback and consultation in 2009. General issues identified by the NSW Government in responding to domestic and family violence include:
- a. the complex array of service providers across multiple sectors and disciplines
 - b. concern that domestic and family violence victims must compete for priority with other demands on each of those service systems
 - c. the difficulty involved in achieving coordination across agencies as a result of limited availability of resources, different information systems and territorial issues

- d. concern that the sector is often specifically interested in parts of the problem or service responses rather than engaged in taking a holistic view of domestic and family violence
 - e. there is no statewide approach to providing targeted support for high demand clients to reduce their disproportionate impact across the service spectrum.⁸⁰⁶
- 17.98 The former Director-General of DoCS has been engaged to assist in the development of the Domestic and Family Violence Strategic Framework, and as part of that work is considering the extent to which high demand clients of human services and justice agencies are among those families experiencing domestic and family violence.
- 17.99 It is evident from the Inquiry's work that there is substantial anecdotal evidence indicating that a relatively small proportion of families in NSW take up a substantial amount of the human services and justice services provided and that these families have experienced domestic and family violence. The extent of the problem and possible systemic improvements in dealing with it at both agency and interagency level are under consideration.
- 17.100 A number of concerns and questions were raised about the Government's new approach to domestic and family violence in various Public Forums and meetings held by the Inquiry around the State. There were concerns in relation to gaps in services but also in relation to the increasing focus on a criminal justice and police response to domestic and family violence rather than other needed responses such as community capacity building.

Apprehended Violence Orders

- 17.101 On 10 March 2008 Part 15A of the *Crimes Act 1900* was repealed and the *Crimes (Domestic and Personal Violence) Act 2007* commenced. For the purposes of the Act a 'domestic violence offence' is defined as a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship, an expression which is given an extended definition.⁸⁰⁷
- 17.102 In passing this Act, Parliament recognised, *inter alia*, that: domestic violence, in all its forms, is unacceptable behaviour; domestic violence is predominantly perpetrated by men against women and children; children who are exposed to domestic violence as victims and witnesses are in a particularly vulnerable position; and such exposure can have an impact on their current and future physical, psychological and emotional well-being.⁸⁰⁸
- 17.103 Significant changes made by the new Act include requirements that:

⁸⁰⁶ *ibid.*

⁸⁰⁷ *Crimes (Domestic and Personal Violence) Act 2007* ss.5 and 11.

⁸⁰⁸ *Crimes (Domestic and Personal Violence) Act 2007* s.9(3)(f).

- a. where a person has been found guilty of a domestic violence offence, a recording is to be made in the person's criminal record that the offence was a domestic violence offence and similar recordings may be made in relation to domestic violence offences previously committed by the person⁸⁰⁹
 - b. when making an apprehended domestic violence order or interim apprehended domestic violence order for an adult, there is to be included as a protected person, under the order, any child with whom the adult has a domestic relationship unless there are good reasons for not doing so.⁸¹⁰
- 17.104 Previously, when a victim took out an AVO, the children were not necessarily included on the order. The Ombudsman found that it was unusual for Police to initiate separate AVOs for children and questioned whether police officers had received adequate procedural guidance to determine the circumstances that warranted an application for an AVO on behalf of a child.⁸¹¹
- 17.105 It is anticipated that the new Act will remedy this by requiring the Magistrate to consider the safety of the protected person and any child directly or indirectly affected by the conduct of the defendant.⁸¹² It will be critical to monitor the impact of these provisions.
- 17.106 Section 43 of the Care Act requires DoCS and Police to consider whether an AVO would provide sufficient protection to a child or young person who is believed to be at risk before making the decision to remove the child from his or her family. The note to section 40 of the Care Act states that:

The intention of the Act is to ensure that children and young persons are protected by using the least intrusive option. Removal of children and young persons should be a last resort. The option of an apprehended violence order to protect a child or young person should be considered. In cases where there is an immediate danger of abuse, an apprehended violence order against the alleged abuser, requiring him or her, for example, to leave the house, may be sufficient to ensure the protection of the child or young person while investigations and assessments continue. The order could be made to cover the child or young person and, if appropriate, the child or young person's primary care-giver and other members of their household.

These orders are available under the Crimes (Domestic and Personal Violence) Act 2007.

If a child or young person is removed in an emergency situation, the Director-General should also consider whether an

⁸⁰⁹ Crimes (Domestic and Personal Violence) Act 2007 Part 3, section 12.

⁸¹⁰ Crimes (Domestic and Personal Violence) Act 2007 Part 9, section 38.

⁸¹¹ NSW Ombudsman, *Domestic Violence: Improving Police Practice*, December 2006, p.42.

⁸¹² Crimes (Domestic and Personal Violence) Act 2007 s.17(1).

application for an apprehended violence order may still be the most effective way of ensuring the immediate and safe return of the child or young person to the home.

- 17.107 These requirements recognise the strong association between domestic and family violence and child protection concerns,⁸¹³ and the desirability of maintaining the victim and children or young people in their home.

Specific NSW Government domestic and family violence projects

- 17.108 The Domestic Violence Intervention Court Model was developed to improve the efficiency and quality of the criminal justice response to domestic and family violence, through agreed protocols and services for:
- a. improved policing
 - b. improved court assistance support
 - c. improved management of local court activities
 - d. reduced incidence of re-offending
 - e. linking victims with other sources of support, including housing and counselling.
- 17.109 Attorney General's is the lead agency for this project. A two year trial began in Wagga Wagga and Campbelltown in September 2005. The Government has now committed recurrent funding of \$2.1 million per year for four years to continue the model at both locations. This funding commenced at the start of the 2007/08 financial year.
- 17.110 Attorney General's is currently investigating the options and implications of mainstreaming the protocols and services developed as part of the model as part of the core business of partner agencies.
- 17.111 An evaluation of the model found mixed results with Police and local court outcomes, however, victims were very satisfied with the Police response in both of the trial local area commands and with the support they received. Most victims reported that they felt safe at the time of interview and most victims said they would report a similar incident to the Police in the future.⁸¹⁴
- 17.112 The majority of stakeholders also believed the trial was successful and should be continued in Campbelltown and Wagga Wagga and should be considered for implementation in other locations.

⁸¹³ Standing Committee on Social Issues, *Care and Support. Final Report on Child Protection Services*, December 2002, p.130.

⁸¹⁴ L Rodwell and N Smith, "An Evaluation of the NSW Domestic Violence Intervention Court Model," *NSW Bureau of Crime Statistics and Research, Attorney General's Department of NSW*, 2008.

- 17.113 However whilst the evaluation reports positive results with respect to the experience of victims, it is silent in relation to the impact of the model on women with children and any associated child protection issues. Given that DoCS is one of the interagency partners in this model the Inquiry suggests that future evaluations factor this into their analysis and subsequent recommendations.
- 17.114 The Domestic Violence Intervention Court Model has been identified as an effective integrated crisis response and short term criminal justice and community social welfare response to domestic and family violence. Following a further evaluation and the completion of the business model, consideration will be given to expanding this program.

Staying Home Leaving Violence

- 17.115 DoCS and Housing are the lead agencies for this project. Staying Home Leaving Violence is an approach that helps women and children stay safely in their homes without their violent partner. The support of the Police, Magistrates and Local Courts is an important aspect of the project as an exclusion order is negotiated as a part of an AVO. The framework entails:
- a. the removal of the violent partner from the home
 - b. keeping the violent partner out of the home over time
 - c. addressing the immediate and longer term safety issues for the woman and her children
 - d. providing longer term support for the woman and her children, and the prevention of future violence.
- 17.116 The framework is based on research funded in 2004 by DoCS, to find out from women who had left a violent relationship what would enable them and other women to remain in their homes.⁸¹⁵ The study found that remaining in their own home brought considerable benefits to the woman and her children including stability of accommodation, stability and security for the children, less disruption to their lives and a sense of empowerment. The study also noted the broader social and economic benefits including reducing women's homelessness and financial disadvantage and placing accountability for violence and its consequences with the perpetrator.
- 17.117 The specific practices that underpin the framework are:
- a. protocols between key agencies to ensure a coordinated response for the removal of the violent partner, and the addressing of safety issues for the woman and her children
 - b. a local community campaign to increase awareness of, and support for the option of staying home safely

⁸¹⁵ R Edwards, "Staying Home Leaving Violence; Promoting Choices for Women Leaving Abusive Partners," *Australian Domestic and Family Violence Clearinghouse*, 2004.

- c. the provision of outreach support by all agencies
 - d. safety plans for the women and children which may include enhanced home security: the changing of locks, installation of a phone alarm linked to key agencies, and security doors.
- 17.118 Pilots have been established to put the key elements of the framework into practice, and to test and evaluate different service approaches to implementing the framework.
- 17.119 Evaluations for both Bega and South Eastern Sydney Staying Home Leaving Violence projects have been conducted. The evaluation of the Bega project found that the pilot had been successful in developing a robust, holistic model for providing a service to assist to keep women and children in a stable home environment while excluding a violent perpetrator.⁸¹⁶ While the Bega evaluation recorded that two thirds of clients reported positive outcomes, there was also significant reporting of inadequate or unsupportive police and court responses, which identified the need for formal MOUs or agreements, which have subsequently been developed.⁸¹⁷
- 17.120 The evaluation of the Eastern Sydney Staying Home Leaving Violence pilot reports that the pilot reached a broad range of women in terms of those who had not previously used welfare services and in terms of their age, housing tenure and cultural identity but noted that “although there is a high incidence of family violence in Aboriginal communities, there is under representation of this group in the project.”⁸¹⁸ Nearly two thirds of the project’s clients were able to remain living in their own homes with the perpetrator of violence excluded. Women who had been employed, were able to stay in employment and the majority of children maintained stability in education and child care arrangements. The pilot found that the project developed strong and well managed linkages with other service providers, leading to appropriate referrals to the project, joint case management and linking of clients to other support.
- 17.121 Both pilots involved the negotiation of an MOU with Police.
- 17.122 The NSW Government has committed an additional \$5.1 million to expand the project to an additional 16 locations from 2009/10 onwards. The locations of these programs will be determined on the basis of Police reporting data. Planning for this expansion commenced in July 2008.
- 17.123 Housing is currently investigating options under the Housing and Human Services Accord, whereby other government agencies and their NGO partners could have nomination rights for public housing properties for domestic and

⁸¹⁶ Bega Women’s Refuge, Purple Kangaroo Consultants, *Final report of the Staying Home Leaving Violence project*, April 2007, p.26.

⁸¹⁷ Department of Premier and Cabinet, *Discussion Paper on Domestic and Family Violence*, November 2008, p.6.

⁸¹⁸ “Evaluation of Staying Home Leaving Violence Eastern Sydney Pilot Final Report,” August 2007, p.5.

family violence clients where support arrangements were in place (see Chapter 7).⁸¹⁹

Risk assessment and information sharing

- 17.124 A priority identified by workers in domestic and family violence has been the development of an approach that can appropriately identify the full range of domestic and family violence risk factors and the consequent intervention that might be required to break the cycle of violence.⁸²⁰
- 17.125 In March 2006 the Government commenced the development of a cross agency approach. Health is the lead agency for this project. The cross agency risk assessment approach is intended to be used by service providers in Health, Police, DoCS, Attorney General's and other agencies in order to:
- a. assess the needs of the victims, including children
 - b. identify existing interventions and service options designed to reduce the risk of violence and address the needs of victims
 - c. provide appropriate referrals and/or reports
 - d. liaise with other agencies to develop a clearer picture of the risks (including documentation of decision making processes, sharing information between agencies and a standard format for data).
- 17.126 A trial of the approach is scheduled for the end of 2008 in two locations (one metropolitan, one rural). An evaluation report of the trial is anticipated by April 2009.
- 17.127 As of 1 July 2008, Health had also recruited a statewide coordinator for Intersectoral Domestic and Family Violence Education and Training. This position will be responsible for scoping, coordinating and delivering specialist domestic and family violence training and resource development across government agencies. The position is based at the Education Centre Against Violence. It is the Inquiry's view that it is of critical importance that DoCS establishes strong links with this initiative.
- 17.128 Overall the literature supports routine screening for domestic and family violence but notes that for successful implementation there needs to be comprehensive training of healthcare and support workers, workers within the judicial system, and the availability of a multi-agency referral network.⁸²¹

⁸¹⁹ ARTD Consultants, "Coordinating NSW Government Action against Domestic and family Violence" 8 November 2007, p.20.

⁸²⁰ *ibid.*, p.21.

⁸²¹ Department of Premier and Cabinet: *Domestic Violence Rapid Review Draft Report*, September 2008, p.10; M Hester and N Westmarland, "Tackling Domestic Violence: Effective Interventions and Approaches: Home Office," *Communities and Development Unit*, London, 2005; R Braaf and G Ganguly, "Cultural Challenges for violence prevention: working towards an ethical practices of sustainable interventions. Expanding on Horizons," *University of Sydney*, 2002.

Integrated Case Management

- 17.129 Integrated Case Management aims to deliver coordinated services to clients through a multi-disciplinary team based on clear referral protocols between agencies. The need for such a model arises because no single government agency is structured to provide the complex mix of services needed to respond to domestic and family violence. The lead agency for this project is DoCS.
- 17.130 The Government provides funding of around \$3 million per annum for Integrated Case Management projects targeting high risk groups and communities experiencing domestic and family violence, at nine locations across NSW (Green Valley, Wyong, Canterbury/ Bankstown, Bourke, Mt Druitt, Wollongong/ Shellharbour, Brisbane Waters, Manning/ Great Lakes and Bellambi/ Corrimal).
- 17.131 Different approaches have been adopted to integrated case management reflecting regional partnership arrangements and local service systems.
- 17.132 DoCS advised that under priority R1 of the NSW State Plan, it has commenced work on the development of the consistent framework for the Integrated Domestic and Family Violence Services Programs. The purpose is to consolidate the project and support alignment with statewide directions.
- 17.133 A number of the projects have been evaluated, and while each vary in terms of operation, process and staffing, evaluation results consistently report the following:
- a. There has been an increase in the number of victims pursuing AVOs as well as a reduction in the reporting of high risk families, systemic improvements in sharing of knowledge and information between Police and child protection services, and a significant reduction in the numbers of chronic high risk offender families.⁸²²
 - b. There has been a sustained decrease in the number of dismissals of AVO and other proceedings because of non-attendance by the parties, a reduction in the percentage of repeat offenders and repeat victims, and a reduction in the percentage of AVO breaches, along with the provision of information, emotional and practical support resulting in women feeling safe during the court process.⁸²³
 - c. There have been improved interagency responses to domestic and family violence, strengthened relationships with Police and the adoption of practice that addresses the safety of both women and children.⁸²⁴
 - d. There has been an increase in the rate at which AVOs are granted in domestic violence cases, compared with domestic violence cases that do not involve integrated case management, along with a significant reduction

⁸²² D Atkins, AandK Consulting Pty Ltd, *DART Review Report*, December, 2004, p.27.

⁸²³ Evaluation of the Central Coast Domestic Violence Intervention Response Team Project, February 2006, p.4.

⁸²⁴ L Laing, 2005, op. cit.

in the rate of repeat domestic violence incidents as well as an improvement in relationships between Aboriginal women and Police, with Aboriginal women becoming more willing to report domestic violence.⁸²⁵

- e. Clients reported feeling safer and helped with a reduced incidence of domestic and family violence.⁸²⁶

Department of Community Services

- 17.134 DoCS allocates significant funding to deal with the consequences of domestic and family violence for children and families. The major program responses cover service delivery through its CSCs and JIRTs, its Domestic Violence Line, CSGP and SAAP.
- 17.135 There are also a range of early intervention and prevention strategies to address the causes and consequences of domestic and family violence. For example, DoCS has partnered with local organisations to deliver the Tamworth Children and Domestic Violence Group Work Program for mothers and children.
- 17.136 The Department also allocates funding to a range of targeted domestic and family violence services, including training and education campaigns and projects funded respectively under the Area Assistance Scheme, and the CSGP and Intensive Family Based Services.⁸²⁷
- 17.137 Delivery of the youth component of the Aboriginal family violence partnership projects has begun in five separate locations in rural and remote areas of NSW. Aboriginal family violence partnership projects are being developed in partnership with Aboriginal communities, local agencies and the Commonwealth Government. They aim to prevent domestic and family violence by promoting messages about healthy and non-violent relationships and by improving access to the legal system for Aboriginal women experiencing violence.⁸²⁸
- 17.138 In addition DoCS early intervention program, Brighter Futures, involves a partnership between DoCS and non-government agencies that offers intensive support to vulnerable families, focusing on their needs and addressing the wide range of factors that can contribute to poor outcomes for children and young persons, including domestic and family violence. Almost half of the families who have entered the program to date have been affected by domestic and family violence.⁸²⁹

⁸²⁵ H Armstrong and P Melser, "Evaluation of the Police/Women's Refuge Partnership against Domestic Violence Project," February 2005.

⁸²⁶ DoCS, *Evaluation Report: Canterbury-Bankstown Domestic Violence Team*, 19 December 2005, p.28.

⁸²⁷ An evaluation of the Intensive Family Based Services demonstrated that the program significantly reduced reports involving domestic violence, physical and psychological abuse, *Intensive Family Based Services, Evaluation Report, Draft, March 2008*, p.6.

⁸²⁸ DoCS, *Annual Report 2006/07*, p.28.

⁸²⁹ Department of Premier and Cabinet, *Discussion Paper on Domestic and Family Violence*, November 2008, p.22.

Domestic Violence Line

- 17.139 DoCS statewide Domestic Violence Line is a toll free 24 hour, seven days a week telephone counselling and referral service. Caseworkers help people work towards stopping domestic and family violence through appropriate referrals thereby minimising the risk and increasing their safety. Domestic Violence Line staff work with DoCS Helpline where children are in danger or at risk of harm in violent family situations.
- 17.140 It is a centralised access point for all women's refuges across NSW and links with other crisis support services in NSW and interstate.
- 17.141 The Domestic Violence Line received more than 23,000 calls in 2007/08. The majority of these involved incidents of verbal, psychological and physical violence. More than 7,200 calls involved nearly 15,000 children in the affected households, an increase of 2,800 children from 2006/07.⁸³⁰ From information provided by DoCS to the Inquiry, it appears that staffing has remained relatively stable at about 32 staff.
- 17.142 As can be seen from Chapter 10, the Inquiry is of the view that if a report does not meet the statutory threshold, this resource should be used more frequently. Other state agencies, including the Police and NGOs should refer the family, or the reporters, themselves should contact the Line to obtain further assistance for the family. This may require additional resources at the Domestic Violence Line.

Supported Accommodation Assistance Program

- 17.143 SAAP provides accommodation and support services to help people who are homeless or at risk of becoming homeless. This can include families in crisis, single adults, young people, and women and children affected by domestic and family violence. Domestic and family violence was cited as the main reason for seeking support in 54 per cent of SAAP support periods for women with children.⁸³¹ SAAP is jointly funded by the Commonwealth and the NSW Governments. NSW contributes 50.4 per cent of funds and the Commonwealth 49.6 per cent. In 2007/08, the program provided around \$120 million in funding to 390 NGOs in NSW to deliver support, outreach, advocacy, living skills development and supported accommodation services, as well as linkages to other specialist services such as health, housing and aged care. It provides a major crisis response for people affected by domestic and family violence whose personal safety is threatened and who have acute needs and require immediate support.⁸³²
- 17.144 The different service models that are funded under SAAP include:

⁸³⁰ DoCS, *Annual Report 2007/08*, p.22.

⁸³¹ Australian Government's Green Paper on Homelessness, *Which Way Home?* May 2008, p.20.

⁸³² DoCS, *Annual Report 2006/07*, p.20.

- a. women's refuges/safe houses and domestic and family violence outreach services
 - b. domestic and family violence support services
 - c. supported accommodation for families
 - d. supported accommodation for young people
 - e. crisis support groups
- 17.145 In 2007/08, DoCS provided funding under SAAP to 82 women's refuges. In 2008/09 these services will receive more than \$32 million in SAAP funding.
- 17.146 According to a 2004 national report, approximately 10,500 women pass through NSW refuges each year.⁸³³ Concerns were raised with the Inquiry about the levels of funding for some safe houses, which meant that the needs of the community could not be met.
- 17.147 Humphries reported that national research showed that only 14 per cent of children accompanying women using SAAP services were provided with counselling, child care, kindergarten and/or assistance with access arrangements. Similarly, an audit of 1,244 agencies across Australia showed that only three per cent of organisations operated individual programs for children exposed to domestic and family violence.⁸³⁴
- 17.148 The Commonwealth Government's recent Green Paper on Homelessness suggests that there is a need to align homelessness responses to domestic and family violence with law and justice services. This could mean, for example:
- a. changing laws to require the removal of perpetrators of violence from the family home
 - b. creating alternative accommodation, custodial and treatment options for perpetrators
 - c. co-locating support and accommodation services with other services such as child care centres, health clinics or recreational facilities
 - d. providing flexible assistance packages that help people move back into safe and permanent housing in a timely manner
 - e. changing laws and procedures to encourage courts and police to work more closely with domestic and family violence service providers
 - f. counting children as SAAP clients and providing brokerage funds to pay for counselling, school books and uniforms so that children can go to school
 - g. forming partnerships between schools and family health services to identify children at risk and to respond early, to minimise the disruption to children's

⁸³³ WESNET, "Women's Refuges, Shelters, Outreach and Support Services in Australia," *Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs*, 2004, p.60.

⁸³⁴ C Humphreys, May 2007, op. cit., pp.16-17.

schooling and to address the effects of homelessness on their ability to learn.⁸³⁵

Orana Far West Child and Family Partnership Development Project

17.149 The Orana Far West Child and Family Partnership Development Project is considered an example of a best practice homelessness response for families experiencing violence. The project, led by DoCS, provides emergency accommodation for women and children escaping domestic and family violence. The project includes assisting the transition of families from the safe houses into longer term affordable housing. Safe houses are also 'drop-in' centres where women can support each other. The project is a partnership between the Commonwealth and NSW Governments and brings together the following key service elements:

- a. promoting strong, functional well supported families, healthy development of children and to reduce and prevent child abuse and neglect in participating families through the Brighter Futures program
- b. enhanced SAAP funding and support – to improve the capacity of safe houses in Bourke, Brewarrina, Lightning Ridge, Walgett and Wilcannia to respond to women and children experiencing, or at risk of, family violence
- c. establishing Child and Family Linkage workers in each of the five safe houses
- d. linking with Housing to assist safe house clients to receive the support services they need to live independently and maintain their tenancies
- e. investigating options for the crisis accommodation program to support the work of the five safe houses
- f. working with the Aboriginal Housing Office to improve housing options for clients and children in safe houses.

Other DoCS initiatives

17.150 In addition to the funding it provides, DoCS has developed a number of resources to provide guidance to caseworkers on working with domestic and family violence. One of these is the Brighter Futures Practice Resource: Domestic and Family Violence Vulnerability, which is evidenced based and provides practical guidance for caseworkers in this Program.

17.151 The Caseworker Development Course has a module which focuses exclusively on domestic and family violence. Staff involved in early intervention casework receive extra training in domestic and family violence via the Safe Homes, Safer

⁸³⁵ Australian Government's Green Paper on Homelessness, *Which Way Home?* May 2008, p.66.

Futures Training Program. This training reflects and operates from the following principles:

- a. responsibility for abuse remains with the perpetrator of abuse
 - b. responsibility for changing abusive behaviour remains with the perpetrator of abusive behaviour
 - c. children's and women's safety is prioritised at all times
 - d. working with interagency partners to access more in depth and specialised intervention.
- 17.152 In addition, Research to Practice seminars are held which included a seminar on domestic and family violence. Relevant research papers are also available on the intranet.
- 17.153 There is a need for a more nuanced assessment and intervention approach by DoCS Child Protection Caseworkers to the impacts of domestic and family violence on children and women. The Inquiry is of the view that this group of staff also need access to specific training and expertise such as that provided to Early Intervention Caseworkers. Further, casework practice guidelines need to highlight the importance of offering support and protection and identifying strategies and resources that can assist child protection workers in better supporting the non-offending partner and children.

Other key agencies

- 17.154 Health predominately delivers domestic and family services through mainstream health services (emergency departments, drug and alcohol, maternity, mental health and other community and hospital services). Health policy and procedures mandate routine screening for domestic violence for women attending antenatal and early childhood health services and for women aged over 16 years attending mental health and drug and alcohol services.
- 17.155 There is no specialist service stream for domestic violence counselling across Health as there is for sexual assault. Victims are referred to other services, where these are available, however, the Inquiry understands that some Area Health Services have developed specialised centres.⁸³⁶
- 17.156 Appropriate accommodation is a key issue in domestic and family violence. Housing is working with other agencies in seven priority locations covering 18 public housing areas, where a component of this work may support families experiencing violence and increase their capacity to access mainstream services and supports.⁸³⁷

⁸³⁶ Department of Premier and Cabinet, *Discussion Paper on Domestic and Family Violence*, November 2008, p.12.

⁸³⁷ *ibid.*, p.13.

- 17.157 Homelessness NSW has reported that the number of women and children becoming homeless as a result of domestic and family violence in NSW is not decreasing under current strategies.⁸³⁸ The most significant problem identified with the current response is the lack of exit points from crisis and transitioned accommodation.⁸³⁹
- 17.158 While there are some initiatives as noted earlier in this chapter, these need to be complemented by a range of accommodation and support options to meet the varying needs of children and women.

NSW Police and domestic violence risk of harm reports

- 17.159 Police has a policy titled *The Investigation and Management of Domestic and Family Violence* which requires its officers to report to DoCS when a child is present at a domestic violence incident, or is known to be living in a domestic violence situation. This is in contrast to paragraph (d) of s.23 of the Care Act which is in the following terms:

the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm.

- 17.160 As a consequence of this policy, Police make many reports to DoCS, the precise number being unknown, where they attend a single incident of domestic violence occurring at premises in which a child usually lives, but who was not present at the time, without harbouring any suspicion of risk of serious physical or psychological harm. Police officers have informed the Inquiry that they report to DoCS about half of the domestic violence incidents they attend. Presumably, the other half have no children in attendance or ordinarily present.
- 17.161 From the work done by the Ombudsman in 2007 in reviewing the deaths of certain children between January 2005 and April 2007, 29 events involving 18 families are identified in which he had concerns about Police compliance with its policy for reporting children at risk of harm in relation to domestic violence.⁸⁴⁰
- 17.162 In nine events, a mandatory risk of harm report and/or a report under the policy may have been warranted, however the Police records do not indicate that one was made. In 10 events, a mandatory risk of harm report and/or a report under the policy may have been warranted, and Police records indicate that a report

⁸³⁸ *ibid.*, section 4.8, p.8.

⁸³⁹ D Tually, C Cutler and M Slater, "Women, Domestic and Family Violence and Homelessness: a Synthesis Report", *Flinders Institute for Housing, Urban and Regional Research*, 2008, cited in Department of Premier and Cabinet, *Discussion Paper on Domestic and Family Violence*, November 2008, section 4.58, p.17.

⁸⁴⁰ NSW Ombudsman, *Report of Reviewable Deaths in 2006, Volume 2: Child Deaths*, December 2007, p.36.

was made but there was no evidence that it was received by DoCS. In 10 events, in which neither a mandatory risk of harm report nor a report under the policy may have been warranted, a report was recorded as having been made by Police yet there was no evidence that it was received by DoCS.

- 17.163 The Ombudsman dealt with these matters by convening meetings with DoCS and the Police. No resolution had been achieved by the time of the writing of this report.
- 17.164 Domestic and family violence warrants serious and timely attention by all authorities. Possible models are discussed in this chapter. However, the response by Police as set out in its reporting policy is resulting in resources being spent unproductively.
- 17.165 It is clear from Chapter 6 that health and education workers acknowledge and accept that the legislation requires of them the exercise of judgement as to whether a risk of harm exists. Those with whom the Inquiry spoke, believed that their knowledge of the child and family and their professional skills well place them to form the judgement required by the Care Act.
- 17.166 The Inquiry has questioned those representing the Police on a number of occasions during the Inquiry about the breadth of its notification policy. Assistant Commissioner Kaldas informed the Inquiry:

if we were to move towards filtering more and not sending things on, we feel that all we would be doing is simply shifting the risk.⁸⁴¹

- 17.167 By which, he clarified, he meant shifting the risk from DoCS to the Police. Detective Superintendent Begg stated:

I think most Police officers are probably not in a position to judge whether a child is going to have any sort of long term effects of domestic violence.⁸⁴²

- 17.168 In its submission to the Inquiry Police said:

A significant proportion of children reported to the Helpline by police officers attending a domestic violence incident require no child protection intervention based solely on the incident. However, the information gathered by police officers from a domestic violence (or any other) incident adds to any information that may already be held by DoCS on the child or the family and should be important in assisting DoCS caseworkers assess any increase in the risk to the children. If it is the first such police report, it could assist DoCS in

⁸⁴¹ Transcript: Inquiry meeting with NSW Police Force senior executives, 25 June 2008, p.2.

⁸⁴² *ibid.*, p.4.

determining risk of harm if future reports are made by any agency about the children.

The Australian Domestic Violence and Family Violence Clearinghouse and the Australian Institute of Criminology have a wealth of literature linking the deleterious impact that witnessing domestic violence has on children. Even if children are not the direct victims of domestic violence, the ability of women victims to provide appropriate quality of care to their children is affected by their violent experiences. There is strong evidence of the coexistence between domestic violence and child protection/child abuse. It is not reasonable to assume that exposure to a 'verbal argument' is any less traumatic than the actual physical abuse of another when witnessed by a child, especially if there is frequent and ongoing patterns of similar family behaviour. The content and context of the verbal argument may determine the impact of the argument upon a child. For example, if there is threatening behaviour by an adult to another, or to the child, this is significant. Context is an important consideration for police officers including whether the incident forms a pattern of abuse or represents the escalation of abuse. This is not for attending police officers to judge. Such matters should always be referred to DoCS caseworkers for appropriate assessment.⁸⁴³

- 17.169 Taking a different view, a police officer at one interagency meeting indicated that "we are, as police officers, well able to apply an objective risk assessed view of the world in terms of the need to provide a child at risk assessment"⁸⁴⁴ so that not as many unnecessary reports go to DoCS. It was suggested that a commissioned officer in each command could have the report referred to them and then make an assessment based on relevant criteria.
- 17.170 In relation to DoCS having all available information, DoCS KiDS system is obviously an important resource to child protection work. However, Police holdings are available and can be accessed by the use of the s.248 Direction Power.
- 17.171 Police urged the Inquiry not to increase the threshold for reporting domestic violence incidents. However, the key concern for the Inquiry has not been the circumstances prescribed by the Care Act as to when domestic violence incidents should be reported, but that Police are directed by policy to report matters which fall short of that specified in s.23(d). In its submission, Police appear to be supporting an amendment to s.23 to align it with the policy. No other person has submitted to the Inquiry that s.23(d) should be amended to that end.

⁸⁴³ Submission: NSW Police Force, May 2008, pp.13-14.

⁸⁴⁴ Transcript: Interagency meeting, Southern Region.

- 17.172 Concerns about the ‘noise’ generated in the system by the volume of domestic violence reports were recorded in a number of submissions received by the Inquiry. The consequence of over reporting means that “when you get all of those reports coming in and the vast majority are trivial, you swamp the system so much you don’t notice the really serious ones.”⁸⁴⁵ Humphries states that “inundating the statutory child care agency with referrals may actually increase the risk of harm, as those children in greatest danger may become lost in the ‘debris of referrals’ and not receive a service.”⁸⁴⁶ The Benevolent Society also noted that we “have a system whereby an incident of domestic violence is counted as a child being at risk of harm.” This means “you have this massive reporting with no action taking place.”⁸⁴⁷
- 17.173 As discussed in Chapter 6, 16,426 reports made by Police in 2006/07 did not meet the statutory test. It is likely that most of these were domestic violence incidents.
- 17.174 In a meeting with the Inquiry, Dr Eileen Munro, Reader in Social Policy, the London School of Economics and Political Science, suggested that if Police used a simple grading of seriousness from one to five, it would be much more useful for DoCS workers. NCOSS similarly suggested that there be a filter applied by mandatory reporters before reporting to DoCS to reduce ‘crowding’ of the system.
- 17.175 Humphries cites work by different Police authorities in the UK that are using or developing tools to assess the risks posed by the perpetrator of domestic and family violence to assist them to prioritise their work. Most of the tools are based on the factors that have been associated with lethality and serious assaults including sexual assault, stalking, perpetrator substance misuse and mental health problems, separation, pregnancy and child abuse.⁸⁴⁸ The evaluation of Police risk assessment showed that officers appreciated having a systematic approach to risk assessment that also provided a basis for safety planning.⁸⁴⁹
- 17.176 Police raised with the Inquiry the inadequacy of COPS⁸⁵⁰ in identifying repeat victims of domestic violence: “There is a great anomaly between the numbers of repeat victims on our COPS system.”⁸⁵¹
- 17.177 Police referred to a domestic violence checklist that is completed by every officer at the scene of a domestic violence incident, however this is not

⁸⁴⁵ Transcript: Inquiry meeting with Dr Eileen Munro, 10 March 2008, p.4.

⁸⁴⁶ C Humphries, “Domestic violence and child protection: exploring the role of perpetrator risk assessments,” *Child and Family Social Work*, Vol 12, 2007, p.361.

⁸⁴⁷ Transcript: Inquiry meeting with senior representatives from the Benevolent Society, 12 December 2007, p.30.

⁸⁴⁸ C Humphreys, 2007, op. cit., p.362.

⁸⁴⁹ *ibid.*, p.366.

⁸⁵⁰ ‘COPS’ is the Computerised Operational Policing System which records all police activities by NSW Police.

⁸⁵¹ Transcript: Public Forum, Assessment Model and Process, 18 April 2008, p.18.

analysed statistically on a state basis, so that one of the questions a police officer has to ask is whether the incident has happened before.

- 17.178 DoCS raised the issue of the quality and timeliness of reports received from Police. In some instances the information was insufficient to make an adequate assessment. DoCS told the Inquiry that Police:

*are interested in criminality and prosecution and evidence; we are just into the softer things that the police may not actually record on their system.....Such as how a child was presenting when the police turned up to a domestic violence incident. Totally irrelevant really, unless the child has been assaulted, to police purposes, but really critical to us.*⁸⁵²

- 17.179 The Ombudsman has also noted the variable quality in information provided by Police to DoCS in child at risk reports. Police reports do not necessarily contain contextual information that may assist DoCS to make an appropriate assessment.⁸⁵³
- 17.180 DoCS reported that they would like to get more information from Police, for example, if it is the first offence, the severity of domestic violence cases, so that DoCS can use this intelligence in assessing the relative priority of the reports for investigation.
- 17.181 Police and DoCS have recently completed a project, following from a recommendation made by the Ombudsman to improve the risk assessment of matters reported by Police. It has resulted in a one page tool being developed to collect key information relevant to assessing risk of harm in domestic and family violence situations. The type of information sought includes whether the incident was a repeat, whether children were present and currently safe and whether there are signs of drug or alcohol use by carers or of mental health issues. The Inquiry understands that some concerns about privacy are being dealt with through legal advice and urges those concerns to be resolved quickly by agreement or amendment of the relevant instrument or law.
- 17.182 It is a very sensible document and should be implemented and shared, after suitable amendments, with other mandatory reporters.

Conclusion

- 17.183 The Inquiry supports the findings of the recent Premier and Cabinet 2008 Literature Review of domestic violence that there is agreement in peer reviewed literature that outcomes of programs designed to prevent the recurrence of domestic violence and to improve the long term safety and well-being of those

⁸⁵² Transcript: Inquiry meeting with DoCS senior executives, 30 November 2007, p.38.

⁸⁵³ NSW Ombudsman, *Domestic Violence: Improving Police Practice*, December 2006, p.43.

who have experienced domestic violence have been inconsistently and poorly evaluated, thus reducing a reliable evidence base about what works.

- 17.184 Notwithstanding this, considerable work has been and is being done in the area of domestic and family violence and child protection. However, challenges remain to ensure that caseworkers and other key professionals such as police have available to them, understand and apply the developing evidence based approaches to intervening in families where domestic violence gives rise to child protection concerns. They need to work with other agencies and NGOs, and with their domestic violence workers, to determine the right service or response. Preferably, caseworkers should support the non-offending parent, usually the mother, to stay in the home with her children, having sufficiently reduced the risk of harm. This may require collaboration with Housing, Police and the courts.
- 17.185 The fathers should not be forgotten; they should be encouraged to take responsibility for their violence or other abusive behaviours and increase their awareness of the impact of their violence on the children. This requires access to Health or other perpetrator programs and/or the involvement of Police and the courts.
- 17.186 Legal protections should be used, including AVOs and criminal charges, and active public awareness campaigns conducted that will emphasise this unacceptability of this form of conduct and publicise the resources available to victims.
- 17.187 In addition to the features identified by DoCS and set out earlier in this chapter of interventions which work, the following principles should be the benchmarks against which proposed interventions are tested:
- a. interventions should occur at universal, secondary and tertiary levels
 - b. the response should be integrated and coordinated and involve, at least Police, Housing and Health and relevant non-government services
 - c. where possible services should be co-located or operated from a 'hub'
 - d. cross agency assessment tools should be used
 - e. cross agency training should be undertaken
 - f. women and children should be supported to stay in their homes.
- 17.188 Where possible, and to assist the Government in determining where best to allocate funds, projects designed to reduce domestic violence or to assist those living with it, should have compatible measures for success. In addition, evaluations of these projects should be undertaken using consistent methodology to enable more useful comparisons to be made than those which have occurred to date.

- 17.189 The nature of the research on the effects of exposure to domestic violence on children and the potential for 'gender blindness' in child protection work⁸⁵⁴ suggest that more should be done to equip caseworkers with the knowledge and skills to assess risk of harm reports and determine interventions when domestic violence is the cause of risk. The use of Structured Decision Making as recommended elsewhere in this report may also assist in this regard.
- 17.190 Equally, joint training between child protection workers and workers with other agencies concerning children and domestic violence should occur. The Education Centre Against Violence would appear to be an appropriate vehicle to facilitate such training.
- 17.191 Otherwise, the Inquiry supports the current Government initiative to develop a comprehensive cross agency response to the problem, be driven from within Premier and Cabinet, focusing on the core group that take up a substantial amount of the time and resources of the human services and justice agencies. Effective intervention in that area could have a significant impact on the costs of those agencies in not having to deal with these families in the future. Equally it could provide an example and incentive for those on the periphery of this care group to seek out assistance.

Recommendations

Recommendation 17.1

The NSW Police Force should amend its policies in respect of reporting domestic violence incidents to DoCS to align with the requirements of s.23(d) of the *Children and Young Persons (Care and Protection) Act 1998* and should provide the necessary training to its officers to enable them to comply with the amended legislation.

Recommendation 17.2

DoCS and NSW Police should agree on the process and content of information to be exchanged when reporting children or young persons at risk to ensure that information received by DoCS enables an appropriate and timely risk of harm assessment to be made.

Recommendation 17.3

DoCS caseworkers should receive domestic violence specific training, jointly with other relevant agencies and NGO workers.

⁸⁵⁴ KL Nixon, LM Tutty, G Weaver-Dunlop and CA Walsh, 2007, op. cit., p.1482.

18 Aboriginal over representation in child protection

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Introduction

- 18.1 Aboriginal children and young persons are significantly over represented in the child protection system, as well as in juvenile justice institutions. The reason for this state of affairs is likely to be the cumulative effects of poor health, drug and alcohol and drug abuse, gambling, pornography, unemployment, discrimination, poor education, housing and the general disempowerment of their parents and communities which has led to family and other violence and then on to sexual abuse of men and women and, finally, of children.⁸⁵⁵
- 18.2 Much has been said and written about this inequity, and this chapter refers to most of it. Sound principles have been expressed by reviews, more recently and notably, the inquiry which led to significant intervention in the lives of Aboriginal families in the Northern Territory.
- 18.3 For a child protection system, the enormity and long standing nature of the causes of child abuse and neglect in Aboriginal communities can be overwhelming. This chapter seeks to document the words and work of others, to examine in some detail the response of NSW to child sexual abuse and to express some views about possible ways forward in NSW.
- 18.4 The purpose of this chapter is to provide a considered basis for intervention, drawing upon other recent inquiries and academic research, that underpins the general recommendations made in this chapter, but more importantly, those individual recommendations which the Inquiry has made in the other chapters, which focus on the individual components or aspects of the care and protection system. The reasons for those recommendations are set out in those chapters, and are not repeated in this chapter, save, on occasions, in passing.

The history of removal of Aboriginal children from their families in Australia

- 18.5 In 1997, HREOC delivered the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing them home*.
- 18.6 *Bringing them home* has since been a key reference point for policy development and further inquiries regarding Aboriginal children and families. In the introduction to the report, the authors note that:

The histories we trace are complex and pervasive. Most significantly the actions of the past resonate in the present and will continue to do so in the future. The laws, policies and

⁸⁵⁵ Northern Territory Government, "Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'", *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, Darwin, Australia, 2007, p.6.

practices which separated Indigenous children from their families have contributed directly to the alienation of Indigenous societies today.

*For individuals, their removal as children and the abuse they experienced at the hands of the authorities or their delegates have permanently scarred their lives. The harm continues in later generations, affecting their children and grandchildren.*⁸⁵⁶

- 18.7 *Bringing them home* details ongoing negative effects for many survivors of the separation. Main areas of functioning discussed were parenting skills (including high anxiety about parenting that can manifest as a lack of discipline), reluctance to use mainstream services due to a fear that those services will take their children away, and a higher incidence of behavioural problems in the children of those who were removed.⁸⁵⁷
- 18.8 Those removed as children were reported to experience high rates of self harm and suicide, high rates of domestic violence, and unresolved grief and trauma that was passed on to their children as anxiety and distress.⁸⁵⁸ The report also commented on the poor mental health of those removed as children, and the effect on their parenting capacity and therefore the life outcomes of their children.⁸⁵⁹
- 18.9 The ongoing and generational negative effects of such policies and practices have been noted in other countries with a similar history of colonisation, and of policies that attempted to control or assimilate Indigenous populations into mainstream culture. The literature notes particular parallels between the experiences of Australia and Canada, the USA and New Zealand.⁸⁶⁰

History of removal of Aboriginal children in NSW

- 18.10 The findings of *Bringing them home* at a national level are also true of the experience of people in NSW. A Protector of Aborigines was first appointed in NSW in 1881, and a Board of Protection established in 1883. The Board was granted statutory authority with the passing of the *Aborigines Protection Act 1909*. Under this Act, an Aboriginal child no longer had to be considered

⁸⁵⁶ Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, p.4.

⁸⁵⁷ *ibid.*, pp.193-196.

⁸⁵⁸ *ibid.*, p.197.

⁸⁵⁹ *ibid.*, pp.198-202.

⁸⁶⁰ For example, D Valentine and M Gray, 2006, *op. cit.*, pp.537-545; T Bell and T Libesman, "Aboriginal and Torres Strait Islander Child Protection Outcomes Project Report, From Aboriginal child welfare to Aboriginal children's well-being," Commissioned by Secretariat of National Aboriginal and Islander Child Care and the Department of Human Services Victoria, unpublished, October 2007; T Libesman, "Child welfare approaches for Indigenous communities: International perspectives," 2004 *Child Abuse Prevention Issues* no. 20, Australian Institute of Family Studies; Northern Territory Government, "Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'", *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, Darwin, Australia, 2007, p.274.

neglected before the Board had the power to remove the child from his or her family.⁸⁶¹

- 18.11 Missions and institutions to accommodate Aboriginal children removed from their parents were established at a number of sites across NSW, including missions at Bomaderry, Bowraville, Erambie, Lake Macquarie, Maloga School, Parramatta, Warrangesda and Wellington Valley, and institutions at Kinchela and Cootamundra.⁸⁶²
- 18.12 NSW claims to be the first Australian jurisdiction to stop the indiscriminate removal of 'part Aboriginal children' in 1940 and also to be the first Australian government to apologise to the Aboriginal people in the wake of *Bringing them home*.⁸⁶³
- 18.13 DoCS has acknowledged the history of removal of Aboriginal children by child welfare authorities in NSW. The DoCS intranet has the following statement:

*DoCS and its predecessor organisations have a long history of involvement with Aboriginal and Torres Strait Islander communities. It is estimated that between 1883 and 1969 nearly 6,000 Aboriginal children were removed from their families in NSW, amounting to one in six or seven children compared to one in 300 for non-Aboriginal children.*⁸⁶⁴

- 18.14 DoCS, through its former and current Director-General, has also apologised to the Aboriginal people for the effects of past policies.

Legislative provisions

- 18.15 The Care Act contains specific provisions regarding needs of Aboriginal children and young persons.
- 18.16 'Aboriginal and Torres Strait Islander' means a person who:
- (a) is a member of the Aboriginal or Torres Strait Islander race of Australia, and
 - (b) identifies as an Aboriginal person, or Torres Strait Islander race of Australia, and
 - (c) is accepted by the Aboriginal community or Torres Strait Islander race of Australia, as an Aboriginal person or Torres Strait Islander race of Australia.⁸⁶⁵

⁸⁶¹ T Drabsch, "Indigenous Issues in NSW: NSW Parliamentary Research Service Background Paper 2004", *NSW Parliamentary Library*, no. 2/04, pp.52-53.

⁸⁶² *ibid.*, p.54.

⁸⁶³ *ibid.*, pp. 54 and 56.

⁸⁶⁴ DoCS, Intranet, Aboriginal Welfare History.

⁸⁶⁵ *Children and Young Persons (Care and Protection) Act 1998 s.5 and Aboriginal Land Rights Act 1983 s.4.*

- 18.17 If the Children's Court is satisfied that a child or young person is of Aboriginal or Torres Strait Islander descent it may determine that they are an Aboriginal or Torres Strait Islander for the purposes of the Care Act.⁸⁶⁶ The Director-General is to make reasonable enquiries as to the Aboriginality of a child or young person who is the subject of a report.⁸⁶⁷
- 18.18 The objects, principles and responsibilities contained in Part 1 of Chapter 2 of the Care Act⁸⁶⁸ apply equally to Aboriginal and non-Aboriginal children and young persons.
- 18.19 The Care Act also contains Aboriginal specific principles the first of which is that Aboriginal people are to participate in the care and protection of their children and young persons "with as much self-determination as is possible" and the Minister may negotiate and agree with Aboriginal people to the implementation of programs and strategies that promote self-determination.⁸⁶⁹
- 18.20 The second Aboriginal specific principle recognises Aboriginal participation in decision making and states that Aboriginal families, kinship groups, organisations and communities are to be given opportunities to participate in decisions made about the placement of their children and young persons, and in other significant decisions made under the Care Act, "by means approved by the Minister."⁸⁷⁰
- 18.21 The Care Act also contains the Aboriginal Child Placement Principles, including the general order for placement, the relevance of the child's self-identification and wishes, and guidance for cases where a child or young person has parents from different Aboriginal communities or one Aboriginal and one non-Aboriginal parent.⁸⁷¹ These principles have been discussed in detail in Chapter 11. The Care Act requires that a permanency plan for an Aboriginal child or young person must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s.13.⁸⁷²
- 18.22 The Care Act contains specific provisions for the keeping of records by DoCS and designated agencies relating to Aboriginal children and young persons placed in OOH. ⁸⁷³
- 18.23 The *Adoption Act 2000* sets out the Aboriginal Placement Principles and their application to adoptions of Aboriginal children. Provision is made for Aboriginal participation in decision making, and to ensure that alternatives to adoption are considered for Aboriginal children.⁸⁷⁴ It also includes specific requirements for

⁸⁶⁶ *Children and Young Persons (Care and Protection) Act 1998* s.5(2) and (3).

⁸⁶⁷ *Children and Young Persons (Care and Protection) Act 1998* s.32.

⁸⁶⁸ *Children and Young Persons (Care and Protection) Act 1998* Part 1 of Chapter 2.

⁸⁶⁹ *Children and Young Persons (Care and Protection) Act 1998* s.11.

⁸⁷⁰ *Children and Young Persons (Care and Protection) Act 1998* s.12.

⁸⁷¹ *Children and Young Persons (Care and Protection) Act 1998* s.13.

⁸⁷² *Children and Young Persons (Care and Protection) Act 1998* s.78A(3).

⁸⁷³ *Children and Young Persons (Care and Protection) Act 1998* ss.14 and 167.

⁸⁷⁴ *Adoption Act 2000* ss.33-39.

counselling and information to be supplied prior to the giving of consent for the adoption of an Aboriginal child.⁸⁷⁵ The court must not grant an adoption order for a child unless it is satisfied that the Aboriginal Placement Principles have been properly applied.⁸⁷⁶

- 18.24 An adoption plan for an Aboriginal child to be adopted by non-Aboriginal parents must set out the ways in which the child is to be assisted to develop a healthy and positive cultural identity and for links with that heritage to be fostered.⁸⁷⁷

Data

- 18.25 The literature reveals the disadvantage experienced by the Aboriginal population compared with the non-Aboriginal population. HREOC has noted that:

It is a tragic fact that an Aboriginal or Torres Strait Islander child born today does not have the same life chances as other Australian children.

*This is something that should not exist in 21st century Australia. And it is the defining challenge for our nation.*⁸⁷⁸

- 18.26 One of the problems with data collection regarding Aboriginal status is that information collected by the census and by government agencies regarding Aboriginality is self reported. This means that if, for any reason, an Aboriginal person does not wish to disclose his or her Aboriginal identity, the statistics will not record him or her as an Aboriginal person.
- 18.27 There are powerful historical and current reasons why Aboriginal people may wish to avoid being identified by government authorities. This means that most of the statistics gathered about Aboriginal people for official purposes are likely to underestimate the true numbers of Aboriginal people using a service. Even with this qualification, the available statistics still clearly demonstrate the over representation of Aboriginal children and young persons among the more disadvantaged people in Australian society, and in the child protection and justice systems. Chapters 5 and 16 set out in detail the available data on Aboriginal people in the child protection system.

⁸⁷⁵ *Adoption Act 2000* ss.64-65.

⁸⁷⁶ *Adoption Act 2000* s.90 (e).

⁸⁷⁷ *Adoption Act 2000* s.46 (3).

⁸⁷⁸ Human Rights and Equal Opportunity Commission, *Social Justice Report Commonwealth of Australia*, Canberra, 2007, p.6.

Aboriginal families

- 18.28 The rate of involvement of Aboriginal children and young persons in the child protection system occurs within a broader context of disadvantage and vulnerability experienced by Aboriginal families.
- 18.29 2.1 per cent of the NSW population identify as Aboriginal.⁸⁷⁹ Aboriginal children account for approximately four per cent of the total NSW 0-17 years population.⁸⁸⁰
- 18.30 13 per cent of Aboriginal families have four or more children compared with five per cent for the total population of families in Australia.⁸⁸¹
- 18.31 The Aboriginal population has a younger age structure than the non-Aboriginal population. 40 per cent of the Aboriginal population in Australia is aged less than 14 years – more than twice the rate for the total population.⁸⁸² 45 per cent of the Aboriginal population of NSW are aged 0-17 years.
- 18.32 In 2004/05 the life expectancy for Aboriginal men in Australia was 59 years and for Aboriginal women 65 years, compared with 77 years for all males and 82 years for all females.⁸⁸³ This impacts on the structure of the extended family, the availability of grandparents and other key relatives to support parents and form relationships with children.⁸⁸⁴
- 18.33 Aboriginal children have poorer health and a higher mortality rate than non-Aboriginal children. For example:
- a. Since 2001, over 10 per cent of NSW Aboriginal babies have had low birth weight (less than 2,500 grams) and prematurity (less than 37 weeks gestation). These rates are one and a half to two times higher than the rates for NSW babies overall.⁸⁸⁵
 - b. The perinatal mortality rate among babies born to Aboriginal mothers in NSW was 15.2 per 1,000 in 2005, higher than the rate of 8.6 per 1,000 experienced by babies born to non-Aboriginal mothers.⁸⁸⁶
 - c. In 2007, the NSW Child Death Review Team reported that 56 of the children who died in NSW in the reporting period identified as Aboriginal. This was 9.3 per cent of the deaths in that period, and represents a death

⁸⁷⁹ Australian Bureau of Statistics, *2006 Population Census*, 26 September 2008.

⁸⁸⁰ DoCS, *What DoCS data tell us about Aboriginal clients*, December 2007.

⁸⁸¹ Department of Families, Housing, Community Services and Indigenous Affairs, "Longitudinal Study of Australian Children," *Fact Sheet No. 5 Indigenous Families are Different*, 2006.

⁸⁸² *ibid.*

⁸⁸³ Australian Bureau of Statistics and Australian Institute of Health and Welfare, *Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Vol 4704.0*, 2008, p. xxii.

⁸⁸⁴ F Stanley, S Richardson and M Prior "Children of the Lucky Country? How Australian society has turned its back on children and why children matter?" *Macmillan*, 2005, p. 52.

⁸⁸⁵ NSW Health, "Mothers and Babies Report," 2005, p.10.

⁸⁸⁶ *ibid.*

rate of 99.8 deaths per 100,000 for Aboriginal children, compared with 35.37 deaths per 100,000 for the overall child population for 2007.⁸⁸⁷

- d. Of the 54 infants who died suddenly and unexpectedly in NSW in 2006, 13 (24.1 per cent) were Aboriginal.⁸⁸⁸ Aboriginal infants in Australia are up to six times more likely to die from sudden infant death syndrome than non-Aboriginal children. Nationally, between 1991-2000, the Aboriginal rate was 4.49 per 1,000 live births compared with the non-Aboriginal rate of 0.73.⁸⁸⁹
 - e. Suicide by Aboriginal people is concentrated in the younger age groups for both males and females. The suicide risk for Aboriginal males aged 15–19 years has been identified as four times that of the general population.⁸⁹⁰
- 18.34 In 2006/07 Aboriginal children and young persons represented 27.2 per cent of those attending a Youth Justice Conference, 39.5 per cent of those under community supervision, 37.8 per cent of those remanded in custody, and 54.7 per cent of those sentenced to detention.⁸⁹¹
- 18.35 In June 2007, Aboriginal men comprised 20 per cent of the total male offender population in custody. Aboriginal women comprised 31.3 per cent of the total female offender population in custody.⁸⁹²
- 18.36 Aboriginal children and young persons are less likely than non-Aboriginal children to finish their high school education, reach minimum standards of literacy and numeracy, or to leave school with the educational levels they need to undertake further education or to enter employment.⁸⁹³
- 18.37 In 2005/06, Aboriginal people accounted for 16 per cent of all SAAP clients in NSW (4,300 Aboriginal clients, including 2,750 accompanying children).

Care and protection of Aboriginal children in NSW

- 18.38 As can be seen from Chapter 5 of this report, Aboriginal children and young persons are far more likely to be reported to DoCS than non-Aboriginal children and young persons. For children aged under one year, Aboriginal children are almost five times more likely to be reported than non-Aboriginal children. Aboriginal children are also more likely to be the subject of multiple reports.
- 18.39 There has been a slowing trend in the number of child protection reports in the period 2006/07 to 2007/08 (preliminary) compared with 2005/06 to 2006/07.

⁸⁸⁷ NSW Child Death Review Team, *Annual Report 2007*, p.9.

⁸⁸⁸ *ibid.*

⁸⁸⁹ SIDS and Kids, "2004 Report on First Australian SIDS Pathology Workshop," p.8: www.sidsandkids.org.

⁸⁹⁰ B Nielsen, E Katrakis and B Raphael "Males And Mental Health: A Public Health Approach," *NSW Public Health Bulletin*, 12(12), 2001, pp.330-332.

⁸⁹¹ Department of Juvenile Justice, *Annual Report 2006/07*, p.21.

⁸⁹² Department of Corrective Services, *Annual Report 2006/07*, p.42.

⁸⁹³ Department of Families, Housing, Community Services and Indigenous Affairs, "Longitudinal Study of Indigenous Children" *Fact Sheet No. 5*, 2006.

For reports involving non-Aboriginal children and young persons, the percentage increase over these two periods fell from 16.7 per cent between 2005/06 to 2006/07 to 4.7 per cent between 2006/07 to 2007/08. For reports involving Aboriginal children and young persons, there was also a fall in the percentage increase of reports, but it was not as marked. The percentage increase fell from 29.1 per cent to 11.9 per cent.

- 18.40 In the period April 07/March 08, Aboriginal children and young persons were less likely to be the subject of reports that were designated as 'information only' or that were closed at the Helpline. The Aboriginal children and young persons in these categories, however, had about twice the number of reports per person compared with non-Aboriginal children and young persons in this group.
- 18.41 Therefore, reports on Aboriginal children and young persons were slightly more likely to be referred for further assessment than non-Aboriginal children and young persons. Of the reports referred to a CSC or JIRT for further assessment in the period April 07/March 08, those concerning Aboriginal children and young persons are less likely to be closed without further assessment.
- 18.42 If the percentage of reports made about Aboriginal children and young persons is taken as a benchmark, the statistics show that a slightly higher proportion of the reports that received a SAS1 and were subsequently closed in April 07/March 08 concerned Aboriginal children and young persons. The proportion of reports concerning Aboriginal children and young persons that received a SAS2 over the same period was also higher than for non-Aboriginal children and young persons. Of the reports that received a SAS2 and were substantiated, the proportion that concerned Aboriginal children and young persons was also higher.
- 18.43 It would appear from the data that Aboriginal children and young persons involved in reports are more likely to be the subject of a completed secondary assessment. Further the subsequent statutory response by DoCS is more likely to result in Aboriginal children and young persons entering care. As is shown in Chapter 16, Aboriginal children and young persons, who accounted for about one seventh of all people reported to DoCS in 2007/08, accounted for almost a third of the children and young persons in OOHC.
- 18.44 In 2006/07 and 2007/08, the proportions of Aboriginal children and young persons reported with specific issues differed from the proportions of non-Aboriginal children and young persons reported with those issues. The proportions of Aboriginal children and young persons with reported issues of carer drug and/or alcohol abuse or neglect were higher than those for non-Aboriginal children and young persons. The difference between the two groups was not as pronounced in the case of domestic violence.
- 18.45 The number of Aboriginal children and young persons in care, and the proportion of Aboriginal children and young persons in the OOHC population, has steadily increased since 2005. Based on the rates per 1,000, Aboriginal

children and young persons are more than ten times more likely than other children and young persons to be in OOHC.⁸⁹⁴

- 18.46 Of the children and young persons in OOHC in 2008, Aboriginal children and young persons were less likely to be in statutory care than non-Aboriginal children and young persons, were less likely to be in an NGO placement, and were more likely than other children and young persons to be in relative/kinship care. Those in relative/kinship care tended to have a lower number of placements, and this may contribute to the fact that Aboriginal children and young persons are slightly less likely to have multiple placements.
- 18.47 Aboriginal children and young persons also continue to be over represented in reviewable deaths, and more broadly, they also feature disproportionately in the deaths of all children in NSW.⁸⁹⁵ In 2006, the deaths of 123 children were reviewable. Twenty-five were Aboriginal children.
- 18.48 From 2003 to 2006, 19 per cent of all child deaths in NSW were reviewable. In the same period, 42 per cent of the deaths of Aboriginal children were reviewable.⁸⁹⁶

Previous reports and their recommendations

- 18.49 The experience of Aboriginal people in the child protection system has been discussed in a number of reports and issues papers.
- 18.50 In the years since the release of *Bringing them home*, South Australia, the Northern Territory, NSW, Queensland, Victoria and Western Australia have released reports which considered at least some aspects of the involvement of Aboriginal children and young persons in child protection systems in Australia.
- 18.51 These key reports are discussed below.

Bringing them home

Findings of the *Bringing them home* report

- 18.52 The report concluded that although legislation and the language used in the child welfare field had changed, paternalistic attitudes towards Aboriginal children and families persisted in child welfare departments in Australia. The experience of Aboriginal children and families with child welfare agencies was still reported to be “overwhelmingly one of cultural domination and inappropriate

⁸⁹⁴ DoCS, *What DoCS data tell us about Aboriginal clients*, December 2007, p.3.

⁸⁹⁵ NSW Ombudsman, *Report of Reviewable Deaths in 2006, Volume 2: Child Deaths*, December 2007, p.16.

⁸⁹⁶ *ibid.*, p.ii.

and ineffective servicing, despite attempts by departments to provide accessible services.”⁸⁹⁷

- 18.53 Thus, it was concluded, a complete overhaul of welfare services for Aboriginal children, families and communities was required, resulting in a very different model of service in which Aboriginal communities would be involved as true partners in negotiating the services and models most appropriate for their particular community or region.⁸⁹⁸
- 18.54 It was noted that the involvement of extended kin networks, close supervision of very young children, a high level of autonomy among older children, and an emphasis on providing comfort and affection rather than discipline, are features of Aboriginal child rearing widely recognised in communities in different geographic locations and living different lifestyles. Such practices contrast with the view in Western societies, where a child’s regular absence from the nuclear family or absence over a period of time is considered abnormal and indicative of a problem within the family.⁸⁹⁹
- 18.55 This contrast demonstrates one aspect of the conflict of values between Western and Aboriginal perspectives regarding children and families. Where there is a lack of understanding and lack of acceptance of extended Aboriginal family relations, the functioning of the extended family within an Aboriginal cultural context is seen as pathological or dysfunctional, and what is ‘normal’ Aboriginal practice signals a problem to many welfare workers.⁹⁰⁰
- 18.56 Many of the recommendations of *Bringing them home* dealt with providing appropriate mechanisms to record and recognise the experiences of individuals, families and communities affected by the forcible removal of Aboriginal children, and the need for a formal apology by government and church groups who were historically involved in the forcible removal of Aboriginal children from their families.
- 18.57 Some of the recommendations had specific relevance for the care and protection of Aboriginal children in NSW. These were about mental health, substance abuse, and parenting and well-being programs, addressing the social and economic disadvantages that underlie the contemporary removal of Aboriginal children and young persons, developing a legislative framework for self-determination, minimum standards of treatment for all Aboriginal children, and amendments to family law.

⁸⁹⁷ Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, p.400.

⁸⁹⁸ *ibid.*, p.401.

⁸⁹⁹ *ibid.*, p.392-393.

⁹⁰⁰ *ibid.*, p.392-393.

Responses to *Bringing them home*

- 18.58 In December 1999, in response to the report, the Commonwealth allocated funding of \$63 million over four years for “practical assistance for those affected by the former practice of separating Aboriginal and Torres Strait Islander children from their families.”⁹⁰¹ The funding included a number of history and archiving initiatives to assist Aboriginal people to record and protect their heritage. It also included funding for four program areas:
- a. almost \$6 million for further development of Indigenous family support and parenting program
 - b. \$11.25 million to establish a national network of family link-up services to assist individuals
 - c. \$16 million for 50 new counsellors to assist those affected by past policies and for those going through the reunion process
 - d. \$17 million to expand the network of regional centres for emotional and social well-being, giving counsellors professional support and assistance.⁹⁰²
- 18.59 In addition, in 2001/02 the Commonwealth allocated \$53.8 million over four years (to June 2006) to continue the Link-Up services, the education and training, and the counselling and parenting elements of the original package of measures. This brought the total expenditure to \$116.65 million for the period to June 2006.⁹⁰³
- 18.60 In 2003, the Ministerial Council of Aboriginal and Torres Strait Islander Affairs evaluated the implementation of the recommendations of the *Bringing them home* report.
- 18.61 The 2003 evaluation noted that the overall response by all states and territories to issues regarding the contemporary separation of Aboriginal children and young persons from their families and communities focused almost exclusively on the impact of children’s and young person’s legislation and the requirement for compliance with Aboriginal Child Placement Principles. The evaluation stated:

The removal of children from Indigenous families for child protection reasons still occurs much more frequently than it does for non-Indigenous families. While action to implement the Indigenous Child Placement Principle has been taken in every jurisdiction, some children are still being placed in non-

⁹⁰¹ The Senate Standing Committee on Legal and Constitutional Affairs, *Stolen Generation Compensation Bill 2008*, June 2008.

⁹⁰² J Herron, Press Release, *Bringing them home: Commonwealth Initiatives, 1997*, parlinfoweb.aph.gov.au.

⁹⁰³ Office for Aboriginal and Torres Strait Islander Health, “Evaluation of the Bringing them home report and Indigenous Mental Health Programs,” Commonwealth of Australia, Canberra, 2007, p.2.

*Indigenous care because of a shortage of Indigenous foster carers.*⁹⁰⁴

- 18.62 A Commonwealth funded evaluation published in 2007 found that there were four main achievements of the programs funded in response to *Bringing them home*. First, the link-up and counselling programs had provided services to a large number of Aboriginal clients nationally. Secondly, along with the mental health and well-being programs, these programs had provided services to many Aboriginal people who are unlikely to have received services otherwise. Thirdly, the programs had generally provided services in a culturally appropriate manner. Finally, there were generally high levels of client satisfaction and positive outcomes for clients in relation to most programs, with the exception of a number of social and emotional well-being regional centre programs.
- 18.63 The evaluation also found four main limitations of the programs. It said there was a lack of focus on the first generation Stolen Generation members, and a significant and undesirable level of variation in the skills and qualifications of staff in many of the programs.⁹⁰⁵ As a result of these and other factors, it was found that staff burnout and turnover were significant problems for the programs.⁹⁰⁶ A lack of national consistency in service delivery, and limited geographical coverage were found to be the other limitations in all four program areas.⁹⁰⁷

Critiques of the Government response to *Bringing them home*

- 18.64 In a speech to mark the tenth anniversary of *Bringing them home* on 24 May 2007, Professor Lowitja O'Donoghue said:

Of the 54 recommendations made in the Bringing them home report, 35 have been ignored – that is two thirds.

*Where there has been a response – for example, Link-Up services – the funding is drastically inadequate to meet the need.*⁹⁰⁸

- 18.65 On Wednesday 13 February 2008, Prime Minister Kevin Rudd delivered a national apology to the Stolen Generations on behalf of the new Commonwealth Government sworn in on 3 December 2007. In a response to the Government's

⁹⁰⁴ Ministerial Council of Aboriginal and Torres Strait Islander Affairs, "Evaluation of Responses to Bringing Them Home Report: Final Report," December 2003, p.49.

⁹⁰⁵ Office for Aboriginal and Torres Strait Islander Health, "Evaluation of the Bringing them home report and Indigenous Mental Health Programs," Commonwealth of Australia, Canberra, 2007, p.iii.

⁹⁰⁶ *ibid.*

⁹⁰⁷ *ibid.*

⁹⁰⁸ L O'Donoghue, "Tenth Anniversary of the Bringing them home report," hosted by *Stolen Generations Alliance: Australians for Healing, Truth and Justice*, Great Hall, Parliament House, Canberra, Speech, 24 May 2007.

national apology to the Stolen Generations, Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner with HREOC said:

The Stolen Generations have needs that have yet to be met, mainly due to under-funding of Link Ups and other support organisations. There remains a pressing need for specific assistance tailored to the particular circumstances of those forcibly removed from their families...

And there are many recommendations of the 'Bringing them home' report that have not been implemented...

In fact, there has been little attempt to even consider many of these recommendations at the federal or state level in recent years, or for them to be implemented systematically across all jurisdictions.⁹⁰⁹

- 18.66 The Inquiry was unable to locate any comprehensive evaluation of the progress in implementing each of the recommendations of the *Bringing them home* report that would provide sufficient detail to assess these current claims that the majority of recommendations have not been implemented.
- 18.67 It did, however, seek information from DoCS about the actions it had taken in response to the report. DoCS advised that it had formally apologised as set out earlier in this chapter, sought and achieved legislative amendment in accordance with nine of the report's recommendations, including maintaining and granting access to records, self-determination and the Aboriginal Child Placement Principle. In addition, it has improved the availability of and access to records, developed a relative and kinship care policy, devised the Aboriginal Strategic Commitment set out later in this chapter, reviewed the Interagency Guidelines in light of the report and begun targeted recruitment of Aboriginal carers.
- 18.68 Further reference to actions by DoCS is made later in this chapter.

Ampe Akelyernemane Meke Mekarle "Little Children Are Sacred" the Northern Territory inquiry

- 18.69 In 2007, *Ampe Akelyernemane Meke Mekarle "Little Children Are Sacred"*, the Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (the NT Inquiry), was provided to the Northern Territory Government. Chaired by Rex Wild QC and Patricia Anderson, the NT Inquiry was asked to examine, among other matters, the extent, nature and factors

⁹⁰⁹ T Calma, "Let the healing begin: Response to government to the national apology to the Stolen Generations" Speech delivered at Parliament House, Canberra, 13 February 2008 at www.hreoc.gov.au.

contributing to sexual abuse of Aboriginal children, with a particular focus on unreported incidents of such abuse, and to identify barriers and issues associated with the provision of effective responses to, and protection against, sexual abuse for Aboriginal children.⁹¹⁰

18.70 In the report, the co-chairs note that:

*Our terms of reference required us to enquire into the protection of Aboriginal children from sexual abuse. We will, no doubt, receive some criticism for appearing to stray well beyond that limited brief. However, we quickly became aware – as all the inquiries before us and the experts in the field already knew – that the incidence of child sexual abuse, whether in Aboriginal or so-called mainstream communities, is often directly related to other breakdowns in society. Put simply, the cumulative effects of poor health, alcohol, drug abuse, gambling, pornography, unemployment, poor education and housing and general disempowerment lead inexorably to family and other violence and then on to sexual abuse of men and women and, finally, of children.*⁹¹¹

18.71 As a result of this widening of the investigation from the limited brief given to the NT Inquiry, the report effectively provides a recent review of national and international work related to the protection of children of the Indigenous peoples of Australia, North America and New Zealand.

Findings of the NT Inquiry

18.72 The NT Inquiry found that the sexual assault of Aboriginal children was associated with the broader indicators of Aboriginal disadvantage.

18.73 Asserting that sexual assault is no more acceptable in Aboriginal culture than it is in European or mainstream society, the report summarised the underlying causes of the present situation in both urban and remote Aboriginal communities.

18.74 The excessive consumption of alcohol and other drugs, including petrol sniffing, was described as a major factor, and as either the cause or result of poverty, unemployment, lack of education, boredom and overcrowded and inadequate housing. Together these factors lead to excessive violence, and in the worst case to sexual abuse of children. The NT Inquiry was convinced that neglect led to physical and emotional abuse and thence, in the worst case, to sexual abuse.

⁹¹⁰ Northern Territory Government, "Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'", *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, Darwin, Australia, 2007, p.4.

⁹¹¹ *ibid.*, p.6.

- 18.75 The NT Inquiry found that the problems underlying the sexual abuse of Aboriginal children have been well documented and that many of the solutions were also well documented. While it found that there were no 'quick fixes,' and that a conservative estimate is that it would take at least 15 years (or one Aboriginal generation) to begin to make the necessary difference, it also found that there were some actions that can be taken relatively quickly and easily.
- 18.76 The inquiry's report noted that vast resources were allocated to crisis responses, when it seemed desirable to prevent the problem from occurring in the first place. Despite the expressed abhorrence of Aboriginal communities for the sexual abuse of children, the same communities appeared to find it difficult to accept responsibility for the behaviour of those community members who committed such abuse. The NT Inquiry found that attitude change was required.
- 18.77 Education was a key strategy in changing the problem attitudes and in rehabilitating Aboriginal communities.

We are utterly convinced that education (that properly addresses the needs of the local community) provides the path to success. We have been dismayed at the miserable school attendance rates for Aboriginal children and the apparent complacency here (and elsewhere in Australia) with that situation.⁹¹²

- 18.78 Along with education, the report noted that addressing alcoholism was a major priority. The effect of alcoholism on the Aboriginal community was seen as so significant, that it was useless to try to implement any other proposals unless alcoholism was addressed.

Recommendations from the NT Inquiry

- 18.79 All the recommendations of the report of the NT Inquiry are seated within a context of working in partnership with Aboriginal people, families and communities. Within the 97 recommendations a number have wider applicability than the Northern Territory.
- 18.80 The recommendations included a call for the Commonwealth to work with the Northern Territory to "develop long term funding programs that do not depend upon election cycles nor are limited by short-term outcomes or overly bureaucratic reporting conditions and strictures."⁹¹³
- 18.81 A whole of government approach to child sexual abuse, and enhanced information sharing between agencies, was recommended. Consultation with Aboriginal people and communities regarding investigations and decision

⁹¹² *ibid.*, p.18.

⁹¹³ *ibid.*, p.22.

making about Aboriginal children was specifically addressed, and consultation with Aboriginal communities in the development of strategies and programs was also a feature.

- 18.82 The report described gaps in the interagency response to sexual assault, and noted that regional and remote services are not adequately resourced to meet the needs, and that victims of sexual assault require a coordinated and integrated response from investigative and support agencies.⁹¹⁴
- 18.83 For statutory child protection services the recommendations covered the need for greater government investment in child protection system reform and in the recruitment, training and retention of a greater number of child protection workers, greater access to cultural advice and expertise for child protection workers, and more strategic, planned investment in local community workforces.
- 18.84 The report found that while hospitals may contribute to the forensic investigation of child sexual abuse and the treatment of injuries and infections, it is primary health care services that play the largest role in the response to child sexual abuse.⁹¹⁵ Particular reference was made to: mental health; the implications and impacts of sexually transmitted infections in young persons; the development of comprehensive child and adolescent mental health services; and the provision of increased services for those children whose behaviour indicates significant trauma and distress resulting from abuse.
- 18.85 The development or expansion of health services such as maternal and child health home visitation, increased services for prenatal care and children aged 0-5 years and their families, increased access to health and welfare services through primary health care centres as 'service hubs', and the collaborative development and implementation with Aboriginal communities of services and programs to address 'inter-generational' trauma and to improve the emotional and mental well-being of community members, was also part of the preventive and early intervention response recommended.
- 18.86 For investigative and justice agencies, themes relevant to most states including NSW included:
- a. better integration of police and statutory child protection
 - b. development of a repository of specialist knowledge and skills in interviewing child victims and Aboriginal child victims
 - c. active recruitment of Aboriginal police officers and associated roles with an emphasis on recruitment of female staff
 - d. more effective consultation with Aboriginal communities

⁹¹⁴ *ibid.*, pp 104-105.

⁹¹⁵ *ibid.*, p.106.

- e. improved knowledge and skills of staff through better education on child abuse and neglect and improved procedures for reporting abuse and for offering support to people affected by abuse
 - f. consideration of the needs of possible child victims when determining bail where a sexual offence is alleged to have been committed against a child
 - g. provision of more sex offender rehabilitation programs, including culturally appropriate community based programs for convicted offenders deemed suitable for such programs, as well as for those at risk of offending
 - h. provision of youth specific culturally appropriate rehabilitation programs for juvenile sex offenders in detention, on parole or subject to community based orders.
- 18.87 Family support services were recommended by the report as an integral aspect of prevention. The need for specific services and groups for men to address their counselling, healing, education and treatment needs and the provision of short term accommodation in crisis was addressed, including a recommendation that the government actively support Aboriginal men to discuss and address child sexual abuse and other violence in communities.⁹¹⁶
- 18.88 The key role of education was addressed in two parts: school education and community education and awareness.
- 18.89 The suggested school education strategies included:
- a. ensuring that all children of school age attend school on a daily basis in accordance with the government's responsibility to provide compulsory education for all school age children, to be supported by the employment of additional home school liaison officers and school counsellors
 - b. ensuring that all three year olds and above attend a preschool program
 - c. ensuring that every child attends a full time transition to school program prior to commencing school.
- 18.90 There were also strategies suggested to reform the education system to provide Aboriginal students with the same outcomes as other students, within a culturally appropriate context. Fostering ownership of the education system by local communities through strategies such as a universal meals program for Aboriginal students with parents to provide financial and in-kind support, and utilisation of schools after hours for purposes such as community centres, supervised homework rooms and adult education venues, were also recommended.
- 18.91 The report urged that consideration be given to the provision of additional residential schools for Aboriginal students, designed to be located near their country, that would enable maintenance of family and cultural ties.

⁹¹⁶ *ibid.*, pp.26-28.

- 18.92 The report proposed a community and parent education campaign on the value of schooling that would encourage community and parental commitment to sending children to school, and also proposed a major attitude change and awareness raising campaign.
- 18.93 Several recommendations in the report specifically focused on addressing the threat posed by alcohol abuse and intoxication in Aboriginal families and communities. The recommended approach included a policy framework to guide actions to reduce overall alcohol consumption and intoxication. Other strategies provided for reduced access to takeaway liquor in the Northern Territory, and reforms to licensing and liquor legislation to increase the consideration of social impacts when granting or refusing liquor licences.
- 18.94 Media and education campaigns were also part of the recommended response to alcoholism, pornography and gambling.
- 18.95 Implicit in the recommendations about the role of communities was the responsibility of government to support and resource Aboriginal communities actively to develop community based and community owned strategies that fit within their cultural context to meet the needs of children.
- 18.96 Finally, the recommendations about compulsory cross cultural practice training for government workers addressed the lack of understanding of Aboriginal perspectives and the conflict of values between Western and Aboriginal perspectives regarding children and families, which was identified as a root cause of the failure of the welfare system to address the needs of Aboriginal children in the *Bringing them home* report and other material reviewed by the NT Inquiry.
- 18.97 All the recommendations made in the report were intended to be implemented according to nine 'rules of engagement' or principles. The report provided detailed interpretation and explanation of each principle to assist service providers. The principles may be summarised as:
- a. improving government service provision to Aboriginal people
 - b. taking language and cultural 'world view' seriously
 - c. ensuring effective and ongoing consultation and engagement
 - d. involving a local focus and recognition of diversity
 - e. encouraging community based and community owned initiatives
 - f. encouraging recognition and respect of Aboriginal law and empowerment and respect of Aboriginal people
 - g. ensuring balanced gender and family, social or skin group representation
 - h. providing adequate and ongoing support and resources
 - i. providing ongoing monitoring and evaluation.

Responses to the NT Inquiry report

- 18.98 On 21 June 2007, the Australian Government announced a national emergency response to protect Aboriginal children in the Northern Territory from sexual abuse and family violence. This response became known as the 'Northern Territory intervention' or Northern Territory Emergency Response (NTER).
- 18.99 The NTER was originally designed with three phases:
- a. stabilisation—the introduction of emergency measures to protect children and make communities safe (year one)
 - b. normalisation of services and infrastructure (years two to five)
 - c. longer term support based on the same norms and choices that other Australians enjoy (year five onward).⁹¹⁷

Progress on the NTER

- 18.100 On 21 June 2008, the NTER Taskforce final report to Government was released (the Taskforce Report). A further update was posted on the FaHCSIA website documenting progress to 22 October 2008.⁹¹⁸
- 18.101 The October operational update noted that income management measures were in place in 70 communities, associated outstations and town camp regions with a total of 15,554 people being subject to income management as at 22 October 2008. Income management provisions involved half of all income support and family assistance payments being held back to be spent only on food, school, nutrition, rent and other essential items. The measures were applied to all members of a target community who received welfare payments.
- 18.102 Additional positions had been created as part of employment reform measures as well as police deployed and more custodial facilities put in place. New liquor laws have been in force since 15 September 2007, with the intent to ban the sale, possession, transportation and consumption of alcohol on Aboriginal land and to monitor takeaway sales across the Territory. Additional activities included interventions to help address the need for alcohol and other drug withdrawal, treatment and rehabilitation services. Changes to Territory legislation to extend 'dry' areas and to support communities in the development of Alcohol Management Plans and permit systems were also noted.
- 18.103 The supply and possession of pornographic material have been banned in prescribed areas since 14 September 2007.
- 18.104 The activity to enhance education reportedly included the provision of funding to the Northern Territory Government to recruit an extra 200 teachers over four

⁹¹⁷ Northern Territory Emergency Response Taskforce, "Final Report to Government," June 2008, www.facsia.gov.au.

⁹¹⁸ *ibid.*, p.8.

years and to establish additional classrooms. Provision of breakfast and lunch to school aged children through the School Nutrition Program has been put in place in 68 communities as at 22 October 2008.

- 18.105 The supporting families element of NTER was reported to include the recruitment of child protection and community workers. Health checks have been carried out with follow up specialist treatment where necessary and new property and tenancy management arrangements are being introduced for public housing.
- 18.106 The Taskforce Report acknowledged the critical role of both early childhood intervention and education in achieving better outcomes for Aboriginal people. It supported a range of investments, from greater support for pregnant women, early parenting skills development and preschool for all four year olds, through to ensuring that there is a primary school in each community, compulsory parental contribution to school nutrition programs, universal access to secondary education for all secondary school aged students, and provision of adult literacy and numeracy programs in remote communities.
- 18.107 The Taskforce Report noted the positive impact of income management strategies for women with children, and the protection it provided from 'humbugging' or being coerced into giving money to others.
- 18.108 In relation to alcohol, the Taskforce Report stated supported the expansion of rehabilitation services, and recommended:

*Consideration should be given to consulting with each community to replace alcohol bans with community-specific Alcohol Management Plans.*⁹¹⁹

Report of the NTER Review Board

- 18.109 On 13 October 2008, the NTER Review Board, which was appointed by the Commonwealth Government to conduct an independent review of the first 12 months of the NTER to assess its progress in improving the safety and well-being of children and in laying the basis for a sustainable and better future for residents of remote communities in the Northern Territory, reported.⁹²⁰
- 18.110 The report however also described a mixed response to NTER, in particular, a "deep belief that the measures introduced by the Australian Government under the NTER were a collective imposition based on race."⁹²¹ It referred to a "strong sense of injustice that Aboriginal people and their culture have been seen as exclusively responsible for problems within their communities."⁹²² The report

⁹¹⁹ *ibid.*, p.21.

⁹²⁰ Report of the Northern Territory Emergency Response Review Board, October 2008. www.nterreview.gov.au.

⁹²¹ *ibid.*, p.9.

⁹²² *ibid.*

found that the effectiveness of the intervention was diminished through its failure to engage constructively with the Aboriginal people.

- 18.111 The report identified gains and noted that there was support for the additional police stations, and the measures designed to reduce alcohol related violence, to increase the quality and availability of housing and to advance early learning and education.
- 18.112 It recommended that while the benefits of income management were being increasingly experienced, it should be imposed only as a part of child protection measures.
- 18.113 It recommended that laws prohibiting the possession and transportation of alcohol on prescribed lands be maintained and that alcohol supply, demand and harm reduction strategies be implemented and comprehensive alcohol management plans finalised. It was recommended that illicit drug use should also be addressed.
- 18.114 Recommendations in relation to capacity building were also made as well as various other recommendations of particular relevance to conditions specific to the Northern Territory.

The Inquiry's experience

- 18.115 The Inquiry travelled throughout NSW and visited a number of towns either with, or located near, significant Aboriginal communities, including Bourke, Coonamble, Broken Hill, Wagga Wagga, Dubbo, Lismore, Moree, Inverell, Ballina and Nowra. The Inquiry visited metropolitan CSCs and held a Public Forum on issues facing Aboriginal communities. It also visited Toomelah and Boggabilla and held meetings with the local communities and with the agencies working with those communities. The Inquiry met with a number of representatives of Aboriginal organisations including the AbSec, the Tharawal Aboriginal Corporation, the Aboriginal Legal Service and the Victorian Aboriginal Child Care Agency Cooperative. SNAICC made valuable contributions to the Public Forum. In addition, the Inquiry met with the Ministerial Advisory Panel on Aboriginal child sexual assault and Aboriginal Affairs.
- 18.116 During these visits and meetings, the Inquiry heard similar stories to those recounted by the reports referred to above. Its experience in relation to the Toomelah and Boggabilla communities is set out in more detail in Chapter 19 of this report.
- 18.117 The Inquiry was particularly impressed by staff of the Ourgunya Women's Safehouse in Brewarrina, a service for Aboriginal women and children with seven beds in the Western Region. Similar to many other rural areas, the Inquiry was informed of insufficient services in this area and of relationships of

variable quality between DoCS workers and Aboriginal communities and workers.

- 18.118 Positive messages were also provided. In the Southern Region, an Aboriginal lawyer from a community legal centre said:

There is a negative perception of DoCS within the Aboriginal community, obviously, given the history of the Stolen Generation, and there is much fear and mistrust of DoCS. Despite this, I have seen some improvement. I think this is a flow on from the community engagement that DoCS is doing. Also, their efforts in communicating with the community about the early intervention programs and their employment of Aboriginal people as liaison officers, et cetera, have gone a long way towards bringing about a slow change in the perception of DoCS. The perception is still there, most community members would agree that DoCS is seen as a place that takes children away, but that is slowly changing and I believe that people are starting to see that DoCS can also provide support for families in need.⁹²³

- 18.119 Summing up working with DoCS staff, one Brighter Futures Aboriginal program manager informed the Inquiry:

Some are excellent. It's like every department ... you get the odd one that doesn't know anything about Aboriginal issues.⁹²⁴

- 18.120 Improvements in relationships with DoCS were also noted in the Northern Region, where the Inquiry was advised that since the commencement of the Brighter Futures program, Aboriginal families had started to specifically request DoCS involvement in preference to that of the Lead Agency.

- 18.121 While still concerned at the lack of Aboriginal agency representation in the evaluation of expressions of interest for OOH service provision, in its final submission to the Inquiry, AbSec noted that there had been a “significant improvement in the Department’s willingness to engage at a meaningful level with AbSec and its member agencies” resulting in the funding of, and participation in, specific projects and in regular meetings between the agencies.⁹²⁵

Work being done by the Commonwealth

- 18.122 The Commonwealth Government has specific initiatives responding to the needs of Aboriginal children, including their over representation in the child

⁹²³ Transcript: Public Forum, Nowra, 13 March 2008, p.6.

⁹²⁴ Transcript: Inquiry meeting with representatives of Tharawal Aboriginal Corporation, 8 March 2008, p.20.

⁹²⁵ Submission: Aboriginal Child, Family & Community Care State Secretariat, 10 October 2008, p.2.

protection system. The Federal ALP policy released before the 2007 Federal election *New Directions: An equal start in life for Indigenous children* makes the following commitment:

*Within a generation, Indigenous and non-Indigenous children should be able to expect the same healthy life outcomes.*⁹²⁶

- 18.123 The Commonwealth Government has a responsibility for funding Aboriginal-specific primary health services, and it also funds Aboriginal child health checks under the Medicare system. The *New Directions* policy made a commitment of \$112 million over four years to child and maternal health services, including enhancements to health care for Aboriginal mothers and children, \$37.4 million for sustained nurse-led home visiting, and additional capital funding for accommodation facilities for Aboriginal women who need to leave their communities to give birth.
- 18.124 The policy also includes commitments to parent-child services to improve parenting skills, as well as the development, learning and well-being of Aboriginal children, and to the provision of 15 hours per week of early learning programs for Aboriginal four year olds, and of funds for further implementation of the Australian Early Development Index, and for intensive literacy and numeracy programs.
- 18.125 Finally, the policy proposes the establishment, where practicable, of 'Indigenous Child and Family hubs' to co-locate parent-child services to "allow greater continuity of care and attention to the individual needs of Indigenous children."
- 18.126 In the May 2008 discussion paper *Australia's Children: safe and well*, the Commonwealth Government described the establishment in December 2007 of a specific Working Group on Indigenous Reform under the authority of COAG, with a work program that includes protection from violence for Aboriginal parents and children, early childhood development interventions, safe home environment, access to primary health services, and supporting school attendance.⁹²⁷
- 18.127 The paper listed existing government strategies including the review of the NTER and the National Indigenous Violence and Child Abuse Intelligence Task Force, jointly funded by the Commonwealth and the States and Territories with a focus on understanding violence, child abuse, substance abuse, pornography and fraud in Aboriginal communities.
- 18.128 Strategies proposed in the discussion paper included the development of a specific set of principles and approaches to guide child protection interventions with Aboriginal children, and the development of specific service models for the

⁹²⁶ Australian Labor Party Policy, "New Directions: An equal start in life for Indigenous children," www.alp.org.au, p.11.

⁹²⁷ Department of Families, Housing, Community Services and Indigenous Affairs, *Australia's Children: safe and well, Discussion Paper*, 2008, p.24.

urban, rural and remote protection of Aboriginal children. The discussion paper suggests a strategy to improve the responsiveness of mainstream interventions to the needs of Aboriginal children, and a specific action to support compliance with the Aboriginal Child Placement Principle. An Aboriginal child protection workforce strategy is also proposed.

- 18.129 The 2008/09 Commonwealth Government budget included additional Aboriginal specific strategies, such as the provision of:
- a. \$1.6 billion over four years for remote Aboriginal housing, to be delivered through bilateral agreements with the States and Territories
 - b. \$19 million over three years to strengthen the Aboriginal health workforce, which was additional to \$49.3 million over four years allocated as part of the COAG commitment to address drug and alcohol use in Aboriginal communities
 - c. \$323.8 million for 2008/09 for the NTER mentioned earlier in this chapter
 - d. \$1.7 million over two years to contribute to evidence based policy.⁹²⁸
- 18.130 Some Commonwealth Government strategies include Aboriginal specific aspects. For example, FaHCSIA reported that the Indigenous Children's Program, part of the Stronger Families and Communities Strategy, funded 33 services in Australia at a cost of \$5.72 million which expired on 30 June 2008. The implementation of the Australian Early Development Index now includes an Aboriginal specific version of the Index.
- 18.131 The NSW and Commonwealth Governments are signatories to the bilateral agreement: Framework Document Overarching Agreement on Aboriginal Affairs between the Commonwealth of Australia and the State of NSW 2005-2010, which includes an agreement on working together through *Two Ways Together* (discussed later in this chapter) and the development of Shared Responsibility Agreements. The Murdi Paaki COAG Trial which commenced in 2002 was implemented under this Agreement.
- 18.132 Shared Responsibility Agreements are voluntary agreements between governments and Aboriginal communities developed where Aboriginal people and communities decide that they want to address specific priorities. These agreements set out what families, communities, governments and other partners will contribute to address the priorities and to achieve the outcomes in the agreement.⁹²⁹
- 18.133 The 2006 evaluation of the COAG Murdi Paaki trial by Urbis Keys Young stated that people consulted in the course of the evaluation raised issues regarding Shared Responsibility Agreements, and gave the following example:

⁹²⁸ Commonwealth Budget Statement: Closing the Gap between Indigenous and non-Indigenous Australians, May 2008. www.ato.gov.au/budget/2008-09.

⁹²⁹ Framework Document Overarching Agreement on Aboriginal Affairs between the Commonwealth of Australia and the State of NSW 2005-2010: www.daa.nsw.gov.au.

While the Australian Government has made it very clear that SRAs have no relevance to core government responsibilities and services in health, education and training, law enforcement, employment services and the like, there can in practice be disagreement about what matters can and cannot be appropriately included in an SRA.⁹³⁰

COAG Murdi Paaki Trial

- 18.134 The Murdi Paaki COAG Trial is one of eight COAG trials that were established in 2002 and referred to as the 'Shared Responsibility Trials'. The purpose of the trials was twofold. First, for governments to work better together at all levels and across all agencies. Secondly, for Aboriginal communities and governments to work in partnership to improve life outcomes and to build the capacity of people in those communities to manage their own affairs.⁹³¹
- 18.135 In the Murdi Paaki region, which covers sixteen communities in the far western district of NSW, it was reported that there were six regional Shared Responsibility Agreements signed by the Murdi Paaki Regional Assembly (or its predecessor, the Regional Council) and 11 local agreements with six of the local communities at the time of the evaluation, with further local agreements under negotiation.⁹³²
- 18.136 The evaluation stated that among stakeholders familiar with the COAG trials, Murdi Paaki was seen as the most advanced trial in terms of community capacity and governance. Further, the findings of the evaluation were positive with regard to the strong commitment to the trial, demonstrated by the key government departments involved, and with regard to the relationships those agencies had developed in the communities. The evaluation also found "the governance capacity of communities has improved, and many communities appear better able to articulate their priorities to government in constructive fashion."⁹³³
- 18.137 The evaluation stated that DoCS was noted positively by stakeholders among the agencies and perceived as having embraced the trial.⁹³⁴
- 18.138 Bromfield and Holzer found that the separate funding of individual services by the Commonwealth and State Governments provided some examples of local collaboration which included Aboriginal health services, Aboriginal targeted programs and family violence programs.⁹³⁵ The Inquiry notes that the Aboriginal Maternal and Infant Health Strategy (AMIHS) in NSW has incorporated the

⁹³⁰ Urbis Keys Young, *Evaluation of the Murdi Paaki COAG Trial Final Report*, 2006, p.17.

⁹³¹ Morgan Disney and Associates, *Synopsis Review of the COAG Trial Evaluations*, November 2006, p.12.

⁹³² Urbis Keys Young, *Evaluation of the Murdi Paaki COAG Trial Final Report*, 2006, p.18.

⁹³³ *ibid.*, p.ii.

⁹³⁴ *ibid.*, p.27.

⁹³⁵ L Bromfield and P Holzer, "A national approach for child protection: Project report," *National Child Protection Clearinghouse, Australian Institute of Family Studies*, 2008, Melbourne. p.50.

Commonwealth funded Alternative Birthing Services Program sites, provided additional funding to those services to enhance them to the level of the State funded programs and aligned the performance indicators to produce a single successful strategy now being implemented statewide.

Work being done in NSW

- 18.139 NSW is addressing the disadvantage experienced by Aboriginal people in a number of ways. The NSW State Plan includes an Aboriginal specific priority which is to improve health, education and social outcomes for Aboriginal people (priority F1). In addition, *Two Ways Together* is the NSW Government 10 year whole of government Aboriginal Affairs Plan. The Inquiry notes that the Standing Committee on Social Issues on Overcoming Indigenous Disadvantage will consider the issue of responsibility for performance indicators and delivering priorities under these two plans in its final report.⁹³⁶
- 18.140 In 2008 an indicator's report was published on *Two Ways Together* which showed a wide gap in outcomes for Aboriginal people compared with the general population of NSW, and acknowledged that there was a need to develop more comprehensive information about many of the services provided for Aboriginal people. It noted that many of the initiatives aimed at reducing Aboriginal disadvantage were targeted at specific locations, in recognition of the need to avoid the 'one size fits all' approach. The report noted that data quality remained an issue.⁹³⁷
- 18.141 The Aboriginal Family Health strategy and the extension of New Street, an adolescent early intervention program for adolescents who display sexually abusive behaviours to Aboriginal adolescents are discussed in Chapter 7. Reference is made to the Education Centre against Violence initiative *Weaving the Net* which has been developed for Aboriginal communities in Chapter 8.

The NSW Aboriginal Child Sexual Assault Taskforce report

- 18.142 The 2006 report of the NSW Aboriginal Child Sexual Assault Taskforce (ACSAT) *Breaking the Silence: Creating the Future. Addressing child sexual assault in Aboriginal communities in NSW*⁹³⁸ was among the reports considered by the NT Inquiry, and the broad findings of both reports are similar. The ACSAT report found that the sexual assault of Aboriginal children was widespread and under reported, that the incidence of sexual abuse and other

⁹³⁶ Overcoming Indigenous Disadvantage in NSW, Interim Report of the Standing Committee on Social Issues, June 2008, p.xix. www.parliament.nsw.gov.au/socialissues.

⁹³⁷ Department of Aboriginal Affairs, *Two Ways Together Report on Indicators 2007*, p.1. www.daa.nsw.gov.au.

⁹³⁸ NSW Aboriginal Child Sexual Assault Taskforce, "Breaking the Silence: Creating the Future, Addressing child sexual assault in Aboriginal communities in NSW," *Attorney General's Department of NSW*, Sydney, 2006.

forms of child abuse and neglect in Aboriginal communities was associated with the broader indicators of Aboriginal disadvantage, and that they were symptoms of a breakdown of Aboriginal culture and society.

- 18.143 Similar to previous reports and the report of the NT Inquiry, ACSAT identified a number of factors that influenced the incidence of child sexual assault. These included:

*Substance abuse; social and economic disadvantage; exposure to pornography and a sexualised society; the 'normalisation' of violence (or intergenerational cycle of violence); the presence of family violence; unresolved trauma and grief; breakdown of family and community structures; lack of community engagement with the issue; lack of support for community-driven solutions; and inadequate responses from service providers.*⁹³⁹

- 18.144 ACSAT found that child sexual assault was not well understood in Aboriginal communities, and was therefore often undetected. While the research specifically considering a link between child sexual assault and family violence required further development, the report noted that the work which had been done, suggested that the presence of family violence in Aboriginal communities had an influence on the incidence of child sexual assault.
- 18.145 ACSAT found that Commonwealth and State Government responses to child sexual abuse in Aboriginal communities lacked coordination and suffered from limited government leadership. It found that child sexual assault in Aboriginal communities was not explicitly addressed in *Two Ways Together* and that service responses to child sexual assault were not being provided in a holistic way.
- 18.146 In relation to data collection across NSW government agencies that impacted on the data used to plan responses to child sexual assault in Aboriginal communities, it found inconsistent recording of Aboriginality, the use of different key definitions across agencies, and the use of different data collection periods, making data correlation and comparison difficult.
- 18.147 ACSAT made specific findings about DoCS. These included the following:
- a. While there was some understanding of the pressures on DoCS and some communities expressed the view that DoCS workers in their area were doing a good job, many Aboriginal people continued to fear and mistrust DoCS as a consequence of past practices towards Aboriginal people. This was compounded by a lack of understanding of the supportive role DoCS could take. Fear and mistrust increased every time DoCS responded inappropriately or inconsistently to a report of child sexual assault, failed to keep families informed or failed to make appropriate referrals for support.

⁹³⁹ *ibid.*, p.4.

- b. There were few stable OOHC placements available for Aboriginal children and young persons. Instances where children were not safe in out-of-home kinship care were cited, as was the need to undertake thorough assessments prior to placing a child in an OOHC placement, and to continue to monitor children's safety. ACSAT also found that DoCS needed to provide adequate financial and practical supports to ensure stability in kinship care placements.
 - c. While DoCS had made attempts to employ more Aboriginal workers, recruitment and retention of Aboriginal staff was still hampered because the Aboriginal people they did employ felt overwhelmed, overworked and not well supported.
 - d. Young persons aged 16 – 18 years were falling through a service gap, and many communities were not aware that DoCS was supposed to provide services to this group.⁹⁴⁰
- 18.148 The need for an improved understanding of Aboriginal culture and improved engagement with Aboriginal communities was identified for staff in DoCS, Police, the DPP Witness Assistance Service, and the Judiciary. ACSAT found that a number of agencies, including Police, the DPP and Education should employ additional Aboriginal staff.
- 18.149 It also found that more culturally specific services and programs needed to be developed and implemented across Corrective Services and Juvenile Justice. These agencies were identified as having an important role in supporting the healing of survivors of child sexual assault, and in preventing further assaults, *inter alia*, by identifying and offering culturally appropriate and effective programs for those people in contact with their services who displayed sexually offending behaviour.
- 18.150 Overall, ACSAT reported that Aboriginal communities were positive about the quality of services provided by Health. However, ACSAT also found that there were barriers to effective service provision for Aboriginal people who had experienced child sexual assault. It was found that Aboriginal people were often confused about the roles of different health workers, and were frequently not aware of sexual assault services or of what they could provide. Some of the services provided by Health, such as child sexual assault telephone counselling, were reported to be culturally inappropriate.
- 18.151 Other health services, such as drug and alcohol services, it was suggested did not respond adequately to the likelihood that their clients may have experienced child sexual assault. ACSAT found that: there were not enough forensic medical services available, especially in rural and regional NSW; there were not enough counsellors or support workers to respond to Aboriginal communities; referral requirements and delays reduced access to services; and it was not clear what types of counselling models worked well for Aboriginal people.

⁹⁴⁰ *ibid.*, pp.6-7.

- 18.152 Communities reported to ACSAT that many Aboriginal people had difficulty accessing JIRT, and did not feel supported by JIRT. Co-location of Police and DoCS together was identified as an effective model, and the suggestion was made that a Health worker should also be co-located with JIRT officers. It found that Health should be more involved in the JIRT model, and that where the transport of Aboriginal people was required, they were most comfortable with it being provided by Health.⁹⁴¹
- 18.153 JIRT interviewing and communication styles were not seen to accommodate Aboriginal cultural practices, and were ineffective for Aboriginal children and young persons. Families who had had involvement with JIRT reported that a lack of information about the JIRT investigation, and the absence of Aboriginal people as staff or community partners in JIRT, made it a difficult experience.
- 18.154 ACSAT found that an incomplete understanding of child sexual assault, and a lack of understanding of the dynamics and impacts of child sexual assault in Aboriginal communities, impacted on the quality of services provided in a number of contexts. These included support provided by the Witness Assistance Service, responses provided by Juvenile Justice, and education and protective behaviours training in schools.
- 18.155 The lack of community awareness of available services for families who had experienced child sexual assault was not found to be limited to Health or DoCS services. ACSAT also found that Aboriginal communities were often not aware of resources in the broader service system such as emergency and alternative accommodation for families in crisis available through Housing, counselling and compensation available through Victims Services, for which Attorney General's has responsibility.
- 18.156 ACSAT examined the response of NGOs. NGO services were well perceived by Aboriginal people and for many Aboriginal people it was the only service type of service they would use. However, many NGOs reported feeling unsupported by government agencies, insufficiently funded to meet community needs for the services they provided, and hampered by the prevalence of one-off project funding which tended to lead to ad hoc service delivery. ACSAT expressed concern about the access of NGO staff to training, about the dynamics of child sexual assault in Aboriginal communities, and about NGO staff awareness of their reporting obligations.
- 18.157 Alternative models for addressing child sexual assault considered by ACSAT included specialist sexual offences courts in South Africa, a Queensland local community model known as the Cherbourg Critical Incident Group and the Community Holistic Circle Healing Model from Hollow Water in Canada. From its examination of alternative models, ACSAT concluded that further research was required.

⁹⁴¹ *ibid.*, p.9.

- 18.158 ACSAT considered the discussion of alternative models to be introductory rather than definitive, and commented that the complexity of theories and principles underpinning the alternative models, and the appropriateness of the various responses to child sexual assault in Aboriginal communities required careful consideration. It suggested that research and development of a new model for responding to child sexual assault in Aboriginal communities needed to occur, at the same time as the recommendations of the report were implemented.

The Interagency Plan

- 18.159 In January 2007 the NSW Government released its public response to the ACSAT report, the *New South Wales Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities 2006-2011*⁹⁴² (the Interagency Plan). The Interagency Plan contains 88 actions, focused on four strategic directions: law enforcement; child protection; prevention and early intervention; and community leadership. Several actions are to be implemented statewide, while others are to occur in specific locations. The Interagency Plan is linked to existing policy frameworks such as *Two Ways Together* and the NSW State Plan.
- 18.160 There are nine lead agencies involved in implementing this plan: Aboriginal Affairs, Attorney General's, DoCS, Corrective Services, Education, Health, Police, Juvenile Justice and Premier and Cabinet.
- 18.161 The Inquiry reviewed the Interagency Plan and the ACSAT report. It found that more than one third of the 119 recommendations of the ACSAT report were not addressed by the Interagency Plan.⁹⁴³ It is noted that the NSW Government did not accept all recommendations which partially accounts for this figure. For example, the role of the Ombudsman as, in effect, auditor of its implementation was not accepted. This matter is discussed later in this chapter.
- 18.162 Those not addressed included some important recommendations or parts of recommendations for child protection services:
- a. Recommendation 11: establishing an Aboriginal child sexual assault coordination unit
 - b. Recommendation 17: concerning the way in which the government provides funding for regional and local initiatives to address child sexual assault issues
 - c. Recommendation 21: proposing a formal review by the Ombudsman of how the ACSAT report recommendations are implemented
 - d. Recommendation 26: providing more prevention and early intervention services

⁹⁴² NSW Government, *New South Wales Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities 2006-2011*.

⁹⁴³ Examples are actions 7, 12.1, 25, 27, 33, 51, 56, 58, 64, 66, 72, 77, 80, 81, 82, 88.

- e. Recommendation 34a: relating to the conduct of annual reviews of all DoCS supported placements for Aboriginal children.
- f. Recommendation 65: relating to the development of community based offender treatment programs for adults, that can be available for self referral and are not dependant for access on involvement in the criminal justice system.

Adequate funding?

- 18.163 The release of the Interagency Plan was not accompanied by any additional funding.
- 18.164 The Inquiry understands that a funding proposal for the Interagency Plan was submitted in late 2006, however, the relevant committee of Cabinet determined that all initiatives would need to be funded within existing agency resources.
- 18.165 However, it appears from a response from the Minister for Aboriginal Affairs to a question asked of him in the Budget Estimates Committee on 13 October 2008, that the Interagency Plan is costed at \$52.9 million and, of that, \$26.9 million was new money allocated in last year's budget.⁹⁴⁴
- 18.166 The Inquiry understands that the 2008/09 budget allocated \$22.9 million over four years for the Safe Families Program, which aims to tackle the incidence and consequences of child sexual abuse in Orana Far West. This is to be achieved by providing community engagement, child protection, early intervention and prevention, law enforcement and individual and family support services.
- 18.167 The Inquiry agrees with the comments of Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC:

*While the plan is a step in the right direction on the part of the New South Wales Government, it also highlights the limitations of addressing such an issue of such scale and seriousness without the commensurate level of responses and resources.*⁹⁴⁵

- 18.168 Various agencies also commented to the Inquiry on the resource implications of some of the actions required under the Interagency Plan. Attorney General's noted that there had been no funds provided to recruit additional Witness Assistance Service officers. The cost of training was noted as a barrier for agencies seeking to train more staff to Certificate IV Aboriginal Cultural Education Program. Health noted that the statewide expansion of the AMIHS was to be met from within existing resources, and noted that the lack of additional funding was a barrier to implementation of the forensic services review. Many of the strategies implemented by Police, Juvenile Justice and

⁹⁴⁴ The Inquiry understands that \$22.9 million rather than \$26.9 million has been allocated.

⁹⁴⁵ Speech by Tom Calma, NAIDOC Week, NSW Department of Premier and Cabinet, 10 July 2008.

Corrective Services are also dependent on funding from within existing resources.

- 18.169 There were some references to funded actions, such as Education's Kids Excel and Youth Excel programs and the installation by Police of digital recording equipment for JIRT units, however the funds referred to do not appear connected to the Interagency Plan. For example, the funds for Education appear to have been announced in 2005, prior to the Interagency Plan.
- 18.170 The recently released Interim report by the NSW Standing Committee on Social Issues, *Overcoming Indigenous disadvantage in NSW*, states that government funding allocated to reduce the incidence of child sexual assault has been inadequate, that the indicators to monitor the programs and implementation of the Interagency Plan have not yet been developed and that the reporting processes vague at best.⁹⁴⁶

Progress

- 18.171 In January 2008 the Inquiry requested that Aboriginal Affairs provide a progress report on implementation of the Interagency Plan. When it proved difficult to access a coordinated analysis of progress, the Inquiry requested copies of the reports provided to Aboriginal Affairs by each agency. These were provided up to October 2007.
- 18.172 Further, in March 2008, the Inquiry requested that all agencies involved provide a progress report on their implementation of the Interagency Plan, along with the milestones and performance measures and information about any funding required, sought and received for implementation.
- 18.173 The Inquiry has reviewed the draft milestones and performance measures proposed for the actions of the Interagency Plan. In the majority of cases the performance measures proposed show a direct link to the action, and logically would indicate whether the action has been successfully achieved.
- 18.174 However, it appears to the Inquiry that the performance indicators are often designed to measure a process (such as a review of legislation, revision of policy or procedures, development of an education package or of a plan for delivery of annual training, or preparation of a research paper or options paper). This means that they measure how well the process has been undertaken, rather than giving a measure of a tangible or practical outcomes for Aboriginal children and young persons or their families. Even where the action relates to a specific service, such as Intensive Family Based Services, current performance indicators are about the completion of a service evaluation, rather than whether there has been a greater availability of services or any improvement in outcomes for Aboriginal children and young persons.

⁹⁴⁶ *Overcoming Indigenous Disadvantage in NSW*, Interim Report of the Standing Committee on Social Issues, June 2008, p.132. www.parliament.nsw.gov.au/socialissues.

- 18.175 With regard to Action 33, which deals with the application of the Aboriginal Child Placement Principles, DoCS has set performance measures such as “per cent of placements meeting Aboriginal Child Placement Principle requirements.” This matter has been addressed at some length in Chapter 11. In short, it is likely that the data are not of sufficient quality to adequately measure compliance.
- 18.176 The ACSAT report found that the problems facing Aboriginal communities in reducing child abuse and neglect and family violence required coordination of services, more community awareness, better cultural awareness for agency staff, changes in policy and more research to inform practice. The Interagency Plan includes actions to address these needs.
- 18.177 However, the ACSAT report also found that Aboriginal people needed more prevention and early intervention services, more services to respond to child sexual abuse, more services to effectively work with adults and young persons who abused children, and more support and counselling for people who report abuse and proceed to court. The Interagency Plan has limited actions to meet these needs.
- 18.178 The Interagency Plan has an emphasis on the development of agency capacity to:
- a. improve staff awareness of Aboriginal culture and increase their capacity to work in a culturally respectful way with Aboriginal people
 - b. increase the proportion of the workforce in human services and justice agencies that identify as Aboriginal
 - c. increase awareness of the incidence and dynamics of child sexual assault, and the flags or markers that can assist in recognising that child sexual assault is occurring, with an emphasis on recognition of risk to Aboriginal children.
- 18.179 At this stage, the human services and justice agencies involved in implementation have reported progress in a number of areas including the development of policies, training packages and programs and negotiations/strategies to improve the recruitment and retention of Aboriginal staff. A number of reviews have been conducted, which contribute a further raft of recommendations to the activities outlined in the Interagency Plan. The reviews that have contributed to implementation of this plan include the JIRT review, and the Review of Forensic Medical Services, the implementation of which is still to occur, even though it is of vital importance for the provision of forensic support for Police investigations and prosecutions.
- 18.180 Additional services have been announced – such as the establishment of four Health Aboriginal child sexual assault counselling positions, with another two funded and about to be established, and a new treatment service for adolescent offenders who are not eligible for Juvenile Justice programs (for the Hunter New England region) which is expected to start taking referrals in late 2008. AMIHS

is also included in service delivery strategies; as are the delivery of the Schools In Partnership (with \$65 million over four years granted by Treasury in 2005 and 2006), the Kids Excel (\$7 million over four years) and Youth Excel (\$4.6 million over four years) programs by Education. Additionally, the newly introduced Health Youth Alcohol Action Plan 2008-2012 includes a special focus on alcohol use in Aboriginal communities.

- 18.181 While the Interagency Plan appears to have generated significant activity levels within each of the agencies since its release in 2006, the nature of the draft performance measures makes it difficult to assess the actual impact on Aboriginal people and communities, or on those Aboriginal children and young persons who are experiencing or at risk of sexual assault.
- 18.182 The lack of independent oversight of implementation by the Ombudsman recommended in the ACSAT report (Recommendation 21) is of particular concern. The Inquiry could not access a report measuring success against the Interagency Plan and this task is not being undertaken by Aboriginal Affairs. The Ombudsman met with Aboriginal Affairs in January 2008 and received advice that the Department was in the process of developing performance indicators to measure the success of these strategies. It was agreed that the Ombudsman would develop a localised audit strategy that complemented the Aboriginal Affairs' coordinating role.⁹⁴⁷ In the Inquiry's view it would be appropriate for the Ombudsman to monitor and report to government on progress with implementation of the ACSAT report, on an ongoing basis.
- 18.183 The NSW Ministerial Advisory Panel on child sexual assault in Aboriginal communities (the Advisory Panel) provided information to the Inquiry on recommendations and actions that had not progressed.
- 18.184 At the Inquiry's invitation, the Advisory Panel provided the Inquiry with a list of areas which it believes require further and particular action on the part of NSW Government in addressing Aboriginal child sexual assault in NSW. Those areas were academic research, restorative justice, workforce development, comprehensive cultural awareness and OOHC. Each of these matters was either the subject of a recommendation or an action in Interagency Plan. The Advisory Panel informed the Inquiry that, in its view, any initiatives should receive additional funding from the NSW Government and that responsible agencies should not be required to implement strategies from existing budgets.
- 18.185 A recommendation about the ACSAT report and the Interagency Plan appears at the end of this chapter.

⁹⁴⁷ NSW Ombudsman, *Submission to the Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission*, February 2008, p.25.

Department of Community Services

- 18.186 DoCS has submitted to the Inquiry that key elements of reform in the child protection system in relation to Aboriginal and Torres Strait Islander children and families are as follows:
- a. establishing a localised response at the community level that will engage Aboriginal people in driving change and in planning service delivery
 - b. continuing efforts to recruit and retain Aboriginal staff and to improve the knowledge and capacity of non-Aboriginal staff to work with Aboriginal families (discussed in Chapter 3)
 - c. continuing work to build the information and research base to inform effective evidence based services
 - d. introducing changes to the Children's Court procedure and practices to make it more appropriate for Aboriginal people
 - e. delivering programs such as Brighter Futures linked with the Aboriginal Infant and Maternal Health Strategy to deliver more holistic and intensive programs over a longer and sustained period
 - f. investigating the merits of family conferencing (discussed in Chapter 12)
 - g. investigating the development of an Aboriginal parenting strategy
 - h. developing further models of care that are appropriate for Aboriginal children and young persons at risk of harm, such as IFBS, accompanied by a pathway into post intervention support services (discussed in Chapters 7 and 8)
 - i. working with Aboriginal NGOs to build the capacity of that sector (discussed in Chapter 3)
 - j. recruiting and retaining Aboriginal foster carers and providing better support for Aboriginal kinship care (discussed in Chapter 16).
- 18.187 The Inquiry agrees with this assessment.
- 18.188 Of particular note, DoCS has published an Aboriginal Strategic Commitment 2006/2011 which has projected results over a five year period, including an increase in the capacity of DoCS funded Aboriginal and non-Aboriginal NGOs, particularly in relation to: early intervention and prevention; the provision of cultural support to Aboriginal children and young persons in child protection and OOHC; a consistent application of the Aboriginal and Torres Strait Islander placement principles, support, development and retention of Aboriginal staff; and increased collaboration across all tiers of government and with Aboriginal communities.
- 18.189 A key area in which DoCS has had some success is in relation to the numbers of Aboriginal caseworkers and other staff that it employs, which is discussed in Chapter 3. Further, it has increased the capacity of its Aboriginal Services Branch, which provides policy and program advice, from two positions in 2001

to 16 positions in 2008 and is taking steps to increase the number of Aboriginal legal officers. It has introduced a number of measures to increase the skills, qualification and career paths of Aboriginal staff, to compensate for the lesser entry qualifications that apply this group, which are discussed in Chapter 3.

- 18.190 DoCS notes that there has been limited research in understanding the issues facing Aboriginal children, young persons, families and communities. Research is now being undertaken by it to examine early childhood education within Aboriginal communities and a senior research officer (Aboriginal) was appointed to the Centre for Parenting and Research in 2007. A literature review on early intervention strategies for Aboriginal children is also being undertaken, while the evaluations which have now been completed in relation to IFBS and Brighter Futures have had some regard to Aboriginal families.
- 18.191 DoCS is carrying out a longitudinal study of children and young persons in OOHC, one sub-component of which will focus on Aboriginal children. In addition, its recent review of the Interagency Guidelines included an evaluation of the effectiveness of the tools for working with Aboriginal communities. This review found that there was a need either to expand the content of the Interagency Guidelines to address the cultural and practical issues or to provide more information and support to workers. Almost 30 per cent of Aboriginal respondents to that study disagreed that the guidelines were useful for Aboriginal people and suggested that the provisions in the Interagency Guidelines for addressing sexual assault could not be effectively applied to Aboriginal children and young persons.⁹⁴⁸ This needs to be addressed.
- 18.192 A further area of work includes the development of a Cultural Support Case Plan to be incorporated into the existing care plans which are presented to the Court.
- 18.193 There are several DoCS initiatives in relation to OOHC which are dealt with in Chapter 16. In particular, DoCS is implementing a training package for Aboriginal foster carers, is preparing a step by step Aboriginal assessment tool for foster carers, and is developing an Aboriginal Life Story Book to support children in care. It has been engaged in consultation and in work directed towards extending the Permanency Planning Project to include Aboriginal children and young persons. Additionally it has been working with seven Aboriginal OOHC service providers to build on existing service provision so as to assist them to become strong and sustainable providers of OOHC to Aboriginal children and young persons.
- 18.194 In August 2007 DoCS commenced the Aboriginal Child Deaths Project to analyse and identify systemic or practice issues arising from the deaths of Aboriginal children from 2005 to 2007.

⁹⁴⁸ DoCS, *Evaluation of NSW Interagency Guidelines for Child Protection Intervention 2006*, Final Report, Volume 1, 24 September 2008, p.19.

- 18.195 It is also noted that DoCS is working with Police and Health to enhance the JIRT program. This includes developing a culturally appropriate JIRT model and working on an Aboriginal child sexual assault project in Nowra to lead practice improvement and better service delivery within DoCS. These matters are discussed in Chapter 8.
- 18.196 In response to recommendations made in the Ombudsman's *Report of Reviewable Deaths in 2006*, DoCS is developing a uniform consultation framework for staff in CSCs, and has established Local Commitment of Service Plans, with Aboriginal advisory groups in each region, to provide a mechanism for the identification of key issues and priorities for Aboriginal families and communities. These can serve as a means of embedding the commitment of service to Aboriginal people within the systems and culture of the organisations, and of reinforcing the role expected of DoCS staff at a local level to give effect to that commitment.
- 18.197 A case study highlighting the importance of understanding Aboriginal family relationships appears in Chapter 9.
- 18.198 DoCS has funded a position to assist Aboriginal agencies through the accreditation process required by the Children's Guardian, to be included on a number of panels of review and to attend regular meetings with senior DoCS officers.
- 18.199 In addition, in August 2008, SNAICC, AbSec and ACWA signed a Service Development, Cultural Respect and Service Access Policy which seeks to develop more culturally appropriate partnership and service delivery models when the non-Aboriginal NGO sector in NSW is working with Aboriginal communities. The policy is in line with AbSec's service delivery model which has been developed to establish new Aboriginal OOHC services under the DoCS capacity building project.
- 18.200 Both these events are welcomed by the Inquiry.

Justice agencies

- 18.201 The initiatives which Police advise have been implemented or are in the process of implementation include the following:
- a. enhancing evidence gathering on paedophile activity in rural and remote communities and working with other agencies when required
 - b. reviewing the effectiveness of AVOs
 - c. providing funding for Aboriginal specific crime prevention and for improved responses to domestic and family violence strategies, with improved data collection and analysis
 - d. improving relationships with Aboriginal communities, to be brokered by the Aboriginal Community Liaison Officers with the active participation of police officers at 12 Local Area Command Aboriginal Consultative Committees,

inter alia through the preparation of a guidelines package, workforce recruitment and retention policies and practices to target Aboriginal employment

- e. recruiting an Aboriginal Family Violence Officer, as a member of the Aboriginal Coordination team, to work with Local Area Commands and specialist areas, to raise awareness of Aboriginal specific issues, including awareness training for Aboriginal Community Liaison Officers in sexual assault, and to develop Aboriginal Sexual Assault Standard Operating Procedures.
- 18.202 The disproportionate involvement of Aboriginal juvenile offenders in the juvenile justice system has been mentioned in Chapter 15, and is a matter that calls for specific attention.
- 18.203 In this regard several initiatives were noted in the NSW Youth Action Plan Progress Report as at 30 June 2007, which appear to hold promise, although some exist on a trial basis and await evaluation. They include the following programs or pilots within the responsibility of Juvenile Justice.
- 18.204 A trial of the Intensive Court Supervision Program was completed at the end of June 2007 in Bourke and Brewarrina as a partnership between the Court, and community and human service agencies. It aims to reduce recidivism and incarceration among young people in these towns, through offering an opportunity to demonstrate a capacity for rehabilitation to young offenders prior to sentencing. Juvenile Justice is to support the program through its Intensive Bail Support Program.⁹⁴⁹
- 18.205 Our Journey to Respect Program is an inter-generational Violence Prevention Program for young Aboriginal men who have been charged, or are at risk of being charged with an offence of violence. Training has been conducted under this program in each of the Juvenile Detention Centres and in the western and other regions of the State, and has included Aboriginal young persons under community supervision. It is supplemented by associated programs such as Black on Track and Step out from the Shadows, as well as by programs focused on alcohol and other drugs which Juvenile Justice has developed or is in the course of developing.⁹⁵⁰
- 18.206 One further initiative worthy of mention is the Tirkandi Inaburra Cultural and Development Centre, which began operations in 2005 and is funded by the NSW Government principally through Attorney General's. It is situated on a rural property near Coleambally in the Riverina region and provides a residence for Aboriginal youths, aged 12-16 years, who demonstrate potential but are showing signs of being involved in the criminal justice system. It is managed by the local Aboriginal community in partnership with the NSW Government and

⁹⁴⁹ NSW Youth Action Plan Progress Report, as at 30 June 2007, p.16. www.youth.nsw.gov.au/minister_and_policy.

⁹⁵⁰ *ibid.*, p.22.

provides educational, vocational, and cultural programs, using teachers provided by the Coleambally Central school, and Aboriginal elders, as well as mentoring programs following the return of participants to their communities.⁹⁵¹ It is the subject of ongoing evaluation with a report due in December 2008.⁹⁵²

- 18.207 It may be noted that the Circle Sentencing initiative that was established in February 2002 initially at Nowra Local Court and subsequently extended to other parts of the State⁹⁵³ is only available in relation to adult offenders. In this respect it differs from the Murri Court in Queensland which also operates in association with the Children's Court.
- 18.208 Circle Sentencing has been the subject of recent evaluation by the Cultural and Indigenous Research Centre Australia,⁹⁵⁴ prepared with the assistance of the statistical analysis conducted by the BOCSAR of its reoffenders database to assess whether participants have lower rates of recidivism (the Circle Sentencing Evaluation). The BOCSAR analysis found that Circle Sentencing had not influenced the rate of re-offending, or the seriousness of the offences of those who had re-offended. However, the report noted that Circle Sentencing has had a positive impact on community members, particularly elders.
- 18.209 Subject to ongoing evaluation of the Circle Sentencing strategy, an increase in the experience of those involved, and attention to the suggestions made in the Circle Sentencing Evaluation concerning the ways in which the effectiveness and cost efficiency of the system could be improved, consideration could be given to its use for juvenile Aboriginal offenders, or for adopting a Murri Court model within the Children's Court.
- 18.210 Elsewhere in this report, we have noted, with concern, that young Aboriginal offenders have been less likely to be involved in diversionary programs than their counterparts in the broader community. The Inquiry is of the view that this is a matter that needs to be addressed since the acquisition of a criminal record and exposure to detention is commonly the beginning of a lengthy involvement in the criminal justice system for this section of the community.

Capacity building

- 18.211 The Inquiry has identified capacity building in Aboriginal communities as critical to building more culturally appropriate models for supporting Aboriginal children.
- 18.212 A Commonwealth Inquiry into capacity building and service delivery in Aboriginal communities in 2004 defined capacity to include "activities which seek to empower individuals and whole communities while building the

⁹⁵¹ Attorney General's Department of NSW, *TIRKANDI INABURRA Factsheet*.

⁹⁵² NSW Youth Action Plan Progress Report as at 30 June 2007, p.15. www.youth.nsw.gov.au/minister_and_policy.

⁹⁵³ Armidale, Bourke, Brewarrina, Dubbo, Kempsey, Lismore, Mt Druitt and Walgett Local Courts.

⁹⁵⁴ Attorney General's Department of NSW, *Evaluation of Circle Sentencing Program Report*, May 2008.

operational and management capacity of both organisations and governments to better deliver and utilise services.”⁹⁵⁵

- 18.213 In relation to building the capacity of government agencies to deliver effective services to address Aboriginal people’s needs, the Inquiry found the evidence fell into four areas of need: enhancing integration and cooperation; enhancing government service delivery; enhancing funding delivery; and enhancing Aboriginal-government partnerships.⁹⁵⁶
- 18.214 The Inquiry supported the argument that Aboriginal people need to be more involved in the design and delivery of services, and need to be supported or resourced to implement initiatives in a sustainable way, as they often know the solutions to the problems they face.
- 18.215 Further, it was found that inequities in the funding provided to Aboriginal and non-Aboriginal organisations providing similar services needed to be addressed. Education and health equity was seen as critical to improving Aboriginal capacity as literacy, numeracy and an acceptable level of health were key requirements to enabling people to participate and function in society.
- 18.216 The Inquiry identified a need to build the capacity of government agencies to understand and work with Aboriginal people and communities, and a need to build the capacity of Aboriginal people and communities to participate in decision making processes. However, the Capacity Building Inquiry stated that “until basic issues of dysfunction and disadvantage in Indigenous communities are addressed, greater capacity building efforts will remain largely ineffective”.⁹⁵⁷
- 18.217 In conclusion, the Capacity Building Inquiry noted that:

*This inquiry has largely been about service delivery, and about building the capacity of stakeholders. At the first level, this involves building the capacity of governments to be more responsive and effective in addressing the service delivery needs of Indigenous Australians. The second layer, which meshes and overlaps with that, is about building the capacity of Indigenous people and organisations so that they can then deliver or influence the delivery of services more effectively. The third layer is about building capacity so that the need for service delivery is reduced, and the way to do that is work together to improve Indigenous people’s quality of life.*⁹⁵⁸

⁹⁵⁵ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, “Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous communities,” *The Parliament of the Commonwealth of Australia*, Canberra, June 2004, p.13.

⁹⁵⁶ *ibid.*, p.57.

⁹⁵⁷ *ibid.*, p.170.

⁹⁵⁸ *ibid.*, p.251.

- 18.218 DoCS efforts at building Aboriginal capacity in its workforce have been discussed elsewhere in this report, and compare favourably with the results achieved by other NSW government agencies. The OOHC capacity building project with non-government organisations involves DoCS, “working with seven Aboriginal OOHC service providers to build on existing service provision and help them to become strong and sustainable providers of OOHC for Aboriginal children and young people.”⁹⁵⁹
- 18.219 The concept of the DoCS project was applauded by AbSec, but was seen as being too small. AbSec stated that the project aimed to increase the capacity of Aboriginal OOHC services from 170 to only approximately 320 places, in the context of there being about 3,200 Aboriginal children and young persons in care. DoCS, on the other hand, advised that the project would increase the capacity of Aboriginal OOHC services by 426 places.
- 18.220 Significant further work is required across the State to build sufficient system capacity to meet needs, as DoCS stated:

*Notwithstanding this valuable work at an individual NGO level, NSW lacks a network of agencies that can work across the issues confronting Aboriginal families in a holistic and locally responsive way. DoCS’ relationship with AbSec has the potential to create such a model by drawing on its networks. In addition, further investigation is needed as to the most effective structures to inform policy and program development at a strategic level, given the diversity of Aboriginal representative groups.*⁹⁶⁰

A recommendation in relation to increasing capacity building in Aboriginal communities is made in Chapter 10.

Lessons from the literature

Characteristics of Aboriginal family structures and child rearing practices

- 18.221 While the terms ‘kinship’ and ‘culture’ have become part of the language of the child protection system in NSW in relation to the care and protection of Aboriginal children, research with Aboriginal communities has demonstrated that “kinship terminology is not purely a matter of language.”⁹⁶¹ A kinship system is a cultural construct.

⁹⁵⁹ Submission: DoCS, Aboriginal Communities, p.12.

⁹⁶⁰ *ibid.*, p.13.

⁹⁶¹ F Morphy, “Lost in translation? Remote Indigenous households and definitions of the family,” *Family Matters*, no. 73, Australian Institute of Family Studies, Melbourne, 2006, p.24.

- 18.222 The differences in the concepts of 'family' and 'kin' have implications for more than the accurate collection of meaningful data about families. It could be difficult for caseworkers and others, with an understanding that values the nuclear family above other conceptualisations of 'family,' to have any insight into the different kind of information that may be required for them to assess the safety of an Aboriginal child, or the appropriateness of the potential options available within the family and community to meet the care and protection needs of the child.
- 18.223 There are also implications for the efforts of caseworkers to correctly assess the context of the child, the meaningful and supportive relationships they have with their family and kin, and to identify the best potential kinship placements for children. Caseworkers raised in Anglo-Celtic society may find it difficult to understand and reflect in casework, and in file notes, the complexity of Aboriginal family and kinship relationships that are important for a child, and for making decisions about where the child should live, if he or she cannot live with parents.

An individualistic approach that focuses on the child's needs without proper consideration of their parent/s' and communities' circumstances has been criticized by Indigenous groups in Canada, New Zealand and Australia as failing to take into account Indigenous understandings of family and children.⁹⁶²

- 18.224 It has also been said that the implications for the child protection system, of having a system based on one set of concepts trying to provide services to children and families who operate on a very different set of concepts, cannot be resolved by making simple modifications to a system designed for non-Aboriginal children. The 2004 Victorian report, *Protecting children: ten priorities for children's well-being and safety in Victoria*, noted that:

It will not be sufficient to add an Indigenous element to, for example, the assessment and investigation procedure or to make modifications to the out-of-home care processes for Aboriginal children without considering whether the system as a whole is inclusive of Indigenous cultures and values.⁹⁶³

What constitutes evidence for what works in Aboriginal contexts?

- 18.225 The literature is consistent in stating or implying that the trauma experienced by Aboriginal people is not only historic but is current and continuing. Responses to trauma and early removal from family and community include antisocial activity, violence and depression, which in turn lead to continuing social

⁹⁶² T Bell and T Libesman, 2007, op. cit., p.18.

⁹⁶³ Victorian Government Department of Human Services, "Protecting Children: Ten priorities for children's well-being and safety in Victoria" cited in T Bell and T Libesman, 2007, op. cit., p.64.

isolation and dislocation. One study of note from Western Sydney⁹⁶⁴ examined two adjoining, demographically similar, economically depressed neighbourhoods with contrasting rates of reported child maltreatment. The outstanding difference between the two neighbourhoods was the structure of social networks. The locality with the higher rate of abuse suffered from a relative lack of connection in the social network.

18.226 The cumulative effect of these factors is seen to provide some explanation for the continuing poor health and welfare of Aboriginal people, and their extreme disadvantage compared with non-Aboriginal people.

18.227 Libesman notes that it has been recognised that an individualised, case based approach to dealing with the issues, looking at each child's issues in isolation from the broader community issues, has not been successful for Aboriginal children and families.⁹⁶⁵

18.228 According to Stanley et al:

*There is a common call in the literature that effective intervention into family violence needs to address both the past traumas and present situational problems and health disadvantages of Indigenous communities. Almost without exception the literature notes the need for inclusion/participation of the local community.*⁹⁶⁶

18.229 Any discussion of 'what works?' begs the question 'how do we know?' Pressures over the last decade or more to adopt 'evidence based' programs, approaches and practices have led to a demand for more rigorous justification of practices.

18.230 Tomison and Poole, in their 2004 audit of prevention programs, note that:

... the difficulties of conducting research in applied settings, a lack of agency resources and staff research expertise has meant that despite the vast number of program evaluations that have been performed on a variety of child abuse prevention programs, very few rigorous evaluations have been done in Australia or internationally. The majority of program evaluations are modest, internally focused studies that assess client satisfaction, document the services delivered, describe program

⁹⁶⁴ T Vinson, E Baldry and J Hargreaves, 1996, cited in J Stanley, AM Tomison and J Pocock, "Child abuse and neglect in Indigenous Australian Communities," Child Abuse Prevention Issues Paper no. 19 *National Child Protection Clearinghouse*, Australian Institute of Family Studies, 2003 Melbourne, p.8.

⁹⁶⁵ T Libesman, "Indigenising Indigenous Child Welfare," *Indigenous Law Bulletin*, Vol 6 Issue 24, 2007, p.17

⁹⁶⁶ J Stanley, K Kovacs, AM Tomison and K Cripps, "Child Abuse and Family Violence in Aboriginal Communities – Exploring Child Sexual Abuse in Western Australia," *National Child Protection Clearinghouse*, Australian Institute of Family Studies, 2002, p.56.

*implementation (for replication) and, if possible, the immediate effects of service provision.*⁹⁶⁷

18.231 The quality of the information available about the short and long term outcomes of interventions is therefore unlikely to be available at the level of empirical trials, particularly in Aboriginal contexts where it is difficult to implement such trials even where it may be ethical to provide a service or program to an experimental group and to deny it to a control group.

18.232 Stanley et al state that:

*Best practice responses and solutions to Indigenous violence are difficult to find due to both what would seem to be a dearth of programs and the lack of documented evaluations about the effectiveness of programs. The many reports on the problems within Indigenous communities conclude that the general failure to find solutions is exacerbated by a significant lack of resources, an on-going paternalistic approach towards Indigenous people and a reluctance to address the problem.*⁹⁶⁸

18.233 However, they also note that a number of principles are repeatedly identified in the literature.⁹⁶⁹ These can be useful in guiding the development and dissemination of programs to address violence and neglect in Aboriginal communities. This dissemination must be undertaken, however, in the context of local acceptance and adaptation of programs. In the conclusion of her review of international literature, Libesman states:

*While some of the issues and ideas may be useful and relevant in the Australian context, a key finding in the research is that a 'one size fits all approach' does not work. Research and programs for children's well-being need to be developed, implemented and evaluated locally.*⁹⁷⁰

18.234 It should also be acknowledged that Aboriginal ways of understanding may place greater value on forms of evidence that are not as highly regarded in scientific frameworks. For example, Stanley, Tomison and Pocock note that:

... an Indigenous perspective is rarely recorded in the academic literature.

Further, much Indigenous knowledge is based on personal accounts and stories, a method which has Indigenous cultural integrity ... Indeed, Indigenous perspectives can be seen as

⁹⁶⁷ AM Tomison and L Poole, "Preventing Child Abuse and Neglect: Findings from an Australian audit of prevention programs," *National Child Protection Clearinghouse, Australian Institute of Family Studies*, 2000, p.6.

⁹⁶⁸ J Stanley, K Kovacs, AM Tomison and K Cripps, 2002, op. cit., p.4.

⁹⁶⁹ *ibid.*

⁹⁷⁰ T Libesman, 2004, op. cit., p.34.

*similar to the qualitative methodologies increasingly being used by some non-Indigenous researchers.*⁹⁷¹

- 18.235 The Aboriginal and Torres Strait Islander Social Justice Commissioner, has advised caution about proclaiming 'best practice' for working with Aboriginal communities. He has said:

I have deliberately chosen the term 'promising practice' over 'best practice'. Best practice is a term from the business world and states that best practice approaches need to be 'replicable, transferable and adaptable'

*Indigenous communities are diverse. This means that we need to be very careful about proclaiming best practice, transplanting it to another community and then just expecting it to work. 'Promising practice' is a slightly more tentative term, but still allows us to recognise and develop strengths.*⁹⁷²

- 18.236 The term 'promising practices' was also used in a review of OOHC programs and services for Aboriginal children in 2007, undertaken by Higgins and Butler for the AIFS. They state:

*... the term 'promising' describes programs that have been successful in meeting their goals and objectives, but which have not necessarily been externally evaluated.*⁹⁷³

- 18.237 In 2007, the Office for Aboriginal and Torres Strait Islander Health, within the Commonwealth Department of Health and Ageing, published a review that evaluated the available evidence of effective programs to address selected social and environmental factors relevant to Aboriginal and Torres Strait Islander people and communities.⁹⁷⁴

- 18.238 The review highlighted the limited quality and quantity of programs addressing these factors in Aboriginal communities in Australia, which makes formulation of specific recommendations difficult. However, the review did identify a number of features of successful programs. These included:

- a. involvement of local Aboriginal people in the design and implementation of programs

⁹⁷¹ J Stanley, AM Tomison and J Pocock, "Child abuse and neglect in Indigenous Australian Communities," Child Abuse Prevention Issues Paper no. 19, *National Child Protection Clearinghouse, Australian Institute of Family Studies*, 2003, p.1.

⁹⁷² Human Rights and Equal Opportunity Commission, *Social Justice Report 2007, Commonwealth of Australia*, Canberra, p.21.

⁹⁷³ J Higgins and N Butler, 2007, op. cit., p.4.

⁹⁷⁴ A Black, "Evidence of effective interventions to improve the social and environmental factors impacting on health: Informing the development of Indigenous Community Agreements," *Office for Aboriginal and Torres Strait Islander Health*, Australian Government, 2007.

- b. effective partnerships between community members and the organisations involved, which resulted in community capacity building and employment for local Aboriginal people
 - c. cultural understanding
 - d. mechanisms for effective feedback to individuals and families.
- 18.239 The conclusion that can be drawn from this information is that the best evidence for what works in addressing the issues in Aboriginal communities is likely to be drawn from the Aboriginal people themselves, through consultations, drawing on their ideas, experiences and opinions, respecting their knowledge drawn from their own individual and community experiences, and drawing on case reports of individual Aboriginal people and specific programs.

Findings of the literature

- 18.240 The literature supports an approach which addresses both the past traumas and history of colonialism and the present situational problems and health disadvantages of Aboriginal communities. The concept of culturally appropriate or culturally competent service provision requires that Aboriginal ways of understanding are incorporated into and respected within models of service delivery.
- 18.241 A number of principles for the way forward have been proposed and reiterated in the literature. Favoured models of intervention:
- a. are tailored to meet the needs of specific localities
 - b. are based on community development principles of empowerment
 - c. are linked to initiatives that deal with poor health, alcohol abuse and similar problems in a holistic manner
 - d. employ local people where feasible
 - e. respect traditional law and customs where appropriate
 - f. employ a multidisciplinary approach
 - g. focus on partnership between agencies and community groups
 - h. add value to existing community structures where possible
 - i. place greater stress on the need to work with men
 - j. place more emphasis on intervention that maintains family relationships and healing.
- 18.242 Based on these principles the report of the NT Inquiry advocates for the integration of health and family support services in community 'hubs' or 'one stop shops', and for the trial of joint teams, in a co-located permanent

multidisciplinary structure for both investigation and subsequent professional intervention.⁹⁷⁵

18.243 The HREOC 2007 Social Justice Report provides a similar view:

There is no 'magic bullet' to solve the problems of family violence and abuse in Indigenous communities. However, we know that there are a range of program areas that must be addressed holistically to promote change. These program areas include:

- a. *support programs*
- b. *identity programs*
- c. *behavioural change*
- d. *night patrols*
- e. *refuges and shelters*
- f. *justice programs*
- g. *dispute resolution*
- h. *education and awareness raising*
- i. *holistic composite programs.*⁹⁷⁶

Identifying 'promising' practices

18.244 A number of programs, services or strategies were recommended to the Inquiry. Examples of programs were selected for further discussion by the Inquiry based on the level of 'promise' they exhibited, as well as their potential for broader application in NSW. Some of these are discussed in this Chapter while others appear in Chapters 7, 8 and 16.

18.245 For the purposes of the Inquiry, the approaches examined can be broadly categorised as follows:

- a. Prevention or early intervention strategies that aim to address multiple factors that are associated with disadvantage and with higher incidence of child abuse and neglect for individuals, families and communities. They include interventions that aim to influence the behaviour of children, parents and communities so that children have improved social and physical environments in which to grow up, and so that risk is reduced.
- b. Child protection interventions, which respond to the presence of reported or suspected child abuse and neglect. Such interventions generally have a

⁹⁷⁵ Northern Territory Government, "Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'," *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, Darwin, Australia, 2007, p.278.

⁹⁷⁶ Human Rights and Equal Opportunity Commission, *Social Justice Report 2007, Commonwealth of Australia*, Canberra, p.18.

focus on improving the situation so that children can remain with their family of origin. For Aboriginal children, this will also mean programs that ensure culturally relevant responses to child protection issues.⁹⁷⁷ The IFBS program is outlined in Chapter 8 of this report.

- c. Interventions to improve the outcomes for children in OOHC, which apply to those children who have (usually) been placed in the care of someone other than a parent after a concern has been raised about their safety and/or welfare.
- 18.246 Some programs cross the continuum of early intervention and child protection.
- 18.247 The level of 'promise' shown by any particular intervention or program that was assessed was based on:
- a. any available formal evaluation of the program and its outcomes
 - b. annual reports or other service data to show the utilisation and/or effectiveness of the service or program
 - c. less formal 'evidence' such as expert opinion (including recommendation of the program by an agency with expertise in the field), consumer satisfaction surveys or qualitative impressions of program staff on the outcomes achieved by the service
 - d. the extent to which the intervention is consistent with the principles found in the literature, including the extent to which it complies with the principles in practice, as well as the extent to which the principles were incorporated in program design and development.
- 18.248 Where the literature contained an analysis of the factors that contributed to a program or intervention being 'promising' for broader application to Aboriginal communities, the analysis was included rather than detailed discussion of the individual programs. This was the case with OOHC services.

Promising practices

Canada

Manitoba Model

- 18.249 Similar to Aboriginal people in Australia, Aboriginal people in Manitoba experience significantly worse health and welfare than the non-Aboriginal population. The Aboriginal population is very young, Aboriginal people have an unemployment rate four times that of non-Aboriginal people, and have hospital utilisation rates two or three times the rates for other Manitobans. Aboriginal

⁹⁷⁷ J Higgins and N Butler, 2007, op. cit., p.4.

children are more likely to live in poverty and are more likely to be in the child welfare system.

- 18.250 In 2002, after significant joint work between government and Aboriginal groups, legislation was enacted creating four new child and family services authorities, one for each Indigenous group. All four authorities have the responsibility to develop policy, practices and procedures that are culturally appropriate. All are responsible for the delivery of services, coordination of services and the funding of community based agencies.⁹⁷⁸
- 18.251 There has been both positive and negative commentary on the Manitoba system.⁹⁷⁹
- 18.252 The Manitoba system may offer options for Australia to move toward a child protection model that will allow Aboriginal communities self-determination, and the autonomy and adaptability that is said to be required for such communities to find ways of delivering child and family services to protect their children, and that will give them an environment that can support their growth and development free from abuse and neglect.

Vancouver

- 18.253 In 2005, the Ministry of Children and Family Development transferred child protection services for Aboriginal children, youth and families in Vancouver to the not for profit agency, the Vancouver Aboriginal Child and Family Services Society. The functions transferred include:
- a. reviewing, assessing and investigating reports of child abuse and neglect of children
 - b. providing services to the parents or others who are responsible for the care of such children
 - c. providing services that will help strengthen Aboriginal children and their families.⁹⁸⁰
- 18.254 The Inquiry considers that the current environment would not be appropriate for a sudden move to such a model. It is something to which the system could move carefully and by degrees, that is by a progressive increase in the involvement of the Aboriginal communities in the decision making and delivery of services.

⁹⁷⁸ T Bell and T Libesman, 2007, op. cit., p.94.

⁹⁷⁹ *ibid.*, p.101.

⁹⁸⁰ www.vacfss.com/index.php

Indigenous Triple P – the Positive Parenting Program

- 18.255 Triple P is a parenting and family support strategy with a number of levels that aims to prevent severe behavioural, emotional and developmental problems in children.
- 18.256 The program aims to do this by enhancing the knowledge, skills and confidence of parents. Triple P is available at a number of levels depending on the needs of parents and families. This ranges from population based media material, through to fact sheets, structured groups and individual parenting programs. An Indigenous version of Triple P was developed and evaluated in two trials, the first with a small sample in Queensland, and the second in twelve communities across Australia.⁹⁸¹
- 18.257 The report on the first clinical trial noted that:
- These results provide the first outcome evidence from a randomised controlled trial of a parenting intervention for Australian Indigenous families conducted by Child Health and Indigenous Health workers in a community setting. This study adds to a series of controlled outcome studies exploring the efficacy and effectiveness of Triple P interventions. The outcomes of this initial trial are a significant step forward in increasing appropriate service provision for Indigenous families and reducing barriers to accessing available services in the community. These trial results are sufficiently encouraging to warrant wider scale implementation and evaluation of the programme with other Indigenous groups in rural and regional areas.*⁹⁸²
- 18.258 Indigenous parents who had completed the Triple P group program reported significantly lower levels of behavioural and emotional problems in their children, and less reliance on dysfunctional parenting practices than was the case for parents who were still on the waitlist for a group. It was reported that the positive effects of the program were still being maintained six months after the program.⁹⁸³
- 18.259 The evaluation examined the cultural acceptability of the program and reported consistently positive feedback from participants on that issue.⁹⁸⁴
- 18.260 The second trial, in twelve diverse urban, rural and remote sites across Australia, displayed similar outcomes to the first trial, including:

⁹⁸¹ K Turner, "Supporting Indigenous Health Professionals: Key issues and supports for the adoption of evidence-based behavioural family intervention in Indigenous communities" Paper prepared for the *Australian Research Alliance for Children and Youth*, 2007, pp.5-6.

⁹⁸² K Turner, M Richards and M Sanders, "Randomised clinical trial of a group parent education programme for Australian Indigenous families," *Journal of Paediatrics and Child Health* vol 43, 2007, p.436.

⁹⁸³ *ibid.*, p.429.

⁹⁸⁴ *ibid.*, p.435

*Significant decreases in problem child behaviour and dysfunctional parenting practices (particularly authoritarian discipline, displays of anger and irritability), and high rates of consumer satisfaction. In addition, there were significant decreases in parental depression and stress, and a significant increase in parenting confidence.*⁹⁸⁵

- 18.261 This trial, however, also included data collected from practitioners which revealed some barriers to delivery of the program:

*Practitioners reported finding the program useful and appropriate, but many interested sites faced obstacles to program implementation, such as community perception of the priority of parenting support, lack of availability of trained professionals and lack of opportunities for supervision and skill rehearsal, difficulties in rearranging workload to allow for group sessions, engagement issues, and perceived reluctance for completion of questionnaires and data collection.*⁹⁸⁶

Alcohol Supply Reduction Programs

- 18.262 Until recently, alcohol supply reduction programs have been trialled in various Aboriginal communities particularly in the Northern Territory and in Western Australia, with a minimum six month trial. Black examined six trials and found that four of these demonstrated significant reduction in alcohol consumption and related harm.⁹⁸⁷ The analysis concluded that Indigenous communities are increasingly engaged in addressing the problem of alcohol misuse. The evidence remains inconclusive. Of the studies that have been done, most are too small to be generalised to the greater Aboriginal population, and others are of poor quality and have yielded inconclusive results. Nevertheless, the results indicate the importance of community support for successful supply reduction interventions.⁹⁸⁸
- 18.263 Black notes that expert opinion has indicated that sustained success is unlikely, unless programs also address the underlying reasons for alcohol misuse.⁹⁸⁹ These include the lack of meaningful employment, lack of engagement in the education system, poverty, and lack of opportunity to accumulate lifelong assets. Unless addressed there is a risk that alcohol reduction strategies will see users turn to potentially more harmful practices involving drug abuse and petrol sniffing and to a greater extent than presently occurs.

⁹⁸⁵ K Turner, 2007, op. cit., p.6.

⁹⁸⁶ *ibid.*

⁹⁸⁷ A Black, "Evidence of effective interventions to improve the social and environmental factors impacting on health: Informing the development of Indigenous Community Agreements," *Office for Aboriginal and Torres Strait Islander Health*, Australian Government, 2007, pp.53, 55-56.

⁹⁸⁸ *ibid.*, p.53.

⁹⁸⁹ *ibid.*

- 18.264 In terms of applicability to NSW, the programs and studies reviewed were in remote locations such as Halls Creek, Curtin Springs Roadhouse, Tennant Creek, Derby and Alice Springs. The alcohol reduction programs operating in the Northern Territory under the NTER have not yet been fully evaluated.
- 18.265 New liquor laws came into effect in NSW on 1 July 2008, to provide, *inter alia*, for greater protections for local communities from alcohol related crime. The new legislation includes Aboriginal specific harm reduction measures which permit the declaration of restricted alcohol areas within which the sale, supply, possession or consumption of liquor can be restricted. The declaration of a restricted alcohol zone may only be done at the behest of the community and in consultation with local community members as well as the Minister for Aboriginal Affairs.⁹⁹⁰
- 18.266 In addition, under the *Local Government Act 1993*, councils can prohibit the consumption of alcohol and create alcohol free zones.⁹⁹¹ The Inquiry understands that Bourke has made its town an alcohol free zone with the consensus of the community.

The NSW Aboriginal Maternal and Infant Health Strategy

- 18.267 AMIHS was developed by Health in 2000, in response to research into Aboriginal perinatal health in NSW (this research was later published in 2003 as the NSW Aboriginal Perinatal Health Report). The research showed that Aboriginal babies were far more likely than non-Aboriginal babies to die in the first four weeks after birth, were more likely to be born prematurely, and that the rate of Aboriginal babies born with low birth weight was almost double that of non-Aboriginal babies. Low birth weight and prematurity are associated with higher risk of death and illness in the first month after birth.⁹⁹²
- 18.268 Health stated that the research recommended a specific model of service provision, which included a team approach to community maternity services including midwifery, Aboriginal health workers, specialists and general practice, a flexible and non-judgemental approach to service delivery, and a sensitive approach to the underlying social and economic factors impacting on the lives of Aboriginal people. Health states that this model has become the core of the AMIHS service delivery approach. Additionally, the model includes a specific Training and Support Unit which provides support to the staff developing and implementing AMIHS services.⁹⁹³
- 18.269 Initially AMIHS operated from Broken Hill, Wilcannia, Coffs Harbour, Taree, Dubbo, Moree, and Newcastle. In 2007, DoCS entered into a partnership with Health to fund the expansion of the service to the remainder of NSW. As part of

⁹⁹⁰ *Liquor Act 2007 (NSW)* ss.115-116.

⁹⁹¹ *Local Government Act 1993 (NSW)* ss.642-649.

⁹⁹² NSW Health, "Aboriginal Maternal and Infant Health Strategy," Newsletter 1, *NSW Department of Health*, October 2007.

⁹⁹³ *ibid.*

this expansion, the seven alternative birthing service programs funded by the Commonwealth will receive additional funding to bring them to the level of AMIHS programs.⁹⁹⁴

- 18.270 With the existing AMIHS services, the enhanced alternative birthing services programs, and additional services to be set up, there will be the equivalent of 31.5 full time equivalent midwife and Aboriginal health worker teams providing specific services to Aboriginal parents across NSW. The cost of providing these services will be approximately \$7.3 million per annum.⁹⁹⁵
- 18.271 The AMIHS model was evaluated after three years of operation, and the results published in 2005.⁹⁹⁶ Outcomes included the following:
- a. significantly more women attended their first antenatal visit before 20 weeks of pregnancy
 - b. there was a significant reduction in the numbers of babies born preterm
 - c. more women initiated breast feeding, and more maintained breast feeding to six weeks
 - d. Aboriginal women were very satisfied with the services provided by the program.
- 18.272 As part of the expansion of services under an MOU between DoCS and Health the program will continue to be externally evaluated.
- 18.273 Although programs exist across Australia with similar goals to the AMIHS, the evaluation of this program has generally demonstrated better outcomes than some other programs.⁹⁹⁷
- 18.274 Health informed the Inquiry that the 2008/09 State Budget included the provision of an additional \$19.1 million to extend the services already provided under the AMIHS model to ensure that Aboriginal families with young children in NSW have quality access to universal early childhood health services. The amount is to be provided over four years. Health further advised that the precise service model was still being developed. Any impact of extending services to early childhood will need to be evaluated and monitored, but the model continues to be promising. In particular an early antenatal visit can be a useful entry point for addressing issues such as alcohol and other drug abuse,

⁹⁹⁴ NSW Health and DoCS, "Memorandum of Understanding between the Minister for Community Services and the Minister for Health regarding joint funding of the Aboriginal Maternal and Infant Health Strategy," 2007.

⁹⁹⁵ *ibid.*

⁹⁹⁶ NSW Health "NSW Aboriginal Maternal and Infant Health Strategy Evaluation: Final Report," 2005, www.health.nsw.gov.au.

⁹⁹⁷ See for example A Rumbold, and J Cunningham, "A Review of the Impact of Antenatal Care for Australian Indigenous Women and Attempts to Strengthen these Services," *Journal of Maternal and Child Health* 12, 2008, p.83-100. This paper compares the results of ten antenatal care programs developed for Indigenous women, concluding that the impact of the antenatal care programs evaluated and published to date remains inconclusive. The study involved a search of databases of peer reviewed publications and Commonwealth Government websites. Possibly because State department websites were not included in the search strategy, the researchers did not review the AMIHS evaluation, and this program did not inform their analysis.

thereby reducing the incidence of babies born with foetal drug syndrome, and for reducing the risk of domestic violence.

Conclusion

- 18.275 From the several reports which emanated from the Inquiries referred to in this chapter, and from its own investigations, the Inquiry considers that there are a number of key challenges to be taken into account, when existing programs are implemented or when new strategies are introduced. In order to place its recommendations in context, it is convenient to note these challenges, each of which was recognised by DoCS in its submission.
- 18.276 The proportion of children and young persons within the Aboriginal population is in excess of that for the non-Aboriginal population, and is growing. A strong community and family structure to support their development is necessary.
- 18.277 Each Aboriginal community in NSW is different, with the result that any intervention needs to focus on local circumstances including the composition of that community, the strength and capacity of local Aboriginal leadership and the physical availability of government and non-government resources.
- 18.278 There has been limited research, and hence limited understanding, concerning the critical issues facing Aboriginal communities in NSW. These include the circumstances leading to the occurrence and concealment of sexual abuse, the normalisation of violence, the breakdown of family and community structures, and the long term impacts of kinship care.
- 18.279 The problems facing Aboriginal families and their children involve a wide range of causes of disadvantage, such that a holistic response involving the full complement of human services and justice agencies is needed.
- 18.280 An effective integrated network of government agencies and sufficiently supported and funded non-government agencies is needed at a local level to address issues confronting Aboriginal families in the more remote communities, in a holistic way.
- 18.281 The risk of problems of high levels of violence, particularly domestic and family violence, sexual abuse, substance abuse, poverty, mental illness, unemployment, and poor housing becoming entrenched, and of positive parenting being unavailable, increases significantly where Aboriginal families are living in small towns or in isolated communities without the services and social infrastructure that support families elsewhere.
- 18.282 The existing services for responding to substance abuse, family violence and neglect in NSW are fragmented, poorly linked and do not reach the more high risk, remote communities. This problem is then compounded by the difficulties faced by caseworkers based in the larger communities, such as Broken Hill, in reaching the at risk families.

- 18.283 Challenges remain in securing the level of training, support and supervision of the Aboriginal caseworkers who are needed to maximise engagement with Aboriginal communities.
- 18.284 Difficulties persist in maintaining a suitable pool of Aboriginal foster carers, a significant proportion of the current cohort being grandmothers or aunts who are ageing and in poor health, and also in assessing the capacity and suitability of potential kinship carers to whom the care responsibility is progressively being passed.
- 18.285 There has been a lack of differential approaches adopted by or available to the Court that would take into account, and that would be more conducive to, kin and community participation in decision making concerning the future of Aboriginal children and young persons.
- 18.286 Those young Aboriginal people caught up in the juvenile justice system have not been well served in relation to bail, diversionary options, or Aboriginal specific rehabilitation options, with the result that they have been left at risk of joining a cycle of re-offending with limited opportunities for establishing sound family relationships.
- 18.287 There is remarkable unanimity in the published reports and literature about the problems facing Aboriginal communities, (particularly those in remote areas), the causes of those problems and the principles which should underpin any intervention in their lives of Aboriginal people.
- 18.288 Notwithstanding this mutual understanding, Aboriginal children and their families remain over represented in the child protection and criminal justice systems. This Inquiry, like many of those that have preceded it, has not identified any universal solution, but has in relation to each of the relevant aspects of child protection, given attention to ways that they may be severally addressed.
- 18.289 Recommendations have been made in Chapter 10 concerning the general principles which the Inquiry believes should underpin the child protection system in NSW, the goals to be reached and what needs to be done to achieve such these goals. Matters specific to Aboriginal children, young persons and their families have also been addressed in those recommendations. In addition, in Chapter 8, a recommendation is made concerning building capacity in Aboriginal organisations to enable one or more of them to take on a role similar to Lakidjeka. Recommendations concerning Aboriginal children and young persons in OOHHC are dealt with in Chapter 16.
- 18.290 In addition, the Inquiry supports the nine rules of engagement devised by the NT Inquiry and agrees that they should be applied in responding to child protection issues in Aboriginal communities.
- 18.291 One strategy identified by Premier and Cabinet was the development of co-located family centres servicing Aboriginal communities, involving health and

education, given the importance of success in these domains to interrupt the inter-generational transmission of family and child vulnerability. These along with other strategies such as improved housing supply, the regulation of alcohol supply and access to alcohol and other drug treatment services are currently being considered by the COAG Working Group on Indigenous Disadvantage. The Ombudsman stated that such a strategy, if effectively implemented, has the potential to give Aboriginal communities much easier access to a suite of services aimed at a continuum of care. The Inquiry agrees and has made a recommendation to that effect in Chapter 10.

18.292 As noted earlier, the recommendations made in this chapter are of a broader nature and should be read in conjunction with the more specific recommendations developed elsewhere in this report.

Recommendations

Recommendation 18.1

The NSW Ombudsman should be given authority to audit the implementation of the Aboriginal Child Sexual Assault Taskforce recommendations as described in Recommendation 21 of the Taskforce's report.

Recommendation 18.2

The NSW Government should consider the following:

- a. Assisting Aboriginal communities to consider and develop procedures for the reduction of the sale, delivery and use of alcohol to Aboriginal communities.
- b. Working with the Commonwealth to income manage Commonwealth and State payments to all families, not only Aboriginal families, in circumstances where serious and persistent child protection concerns are held and there is reliable information available that income is not being spent in the interests of the safety, welfare and well-being of the relevant child or young person.
- c. Introducing measures to ensure greater attendance at school, preferably by means other than incarceration, including the provision of transport and of meals.
- d. In smaller and more remote communities, introducing the greater use of night patrols to ensure that children are not wandering the streets at night in circumstances where they might be at risk of assault, or alternatively of involvement in criminal activities.

- e. Providing accommodation to Aboriginal children and young people at risk of harm of a boarding nature type where the children are cared for and educated.

Recommendation 18.3

The NSW Government should take steps to ensure that the recommendations of the Aboriginal Child Sexual Assault Taskforce report, and the actions in the Interagency Plan, which relate to provision of direct services to Aboriginal children, young persons, families and perpetrators, are carried into effect within the lifetime of the plan.

Recommendation 18.4

The NSW Government should work actively with the Commonwealth in securing the delivery, in NSW, of the services identified in the New Directions Policy and in the 2008/09 Commonwealth Budget that were earmarked for the benefit of Aboriginal people.

19 A case study: the communities of Toomelah and Boggabilla

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The communities

- 19.1 Toomelah is an Aboriginal community located just south of the McIntyre River, which forms the border between NSW and Queensland. It has a primary school, a health service with visiting general practitioner, a preschool, a family support service and a shop. It is about 21 kilometres south of Goondiwindi in Queensland and 125 kilometres north of Moree in NSW.
- 19.2 According to the 2006 census there were 337 persons usually resident in Toomelah, 247 (or 73 per cent) of whom identify as Aboriginal. Of the residents, 51 per cent were male and 49 per cent female.
- 19.3 As at the census date the median age of the Aboriginal population in Toomelah was 20 years, compared with 37 years across the whole Australian population. Ninety-seven (39 per cent) of Toomelah's Aboriginal residents were children aged 0-14 years and most Aboriginal people over the age of 15 years were not in the labour force. About 20 per cent of Aboriginal persons aged 15 years and over had completed Year 10 or equivalent as their highest qualification, and 36 per cent had a qualification. About eight per cent had completed Year 12 and two per cent aged 15-19 years were in full time education.
- 19.4 There were 48 total dwellings, over 90 per cent of which were rented.
- 19.5 The median individual weekly income for Aboriginal persons aged 15 years and over was \$210, compared with \$466 across Australia and the median household income was \$619, compared with \$1,027 across Australia. The average household size was 5.1 persons and the average number of persons per bedroom was 1.5. The median weekly rent was \$50, compared with \$190 across Australia.
- 19.6 Boggabilla is another small community located half way between Toomelah and Goondiwindi, also on the NSW side of the river. It has a central school (primary and secondary), a post office, a police station and court, a health service without a general practitioner, a play group, a TAFE, the Wobbly Boot Hotel, the Town & Country Club, a butcher shop, a service station, a general store and a paper manufacturing business.
- 19.7 According to the 2006 census there were 647 persons usually resident in Boggabilla. Of the residents, 53.5 per cent were male, 46.5 per cent female, 56 per cent were Aboriginal. The median age was 27 years. About 36 per cent were children aged from 0-14 years. Eighteen per cent were unemployed. The median weekly individual income was \$245, while median household income was \$560. One parent families accounted for 42.5 per cent of the town's population. The median weekly rent was \$100.
- 19.8 Aboriginal Affairs informed the Inquiry that the Toomelah and Boggabilla communities experience various socio-economic problems associated with isolated Aboriginal communities including poverty, poor housing, limited

infrastructure, and high incidence of domestic violence, alcoholism and diabetes.

- 19.9 There have been a number of inquiries and reports describing the two communities and recommending action by Commonwealth, state and local agencies over the past two decades.

1988 HREOC report

- 19.10 In January 1987, racial violence occurred between Aboriginal and non-Aboriginal communities in Boggabilla, Toomelah and Goondiwindi.
- 19.11 In response, the then Race Discrimination Commissioner, Irene Moss, visited the area and found wide disparities between the living standards and socio-economic expectations of Aboriginals and non-Aboriginals. In particular, she found that the living conditions of Toomelah were unacceptably poor and considerably worse than those in Goondiwindi and Boggabilla.
- 19.12 In Toomelah, Commissioner Moss found that the water supply was rationed and dispensed twice a day for fifteen minutes at a time, the sewerage system was completely inadequate, the roads were unsealed dirt tracks and there was no drainage or street lighting. She concluded that the poverty and neglect that made up the fabric of the lives of Aboriginal people in Toomelah and to a lesser extent in Boggabilla needed to be further investigated.
- 19.13 An inquiry was then undertaken by HREOC which resulted in the publication in June 1988 of the *Toomelah Report: Report on the Problems and Needs of Aborigines Living on the New South Wales/Queensland Border* (the HREOC Report). The HREOC Report recorded the history of Toomelah as follows:

Toomelah's five hundred residents live on what was originally part of the traditional land of Gamiliraay people. Present knowledge suggests a connection of Aboriginal people with land in this area stretching back fifty thousand years. Toomelah has been an Aboriginal reserve since 1937... In 1975 the land ceased to be a reserve and the freehold title was transferred to the New South Wales Aboriginal Lands Trust pursuant to the Aborigines Act 1969...

In 1984 the freehold (184.9 hectares on which stood forty houses, health clinic, primary school and sheds) was transferred to the Boggabilla – Toomelah Local Aboriginal Land Council... established under the Aboriginal Land Rights Act 1983. Generally speaking, all Aboriginal residents of Boggabilla and Toomelah are eligible for membership of the Local Aboriginal Land Council. Members elect their own office bearers. Funding support for the Land Council comes from an annual allocation from the New South Wales Government under

the Aboriginal Land Rights Act. The Co-operative continues to operate and to receive Federal funding. It holds a ninety-nine year lease over the entire original area...

In the decade since [the reserve era ended] the community has had come to terms with a vast array of new rights and responsibilities. They have had to learn to deal with numerous government departments and other bodies with respect to the provision of a wide range of services and goods, including housing, enterprise funding and other matters. This period has been attended by many difficulties forged by the reserve experience... As Mrs Madeline McGrady told the Inquiry, "No training was given to help people make the transition"...⁹⁹⁸

19.14 The HREOC Report further stated:

The Inquiry was struck by the fact that even after numerous State and Federal government inquiries into Aboriginal and Torres Strait Islander needs, the awarding of joint responsibility for Aboriginal affairs to the Commonwealth Government by a constitutional amendment in 1967, the conclusion of the Commonwealth – State Arrangement with respect to funding for Aboriginal affairs in 1976, and the passage of the Aboriginal Land Rights Act by the New South Wales Parliament in 1983, the people of Toomelah still suffered living standards far below those experienced by the vast majority of non-Aboriginal residents of New South Wales and for that matter by the vast majority of Australians. Words, intention and goodwill are simply not sufficient.⁹⁹⁹

19.15 The HREOC Report recorded that there were 40 dwellings at Toomelah, generally of poor standard, accommodating on average more than 12 people each; which was four times the State average of three persons per household. Water was being rationed.

19.16 The HREOC Report referred to a 1986 Health Department survey of children under six years which found:

over 20% suffering from recurrent chest infections and almost 50% had chronic ear disease... Other health problems identified include diabetes, alcoholism and sexually transmitted diseases... Although a community of five hundred people; Toomelah residents have inadequate access to medical services. The community health worker... has a diploma in Aboriginal Health and services the entire community on her own

⁹⁹⁸ Human Rights and Equal Opportunities Commission, *Toomelah Report: Report on the Problems and Needs of Aborigines Living on the New South Wales/Queensland Border*, June 1988, pp.2-4.

⁹⁹⁹ *ibid.*, p.4.

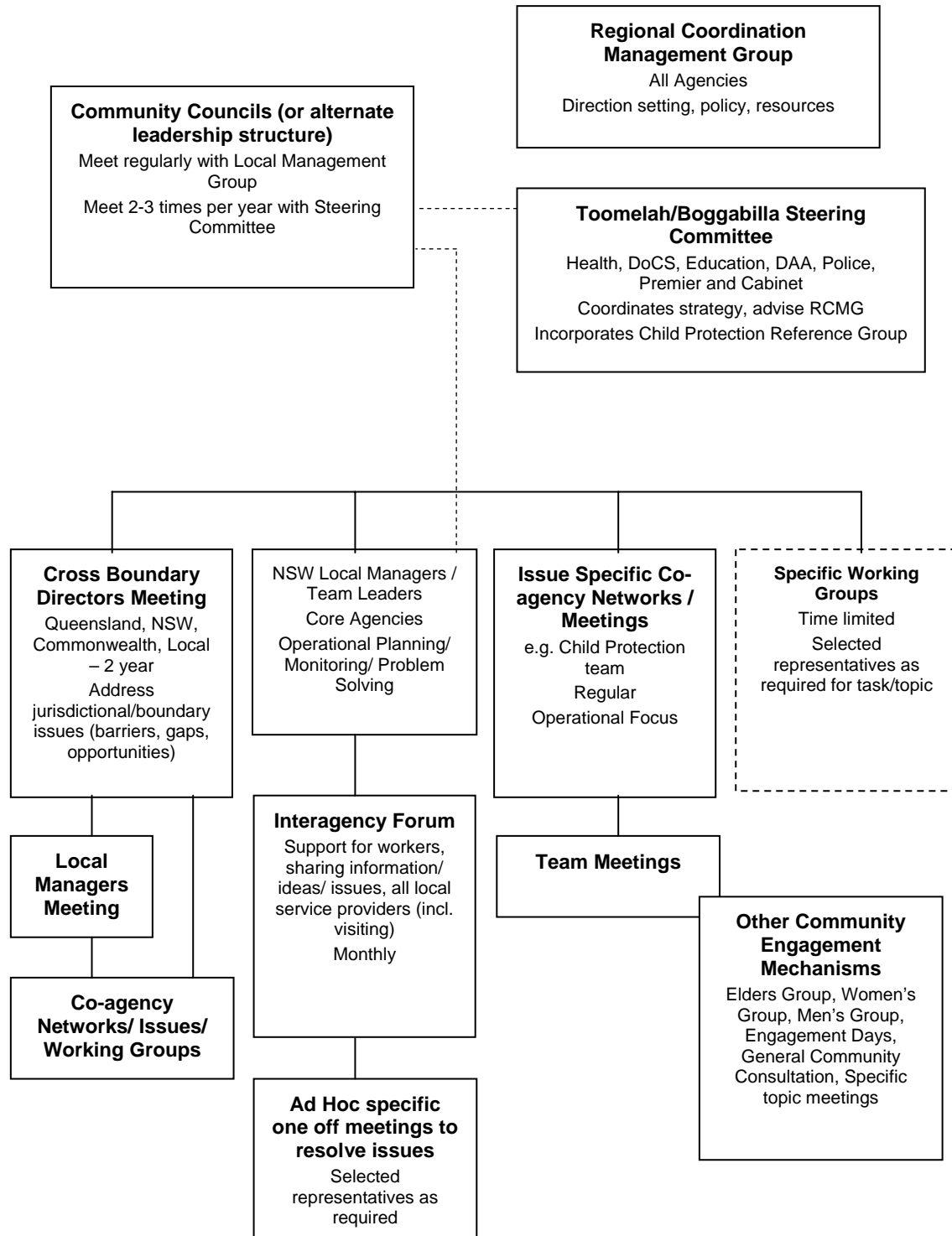
*most of the time. At times over the past few years a registered nurse has worked full-time at Toomelah. However, there has been no nursing service there since shortly before this Inquiry commenced. A Health Department doctor visits about ten times each year but only to immunise the children... the people must travel to Goondiwindi for most medical treatment... For dental treatment they must often travel to Moree...*¹⁰⁰⁰

- 19.17 The HREOC Report summarised the condition of the community as consisting of sub-standard, overcrowded housing, without an adequate water supply or a properly functioning sewerage system, higher than average rates of a range of debilitating diseases for which members of the community could not get adequate treatment, lack of adequate education and chronic unemployment.

Child protection project

- 19.18 In 2005, with the assistance of a consultant, the then elders identified key issues in the Toomelah community as health, child sexual abuse and relations with police. As part of a whole of government project to address these issues in both of the communities, the Child Protection Project was initiated in December 2005, led by DoCS. The DoCS Project Team (the Team) began work in June 2006 with the intention that the Team of three caseworkers and a manager, all Aboriginal, would be assisted by two health workers, employed by Hunter New England Area Health Service (HNEAHS).
- 19.19 The objectives of the project were stated as follows:
- a. co-ordination of the planning and implementation of government responses, interventions and prevention programs regarding child sexual abuse issues based on close collaboration with community elders, leaders and agencies and the development of outcomes which would be externally evaluated
 - b. engagement of the local people in learning necessary skills
 - c. oversight of capacity building
 - d. development of a program with Education.
- 19.20 The primary focus was to be on community prevention combined with counselling and healing to address past abuse.
- 19.21 It was anticipated that the desired outcomes would take at least five to 10 years to achieve. It was estimated in 2006 that the costs would be around \$650,000 in 2006/07, \$688,000 in 2007/08 and \$638,000 in 2008/09.
- 19.22 The governance structure is as set out in the diagram below.

¹⁰⁰⁰ *ibid.*, p.53.



Progress

June 2006

19.23 One of the first tasks undertaken by the Team was to analyse child protection data from the two communities for the period 2003 to 2005. The following matters were identified:

- a. the reporting trends were consistent

- b. 20 per cent of reports were from non-mandatory reporters of whom 16 per cent were family or community members
- c. neglect was the most reported issue
- d. 21 per cent indicated that carer alcohol or other drug use was an issue
- e. almost a third of reports related to concerns about children being exposed to sexual harm and most of these reports came from mandatory reporters who appeared to be relaying concerns on behalf of community members
- f. four individuals were identified as perpetrators as well as a number of members of one particular named family
- g. an estimated 15 per cent of all the children in the two communities had been reported for sexual harm or risk of sexual harm in 2004/05
- h. only 17 per cent of these sexual abuse reports received a less than 24 hours response, notwithstanding that in many cases the perpetrator was clearly identified and named
- i. the great majority of alleged perpetrators referred to in reports of specific incidents of sexual abuse or immediate risk of harm were outsiders or community members not closely related to the children
- j. few children were interviewed and only one perpetrator out of the 50 was interviewed; he made a confession and was placed on a bond.

November 2006

- 19.24 By November 2006, most of the 92 children who had been reported for harm or risk of harm from sexual abuse since January 2004 had received some attention from the Team. Thirty-eight children had been assessed, of whom nine were identified as being at serious risk of harm. More than 20, nearly one quarter, were being dealt with by other child protection agencies and another 20 did not warrant further attention by the Team because of, generally, an assessment of low risk of harm.
- 19.25 In relation to perpetrators, some suspected men and adolescents had left the community and a non-Aboriginal alleged perpetrator was charged with numerous sex offences following a JIRT investigation. Disclosures from two 13 year old girls were being investigated by JIRT, however, ultimately no prosecution occurred as they did not wish to give evidence.
- 19.26 The plans for 2007/08 were to develop a comprehensive community education program, further develop partnerships, consider international models, evaluate data and outcomes, employ two trainees and establish a transition plan.
- 19.27 Regular interagency meetings and cross border collaboration meetings were being held. However, one caseworker had resigned and would not be replaced until October 2007.

February 2008

- 19.28 By February 2008, the communities had suffered the death of three key elders, one of whom was identified as having been the key player in persuading the elders group to request government help. The Team manager had been off work for some five months following an injury. These events were to hinder the Team in attaining its objectives.
- 19.29 Two administrative positions within the team had been recently created. Community engagement activities had been organised and apparently were well attended. Men's and women's groups were operating with variable attendances and success. The Inquiry was told that about 50 per cent of the Team's time was spent on education and community awareness and support activities.
- 19.30 Also by this time, risk assessments had been initiated on all children reported for child sexual abuse since 2005 who had remained in the communities. One couple had been assessed as foster carers.
- 19.31 Thirteen children and young persons had disclosed abuse since July 2006, as a result of which charges were laid against four men and an AVO was granted. Most of the victims were girls aged between 14 and 16 years. It was recorded at this time by the Team that:
- They [the victims] are without exception unable to confront alleged perpetrators who live close by, who are related or living with someone related to them and who may be in positions of power and influence in the community.¹⁰⁰¹*
- 19.32 Clearly, there were considerable challenges in encouraging reporting and in following through with giving evidence in any prosecution of the perpetrator.
- 19.33 A survey of the community was undertaken by the Team, and based on the findings from that survey, a Community Education Plan was drafted. It covered broad and targeted education using the resources of Health, Education and Corrective Services. Elders, men's and women's groups were identified, as were preschool, primary and secondary school children and young persons.
- 19.34 In terms of the progress made by other agencies, after November 2006, experiences were mixed.
- 19.35 Significant improvements at the Toomelah Public School were reported including breakfast being provided to children and activities being arranged during breaks and after school. 'Beats', a program to ensure primary school children were attending school, had been instituted, which had resulted in a

¹⁰⁰¹ DoCS, Briefing Note, *Update of Toomelah / Boggabilla Child Protection Project*, 6 July 2007, p.5.

doubling in attendance rates to 80 per cent. Caseworkers were involved in one or two personal development classes at the Boggabilla Central School.

- 19.36 Relationships with Police suffered when, following a domestic violence incident at Toomelah, a number of community members withdrew the existing MOU with Police to enable Police to enter onto Aboriginal land.
- 19.37 HNEAHS had created new positions in 2006 in response to community requests, comprising a community development facilitator and a child and family health worker. Both of these positions had been vacant, one since August/September 2007 and, the other since January 2008. However, more positively, Health was funding a new offender treatment program, based on the New Street Service (see Chapter 7), which would operate in Tamworth and target young offenders from the Toomelah and Boggabilla communities.
- 19.38 The laying of a sewerage system in Boggabilla was apparently complete and repairs to houses were underway.
- 19.39 During the preceding months, community attention had been diverted by concerns with governance and management at the Land Council, which resulted in the contracting of Land Council management of the community to a private provider. This ultimately affected management of infrastructure, in particular the maintenance of houses.

June 2008

- 19.40 By June 2008, there had been little further progress recorded. Sixty-nine children were under scrutiny of the Team. While the Toomelah Women's Group was apparently working well, Boggabilla groups were not.
- 19.41 A deal of publicity had been generated when claims were made to ABC's Lateline program about children prostituting themselves at the Boggabilla Roadhouse. The Inquiry had discussions with Police and DoCS about these claims and was advised that each had been unsuccessful in obtaining sufficient and reliable information from the community to take any further action.
- 19.42 The Team assisted the Youth Group to develop activities for Youth Week. The HNEAHS positions remained vacant. The Child Protection Reference Group continued to meet bi-monthly.
- 19.43 Concerns about one of the project Team interviewing a child about allegations against a person to whom the caseworker was related were raised by Police and resolved, apparently to everyone's satisfaction. This highlights the particular challenges when those from within small communities are carrying out difficult and sensitive work, such as child protection.
- 19.44 The proposed young mothers group, an important initiative given the numbers of pregnant young women and mothers and their reported reluctance to engage with doctors, had commenced.

Data

- 19.45 Understanding the progress made by the Team is important to know the challenges being faced. In order to gauge the nature of the child protection work being undertaken in the Toomelah and Boggabilla communities, the Inquiry sought various statistics and other data from DoCS. The data collected for the financial year 2006/07 and for July 2007 to March 2008 show the following:¹⁰⁰²

Reporters and assessment

- 19.46 In 2006/07, 59 reports involving 31 children and young persons were allocated to a member of the Team. Twenty-two of those reports received a SAS2, 33 reports received a SAS1 only and for four reports there was no record of a risk assessment.
- 19.47 In this period, 54 reports were made by mandatory reporters with 22 from police and 21 from school/child care reporters. Five reports were by non mandatory reporters comprising three relatives and two from the community.
- 19.48 For the period July 2007 to March 2008, 106 reports made about 62 children and young persons were allocated to the Team of which, 34 reports received a SAS2, 36 reports received a SAS1 only and for a further 36 reports there was no record of a risk assessment.
- 19.49 In this period, 84 reports were by mandatory reporters, of whom 32 were police officers, 27 worked in education and 14 in health. There were 22 non-mandatory reporters of whom 11 were from the community, eight were relatives and three were others.
- 19.50 Thus, the number of reports almost doubled while the percentage that received a SAS1 and SAS2 had reduced, assuming all appropriate records were kept.

¹⁰⁰² Unallocated reports or reports allocated to the Moree CSC are not included in this data.

Table 19.1 Reports involving alleged child sexual abuse allocated to the Toomelah Boggabilla DoCS case workers by reporter type

Source of report	2006-07	July 2007-March 2008
Mandatory reporters		
Police	22	32
Probation and parole	1	0
Corrective services	3	0
Interstate welfare	3	0
Juvenile Justice	1	6
Education	21	28
Health	2	14
NGO	1	4
Non-mandatory reporters		
Relative	3	8
Community	2	11
Other	0	3
Total	59	106

Issues reported

Table 19.2 Child protection reported referred to the Toomelah Boggabilla DoCS caseworkers by primary reported issue

<i>Primary Reported Issue</i>	<i>2006 to 2007</i>	<i>July 2007 to March 2008</i>
Sexual abuse	20	43
Drug and alcohol use by child or young person or carer	6	4
Domestic violence	14	18
Neglect	11	12
Physical abuse	2	9
Inappropriate sexual behaviour by a child or young person	2	10
Psychological abuse	3	6
Carer mental health issues	1	2
Suicide risk	0	2

- 19.51 The reporting of sexual abuse, physical abuse and inappropriate sexual behaviour by a child have clearly increased.

Multiple reports

- 19.52 In 2006/07, 15 children and young persons received between two and five reports with the majority receiving two reports. The average number of reports per child or young person was 1.9.
- 19.53 From July 2007 to March 2008, 29 children and young persons received between two and four reports with the average number of reports per child or young person being 1.7.

Seriousness of reports

- 19.54 In 2006/07 two reports requiring a response time of less than 24 hours were received, 30 requiring a within 72 hours response and 27 requiring a response within 10 days.
- 19.55 Of the reports received from July 2007 to March 2008, seven were assigned a required response time of within 24 hours, 49 within 72 hours and 50 within 10 days.
- 19.56 Four cases have been referred to the Brighter Futures Lead Agency, one through the community pathway and three through the Helpline. The Brighter Futures program began in July 2007. Of the four cases, two are in the assessment phase, one is in the case management phase and the remaining family has exited the program.

Removal of children

- 19.57 Between July 2006 and June 2007:
- a. 10 children had been removed from their families, three of whom were Aboriginal children. Two of those were siblings who were in care and later removed from their carer by Moree CSC and returned to a kinship placement. The third child was removed at her own request and returned to her grandmother/carers, at her own request. The return was subject to undertakings which were not made under the Care Act. The seven remaining children are from a non-Aboriginal sibling group
 - b. six children were placed under the parental responsibility of the Minister or under shared responsibility
 - c. 12 children were living in OOHC within the communities of Toomelah or Boggabilla.
- 19.58 During the period July 2007 to March 2008:
- a. one child living in Toomelah or Boggabilla had been found by the Court to be in need of care and protection, and one child was removed from the family
 - b. one child was placed under parental responsibility of the Minister or under shared parental responsibility
 - c. 11 children were living in OOHC within the communities of Toomelah or Boggabilla
 - d. there had been no children restored to families in that period.
- 19.59 In the period July 2006 to March 2008, there had been one order accepting undertakings and no orders for the provision of support, to attend therapeutic or treatment programs or for supervision.

Prosecutions

- 19.60 Police informed the Inquiry that, as at March 2008, there had been six prosecutions, some of which were continuing, some dealt with and some found not guilty. A small number of AVOs had been granted.

DoCS responses to children

- 19.61 To understand the nature of the intervention for some of the children and young persons who received SAS2 assessments, the Inquiry sought and was provided with the following response.

- 19.62 Between April 2007 and March 2008, 38 children, the subject of 24 reports, had a SAS2 completed. DoCS took the following action concerning these children:

- a. Nine reports were referred to JIRT:
 - i. three of the reports were in relation to sexual abuse of a non-Aboriginal child; these were assessed by the Moree CSC and in each case the matter was investigated by JIRT
 - ii. six were referred to JIRT by the Team; one case concerned domestic violence and the remaining five concerned sexual abuse.
- b. Services, usually in the form of referrals for drug and alcohol counselling or to the adolescent mental health services were provided in eight cases. The Inquiry is unaware of the outcome of those referrals.
- c. The child and/or the family relocated in six instances, generally in response to issues of neglect and sexual abuse.
- d. A care application was brought in two cases; both concerned sexual abuse, and each child was placed with a relative.
- e. In relation to two matters the young person involved was not willing to pursue charges.
- f. In two cases the perpetrator was charged; one in relation to domestic violence and the other, sexual abuse. In a number of other cases the perpetrator was in jail on unrelated matters.
- g. In one case a placement was arranged by the family.

The Inquiry's visits

- 19.63 The Inquiry travelled to Toomelah and Boggabilla on two occasions. On the first occasion, in March 2008, the Team arranged for the Inquiry to meet with a number of elders from the Toomelah community at Toomelah. In addition, the Team arranged a meeting with interested members of the Boggabilla community in Boggabilla.

- 19.64 During that visit, the Inquiry also met with caseworkers and their managers from Moree CSC and representatives of agencies working in the region.
- 19.65 On the second occasion, in June 2008, the Inquiry held a Public Forum to discuss concerns within the two communities. At the request of members of the communities, a portion of that forum was held in private to enable them to express their views without the presence of the representatives of various agencies who also attended.
- 19.66 At the meeting with elders on 18 March 2008 the issues raised with the Inquiry were similar to those identified in 1988. They included inadequate transport, poor maintenance of houses and overcrowding, continued problems with the water supply, inadequate street lighting and limited employment opportunities. The elders identified a lack of activities for children, a concern about safety of children at communal areas such as the playground, the cost of the contract to build new houses, the failure to transfer skills to the community after those houses had been constructed and the reluctance of young mothers to seek early medical assistance.
- 19.67 Positively, they noted that there had been improved school retentions since the new principal had commenced at the Toomelah Public School.
- 19.68 They also identified an issue of particular concern to the Inquiry, which is the reduced ability of the current generation of mothers to assist their daughters in looking after their children, because of substance abuse and similar problems which have blighted some within that generational group. This has led to an increased dependence on ageing elders, and it raises a serious issue for the safety of future generations unless there is a change within the communities.
- 19.69 The elders identified the need for improved security at the school in relation to the safety of children, drug and alcohol programs and training and linked employment programs. The elders advised the Inquiry that there had been a discussion about whether Toomelah should become a dry community but no agreement had been reached.
- 19.70 The Inquiry gained the impression that the elders who attended the meeting had little understanding of the presence of the Team or, more broadly, that a concerted effort was being made by various government agencies to assist the community and that additional services and programs were now available.
- 19.71 This was supported by one of the Team members who advised us that, in her experience, the members of the community did not connect the work that the Team was doing, in relation to establishing and running groups and community education activities, with child protection work. She informed the Inquiry that the members of the community continually asked the Team to tell them again why they were there.
- 19.72 At Boggabilla, those attending the meeting also raised concerns with the lack of public transport, the need for more services such as mental health, medical and

dental services, problems with housing including overcrowding, and the costs and maintenance and the closure of a local community centre. Additionally there was a degree of scepticism about external intervention and the Inquiry was informed that people from the Government made repeated visits, talk a lot, but nothing ever changes.

- 19.73 While in the region, the Inquiry also met with representatives of Aboriginal Affairs, DoCS, Police (including JIRT), Health, Housing, Education, Juvenile Justice and DADHC.
- 19.74 The Inquiry notes that many of the issues raised by the community are under consideration on a statewide basis by the Legislative Council's Standing Committee on Social Issues, in particular the effective provision of essential services including water and transport and improving educational outcomes.¹⁰⁰³

The Team's experiences

- 19.75 On the second occasion the Inquiry visited, the members of the Team informed the Inquiry of the challenges they had experienced in engaging with the community.
- 19.76 For example, one caseworker advised the Inquiry that to have the community attend various events, encouragement by way of a supply of food was often necessary and that any overt mention of child sexual abuse tended to keep people away. Door knocking the communities has been done to encourage people to attend meetings.
- 19.77 The Team manager described their work as dealing with people who have been disempowered and disenfranchised, and who looked to others to identify for them what was needed to address the many problems faced by the community. This accords with the sentiment expressed at the Public Forum in Boggabilla that the past abuses that had led to these communities becoming dysfunctional, had not yet been addressed, and that there needed to be a more effective healing process and a mutual understanding of the history of these communities.
- 19.78 An example of the complexity of the task of tackling child sexual assault in the communities arose recently. The Inquiry heard that a 11 year old girl told her family she had witnessed a sexual assault by a 15 year old boy on a nine year old girl. Police were informed, as was DoCS, and JIRT investigated the claim. However, the 15 and nine year old denied that it had occurred, the community became divided between support for the witness and the two supposedly involved. The 11 year old was harassed at school, and tensions developed between the two families.

¹⁰⁰³ NSW Parliament Legislative Council, Standing Committee on Social Issues, *Overcoming Indigenous Disadvantage, Interim Report*, June 2008, pp.xix-xx.

- 19.79 JIRT could not take the matter much further in the absence of a disclosure by the nine year old and the events were too old to result in useful forensic evidence. A further compounding factor was described as follows:

There is an underlying attitude within the community as well to what they'd call marrying up or relationships between children and young people and in some people's eyes this nine-year-old girl has been in a relationship with this 15-year-old boy.¹⁰⁰⁴

- 19.80 However, gains have been made. The Team manager told the Inquiry of a man who had lived in the community all of his life who had mental health problems and who had sexually assaulted different people at different times. Following intervention by a caseworker, reports were made to DoCS and, as a result, the man was charged and jailed.
- 19.81 The Inquiry was also told of a 16 year old young woman who had been in a violent and abusive relationship and who, with the support of a caseworker, obtained an AVO and took action which resulted in the young man being charged.
- 19.82 Another caseworker described collecting a girl to take her to school every day and after 12 months, she gained her trust and the child made disclosures to her.

The communities' experience

- 19.83 In the part of Public Forum where only members of the communities were present, similar issues were raised to those when the Inquiry first visited. In addition, the Inquiry's attention was drawn to limited counselling for sexual assault victims, lack of knowledge about how to respond to disclosures of sexual abuse, problems with school attendance, the need for a TAFE Certificate Course in Indigenous Therapies and the closure of a community centre funded by the Land Council.
- 19.84 A Toomelah resident said that the presence of the DoCS worker made a great deal of difference in terms of "people taking responsibility for their kids and making sure that they're safer and getting people to look at the issue."¹⁰⁰⁵
- 19.85 The Inquiry was informed:

This has been going on since I was a child. I'm nearly 50. It happened to me and there's nothing different, nothing has changed out there. It's hopeless, they think it's hopeless, there's hopelessness in this town and in Toomelah. As a child growing up in Toomelah, being sexually assaulted by family members, non-family members, you know, it's hard for a child,

¹⁰⁰⁴ Transcript: Inquiry meeting with members of the DoCS Project Team at Boggabilla, 10 June 2008, p.6.

¹⁰⁰⁵ Transcript: Public Forum, Communities of Toomelah and Boggabilla, 11 June 2008, p.15.

especially a young girl, and for a boy it's even harder. They feel disgraced, they feel dishonoured, they feel disrespected and you wonder why they grow up with all this anger, all this tension. They just want to rage at people. I can identify with them.

It is actually the elders that keep all this hidden. It's not the young people, it's the elders. They don't want it to be leaked out because it will disgrace them, it will disgrace the family and speaking from experience and from this place, when things are being opened up, there's lot that's going to shut it down.¹⁰⁰⁶

- 19.86 By contrast, the Inquiry was informed of the following event, as illustrative of positive change which was occurring in the communities:

There was a recent situation ... where, you know, the big boys were at the toilet and the little fellow was there. He knew that those big boys were there for something, and I'm talking about a little fellow about five. He knew what to do. He called out for help. Then he went back to the class and he was congratulated and everybody supported him. That's the sort of stuff that has been happening out there. The bigger boys are now identifying some of the men who have been perpetrators in the community. That's the sort of stuff I'm talking about. But the most important one I think is that the kids are getting it, but a lot of our women are not. I think that's where it lies too, that we need to get some more education there.¹⁰⁰⁷

- 19.87 However, there was frustration expressed about the slow pace of change:

The fact is that we had a human rights inquiry some 20 years ago. I don't know if people have noticed much change. They came out and addressed some of the infrastructure stuff, but in terms of the social issues, nothing: our education, economic development, no. We're still going to be sitting down there below the poverty line until our community gets up and says, "Yes, we're going to have a go," but we also need greater assistance from the government and from people within the community as well.¹⁰⁰⁸

¹⁰⁰⁶ Transcript: Interagency meeting, Communities of Toomelah and Boggabilla, 10 June 2008, p.61.

¹⁰⁰⁷ Transcript: Public Forum, Communities of Toomelah and Boggabilla, 11 June 2008, p.9.

¹⁰⁰⁸ *ibid.*, p.16.

Responses of other government agencies

- 19.88 The Inquiry also benefited from the views of other agencies involved in supporting the communities as part of the whole of government response.

Interagency response

- 19.89 A number of structures have been put in place to enhance interagency work. A Regional Coordination Management Group meets a number of times a year and is coordinated by Premier and Cabinet. There is also a Toomelah-Boggabilla Strategy Steering Group.
- 19.90 Remote Community Critical Incident Response Standard Operating Procedures For Child Protection in Toomelah and Boggabilla Communities have been formulated to define the joint responsibilities and responses to be taken by NSW Government agencies for serious cases. A critical incident of child abuse is defined as a JIRT referral or other child abuse incident where there is, or is likely to be, significant community impact. They essentially require each relevant agency to respond quickly and appropriately.
- 19.91 From all accounts, the cooperation achieved has been significant. The representative from Health informed the Inquiry:

...when we first started as a group having discussions... in 2005, we agreed that the issues that we were working on within this community required a long term approach and we said between ourselves right back then, "This is at least a 10 year commitment that we're making," so we're now two and a half to three years into that 10 year commitment. I think at this stage I wouldn't claim necessarily big health achievements. I can't say to you that we're seeing major improvements in the health status of the local communities yet, but I think what we have done is laid the foundations and ...I think that's largely around the agencies getting their acts together and working much more closely together... We are in the process of doing some extensions and refurbishments to the clinic building in Toomelah to enable us to house the additional services that we're providing there.... I think the fact that we have had a few social emergencies, which is a very broad term, particularly some around child protection, but also some others where we have initiated a very rapid response between the agencies, that has I think worked quite effectively and that's something that might not have happened previously.¹⁰⁰⁹

¹⁰⁰⁹ Transcript: Interagency meeting, Communities of Toomelah and Boggabilla, 10 June 2008, pp.34-35.

- 19.92 The Police gave an example of recent interagency response to an event in the community:

That was a situation, ...a Saturday..., where a young fellow had gone in the river and drowned and been taken out of the river by one of the locals and revived and that caused a lot of trauma in the community. The child had to be airlifted to Brisbane. The family had no money. We were quickly able to make contact with the relevant agencies. I know we contacted DoCS and Health and the next day... the Sunday morning, Health were able to put counsellors on the ground in the community and were able to service that on a Sunday morning, which was remarkable considering that's a big feat generally in the real world. That was a really good outcome and we worked very well together and we were able to ring the right people and get the response we needed.¹⁰¹⁰

- 19.93 Key issues identified by those attending the Inquiry's interagency meeting have been the engagement and retention of qualified staff, obstacles to sharing information, some practical problems in obtaining access to cross border services, the insufficiency of specialist services, inadequate transport, absence of sexual assault counselling and the closure of a centre in Boggabilla funded by the Council. The cross border and information sharing issues are dealt with in Chapter 24 of this Report.
- 19.94 In addition to their combined effort, each agency has particular responsibilities.

Aboriginal Affairs

- 19.95 The Inquiry was informed that Aboriginal Affairs is undertaking a number of projects in the area. One, in conjunction with the Department of Climate Change is exploring community engagement structures and others concern how to better manage housing infrastructure, water and sewerage.
- 19.96 The Toomelah water supply comes from an artesian bore and, according to Aboriginal Affairs, there has been a long held community view that the water is unsafe due to its relatively high salt and mineral content. Prolonged testing has been undertaken and a major water supply infrastructure upgrade amounting to \$600,000 has been commissioned.
- 19.97 The HNEAHS advised the Inquiry that between January 2007 and June 2008 there have been seven occasions where samples of water have not complied with Australian drinking water guidelines for E.coli. Three of those failures were in 2008 with one continuing for a week in March 2008.

¹⁰¹⁰ *ibid.*, p.35.

- 19.98 On each occasion of the Inquiry's visits on 18 March 2008 and on 11 June 2008, Toomelah was without water. The Inquiry was told on the second occasion that the pump had broken down and the back up could not be found. Water was being shipped into the communities. Not surprisingly, many in the community were angry at the failure to provide adequate water supplies.

Housing

- 19.99 Housing has been a vexed issue for decades. It appears from data provided by Housing that there has been considerable expenditure in the area.
- 19.100 Between 2000 and 2006 Toomelah/Boggabilla benefited from an Aboriginal Community Development Program with a budget of \$11 million to provide new and improved housing and infrastructure. The program was hampered and delayed for some years due to compliance and capacity issues with the Land Council. To date the program has delivered 20 new houses, 13 house refurbishments, three house acquisitions and an eight block sub-division (including all services, extension, earth works and roads), a waste transfer station, storm water drainage works, upgraded street lighting, traffic calming, playground equipment and various miscellaneous works. In addition 10 local Aboriginal people have been employed by a private building company as trainee apprentices.
- 19.101 The management of Toomelah housing has been outsourced by the Land Council to a private Aboriginal management company. The Inquiry understands that there are disputes about the payment of rent and what has been described as the 'poor maintenance' of the properties. Aboriginal Affairs described the Land Council as having "really, really struggled" with housing issues.¹⁰¹¹
- 19.102 The 2006 census and the view of the community members with whom we spoke suggest that overcrowding persists.

Education

- 19.103 The Toomelah and Boggabilla schools each receive additional funding as result of their location and the disadvantage suffered by many of their students.
- 19.104 For example, since the start of the 2007 school year, Education has funded a non-teaching school principal at Toomelah Public School to strengthen the schools relationship with the community. Education describes Toomelah and Boggabilla as "focus support schools" which means they have attracted additional funding (respectively \$180,000 and \$150,000 a year) for matters such as literacy, numeracy and attendance.¹⁰¹² The child protection syllabus is taught weekly.

¹⁰¹¹ *ibid.*, pp. 11 and 12.

¹⁰¹² *ibid.*, p.48.

- 19.105 Boggabilla Central School has a Families NSW funded playgroup operating three days per week. Year 11 and 12 studies are offered as part of the Northern Border Senior Access Program. The school receives additional funding from the Country Area Program, the Priority Schools Program and the Targeted Schools Initiative.
- 19.106 Toomelah Public School receives additional financial and staffing support from a similar range of programs.
- 19.107 That funding has allowed both schools to reduce class sizes. Boggabilla Central School has also focused on attendance, which the principal said is worse from Year 7. Its Principal said:

We have what's called a "You can do it" program. That deals with anti-bullying, violence, child protection, and I suppose to the basic, good touch, bad touch. We work with and it is done just about every day in schools. We initiated last year with DoCS to bring in the DoCS workers to have them come into our secondary department. That sort of fell over and we are putting it together again this year... So as we are building up this resilience and ways of the children looking after themselves and how they go about reporting, they will also know the faces of the DoCS workers so that there is a bit of a relationship developed between them that they will report. We have had issues of sexual assault where, when it comes to interviewing, the children just will not disclose, and it can go nowhere unless the children tell their story. I think [that is] the biggest.¹⁰¹³

- 19.108 The reporting rate for the school is promising. Sixteen reports, the majority of which were of a sexual nature, were made to DoCS in the first six months of 2008 compared with 12 for 2007 and a similar number for 2006. These were made as a result of greater number of disclosures by children at Toomelah Public School.
- 19.109 Recently conducted evaluations of Boggabilla Central School and Toomelah Public School reveal attendance and performance are significantly below regional and state levels.
- 19.110 However, the most recent Basic Skill Test figures for Boggabilla Central School show an improvement in the growth recorded by matched students moving from Year 3 to Year 5.

Health

- 19.111 As at June 2008, the Inquiry was informed that HNEAHS operates the Toomelah Clinic which is staffed by one registered nurse and one Aboriginal

¹⁰¹³ *ibid.*, p.52.

health worker. In addition, the Aboriginal Medical Service of the Pius X Aboriginal Corporation had recently recruited two health workers, including a nurse, who are also located at the Toomelah Clinic. General Practitioner clinics are held in Toomelah twice weekly and a specialist physician visits monthly.

19.112 A clinic is also situated in Boggabilla staffed by two registered nurses. There is no doctor in Boggabilla. The closest hospital is in Goondiwindi, in Queensland and dentists are located in Moree and in Goondiwindi. There are challenges in using the Queensland health system, for example the mental health services in that State are not available to NSW residents.

19.113 AMIHS has a team in Moree which services Toomelah and Boggabilla.

... we are having some difficulty recruiting a midwife to that team at the moment. One of the RNs in Boggabilla, who was recently appointed in a relieving role but likely to be taking on a more permanent role, is actually a midwife and so is doing a lot of that work at the moment as well. We are responding using those strategies. I think the maternal and infant health strategy is probably the most significant strategy that we use, not only in Toomelah-Boggabilla because it's not the only community that has those issues, yes.¹⁰¹⁴

19.114 Funding has been received to establish a New Street program for juvenile offenders based in Tamworth and the Toomelah/Boggabilla community is the first priority community for that program.

19.115 HNEAHS said that it was difficult to obtain detailed health status data at a level of a small community. It said that over 200 Aboriginal people aged over 30 years had been offered screening and as a result 26 new diabetics had been diagnosed along with 29 new cases of heart disease. Half of those screened had been diagnosed as having diabetes and or heart disease or were considered at high risk of developing such conditions. Sixty per cent had accepted and attended referrals to other services.

19.116 The clinical services offered include immunisations, blood pressure, blood glucose, and child and adult health checks. A weekly antenatal program is available through Goondiwindi Hospital. Eye and vision clinics are provided through the Walgett Aboriginal Medical Service and there is a monthly visit by a renal Aboriginal health education officer. Various health promotions are run. Toomelah and Boggabilla preschools have been screened for Otitis Media throughout 2008.

19.117 Of particular interest, is an MOU which was entered into on 18 February 2008 between HNEAHS, Pius X Aboriginal Corporation and the Toomelah Community Council.

¹⁰¹⁴ *ibid.*, p.34.

- 19.118 The MOU acknowledges that the Commonwealth Department of Health and Ageing has funded Pius X Aboriginal Corporation to deliver primary health care services in Toomelah and Boggabilla. If that MOU is satisfied, there will be a considerably increased array of services available to the two communities. It is worth setting out in full.
- 19.119 Under the MOU, Pius X Aboriginal Corporation is to provide a senior Aboriginal health worker, an Aboriginal health worker and a vehicle, as well as a fortnightly substance abuse worker and weekly mental health worker. HNEAHS is to provide an Aboriginal health worker, registered nurses at Toomelah and Boggabilla, a community development facilitator, a general practitioner twice a week, an occupational therapist on request and by referral, a diabetes educator fortnightly, a drug and alcohol counsellor fortnightly, a mental health worker fortnightly, a dietitian monthly, an immunisation clinic and well baby clinic weekly, an Aboriginal midwifery service fortnightly, a child and family health worker, a sexual assault counsellor weekly, a PANOC counsellor by referral, a substance abuse project worker weekly, a renal health education officer weekly, a physician half day a week, palliative care by referral, cancer care social worker by referral, Families NSW worker (pending recruitment), Aboriginal family violence support worker, Aboriginal health coordinator, environmental health officer as required, asthma educator by referral and audiometrist.
- 19.120 According to a worker at the Pius X Aboriginal Medical Service:

It's a humungous problem and it needs a humungous amount of work in there to get anywhere because of the shame factor and of course it's shameful, but it is coming down from the generations. As I said, the kids think that's the norm until they get the idea that there's another way of life and this is a very, very sad thing.¹⁰¹⁵

Police

- 19.121 Police resources in the area are as follows: there is no Domestic Violence Liaison Officer, there are six police officers at Boggabilla and one of three Aboriginal Community Liaison Officers in the Local Area Command covers Toomelah and Boggabilla. There are three JIRT positions at Inverell which covers Toomelah and Boggabilla while the Health worker for JIRT comes from Tamworth or Glen Innes. Forensic medical services are provided in Armidale or Tamworth.
- 19.122 Police informed the Inquiry that disclosures of child sexual assault were being made through their usual channels, Education and the community, rather than from the Team. Further, there has not been an increased willingness by people in Toomelah or Boggabilla to speak with Police about child sexual assault matters over the last couple of years.

¹⁰¹⁵ *ibid.*, p.59.

- 19.123 The Police expressed the challenges in obtaining evidence to support charges:

*I know that JIRT have a great deal of difficulty trying to obtain the relevant evidence that they need to progress things. That is a very frustrating thing. It is very frustrating for the community because I think at times they don't understand the level of evidence we need to progress things, but it is very frustrating for the Police on the ground who are trying to contain the situation at the same time.*¹⁰¹⁶

- 19.124 The Team Manager's view was as follows:

*I suppose, first and foremost, we have to accept, whether we like it or not, that it is not always the desire of the community for members of their group to actually be incarcerated: that's one point. Another point is that because of the nature of the environment in which these children are living, that it's not always going to be in their best interests either to disclose or to see something through. That is also dependent upon the supports that they have around them and the possibility that, for instance, their supports, as in their immediate family, if the family member is not the perpetrator, to withstand some of the pressures that can come. It is very different for a child in a Toomelah or even in a Boggabilla to deal with the ramifications of speaking out than it is for a child in a Blacktown or Dubbo or somewhere else.*¹⁰¹⁷

- 19.125 In discussions with members of the Australian Crime Commission, the Inquiry learned of the less formal methods which staff were using in engaging with local communities in the Northern Territory and which were achieving a greater level of disclosure. The lessons of this experience may be of assistance to JIRT officers.

Identifying gaps

- 19.126 As is clear from the introduction to this chapter, there has been considerable interest taken in these communities since 1988. Various plans, strategies and approaches have been developed over the decades.
- 19.127 Sensibly, in 2007, Aboriginal Affairs engaged a consultant to examine these various initiatives and to reduce them to specific actions.

¹⁰¹⁶ *ibid.*, p.25.

¹⁰¹⁷ *ibid.*, p.42.

- 19.128 Most of the actions identified derive from the Interagency Plan to Tackle Child Sexual Assault which is dealt with in the previous chapter. In addition, other strategies which are either in place or needed are described as including:
- a. establishment of a preschool and occasional child care centre
 - b. the proposed appointment by Queensland Health of a health education/community liaison position
 - c. an upgrade of the sub-standard housing and water supply
 - d. an audit and assessment of assets
 - e. development of sporting programs
 - f. revival of the language
 - g. support for the Toomelah Family and Youth Support Service
 - h. provision of a bus service
 - i. vocational education for youth at risk and young offenders.
- 19.129 The consultant identified gaps including:
- a. alternative accommodation for offenders
 - b. an assessment of the community capacity for the application of the Aboriginal Placement Principles for Aboriginal children and young persons in OOHC
 - c. wider use of the TAFE Certificate IV course in Aboriginal Cultural Education Program
 - d. cultural camps
 - e. employment related strategies
 - f. improved street lighting in Toomelah
 - g. night patrols
 - h. a service agreement with Moree Plains Shire Council.

Is the project working?

- 19.130 An evaluation of the Child Protection Project was proposed in October 2007. An expression of interest for that evaluation anticipated that a number of measures would be considered. Ultimately, for reasons associated with the anticipated ending of the project in December 2008, an evaluation of a different kind was conducted and a report prepared in October 2008. Those conducting the evaluation had access to similar written information to this Inquiry. In addition, they had a series of face to face meetings with groups and individual stakeholders during a three day visit to the communities.
- 19.131 Under the categories of child protection reports and responses, community engagement, capacity building, coordination and improvement in support

services and community education, the evaluation made the following observations or conclusions:

- a. There had been a significant increase in reporting by the community, although the nature of the reports did not generally result in sufficient information being available for a prosecution.
- b. New reports were being appropriately followed up and risk assessments undertaken.
- c. Systemic failures including non-reporting by the schools and JIRT criteria had been addressed.
- d. While building community engagement has been a core activity for DoCS, feedback was mixed about the work of the Team with the Boggabilla community being least satisfied.
- e. Attracting and retaining staff was an ongoing difficulty for Health and DoCS.
- f. While Police were generally positive about the effects of the project, the evaluation noted poor relations between the two schools and the Team.
- g. Strong senior governance structures were in place, although at the local level this was not as evident.
- h. No referrals had been made by DoCS of Toomelah or Boggabilla families to the Brighter Futures Lead Agency, notwithstanding the fact that there was capacity in that Agency (DoCS advised the Inquiry that referrals for Brighter Futures are made from Moree CSC, of which there have been five for Toomelah and Boggabilla).
- i. A lack of services targeting youth was identified as well as the adverse impact of the closure of the community centre.
- j. Service coordination was hampered by the absence of co-location and the lack of feedback by DoCS.
- k. Community education was also been hampered by the delay in providing an education plan, the draft of which has not yet been accepted by other agencies and the communities, although some work of an educative nature had occurred.
- l. The evaluation concluded that the project had “achieved quite a lot, but still had a way to go.”

19.132 The Inquiry reviewed the success of the project by reference to the measures which were set out in the initial expression of interest document. They appear below in bold. The data available to the Inquiry is discussed beneath each measure.

Frequency and severity of reports and number of further reports after DoCS (appropriate) action. The criteria for success are stated to be decreasing reports

- 19.133 Between January 2003 and November 2005, 61 children and young persons were the subject of a child protection report, of whom 60 per cent received no assessment and five per cent received a SAS2. In 2006/07, 31 children and young persons the subject of a child protection report which was allocated to the Team and in the following nine months, the number of children and young persons involved in reports doubled as did the number allocated. This may be due to an increase in reporting overall, an increased capacity in the team, or it may indicate a lack of success by the team or, conversely, success in raising the awareness of child sexual assault.
- 19.134 There has been a decrease in the number of reports requiring a less than 24 hours response and an increase in the number of reports requiring responses within 72 hours and within 10 days. This may suggest that the presence of the Team in the community has enabled them to address risks earlier. Of the 38 children and young persons who received a SAS2 and for whom information was available in relation to DoCS follow up, it appears that most received some sort of referral, although its outcome is unknown.
- 19.135 There has been no significant change in the number of children and young persons reported more than once, although the rate of multiple reports is lower than that which occurs on average across the State.
- 19.136 Of the 11 children and young persons reported more than once in 2007/08, for whom the Inquiry had information about the action taken by DoCS, two were being dealt with by Moree CSC and had been referred to JIRT, three had been referred to JIRT by the Team, one had relocated and the remainder had received support in one form or another from DoCS, as described earlier in the chapter. The dates of the relevant response and their results are not known, so no real conclusions can be drawn.
- 19.137 There has been increased reporting of sexual abuse, physical abuse and inappropriate sexual behaviour by a child.
- 19.138 Fewer children and young persons have been removed.

Number of prosecutions and convictions initiated

- 19.139 Overall, there have been few criminal charges laid, which although disappointing, is hardly surprising.

Number of children and young persons counselled, number of children and young persons and families where DoCS provides follow up and support and nature and type of preventative measure implemented.

- 19.140 The data provided to the Inquiry are set out earlier. There has been an increase in the number of children who received a SAS2, although whether or not that resulted in the provision of any particular services and whether they were successful is not known.

Improved school attendance, health measures and changes in parental supervision, neglect, domestic violence and drug and alcohol abuse

- 19.141 Improved school attendance has been reported at Toomelah Public School and there have been reduced class sizes in each school. There is some indication of improvement in performance at Boggabilla Central School.
- 19.142 There is not sufficient information about changes to health status. HNEAHS told the Inquiry that it is difficult to obtain detailed health status data at the level of a small community.

Communication protocols approved and distributed

- 19.143 The protocols are in place and the comments made to the Inquiry by the relevant agencies were generally positive. It is noted however that the evaluation reported some dissatisfaction with DoCS, in particular concerning feedback.

Change in community awareness

- 19.144 There has been an increase in reports from non-mandatory reporters from nine per cent in the first year the Team operated to 20 per cent in the following year.
- 19.145 There has been an increase in reports from Health from 0 to 17 per cent of all reports by mandatory reporters.
- 19.146 There has been a decrease in the proportion of reports from Education from about 39 to 32 per cent.

Meetings held with elders, men's and women's groups and other community members

- 19.147 The success of these groups has been patchy although a young women's group has been recently established. There is evidence from the interagency meetings organised by the Inquiry that a range of meetings have been held by DoCS and other agencies.

Number of services that have improved capacity to deliver services

- 19.148 There appears to have been an enhanced capacity by Health to deliver some services, although gaps, as set out earlier, remain. Similarly, the funding available to Education suggests an improved capacity.

Project costs sustainable

- 19.149 According to DoCS, the Team cost just under \$1 million in the year 2007/08 and it expects to spend about \$700,000 in the second half of 2008. The source of funding has been existing consolidated revenue. The key costs have been staffing.
- 19.150 In addition to these funds, the CSGP has funded \$130,000 for the Toomelah Family and Youth Support Service. The Children's Services Program has funded a preschool and occasional care centre with an annual cost of about \$115,000 providing 35 places. The Alcohol and Other Drugs Program for the year 2008/09 will fund about \$170,000 for the Toomelah/Boggabilla Getting it Together Program.
- 19.151 Those figures contrast with the projected costs in 2006, when it was estimated that the costs would be around \$650,000 in 2006/07, \$688,000 in 2007/08 and \$638,000 in 2008/09.
- 19.152 It is clearly very resource intensive and more so than anticipated.

Other measures

- 19.153 The Inquiry does not have sufficient information to comment on the remaining indicators, that is the:
- a. number of local persons appointed to community development, counselling, youth work and family support roles
 - b. percentage of case plans which are collaborative
 - c. percentage of documented collaborative efforts
 - d. percentage of children and young persons who have received services in line with their case plan
 - e. nature, type and attendance levels for training for:
 - i. government and non-government staff
 - ii. children and young persons
 - iii. parents and other adults
 - f. children and young persons who view services as responsible and culturally sensitive
 - g. perceived increases in safety and reduced vulnerability in the community.

- 19.154 The Inquiry has not viewed individual files and, in particular, care plans to determine their adequacy and whether they have been implemented. A different story may emerge from that material.
- 19.155 The Inquiry also reviewed the progress being made against the recommendations of the ACSAT report and considered the issues arising from the evaluation of the project.
- 19.156 The report contained 119 recommendations for implementation across Government. A detailed analysis of the Interagency Plan appears in the previous chapter.
- 19.157 The plan contains a number of recommendations which relate to priority locations, Toomelah/Boggabilla being one of them. The Inquiry has applied the work being done by the Team and the Government, about which the Inquiry has sufficient information, against those measures which have been identified as necessary to address child sexual assault in Aboriginal communities.
- 19.158 Generally, the work being done is in line with the recommendations and indicates that progress is being made. First, in relation to the work which is consistent with the Plan, the following has occurred:
- a. In relation to options for removing impediments to reporting child sexual abuse and family violence, there has been increased reporting, particularly from Health, and education sessions with mandatory reporters have been conducted including school principals and the Queensland Department of Child Safety (actions 36 and 37).
 - b. Truancy is being addressed in a number of ways (action 61 and 62).
 - c. Community placements have ultimately been found for all young children who could not remain with their parents/carers (action 40).
 - d. Community events have been held including a child protection summit in September 2007, a community education plan has been developed, personal development classes have been delivered at school and there has been interaction with schools, police and NGOs (action 81).
 - e. A treatment program for children who sexually offend is being established in Tamworth and will take clients from Toomelah/Boggabilla (action 56).
 - f. AMIHS has been implemented in Moree and covers Toomelah/Boggabilla (action 64).
 - g. Experienced Aboriginal staff have been recruited, one of whom is JIRT trained (actions 38, 63 and 66).
 - h. Cross border meetings are held (action 65).
- 19.159 Secondly, in relation to those areas where progress is not as stipulated in the Plan:
- a. No research on safe houses for Aboriginal women has been carried out (action 41).

- b. There is no ongoing coordinated program for school holiday activities or sport and recreational facilities and transport remains a key issue for the communities (action 62).
- c. The sexual assault counselling position and the community development worker position exists but neither is filled and both have been vacant for some time (action 44).

Conclusion

- 19.160 The Child Protection Project was established with an expectation that results would be unlikely to be seen for five to 10 years. Two years in, it is fair to say that there have been modest gains.
- 19.161 Knowledge in the professional community of child protection issues seems to have improved as seen through the indicator of increased reporting by those mandated to do so, in particular health workers. While a high level of awareness of child protection issues among those living in the communities of Toomelah and Boggabilla was not demonstrated to the Inquiry, the Inquiry accepts that there may be little connection made in the communities between the activities encouraged by the Team and child protection.
- 19.162 There is available to the Inquiry little information about outcomes for children and young persons reported in the communities. Although, that is true for much of NSW, the numbers of children involved are relatively small.
- 19.163 There is a deal of information about the costs of the Child Protection Project and some information about the expenditure by Education. Health appears to have committed to make available significantly more resources than were previously available in the community. The Project is without doubt resource intensive and more so than was originally envisaged.
- 19.164 The complexities and challenges are significant and the interplay with other events such as the death of key community members and the performance of the Land Council, cannot be predicted.
- 19.165 What is clear to the Inquiry is that no intervention will be successful until many, and particularly leaders within the community, want their lives, and the lives of their children, to change and subsequently begin to participate actively in causing that change. It is not only the responsibility of government and non-government agencies. It has struck the Inquiry that it is the young persons who need to be engaged, along with those young mothers and fathers whose own parents have been unable to help them. The young mothers' group may assist.
- 19.166 A key issue is the planned finalisation of the Child Protection Project at the end of this year. Most agencies expressed concern to the Inquiry that it would be detrimental to the community for it not to continue. The importance of DoCS presence should not be understated, the Inquiry was informed, it seems

because of the pivotal role played by the Team manager and the Team's consistent and visible role, at least, so far as the professional community is concerned.

- 19.167 The Inquiry is of the view that it is too early to wind the project up and to refer case management back to Moree CSC. It should continue for up to 18 months on the basis that more comprehensive data are kept, particularly on outcomes, that there is closer collaboration with the new health workers, with whom the Team is preferably co-located, and that there are more referrals to the Brighter Futures Lead Agency.
- 19.168 DoCS has recently informed the Inquiry that it has made a commitment to the Toomelah/Boggabilla project for a further two years and noted that it had not been funded to do so. The costs of the Project are estimated to be about \$773,000 in 2008/09 and about \$795,000 in 2009/10.
- 19.169 Whether this project, or aspects of it, is an appropriate model for child protection work in other Aboriginal communities, is not yet known. While it began at the invitation of some of the elders, it has not continued in that vein, which may be partly because of their deaths, or because their vision was not necessarily shared by other members of the community. It is the case that it incorporates many of the features identified in the literature as contributing to a good model. That literature is discussed in the previous chapter.
- 19.170 An area which does seem to require more attention, and which was addressed at the Public Forum, was the need for the local community and the broader community, particularly those delivering services in the area, to acquire a better understanding of the history that led to these communities becoming dysfunctional, and of the differences in culture that might lead to a better understanding and partnership.