Community Services Division Legal Conference
Darling Harbour: Thursday 1 August 2013

Judge Peter Johnstone
President of the Children's Court of NSW

"Best Practice in the Conduct of Care Proceedings in the Children's Court"

Introduction

1. This paper has been prepared for the 2013 Department of Family and Community Services (FaCS) Legal Services Care and Protection Conference on Thursday 1 August 2013.

2. Attendees at the conference will include both public and private legal practitioners representing FaCS in care proceedings in the Children's Court of New South Wales.

3. The paper is presented in four parts: the first part will address model litigant requirements, the code of conduct obligations, and case management in care proceedings. The second part will deal with alternative dispute resolution. The third part will deal with the Children's Court Clinic, and the fourth part will address the way forward for care proceedings. I have added an Appendix dealing with some recent cases of importance.

4. As President of the Court I get a first hand view of the complex balancing act undertaken by FaCS practitioners on a daily basis. Accordingly, I appreciate the obligations placed upon government practitioners to conduct their work fairly and in the public interest.

5. The position of the Director-General as the model litigant in a jurisdiction as sensitive as care and protection poses discrete challenges for practitioners representing him.

6. The responsibility of practitioners appearing in the Children's Court is not dissimilar from that in other jurisdictions, but in some ways is even more vital. The following comments from the President of the Court of Appeal in *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2008] NSWCA 243 at [161] are illustrative:

> "The need for clarity, precision and openness in the conduct of litigation and the responsibility of parties and their legal representatives therefore flows most clearly from the statutory duty of a party and his, her or its legal representatives in civil proceedings to assist the court to further the overriding purpose to facilitate the just, quick and cheap resolution of the real issues in dispute and to participate in the processes of the court to that end."

7. The *Children's Court Act 1987* imposes upon me both judicial and extra-judicial functions, placing me in a unique position to bring about reform, both cultural and procedural: s 16. I am committed to engaging with all practitioners involved in the care jurisdiction to improve process and procedure, and to foster a culture of courtesy, integrity and transparency in the conduct of proceedings.

8. In this jurisdiction, we share a common goal and a commitment to the fundamental precepts governing the *Children and Young Persons (Care and Protection) Act 1998* (the *Care Act*). Our overriding duty is to safeguard the interests of the child or young person and ensure that all decisions are made with their safety, welfare and well-being as the paramount concern: s 8.[1]

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[1] I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children's Court Research Associate, Paloma Mackay-Sim.

Practitioner Conduct in Care Proceedings

Honourable service

9. In the NSW Solicitor's Manual, Riley observes:

> "The true profession of law is based on an ideal of honourable service."[2]

10. This statement is even more compelling when applied to the care and protection jurisdiction.

Model litigant obligations

11. As the representative of the model litigant, you have additional obligations that inform your conduct of care proceedings.

12. The core of the model litigant principles is cogently articulated in a speech delivered by the Honourable Justice Michael Barker on 19 November 2010. He stated:

> "What I think is really important is for government lawyers to have an instinctive sense of what it means to advise and act for the model litigant. The government lawyer must ensure that they do not unwittingly breach the obligations of the model litigant in their reasonable quest to do the very best for their client."[3]

13. In *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90, the full court stated at [42]:

> "Being a model litigant requires the Commonwealth and its agencies to act with complete propriety, fairly and in accordance with the highest professional standards."

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2 Law Society Statement of Ethics, accessible at: http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ethics/statement_of_ethics/index.htm

3 'What Makes a Good Government Lawyer' (FCA) [2010] FedJSchol 26

14. Your conduct as the representatives of the model litigant in care proceedings should therefore be informed by a clear understanding of the importance of providing accurate, independent advice. You should also ensure that you maintain confidentiality and understand the principles surrounding conflicts of interest.[4]

15. Further, you should maintain objectivity and remain politically impartial. If authorised to provide advice on policy, you should ensure that you clearly indicate a separation between legal, management or policy advice. [5]

16. Finally, you should maintain diligence and integrity when engaging external legal providers, ensuring that you brief and assist the external provider and alert them to any deficiencies arising in their advice.[6]

The Children's Court Code of Conduct

17. The Children's Court Advisory Committee has adopted a Code of Conduct (the Code), in partnership with and agreed to by FaCS and Legal Aid, for practitioners participating in the conduct of care proceedings in the Children's Court.[7]

18. This Code highlights that it is incumbent upon all practitioners to conduct their work in accordance with their professional ethical and legal obligations as well as specific obligations tailored to care matters.

19. It serves as a reminder that the conduct of practitioners must consistently be informed by the paramount principles of the safety, welfare and well-being of the child.

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4 'A Guide to Ethical Issues for Government Lawyers' (2010) 2nd edition, The Law Society of New South Wales at p. 3-4

5 Ibid at p 5

6 Ibid at p 5

7 Code of Conduct for Legal Representatives in Care and Protection Proceedings in the Children's Court of New South Wales as prepared by the Children's Court Advisory Committee

20. I have extracted below those parts of the Code that I consider to be most relevant to best practice practitioner conduct.

21. It is implicit upon practitioners in care matters to:

- Perform their duties diligently, ethically and competently: 1.1
- Take reasonable steps to facilitate full and frank disclosure of relevant information to the Court and all other parties: 1.4
- Assist parties to reach an expeditious resolution and encourage alternative dispute resolution (where appropriate): 1.7
- Promote non-adversarial conduct and ensure proceedings are progressed with as little technicality and formality as the circumstances permit: 1.8
- If circumstances require a party to communicate with the Court in the absence of the other parties, promptly inform the parties of any communications which passed between the practitioner and the Court: 1.16
- Not to examine or cross-examine witnesses in any proceedings in a way that is oppressive, repetitive or hectoring, unless it is in the interests of justice: 1.18
- Limit evidence, including cross-examination, to that which is relevant and necessary: 1.19.

22. The Code also contains provisions specific to FaCS practitioners, namely that they are required to:

- Represent Community Services in a way that protects and promotes the credibility of Community Services and is consistent with its role to provide assistance to children, young people and families in the least intrusive way possible: 2.2
- Provide court documents to other parties in a timely manner to allow adequate time for other parties to obtain instructions: 2.3
- Provide the Court with all relevant material known to the legal practitioner in a complete, fair and impartial manner whether the material is supportive of the Director-General's case or otherwise: 2.4
- Take adequate steps to ensure that any redaction or editing is limited to that which is necessary to protect the identity of persons: 2.5.

23. I wish to continue the drive for cultural change in the Children's Court, for practice and procedure to evolve and move away from the traditional, legalistic and antagonistic processes of the past.

24. In the care and protection jurisdiction, a non-adversarial system is one of the core aims of the *Care Act*: s 93 (1) - (3). This obligation is emphasised in the Code by requiring that practitioners:

> "Promote the conduct of proceedings that are non-adversarial and with as little formality and legal technicality as the circumstances of the case permit." 1.8

25. A cultural shift will improve and simplify processes, increase accessibility, reduce costs and speed up the process of resolution.

26. Against this framework for the ethical, transparent and non-adversarial way in which care proceedings are to be conducted, I propose now to address some circumstances where, unfortunately, I have observed legal practitioners conducting themselves in care proceedings in ways that I consider inappropriate.

27. First, I have observed instances of practitioners inappropriately communicating with the Court. This includes communicating through improper means and through inappropriate persons. I have also seen communications being made in the absence of other parties, or without informing the other parties of these communications.

28. Practitioners need to be careful not to allow the non-adversarial nature of care proceedings to cloud the need for professional courtesy. Comments by Justice Brereton in *Owners of SP 60693 v Anneliese Pty Ltd* [2006] NSWSC 210 at [9] are apt to make the point:

"The mere circumstance that a court reserves leave to apply to it on short notice is not a carte blanche to parties…to come to court on that notice without having given reasonable notice to the other party of what relief they are seeking and what material they are relying on to support it."

29. There have also been instances of unnecessary use of cross-examination by practitioners, with multiple practitioners putting identical questions to a witness in a repetitive manner.

30. Improper use of cross-examination sometimes occurrs in the context of evidence given by caseworkers. In *DFaCS (NSW) re Day* [2012] NSWChC 14 I made adverse comment at [61] - [63], including the following:

"The solicitor appearing for (the uncle) levelled accusations of bias, devious and egregious behaviour, and unbalanced, even unprofessional, conduct on the part of (the caseworker). She was accused, for example, of disliking (the uncle), and allowing that dislike to influence inappropriately her decision-making. These submissions were totally unfounded, were unnecessary and eristic. The criticism of her was misconceived and inappropriate. The solicitor, however, pursued his submissions undeterred. It was not clear to me whether the solicitor launched and persisted with his attack on specific instructions, or on his own initiative, but it emanated as a shallow and hollow echo of his client's sense of resentment, anger and frustration, further considerations, I would have thought, in the assessment of and balancing of the risk/benefit equation surrounding any placement with (the uncle). I have dwelt on this aspect, both to restore the integrity of the caseworker concerned and as a general message to practitioners in the Children's Court that ill-founded and unjustified criticism of departmental officers in Care & Protection matters is not the soundest form of advocacy, and is to be expressly discouraged."

31. Which raises the question of costs in the Children's Court. At present the power of the Children's Court to make orders for costs is limited. The power to make costs orders against legal practitioners is non-existent.

32. This issue has been considered by the Court in two recent decisions, which are discussed more fully in the Appendix. In the present context, however, I want to highlight some comments by Magistrate Heilpern in his judgment *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11, where he made the following adverse comments regarding a practitioner's conduct at [22]:

> "The duty of a legal practitioner in these circumstances is very clear – it is to appear. Not attending in the first place, and not attending when directed, and directing your client not to attend in some sort of unilateral decision to negotiate recently served material is a breach of that duty. Where matters are set down part heard as a special fixture in Care proceedings, the breach becomes a serious breach."

33. In this matter, Magistrate Heilpern was restricted from making a personal costs order against the practitioner as he lacked the power under the *Care Act*. However, he recommended that the legislation be amended to allow for personal costs orders to be made against solicitors for misconduct: [33].

34. Whilst the Court would only entertain exercising such a power in exceptional circumstances, I support Magistrate Heilpern's recommendation and believe that s 88 of the *Care Act* be amended to empower the Court to award costs against third parties, including legal practitioners, in appropriate circumstances.

35. This would assist in controlling poor professional behaviour, and in deterring the unnecessary prolongation of proceedings, and the serious and substantial waste of public resources that can produce.

36. I have recommended amendment of the *Care Act* to give the Children's Court costs powers consistent with those in the *Civil Procedure Act 2005*: s 98 and s 99.

Aboriginal & Torres Strait Islander Principles

37. An area of emerging concern in respect of which I want to spend some time addressing is the application of the Aboriginal & Torres Strait Islander Principles in the *Care Act*: s 11, s 12, and s 13.

38. The *Care Act* expressly requires that Aboriginal & Torres Strait Islander people are to participate in the care and protection of their children with as much self-determination as possible, and to participate in decisions concerning placement. A general order for placement is laid out in s 13, which must be addressed in any permanency plan: s 78A(3).

39. In my observation, and from anecdotal evidence from Children's Magistrates, I have the impression that these principles are often inadequately or inappropriately addressed in the permanency plans presented to the Court for approval.

40. The most recent decision by a superior court dealing with Aboriginality is that of *Re Kerry (No 2)* [2012] NSWCA 127, per Barrett JA. The issue that arose in the Court of Appeal, as regards the Aboriginality provisions of the *Care Act*, was a somewhat technical one. The issue involved the interpretation of s 78A(4) of the *Care Act*, which provides as follows:

> (4) If a permanency plan indicates an intention to provide permanent placement through an order for sole parental responsibility or adoption of an Aboriginal or Torres Strait Islander child or young person with a non-Aboriginal or non-Torres Strait Islander person or persons, such an order should be made only:
>
> (a) if no suitable permanent placement can be found with an Aboriginal or Torres Strait Islander person or persons in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in section 13, and
>
> (b) in consultation with the child or young person, where appropriate, and

(c) in consultation with a local, community-based and relevant Aboriginal or Torres Strait Islander organisation and the local Aboriginal or Torres Strait Islander community, and

(d) if the child or young person is able to be placed with a culturally appropriate family, and

(e) with the approval of the Minister for Community Services and the Minister for Aboriginal Affairs."

41. The proceedings concerned a four-year-old Aboriginal boy with certain congenital abnormalities in respect of whom sole parental responsibility was allocated to the Minister, who placed the child in out-of-home care.

42. It was submitted that s 78A(4) operated to require that the allocating order not be made unless the conditions in paragraphs (a) to (e) were satisfied.

43. Implicit in that submission was the proposition that the Minister is "a non-Aboriginal person"; and that different considerations apply to a proposal for allocation of parental responsibility for an Aboriginal child to the Minister: [74].

44. The Court rejected the proposition, and held that the concept of allocation of parental responsibility to the Minister is a concept of allocation to the State and not to a person who has racial and other characteristics possessed by human beings:

> “The Minister is not within the concept of Aboriginal or non-Aboriginal person for the purposes of the *Care Act*. It follows that where a permanency plan of the kind dealt with in s 78A(4) envisages "permanent placement through an order for sole parental responsibility" and that responsibility is to be allocated to the Minister, the circumstance on which the operation of that section is predicated (that is, parental responsibility of a non-Aboriginal person) is not satisfied and s 78A(4) does not impose any restraint upon the making of the order.” [75].

45. These principles were considered more recently by the Children's Court in *DFaCS (NSW) re Ingrid* [2012] NSWChC 19. That case involved a young Aboriginal girl whose father is Aboriginal, but whose mother is non-Aboriginal. She was assumed into care and placed in short-term fostering arrangement with non-Aboriginal short-term carers. The Director-General sought final care orders involving allocation of sole parental responsibility for the child to the Minister and placement of the child in long-term out-of-home care till the age of 18 with a non-Aboriginal carer.

46. The short-term carers, however, wanted to keep the child, and sought permanent placement of the child with them through an order for sole parental responsibility in their favour.

47. The matter came before the President of the Children's Court on a preliminary issue, the Director-General contending that the position of the short-term carers was untenable as a matter of law.

48. The issue was this: because the short-term carers were non-Aboriginal, the Director-General contended that they must positively establish the matters in s 78A(4), but they had not and indeed could not do so.

49. The short-term carers contended, however, that the circumstances set out in s 78A(4) are not obligatory. That is, the circumstances in s 78A(4), merely indicate "advisability', or a strong suggestion, and do "not go so far as to create a requirement or an obligation".

50. The President reviewed the competing arguments: [36] - [48]. He then held that the Court is expressly precluded from placing an Aboriginal child with non-Aboriginal carers, through an order for sole parental responsibility in favour of those carers, unless and until the required pre-conditions set out in s 78A(4) have been established.

51. He said that the juxtaposition of the word ‘only’ with the word ‘should’ in the phrase ‘such an order should be made only…’ clearly indicates the mandatory nature of the requirements in s 78A(4): [49]. He said:

- The Court is not compelled to make an order providing for permanent placement of an Aboriginal child with non-Aboriginal persons through an order for sole parental responsibility merely because the circumstances specified in the sub-section are satisfied. The Court retains an overriding discretion to accept or reject any permanency plan proposed, in accordance with the various principles set out in the *Care Act*, not the least being the principle that the safety, welfare and well-being of the child is paramount, the test being whether there is an unacceptable risk of harm to the child: [50].

- What the Court cannot do, however, is provide for the permanent placement of an Aboriginal child with non-Aboriginal persons through an order for sole parental responsibility in their favour unless and until the circumstances specified in s 78A(4) are established to the Court’s satisfaction. In this sense, the matters set out in s 78A(4) are obligatory pre-conditions to the making of the type of order contemplated by the sub-section. The Court does not have a discretion to dispense with any of the pre-conditions specified, and each and every one of them must first be established before an order can be made: [51].

- Such a construction is in my view the only appropriate way in which to interpret the sub-section. It is the purposive construction that is clearly consistent with the objects and principles of the *Care Act*, in particular the Aboriginal and Torres Strait Islander Principles set out in Part 2 of Chapter 2. The Court’s discretion is not usurped, in that the Court retains an overriding discretion to reject a proposed placement: [52].

52. One of the interesting notions to emerge from the argument was the idea that “kinship” in the Aboriginal context may be wider than in the European concept. S 13(1)(a), for example, talks about a kinship group “as recognised by the Aboriginal…community to which the child…belongs”. It is conceivable, therefore, as was the case in *Re Ingrid*, that the carer, though non-Aboriginal, might nevertheless be part of a kinship group recognised by the Community to which the child concerned belongs. This notion has interesting connotations.

53. The Court will be insisting on compliance with the ATSIC principles, such that you may anticipate in the future that unless a cultural plan is prepared as part of the permanency planning, the Court may well decline to expressly find that permanency planning has been appropriately and adequately addressed, and refuse to make any final care orders: s 87 (7)(a).

Case Management and Practice Notes

54. Best practice in care proceedings requires that practitioners be familiar with the relevant Care and Protection Practice Notes, in particular Practice Note 2 and Practice Note 5.

55. Practice Note 2 relates to the initiation of proceedings. I appreciate that you will all be familiar with the revised Practice Note, which took effect from 1 January 2013.

56. It emphasises, for example, the need for initiating applications to be accompanied by a report that 'succinctly and fairly' summarises the information relied upon by the Director-General: s61. Despite this requirement, the Court is continuing to see inappropriately detailed and lengthy chronological accounts in initiating reports. It is my view that caseworkers should include an executive summary in the report that concisely and accurately outlines the reasons for the application.

57. Correspondingly, it becomes the responsibility of the practitioner, when appearing in court, to summarise the essential aspects of the Director-General's case in a succinct and logical way.

58. Similarly, an executive summary should be included in Care Plans and in reports prepared under s 76(4) and s 82. Such a summary should outline the fundamental features of the plan or the report, with a succinct statement of the reasons for the plan or any recommendations in the report.

59. Practice Note 5 addresses case management in care proceedings. It provides for a series of standard directions [15.6] with prescribed times for the completion of various interlocutory processes, leading to the earliest resolution or allocation of a hearing date, if required.

60. The *Care Act* provides that all care matters are to proceed as expeditiously as possible: s 94(1). The Children's Court aims to complete 90% of care cases within 9 months of commencement and 100% of care cases within 12 months.

61. Adjournments are to be avoided and will only be granted by the Court where it would be in the best interests of the child, or where some other cogent or substantial reason for an adjournment exists: s 94(4).

62. A recent case has, however, sounded a word of warning. In *Re June* [2013] NSWSC 969, Justice McDougall invoked the parens patriae jurisdiction to grant prerogative relief under s 69 of the *Supreme Court Act* 1970 where proceedings in the Children's Court had miscarried in a substantial way.

63. The Magistrate made various decisions, including a refusal to permit cross-examination of certain witnesses, citing the need for expedition, and stating that time was of the essence.

64. Justice McDougall said at [13]:

> "I accept that it was very important to resolve the mater as quickly as possible. But it was also important to resolve it on the basis of a proper understanding of the evidence. In circumstances where the submissions of the independent legal representative had raised some very serious issues, declining the application for cross-examination on the basis of "time is of the essence" seems to me to be entirely unsatisfactory."

Use of technology

65. I continue to encourage the increased use of technology to improve accessibility for court users, and the elimination of unnecessary work and cost. The Code requires that practitioners promote the use of information technology: 1.12. The greater use of AVL's and electronic filing will benefit both the Court and practitioners, as it will remove unnecessary and time-consuming appearances.

66. It is also important to determine how to negotiate the care and protection challenges posed by the improper use of social media. Given the increase in the proliferation of social media over recent years, it is reasonable to expect that it will continue to grow.

67. It seems an appropriate time to review s 105 of the *Care Act* to avoid the publication of names and identifying information on the plethora of social media sites in existence.

68. I raise this as I believe it is instructive for practitioners to be aware of the multitude of mediums through which the safety, welfare and well-being of a child may be put at risk.

Alternative Dispute Resolution

69. In my view, it is imperative for practitioners working in this jurisdiction to challenge the adversarial nature of court proceedings and harness alternative options. It is my hope that we will eventually see conciliation as the norm in care proceedings.

70. The Australian Institute of Criminology (AIC) conducted an evaluation of the use of alternative dispute resolution initiatives in the area of care and protection, and found high levels of participation and satisfaction. Family members involved found that the processes were useful, and felt they were listened to and treated fairly. The AIC evaluation found that approximately 80% of mediations conducted have resulted in the child protection issues in dispute being narrowed or resolved.[8]

71. The Dispute Resolution Conference (DRC) model used in the Children's Court has become an integral aspect of care and protection proceedings and is informed by the conciliation model. In this context, Children's Registrars perform an advisory and facilitation role.

72. DRCs are instrumental in ventilating the primary issues and creating an environment that provides parties with a legitimate voice, in a context often associated with complexity and isolation. Whilst the paramount concern should always be on the safety, welfare and well-being of the child, DRCs provide other concerned parties with the ability to engage in the process.

73. Where parties feel that the process has been fair and that they have been treated respectfully, they are more likely to engage. This is significant as it ensures that parents do not become resentful toward FaCS or disconnected from decisions made about their child.

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[8] Evaluation of Alterntive Dispute Resolution Initiatives in the Care and Protection Jurisdiction of the Children's Court of NSW, Anthony Morgan, Hayley Boxall, Kiptoo Terer and Dr Nathan Harris (2012) Australian Institute of Criminology, Research and Public Policy Series 118.

74. Another significant conciliation model utilised by the Children's Court, is the Care Circle program. This model engages Aboriginal families, allowing them to meet with the other parties involved in care proceedings together with Aboriginal leaders and a specialist Children's Magistrate.

75. This is a significant method of resolution as it advances culturally appropriate solutions and empowers Aboriginal communities by involving them in the decision making process.

76. I encourage FaCS to continue to take part in DRCs and to engage with Care Circle programs. I believe that the use of these processes align with the ‘Practice First’ initiatives currently being piloted in Community Services. Parental collaboration and cooperation with agencies and affected communities is fundamental to the just and equitable administration of the *Care Act*.

The Children's Court Clinic

77. The Children's Court Clinic (which I will refer to in short form as the Clinic) is a powerful means of obtaining expert, independent and objective assessments. I will not traverse the functions and powers of the Clinic in this paper. However, I will address the matter of how practitioners can utilise the Clinic as effectively as possible.

78. The Court can derive considerable assistance from an Assessment Report. In addition to providing impartial, expert opinion, the Clinician can provide the Court with insights and nuances that might not otherwise come to its attention.

79. But the Clinic has limited resources, and great care should be exercised in applying for assessment orders, and practitioners should ensure that they clearly articulate the purpose of any assessment.

> "It is important to remember that the Court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course."[9]

80. When making an assessment order, the Court will consider the safety, welfare and well-being of a child, to ensure that the child is not subjected to unnecessary assessment: s 56(2).

81. It is critical that FaCS practitioners collaborate with other parties in proceedings to avoid unnecessary delay in the preparation of assessment by the Clinic.

82. The Clinic has identified the most common reasons for delay. It is important that practitioners are aware of these factors when making assessment applications.

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[9] From a paper by Jennifer Mason, then Director-General of DoCS, "Courts, DoCS and Child Protection in NSW" delivered to District Court Judges in May 2009 at p.7

83. These factors include:

- Multiple conflicting assessment applications
- Confusing requests
- No case summary explaining how the children came to be assessed as of being of such risk that FaCS had to be involved, what steps led to the current court involvement, and why a Clinic assessment is necessary
- Insufficient time allowed for assessments
- Impossible restrictions on the Clinician (e.g. to assess a child 'by observation only' when a comprehensive understanding is required)
- Requesting assessments by a person who is not an Authorised Clinician, or a specific Authorised Clinician or professional (without an explanation)
- Requesting assessments when parties have indicated they do not consent to one
- Parties have not agreed to the contents of the file of documents
- Medical or paediatric assessments, or requests for a diagnosis, prognosis and treatment compliance when a parent already has a treating psychiatrist
- Requests for evidence of child sexual abuse and/or
- Where it would be harmful for a child to be subjected to an assessment.[10]

[10] 'How to Get the Most Out of the Children's Court Clinic', Mark Allerton, Director, Children's Court Clinic, March 2013 at p.9

Future Challenges

84. Finally, I wish to discuss some of the challenges that I see confronting the Children's Court in the short-term future, so far as its care and protection jurisdiction is concerned.

85. In my view, a fundamental theme underpinning the legislative reforms proposed by FaCS is early intervention, facilitated through community engagement and interagency cooperation.

86. It is imperative that FaCS practitioners appreciate that a large part of their work is dependent upon developing trust with families and members of the community. It appears that the 'Practice First' initiative aims to foster a level of trust and engagement that will allow communities to act as 'social guardians'.[11]

87. This community approach links in with interagency cooperation. Whilst it is challenging to identify children at risk in the private sphere, signs of abuse and neglect often manifest in the public sphere – through interactions with police, at school, and in hospitals.[12]

> "It is through trust and engagement that families will become more functional and come back to seek help if their circumstances deteriorate."[13]

88. Practitioners may be assisted through a more collaborative approach with agencies, families and communities, to foster trust and receive the best evidence to identify at risk children. I urge you all to feel empowered – not restricted - by your role in acting for the model litigant and set an example to other practitioners involved in care matters.

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11 'Bridging the Gap: Thinking Beyond the State in Child Protection', Janice Sim, (2012), *Current Issues In Criminal Justice*, 23 (3), pp.469-475 at 471.

12 Ibid at p.472.

13 'What intensity of service is needed to prevent children's entry to care? Addressing the pressures on early intervention and prevention services', Susan Tregeagle and Louise Voigt, *Developing Practice*, (2013) Issue 34, pp.31-43 at p.39.

Conclusion

89. I want to conclude by returning to the central theme of unacceptable risk of harm because it seems to me that most decisions in the care jurisdiction ultimately involve a risk assessment, and more often than not an assessment of comparative risks.

90. It is now well settled law that in all decisions under the *Care Act* involving the paramount concern of safety, welfare and well-being of a child, including issues of removal, restoration, contact, custody and placement, the proper test to be applied is that of "unacceptable risk to the child": *The Department of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid and "Frank Reid"* [2010] CLN 1 per Judge Marien at [61]. The appropriate test is whether there is an "unacceptable risk" of harm: see *M v M* [1988] HCA 68 at [25].

91. Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved according to the relevant civil standard, as discussed above: see *Johnson v Page* [2007] Fam CA 1235.

92. I have sought to examine this test in several recent decisions, which may now be found on CaseLaw, including *DFaCS re Amanda and Tony* [2012] NSWChC 13; *DFaCS re Day* [2012] NSWChC 14; and *DFaCS re Oscar* [2013] NSWChC 1.

93. Most recently, I addressed the issue in *DFaCS re Abbey* [2013] NSWChC 3, in the context of the death of an older sibling of the child at risk:

> "I agree with the submissions that it is not necessary to conclusively determine, on the balance of probabilities, that the mother did administer the methadone that killed James. It is sufficient, however, for that to exist as a scenario, against which the assessment of future risk must be measured."

Some Recent Cases

Realistic possibility of restoration

1. The leading superior court decision in respect of the phrase "realistic possibility of restoration" is *In the matter of Campbell* [2011] NSWSC 761, a decision by Justice Slattery. I have endeavoured to summarise the relevant principles in a number of judgments including *DFaCS (NSW) re Amanda & Tony* [2012] ChC 13 at [29] - [32] and *DFaCS re Oscar* [2013] ChC 1 at [29] - [34]. I set out here what I said in *DFaCS re Oscar*:

> "29 When assessing whether there is a realistic possibility of restoration, the Director-General is required to have regard to:
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> (a) the circumstances of the child or young person, and
>
> (b) the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care: s 83(1).
>
> 30 It follows that when deciding whether to accept the assessment of the Director-General, the Court should also have regard to those considerations: s 83(5).
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> 31 I have set out in a number of judgments a summary of the case law surrounding the concept of realistic possibility of restoration, which I now summarise as follows:
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> - A possibility is something less than a probability; that is, something that it is likely to happen.
>
> - A possibility is something that may or may not happen. That said, it must be something that is not impossible.

- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve. The possibility must be 'realistic', that is, it must be real or practical. It must not be fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'. It needs to be 'sensible' and 'commonsensical'.

- It is going too far to read into the expression a requirement that a parent must always at the time of hearing have demonstrated participation in a program with some significant "runs on the board": *In the matter of Campbell* [2011] NSWSC 761 at [56].

32 The *Care Act*, s 83(1) makes clear at what time the "realistic possibility" of restoration should be assessed. When the application for a care order is before the Court, it is at that time the Court must assess "whether there *is* a realistic possibility" [Emphasis added]. It must not at the time of the… application be merely a future possibility. It must at that time be a realistic possibility": *In the matter of Campbell* [2011] NSWSC 761 at [57].

33 As noted above, there are two limbs to the requirements for assessing whether there is a realistic possibility of restoration, whether the assessment is made under s 83(1), s 83(5) or s 83(7), to each of which regard must be had.

34 The first limb is the "circumstances of the child", and the second limb is "the evidence, if any, that the child's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care".

Applications under s 90

2. Applications for rescission or variation of care orders require the applicant to obtain leave, which will only be granted if there has been "significant change in any relevant circumstances" since the original order: s 90.

3. The *Care Act* sets out a number of additional matters that the Court *must* take into account before granting leave: s 90(2A):

(a) the nature of the application, and

(b) the age of the child or young person, and

(c) the length of time for which the child or young person has been in the care of the present carer, and

(d) the plans for the child, and

(e) whether the applicant has an arguable case, and

(f) matters concerning the care and protection of the child or young person that are identified in:

(i) a report under section 82, or

(ii) a report that has been prepared in relation to a review directed by the Children's Guardian under section 85A or in accordance with section 150."

4. Once leave is granted, the *Care Act* goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order concerning allocation of parental responsibility: s 90(6).

5. The matters specified in s 90(6) are:

(a) the age of the child or young person,

(b) the wishes of the child or young person and the weight to be given to those wishes,

(c) the length of time the child or young person has been in the care of the present caregivers,

(d) the strength of the child's or young person's attachments to the birth parents and the present caregivers,

(e) the capacity of the birth parents to provide an adequate standard of care for the child or young person,

(f) the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded."

6. In the decision by Justice Slattery *In the matter of Campbell* [2011] NSWSC 761, his Honour discussed the concepts of '*a relevant circumstance'* and '*significant*' change in a relevant circumstance in the context of an application for leave.

7. As to what constitutes a "*relevant circumstance*" Slattery J said:

"The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to a 'snapshot' of events occurring between the time of the original order and the date the leave application is heard. This broader approach reflects the existing practice of the Children's Court on s 90 applications: see for example In the matter of *OM, ZM, BM and PM* [2002] CLN 4."

8. As to what constitutes a "*significant*" change in a relevant circumstance, Slattery J referred to *S v Department of Community Services (DoCS)* [2002] NSWCA 151 where the Court of Appeal held that the change must be "*of sufficient significance to justify the consideration [by the court] of an application for rescission or variation of the order*."

9. Slattery J said that there are dangers in paraphrasing the s 90(2) statutory formula for the exercise of the discretion beyond this statement of the Court of Appeal: [43].

10. Slattery J also made it clear that the Court's discretion to grant leave is not only limited by s 90(2), but also by the requirement to take into account the s 90(2A) list of considerations.

11. Therefore, establishing a significant change in a relevant circumstance under s 90(2) is a necessary, but not a sufficient, condition for the granting of leave.

12. As to the requirement of an "*arguable case*", Slattery J held that this does not relate to the application for leave, but relates to the case for the rescission or variation sought, taking into account the matters in s 90(6). Therefore, the matters in s 90(6) must be taken into account in determining whether the applicant for leave has an arguable case.

13. Slattery J agreed with Judge Marien that the interpretation of *"arguable case",* as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is *"reasonably capable of being argued"* and has *"some prospect of success"* or *"some chance of success"*.

14. These principles were considered and applied by the then President of the Children's Court, Judge Marien, in *Kestle v Department of Family and Community Services* [2012] NSWChC 2. In his Reasons, his Honour sets out a helpful summary of the principles to be applied in a s 90 application [22]:

(i) In determining whether to grant leave the Court must first be satisfied under s 90(2) that there has been a significant change in a relevant circumstance since the care order was made or last varied.

(ii) The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to just a 'snapshot' of events occurring between the time of the original order and the date the leave application is heard.

(iii) The change that must appear should be of sufficient significance to justify the Court's consideration of an application for rescission or variation of the existing Care order: *S v Department of Community Services* [2002] NSWCA 151.

(iv) The establishment of a significant change in a relevant circumstance is a necessary but not a sufficient condition for leave to be granted. The Court retains a general discretion whether or not to grant leave.

(v) Having been satisfied that a significant change in a relevant circumstance has been established by the applicant, the Court must take into account the mandatory considerations set out in s 90(2A) in determining whether to grant leave.

(vi) The s 90(2A) mandatory considerations include that the applicant has an "arguable case" for the making of an order to rescind or vary the current orders.

(vii) An arguable case means a case "which has some prospect of success" or "has some chance of success".

(viii) In determining whether an applicant has an arguable case and whether to grant leave, the Court may need to have regard to the mandatory considerations in s 90(6).

15. Judge Marien went on to specifically consider whether leave could be granted on a specific basis. The mother had submitted that it was not open to the Court to grant leave on a discrete issue such as contact.

16. She submitted that once leave is granted, all issues (including restoration and contact) may be re-visited by the Court at the substantive hearing. The President did not accept this argument and held that the Court has a wide discretion under s 90(1) to grant leave. His Honour referred to the decision of Mitchell CM in *Re Tina* [2002] CLN 6, and said at [53]:

"In my view, the wide discretion available to the court in granting leave under s 90(1) allows the court to also exercise a wide discretion as to the terms and conditions upon which leave is granted. Accordingly, the court may restrict the grant of leave to a particular issue or issues. This would be appropriate, for example, where the court determines that an applicant parent does not have an arguable case for restoration of the child to their care, but does have an arguable case on the issue of increased parental contact."

17. In a careful judgment in *Re Bethany* [2012] NSWChC 4, CM Blewitt AM applied these principles at [49] - [50].

Costs Orders

18. The *Care Act* gives the Children's Court a limited power to make an order for an award of costs.

19. S 88 of the *Care Act* provides:

> "The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances."

20. In his 2012 paper Judge Marien dealt in detail with what constitutes "special circumstances" justifying an award of costs against a party: [14].[14] (See also PN 5 at [17.1]).

21. More recently, Judge Marien has held that the costs power does not extend to the making of an order against a non-party: *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

22. In that case, the Court dismissed an application for leave brought pursuant to s 90(1) by the mother of the child Amy. The father sought an order for costs against the mother's solicitor, Mr Potkonyak. On behalf of the mother, the solicitor abandoned the bulk of her case, but insisted upon maintaining an argument based on a jurisdictional question. Judge Marien held that the jurisdictional argument had no prospect of success. He went on to find, further, that exceptional circumstances existed, as required by s 88.

> "On any view, the fact that Mr Potkonyak invited the court to dismiss the mother's application and declined the opportunity to put any argument to the court that the application should not be dismissed,

[14] See also Judge Marien's 2011 paper at [7].

must constitute exceptional circumstances for the purposes of s 88.

Further, and very regrettably, I have also formed the view that exceptional circumstances exist because Mr Potkonyak's overall conduct of the matter in the Children's Court was at the very least grossly incompetent.

A competent legal practitioner would be aware that such a jurisdictional argument could not be raised, let alone succeed in the Children's Court but would have to be made in the Supreme Court by way of an application for prerogative relief."

23. Thus, Judge Marien was satisfied that exceptional circumstances existed warranting the making of an order for costs in favour of the father. The solicitor for the father then submitted that the order should be made against Mr Potkonyak personally.

24. His Honour went on to hold, however, that he could not make the order sought in the absence of an express power to do so. The Children's Court cannot make a costs order against a non-party, such as a legal representative for a party.

25. I respectfully concur with the view of Judge Marien. The general rule is that an order for costs should only be made against a party to the proceedings. That principle, however, may be displaced by an express statutory power: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, such as a section in the terms of s 98(1) of the *Civil Procedure Act 2005*, which states:

> (1) Subject to rules of court and to this or any other Act:
>
> (a) costs are in the discretion of the court, and
>
> (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid…"

26. S 88 of the *Care Act*, however, involves a restricted, limited power, insufficiently express to empower the Children's Court to make costs orders against non-parties.

27. There are some exceptions to the principle under the general law. The exceptions include persons who are not parties in the strict sense, but are closely connected with the proceedings, such as nominal parties: *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 217; or "relators": *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518; or "next friends": *Palmer v Walesby* (1868) LR 3 Ch App 732; and tutors: *Yakmor v Hamdoush (No 2)* [2009] NSWCA 284.

28. Then there are persons who appear in the proceedings for some specific limited purpose, who are in effect a party, for that limited purpose, such as someone appearing to maintain a claim for privilege: *ACP Magazines Pty Ltd v Motion* [2000] NSWSC 1169, or to obtain a costs order: *Wentworth v Wentworth* (2001) 52 NSWLR 602; [2000] NSWCA 350.

29. It might also be arguable that such orders may also be made against persons who are bound by an order or judgment of the Court and fail to comply, or who breach an undertaking given to the Court, or persons in contempt or who commit an abuse of process.

30. The Supreme Court, as a superior court, also has inherent jurisdiction to order costs against officers of the Court, that is barristers or solicitors. But not the Children's Court.

31. Thus in a recent decision by Magistrate Heilpern, his Honour declined to make a costs order against the solicitor for a party: *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11.

32. In that case a legal practitioner failed to turn up at court, and advised his client not to do so either.

33. His Honour said at [22]:

> "The duty of a legal practitioner in these circumstances is very clear - it is to appear. Not attending in the first place, and not attending when directed, and directing your client not to attend in some sort of unilateral decision to negotiate recently served material is a breach of that duty. Where the matters are set down part heard as a special fixture in care proceedings, the breach becomes a serious breach. When the practitioner evidences a complete lack of understanding of that duty in seeking to justify the non-appearance, that is a matter that falls well within the ambit of serious incompetence or serious misconduct of a legal practitioner without reasonable cause to borrow the terminology of s 99 of the *Civil Procedure Act 2005*."

34. Magistrate Heilpern referred to the Judge Marien's decision in *DFaCS v Robinson-Peters* and concluded that he had no power to make an order for costs against the solicitor:

> "In my view it is unfortunate that there are no clear powers to make an order for costs against a practitioner who behaves as Mr Donaghy has. Whether parliament intended by the broad brush of s 15 of the *Childrens Court Act*, or s 88 of the *Care Act* to enable costs against a practitioner is not apparent in the second reading speech or any other extrinsic material that I have researched": [29].

35. The Court has asked FaCS to give consideration to amending the Act to give it an express power to make personal costs orders against legal practioners, consistent with the power in the Local Court, derived from s 98 of the *Civil Procedure Act 2005*.

Protection of Confidentiality in ADR (DRC's)

36. The importance of confidentiality in the DRC model was reaffirmed in *Re Anna* [2012] NSWChC 1. In that case the father said something during the DRC that was described by the Director-General as an admission that may have been relevant to the father's capacity to be responsible for the safety, welfare and well-being of his daughter. The Director-General sought leave to file an affidavit by a caseworker who was present at the DRC in which he refers to the alleged admission made by the father.

37. In rejecting the application to file the affidavit, Judge Marien, said:

> "A pivotal feature of alternative dispute resolution (ADR) is that, except in defined circumstances, what is said and done in the course of ADR is confidential in the sense that it cannot be admitted into evidence in court proceedings. This important protection of confidentiality encourages frank and open discussions between the parties outside the formal court process…
>
> The encouragement of frank and open discussion between the parties is particularly important in ADR in child protection cases. ADR provides parents with the opportunity to freely discuss with the Department, in a safe and confidential setting, the parenting issues of concern to the Department and, most importantly, it provides the Department with the opportunity to discuss with the parents in that setting what needs to be done by the parents to address the Department's concerns."

38. His Honour went on to say, however, that the the protection is not absolute. He referred to a clause in the *Children and Young Persons (Care and Protection) Regulation 2000*. That Regulation has been superseded and the relevant clause is now Clause 19 of the *Children and Young Persons (Care and Protection) Regulation 2012*.

39. Clause 19 of the new *Care Regulation* defines “alternative dispute resolution”, which includes a DRC. It goes on to provide that evidence of anything said or of any admission made, during alternative dispute resolution is not admissible in any proceedings.

40. Similarly, a document prepared for the purposes of, or in the course of, or as a result of, alternative dispute resolution is not admissible in evidence in any proceedings before any court, tribunal or body.

41. Clause 19(5) enables the disclosure of information obtained in connection with the alternative dispute resolution, but only in very limited circumstances, and only by the Children’s Registrar conducting the DRC. The permissible circumstances include where the relevant persons consent, or in accordance with a requirement imposed by or under a law (other than a requirement imposed by a subpoena or other compulsory process).

42. Judge Marien went on to discuss the clause. In that discussion he made various important observations, including:

> “However, the clause does not impose a general prohibition against disclosure of information obtained in connection with ADR. The clause does not, therefore, prohibit a person attending a DRC disclosing information obtained in connection with the DRC to a third party. For example, the clause does not prohibit a parent disclosing to their treating professional what was said at a DRC nor does it prohibit a lawyer who appears at a DRC as an agent disclosing to their principal what transpired at a DRC.” [17]

> “Nor does the clause prohibit a party attending a DRC using information disclosed by another party at the DRC to make independent inquiries and tender in evidence in the proceedings the result of those independent inquiries”: see *Field v Commissioner for Railways for New South Wales* [1957] HCA *92*. [18]

43. The more contentious exception enabling disclosure by the Children's Registrar now appears in Clause 19(5)(c).

44. Clause 19(5)(c)provides as follows:

> "(c) if there are reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of section 23 of the Act."

45. I do not propose here to consider in detail today the circumstances under which a disclosure made at a DRC might be admissible pursuant to Clause 19(5)(c). That is a discussion for another day. For the moment, be aware that the power exists, but it is limited to disclosure by the person conducting the alternative dispute resolution, that is the Children's Registrar, and not the parties or others in attendance, or the caseworkers or legal practitioners involved.

The media in Court

46. The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the Court has a discretion to exclude the media. In my view, the discretion would only be exercised in exceptional circumstances, because the provisions of s 105 of the *Care Act* are usually sufficient protection: *R v LMW* [1999] NSWSC 1111.

47. Under the common law principles of open justice, the balance would lie in favour of the newspaper: *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* [1986] 5 NSWLR 465 at p 476 at G. In *McFarlane v DoCS; ex parte Nationwide News* [2008] NSWDC 16, I held that the common law principle of open justice is secondary to the principles in s 9(a) of the *Care Act*, in particular the paramountcy principle.

48. In that case, I held that the newspaper, which had previously published material tending to identify the children, had not satisfied me that this sort of publication was not likely to re-occur.

49. I excluded the reporter from remaining in court. I went on to say:

> "However, in the interests of a balancing exercise and applying the principle of open justice to the extent that it applies subject to s 9(a), I would be prepared to allow this newspaper to come back with some evidence which might convince me that it would be appropriate for me to be satisfied that, with acceptable undertakings, there could be a basis upon which I might allow its reporters to remain in court during the hearing."

Interestingly, the newspaper concerned did not take up that invitation.