

---

**From:**  
**Sent:** Wednesday, 16 December 2015 2:32 PM  
**To:** MB\_Contact  
**Subject:** CREF\_15254 Response to letter 14 December 2015 regarding letter publication / possible de identification / COAG Recommendations from Senate enquiry  
**Attachments:** US\_Senator\_Schaeffer\_Report.pdf  
**Importance:** High

Dear Mr Reed,

Thank you for responding to my written submission to the commission.

I would be more than happy should you wish to publish my submission(s), as de-identified. I would also like to add [this email](#) as a further submission in support of the original.

It is my wish to contributing to making Australian a fairer and better place in which to live, and as such to be of full service to the royal commission.

This means consideration of constitutional legitimacy, natural justice (procedural fairness) and due process in anything that results in punitive provisions being applied under the law.

I have children myself who I love dearly and have been a parent for nearly 17 years.

Due to the prevailing winds of emotion that relate to the issue of child sexual abuse this can be challenging.

Without such due process, it would only take one false allegation and an innocent persons life could be completely destroyed. Expedience in considering matters this serious can be devastating.

Strong families make up strong societies. The family unit needs, in my informed opinion, to be the central focus of these matters.

During my research and 'in-camera' therefore unpublishable contributions to the 'Senate enquiry into out of home child care' (published August 2015) I noted that although Australia is a party to, and has ratified the United Nations convention of the rights of a child, the counterbalancing provisions contained within the convention that relate to keeping a family together are conspicuously absent from the state based legislation (the latter is enforced without the counterbalancing and less punitive provisions of the former).

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Out\\_of\\_home\\_care/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Out_of_home_care/Report)

In one annual report (WA DCP 2014) I noticed that 37% of removals were for matters 'deemed' by departmental workers to be 'emotional abuse'.

<http://www.dcp.wa.gov.au/Resources/Documents/Annual%20reports/Annual%20Report%20Online%20201415.pdf>

Once a family is separated *from the stage of removal children are particularly vulnerable to sexual abuse* from parties that do not have their true best interests necessarily at heart, and no bond of kinship.

According to the statistics below retrieved from the 'The National Centre on Child Abuse and Neglect NCANN' (USA) this averages 8.6 times per likely that a child will be sexually abused once removed from their parents and placed in the 'care' of a statutory agency.

On the subject of enforceability of child removals I would also like to point out that this currently occurs without full due process, i.e. The civil 'balance of probabilities' is used in a children's magistrates court against parents during removals, where only 51% on the balance of probabilities is required to remove a child from its parents.

After interviewing countless parents who have been affected, it became clear that most of these affidavits used in child protection proceedings were not able to be substantiated, and were simply hearsay, and yet this resulted in many false positives by way of children being removed from parents, completely unnecessarily, and certainly not in the best interests of the child.

An **attached** article by the late US Senator Nancy Schaeffer highlights both the causes and a solution for how this can be prevented.

Chapter 10 of the Australian 'community affairs reference committee out of home care Senate enquiry' (August 2015), under the heading of conclusion and recommendations, makes a number of entirely relevant concluding comments and recommendations. Amongst these, a few notable recommendations stood out:

10.2 'The committee is deeply concerned by the increasing number of children entering and remaining longer in out-of-home care.' (Emphasis added).

10.16 'The committee shares the concerns expressed by the United Nations Committee on the Rights of the Child about the lack of data on the reasons why children are placed in out-of-home-care.' (Emphasis added).

10.17 'The committee recommends that AIHW work with states and territories to develop and implement a data collection project that would provide general data on the reasons children are placed in out of home care, consistent with the recommendation of the United Nations Committee on the Rights of the Child.'

10.20 'The committee is concerned by evidence that suggests children and young people in out-of-home-care continue to experience poor outcomes across a range of indicators, including health, education and homelessness.'

10.49 'The committee is concerned by evidence that suggests children in out-of-home care are less likely to complete school and transition into higher education and training'.

10.70 'The committee recognises there is no national consistency of independent oversight of child protection decisions or complaints mechanisms for parents and families with children in or at risk of entering out-of-home care.

10.71 'The committee recommends that COAG include in the third action plan (2015-2018) of the National Framework the development of nationally consistent mechanisms, such as independent bodies, for managing complaints from families and investigating individual cases.

10.72 'The committee recommends that COAG include in the third action plan (2015-2018) of the National Framework the introduction of national accreditation and registration of child protection workers, including those employed by government departments and NGOs'.

10.76 'The committee also recognises the lack of legal assistance available to families seeking to maintain parental responsibility for their children (including grandparent or other relative / kinship carers).' (Emphasis added).

10.86 'The committee recommends that the National Disability Insurance Agency (NDIA) review the adequacy of and availability of funding for children with disability at National Disability Insurance Scheme (NDIS) trial sites, including:  
- early intervention funding to support children with disability remaining at home in the care of their parents;' (Emphasis added)

10.90 includes the recommended inclusion of 'establishment of a national peak body for relative / kinship carers, as well as the accreditation and training of relative / kinship carers and increasing the allowances available to relative / kinship carers.

By keeping children with their parents or connected with their Kin, there is a considerable less chance that they will be sexually molested.

This can be borne out from statistics available in the USA, but not currently collected in Australia, a requirement for such data was recommended in the above Senate enquiry.

The Late Senator Nancy Schaefer stated "The National Center on Child Abuse and Neglect in 1998 reported that six times as many children died in foster care than in the general public and that once removed to official "safety", these children are far more likely to :suffer abuse, including sexual molestation than in the general population. Think what that number is today ten years later!"

(NCANN is now the 'Office on Child Abuse and Neglect' (OCAN) since 1996.)

The NCCAN report on "Perpetrators of Maltreatment" provides the following figures:

<b>Maltreatment per 100,000 US children</b>	<b>CPS</b>	<b>Parents</b>
Physical Abuse	160	59
Sexual Abuse	112	13
Neglect	410	241
Medical Neglect	14	12
Fatalities	6.4	1.5

Senator Schaeffer also commented: 'The Department of Child Protective Services has become a protected empire. It's built on taking children and separating families.'

'Mrs. Schaefer states that the financial motive for the State to legally kidnap children was put in place in 1974 by Walter Mondale with the "Adoption and Safe Families Act." This was later expanded by President Bill Clinton in 1997 with The Adoption and Safe Families Act that gave states cash bonuses for every child adopted out of foster care.'

<http://medicalkidnap.com/2015/04/27/senator-nancy-schaefer-did-her-fight-against-cps-corruption-cost-her-life/>

A speech given (prior to hear relatively recent death that Mrs. Schaefer) give can be found at <https://www.youtube.com/watch?v=1zKKkVrLpzc> which you would probably find very relevant in regard to this topic. The the majority of sexual abuse in Australia is facilitated by the very institutions of whose charter is to 'protect' children.

*This is a key point I believe that any investigation into child sexual abuse should give due consideration.*

Australia is the only common law country not to have an national explicit bill of rights protecting its citizens, although the ACT and Victoria have specific statutes assented to in 2004 and 2006 respectively.

I was quite staggered by the statistics a very kind and experienced ex social worker shared with me the other day about the history Australian State and Federal Government's has of removing children from their parents, at a rate of approximately four times any other western country.

- 7000 English and Maltese Children were relocated into Australia not understanding the consequences (as in the film Oranges and Sunshine)
- 50,000 Aboriginal children were taken, they were known as the 'Stolen Generation'
- 400,000 White Australian children, many of them taken from their Parents, were known as the 'Forgotten Generation'. Some of the older generation are now in nursing homes around Australia.

Some of their stories are here: <http://www.forgottenaustralians.org.au/dvd.htm>. Many of them were sexually abused by the people chartered to protect them.

What about relocation of a family to another state once a social worker or statutory child protection agency desires the unlawful removal of their children, so a parent can protect them from the child protection / foster care system and hence an elevated risk of sexual abuse by a yet unknown third party?

No court action has been brought against this parent? Surely they can relocate? Perhaps not:

<http://www.dhs.vic.gov.au/cpmanual/legal-processes/missing-persons-report-and-childrens-court-search-warrants/1359-execution-of-warrants-interstate/3> and Victoria has its own explicit bill of human rights that is supposed to allow for

'freedom of movement' of it's citizens. One can lose their children to the system (institutional, foster care and possibly even adoption) without a criminal charge.

Examples of institutional sexual abuse of children abound from organisations that are responsible for the removal and subsequent 'care' of children.

As this correspondence is contained in the body of an email, I have not referenced Internet URL's in this document. A series of media links can be found below.

It is my sincere belief, should you take the time to explore these links (both above and below) you will come closer to identifying the root cause of the problem you are seeking to investigate.

Educating parents to ask their children questions, teaching them defensive strategies, and abolishing the current 'child protection' systems (of which forced removals are the major cause of child sexual molestation) are the only practical way I can see change being meaningfully effected to achieve the aims of the commission.

I have a considerable amount of additional data available should this become necessary for the purposes of further substantiation regarding this matter,

Sincerely

■■■■

**Adverse Media reports demonstrating the sexual molestation of children whilst in agency or foster 'care', and the precipitation of events leading to child removals and subsequent abuse.**

By State

South Australia

<http://www.abc.net.au/news/2014-07-22/child-sexual-abuse-families-sa-carer/5614118> (Likely Leading to a Royal commission in SA)

<http://www.adelaidenow.com.au/news/south-australia/premier-jay-weatherill-to-order-royal-commission-into-child-abuse-following-horrific-new-case-at-government-run-care-facility/story-fni6uo1m-1226997496682?nk=d055967f89a50913763e12e250bb97ad>

New South Wales

<http://www.smh.com.au/nsw/calls-for-pru-goward-to-be-sacked-over-abandoned-children-20140410-36g31.html>

<http://www.probonoaustralia.com.au/news/2015/08/senate-inquiry-slams-out-home-care-system#>

Queensland

<http://www.childprotectioninquiry.qld.gov.au/publications> (the Carmody report – Queensland was the first state to be investigated)

<http://raisingchildren.net.au/forum/Topic41682-29-1.aspx>

Victoria

<http://www.abc.net.au/news/2014-07-02/siblings-sexual-abuse-highlights-flaws-in-victorian-state-care/5566378> (The flaws in the Victorian System are aired)

<http://www.abc.net.au/news/2014-03-11/criminal-gangs-enticing-children-in-state-care-into-prostitution/5313632> (more victorian issues – prostitution of children)

Northern Territory

<http://www.abc.net.au/am/content/2013/s3848760.htm>

<http://www.theaustralian.com.au/national-affairs/policy/social-problems-overwhelming-northern-territory-child-protection-system-says-report/story-fn59nokw-1225940286359?nk=d055967f89a50913763e12e250bb97ad>

Tasmania

<http://www.abc.net.au/news/2013-04-12/ombudsman27s-damning-report-on-child-protection/4626510>

USA

<https://www.youtube.com/watch?v=S36rozABiZk&feature=youtu.be> (One mainstream - US Media view on situation)  
<https://www.youtube.com/watch?v=I00iNdj2aP4> (A Texas CPS whistleblower – a very good watch from the inside of US CPS and right on the money)  
<http://medicalkidnap.com/2015/05/05/whistleblowers-reveal-cps-child-kidnappings-in-kentucky-adoption-business/>

UK

<http://www.telegraph.co.uk/women/mother-tongue/8349748/Social-services-took-my-children.html> (a legal student and diligent mum)

Aboriginal

<http://www.sbs.com.au/ondemand/video/278236227943/LIVING-BLACK-23-June-2014> (some of these people are whistle blowers having worked for DOCS and it includes a DOCS lawyer)  
<http://johnpilger.com/videos/utopia-trailer>

Italy and psychiatry resulting in the kidnapping and abuse of children (CCHR reported)

[http://www.cchr.org/newsletter/2015-fall-italy-hidden-scheme-to-abduct-children.html? link=article2\\_readmore&utm\\_campaign=cchr-newsletter&utm\\_medium=email&utm\\_source=2015-fall](http://www.cchr.org/newsletter/2015-fall-italy-hidden-scheme-to-abduct-children.html? link=article2_readmore&utm_campaign=cchr-newsletter&utm_medium=email&utm_source=2015-fall)

Norway and children being taken due to 'Christian Indoctrination'

<http://christiannews.net/2015/12/03/children-seized-from-parents-on-charges-of-christian-indoctrination-in-norway/>

**NANCY SCHAEFER**  
District 50  
P.O. Box 294  
Turnerville, Georgia 30580  
Tel: (706) 754-1998  
Fax: (706) 754-1803



**COMMITTEES:**

Secretary, Retirement  
Banking and Financial Institutions  
Economic Development  
Ethics  
Special Judiciary

323 - A Coverdell Legislative Office Building  
18 Capitol Square, SW  
Atlanta, Georgia 30334  
Tel: (404) 463-1367  
Fax: (404) 463-1388

**The State Senate**  
Atlanta, Georgia 30334

E-mail: [senatormancyschaefer@alltel.net](mailto:senatormancyschaefer@alltel.net)

*From the legislative desk of Senator Nancy Schaefer 50th District of Georgia*

November 16, 2007

Updated: September 25, 2008

## **THE CORRUPT BUSINESS OF CHILD PROTECTIVE SERVICES**

**BY: Nancy Schaefer**  
**Senator, 50<sup>th</sup> District**

**My introduction into Child Protective Service cases was due to a grandmother in an adjoining state who called me with her tragic story. Her two granddaughters had been taken from her daughter who lived in my district. Her daughter was told wrongly that if she wanted to see her children again she should sign a paper and give up her children. Frightened and young, the daughter did. I have since discovered that parents are often threatened into cooperation of permanent separation of their children.**

**The children were taken to another county and placed in foster care. The foster parents were told wrongly that they could adopt the children. The grandmother then jumped through every hoop known to man in order to get her granddaughters. When the case finally came to court it was made evident by one of the foster parent's children that the foster parents had, at any given time, 18 foster children and that the foster mother had an inappropriate relationship with a caseworker.**

**In the courtroom, the juvenile judge, acted as though she was shocked and said the two girls would be removed quickly. They were not removed. Finally, after much pressure being applied to the Department of Family and Children Services of Georgia (DFCS), the children were driven to South Georgia to meet their grandmother who gladly drove to meet them.**

**After being with their grandmother two or three days, the judge, quite out of the blue, wrote up a new order to send the girls to their father, who previously had no interest in the case and who lived on the West Coast. The father was in “adult entertainment”. His girlfriend worked as an “escort” and his brother, who also worked in the business, had a sexual charge brought against him.**

**Within a couple of days the father was knocking on the grandmother’s door and took the girls kicking and screaming to California.**

**The father developed an unusual relationship with the former foster parents and soon moved to the southeast. The foster parents began driving to the father’s residence and picking up the little girls for visits. The oldest child had told her mother and grandmother on two different occasions that the foster father molested her.**

**To this day after five years, this loving, caring blood relative grandmother does not even have visitation privileges with the children. The little girls are, in my opinion, permanently traumatized and the young mother of the girls was so traumatized with shock when the girls were first removed from her that she has never completely recovered. The mother has rights but the father still has custody of the children.**

**Throughout this case and through the process of dealing with multiple other mismanaged cases of the Department of Family and Children Services (DFCS), I have worked with other desperate parents across the state of Georgia and in many other States because their children were taken for no cause and they have no one with whom to turn. I have witnessed ruthless behavior from many caseworkers, social workers, investigators, lawyers, judges, therapists, and others such as those who “pick up” the children. I have been stunned by what I have seen and heard from victims all across this land.**

**In this report, I have focused mainly on the Georgia Department of Family and Children Services (DFCS). However, I believe Child Protective Services nationwide has become corrupt and that the entire system is broken beyond repair. I am convinced parents and families should be warned of the dangers.**

**The Department of Child Protective Services, known as the Department of Family and Children Services (DFCS) in Georgia and other titles in other states, has become a “protected empire” built on taking children and separating families. This is not to say that there are not those children who do need to be removed from wretched situations and need protection. However, this report is concerned with the children and parents caught up in “legal kidnapping,” ineffective policies, and an agency that on certain occasions would not remove a child (or children) when the child was enduring torment and abuse.**

**In one county in my District, I arranged a meeting for thirty-seven families to speak freely and without fear. These poor parents and grandparents spoke of their painful, heart**

wrenching encounters with DFCS. Their suffering was overwhelming. They wept and cried. Some did not know where their children were and had not seen them in years. I had witnessed the “Gestapo” at work and I witnessed the deceitful conditions under which children were taken in the middle of the night, out of hospitals, off of school buses, and out of homes. In one county a private drug testing business was operating within the agency’s department that required many, many drug tests from parents and individuals for profit. It has already made over \$100,000.

Due to being exposed, several employees in this particular office were fired. However, they have now been rehired either in neighboring counties or in the same county again. According to the calls I am now receiving, the conditions in that county are returning to the same practices that they had before the light was shown on their evil deeds.

Having worked with probably 300 cases statewide, and now hundreds and hundreds across this nation and in nearly every state, I am convinced there is no responsibility and no accountability in Child Protective Services system.

I have come to the conclusion:

- that poor parents very often are targeted to lose their children because they do not have the where-with-all to hire lawyers and fight the system. Being poor does not mean you are not a good parent or that you do not love your child, or that your child should be removed and placed with strangers;
- that all parents are capable of making mistakes and that making a mistake does not mean your children are to be removed from the home. Even if the home is not perfect, it is home; and that’s where a child is the safest and where he or she wants to be, with family;
- that parenting classes, anger management classes, counseling referrals, therapy classes and on and on are demanded of parents with no compassion by the system even while the parents are at work and while their children are separated from them. (some times parents are required to pay for the programs) This can take months or even years and it emotionally devastates both children and parents. Parents are victimized by “the system” that makes a profit for holding children longer and “bonuses” for not returning children to their parents;
- that caseworkers and social workers are very often guilty of fraud. They withhold and destroy evidence. They fabricate evidence and they seek to terminate parental rights unnecessarily. However, when charges are made against Child Protective Services, the charges are ignored;



- that the separation of families and the “snatching of children” is growing as a business because local governments have grown accustomed to having these taxpayer dollars to balance their ever-expanding budgets;
- that Child Protective Services and Juvenile Court can always hide behind a confidentiality clause in order to protect their decisions and keep the funds flowing. There should be open records and “court watches”! Look who is being paid!

There are state employees, lawyers, court investigators, guardian ad litem, court personnel, and judges. There are psychologists, and psychiatrists, counselors, caseworkers, therapists, foster parents, adoptive parents, and on and on. All are looking to the children in state custody to provide job security. Parents do not realize that the social workers are the glue that hold “the system” together that funds the court, funds the court appointed attorneys, and the multiple other jobs including the “system’s” psychiatrists, therapists, their own attorneys and others.

- that The Adoption and the Safe Families Act, set in motion first in 1974 by Walter Mondale and later in 1997 by President Bill Clinton, offered cash “bonuses” to the states for every child they adopted out of foster care. In order to receive the “adoption incentive bonuses” local child protective services need more children. They must have merchandise (children) that sells and you must have plenty so the buyer can choose. Some counties are known to give a \$4,000 to \$6,000 bonus for each child adopted out to strangers and an additional \$2,000 for a “special needs” child. Employees work to keep the federal dollars flowing;
- State Departments of Human Resources (DHR) and affiliates are given a baseline number of expected adoptions based on population. For every child DHR and CPS can get adopted, there is the bonus of \$4,000 or maybe \$6,000. But that is only the beginning figure in the formula in which each bonus is multiplied by the percentage that the State has managed to exceed its baseline adoption number. Therefore States and local communities work hard to reach their goals for increased numbers of adoptions for children in foster care.
- that there is double dipping. The funding continues as long as the child is out of the home. There is funding for foster care then when a child is placed with a new family, then “adoption bonus funds” are available. When a child is placed in a mental health facility and is on 16 drugs per day, like two children of a constituent of mine, more funds are involved and so is Medicaid;
- As you can see this program is ordered from the very top and run by Health and Human Resources. This is why victims of CPS get no help from their legislators. It explains why my bill, SB 415 suffered such defeat in the Judicial Committee, why I was

cut off at every juncture. Legislators and Governors must remember who funds their paychecks.

- that there are no financial resources and no real drive to unite a family and help keep them together or provide effective care;
- that the incentive for social workers to return children to their parents quickly after taking them has disappeared and who in protective services will step up to the plate and say, “This must end! No one, because they are all in the system together and a system with no leader and no clear policies will always fail the children. *Just look at the waste in government that is forced upon the tax payer;*
- that the “Policy Manuel” is considered “the last word” for CPS/DFCS. However, it is too long, too confusing, poorly written and does not take the law into consideration;
- that if the lives of children were improved by removing them from their homes, there might be a greater need for protective services, but today children are not safer. Children, of whom I am aware, have been raped and impregnated in foster care;
- It is a known fact that children are in much more danger in foster care than they are in their own home even though home may not be perfect.
- that some parents are even told if they want to see their children or grandchildren, they must divorce their spouse. Many, who are under privileged, feeling they have no option, will divorce and then just continue to live together. This is an anti-family policy, but parents will do anything to get their children home with them. However, when the parents cooperate with Child Protective Services, their behavior is interpreted as guilt when nothing could be further from the truth.
- Fathers, (non-custodial parents) I must add, are oftentimes treated as criminals without access to visit or even see their own children and have child support payments strangling the very life out of them;
- that the Foster Parents Bill of Rights does not stress that a foster parent is there temporarily to care for a child until the child can be returned home. Many foster parents today use the Foster Parent Bill of Rights as a means to hire a lawyer and seek to adopt the child placed in their care from the real parents, who are desperately trying to get their child home and out of the system. Recently in Atlanta, a young couple learning to be new parents and loving it, were told that because of an anonymous complaint, their daughter would be taken into custody by the State DFCS. The couple was devastated and then was required by DFCS to take parenting classes, alcohol counseling and psychological evaluations if they wanted to get their child back. All of the courses cost money for which most parents are required to pay. While in their

**anxiety and turmoil to get their child home, the baby was left for hours in a car to die in the heat in her car seat by a foster parent who forgot about the child. This should never have happened. It is tragic. In many cases after the parents have jumped through all the hoops, they still do not get their child. As long as the child is not returned, there is money for the agency, for foster parents, for adoptive parents, and for the State.**

- that tax dollars are being used to keep this gigantic system afloat, yet the victims, parents, grandparents, guardians and especially the children, are charged for the system's services.**
- that grandparents have called from all over the State of Georgia and from other states trying to get custody of their grandchildren. CPS claims relatives are contacted, but there are many many cases that prove differently. Grandparents who lose their grandchildren to strangers have lost their own flesh and blood. The children lose their family heritage and grandparents, and parents too, lose all connections to their heirs.**
- that The National Center on Child Abuse and Neglect in 1998 reported that six times as many children died in foster care than in the general public and that once removed to official "safety", these children are far more likely to suffer abuse, including sexual molestation than in the general population. Think what that number is today ten years later!**
- That according to the California Little Hoover Commission Report in 2003, 30% to 70% of the children in California group homes do not belong there and should not have been removed from their homes.**

## **RECOMMENDATIONS**

- 1. Call for an independent audit of all State Child Protective Services (CPS) and for a Federal Congressional hearing on Child Protective Services nationwide.**
- 2. Activate immediate change. Every day that passes means more families and children are subject to being held hostage and their lives destroyed.**
- 3. Abolish the Federal and State financial incentives that have turned Child Protective Services into a business that separate families for money.**
- 4. Grant to parents their rights verbally and in writing.**

5. **Mandate a search for family members to be given the opportunity to adopt their own relatives if children need to be removed permanently.**
6. **Mandate a jury trial where every piece of evidence is presented before permanently removing a child from his or her parents. Open family court. Remove the secrecy. Allow the press and family members access. Give parents the opportunity in court to speak and be a part of their children's future.**
7. **Require a warrant or a positive emergency circumstance before removing children from their parents. (Judge Arthur G. Christean, Utah Bar Journal, January, 1997 reported that "except in emergency circumstances, including the need for immediate medical care, require warrants upon affidavits of probable cause before entry upon private property is permitted for the forcible removal of children from their parents.")**
8. **Uphold the laws when someone fabricates or presents false evidence. If a parent alleges fraud, hold a hearing with the right to discovery of all evidence made available to parents.**

## **FINAL REMARKS**

**On my desk are scores of cases of exhausted families and terrified children. It has been beyond me to turn my back on these suffering, crying, and beaten down individuals. We are mistreating the most innocent. Child Protective Services have become an adult centered business to the detriment of children. No longer is judgment based on what the child needs or who the child wants to be or with whom, or what is really best for the whole family; it is some adult or bureaucrat who makes the decisions, based often on just hearsay, without ever consulting a family member, or just what is convenient, profitable, or less troublesome for the social workers.**

**I have witnessed such injustice and harm brought to so many families that I am not sure if I even believe reform of the system is possible! The system cannot be trusted. It does not serve the people. It obliterates families and children simply because it has the power to do so.**

**Children deserve better. Families deserve better. It's time to pull back the curtain and set our children and families free.**

***"Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and the needy" Proverbs 31:8-9***

---

**From:** [REDACTED]  
**Sent:** Monday, 10 August 2015 7:32 PM  
**To:** Schools policy  
**Subject:** Information that you may find useful regarding child protection in Australia / False positives and malicious reporting.  
**Attachments:** Monash Law Review CPS.pdf; JT v CEO of DCP.pdf

Dear [REDACTED],

Thank you for your role in assisting the the Royal Commission into child sexual abuse.

As emotive, and shocking as the act of child sexual abuse is in human terms, I strongly *urge caution* in regards to adhering to a criminal standard (proof beyond reasonable doubt) of proof as an approach to justice.

Child 'protection' as an agency do not use this standard, but rather use a civil standard (Balance of probabilities) in what is normally a criminal jurisdiction. The **attached** Monash Law Review indicates this from a lawyers perspective.

The other **attached** case from the WA Supreme Court shows the devastation that results for parents when extreme powers are exercised against a parent in circumstances that are otherwise discretionary.

The problem I have observed first hand in both the children and family courts, is that of 'false positives' when reporting abuse, sexual abuse included.

By using words that convey broad meaning and or differ state to state such as family violence, sexual assault, harm, future risk of harm, best interests of the child, concerns etc, it can result in a false or inaccurate report to escalating out of control against an innocent person based on a misconception or a rumour, possibly a malicious one.

Such examples would be the child protection system in Australia today which take the majority of their intakes for what is deemed 'emotional abuse', and not sexual or physical abuse. This ties up the resources of the system, to the detriment of those who actually need to be protected.

However I am observing an increase in family law cases in which the charge of sexual abuse is being levelled at one parent as a way to 'use the system' to deprive the other parent of access to a child.

I would also urge that you give consideration to only allowing the rules of evidence and procedural fairness be used in all trials, as without these the risk to being occupationally or socially occupied with youth are simply to high in case of a false report for reasons which may well be malicious.

Child protection agencies regularly engage in conduct that could easily be construed if not overtly manifest as malfeasance and perversion of the course of justice. And some individuals also do the same in initiating false reports, without considering the consequences or having any comeback on them for making a false report.

I believe this latter issue requires serious attention to counterbalance the issue that you have before you.

I can provide further evidence on this matter, would highly recommend the reading of "Sarah's Last Wish" by the medical professional Eve Hillary. <http://www.sarahs-last-wish.com> as a direct indication of how bad this actually gets. In that case it was the statutory agency that caused the harm, based on a false report that the 11 year old girl was pregnant, when in actual case she had stage IV cancer.

Finally, although fictional, I believe the movie called "The Hunt" would be entirely relevant in consideration of the aim being pursued by the Commission, as regards that of potential false positives and the unintended consequences of false reports. <http://www.rogerebert.com/reviews/the-hunt-2013>

Amongst other things, the criminal standard of justice was developed to ensure "that ten 'guilty' persons went free, so that one one innocent person did not get unjustly imprisoned."

I feel personally compelled to contribute this information to the enquiry, and wish you all the best with the process,

Sincerely



# LAWYERS' VIEWS OF DECISION-MAKING IN CHILD PROTECTION MATTERS: THE TENSION BETWEEN ADVERSARIALISM AND COLLABORATIVE APPROACHES

TAMARA WALSH\* AND HEATHER DOUGLAS\*\*

*Outcomes in child protection cases impact substantially on children and families. Decisions in child protection matters must, therefore, be made with due caution and sensitivity. In order for the best outcomes to be achieved for children and their families, research suggests that decisions should be made collaboratively, and proceedings should be less adversarial in nature. At the same time procedural rules should be rigorously adhered to when decisions of a serious nature are being made, particularly where State interference in individuals' lives has occurred or is being contemplated. Thus, there is a tension in the child protection context between the use of informal dispute resolution methods, and the need to safeguard the rights of children and families. This tension is explored in this paper, with particular reference to the principles of natural justice and the rules of evidence. The discussion is informed by empirical research undertaken with child protection lawyers in Queensland. The authors conclude with some suggestions for reform which reflect the ideal of collaboration without compromising the need for procedural fairness.*

## I INTRODUCTION

Children in the developed world are most at risk of abuse and neglect within their family home, and the experience of child abuse and neglect has deep and long lasting consequences.<sup>1</sup> At the same time, the removal of a child from his or her family unit is one of the most significant and traumatising events that can happen in the life of a child and his or her parents.<sup>2</sup>

Determining the best interests of children in situations where facts are often uncertain is a difficult and complex process. There are often two or more versions of the situation which are experienced as 'real' by different people,<sup>3</sup> and evidence

\* Associate Professor, TC Beirne School of Law, The University of Queensland.

\*\* Professor, TC Beirne School of Law, The University of Queensland. The authors extend sincere thanks to Megan Middleton for her outstanding field research work, and to Caxton Legal Centre for their in-kind support. Thanks also to Grace Devereaux, Abbey Richards and Lana Stirling for their research assistance, and to all the lawyers involved for sharing their knowledge with us.

1 See, eg, Patricia M Crittenden and Mary D S Ainsworth, *Child Maltreatment and Attachment Theory* (Cambridge University Press, 1989).

2 Joseph J Doyle, 'Child Protection and Child Outcomes: Measuring the Effects of Foster Care' (2007) 97(5) *American Economic Review* 1583.

3 Michael King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57 (3) *Modern Law Review* 385, 391.

may be circumstantial or ambiguous.<sup>4</sup> Each stakeholder has a different perspective on the child protection process. While a child protection worker may see a need to intervene to protect a child from family violence, a domestic violence worker supporting the mother may see a State failing to assist a mother to care for her children in a safe place,<sup>5</sup> and a lawyer acting for the child's parent may see an unnecessary intrusion by the State in family life. What is in the best interests of the child is not always clear. The phrase 'best interests of the child' has been examined in depth by many scholars and commentators, especially in the context of family law disputes.<sup>6</sup> Kordouli argues that a wide interpretation of 'best interests' that takes into account parental interests as far as they affect the child's welfare, has been adopted by the High Court in family law cases.<sup>7</sup> We suggest the wide approach is also appropriate in child protection matters. If this is accepted, a parent's willingness to parent, and ways in which parents (mostly mothers)<sup>8</sup> could be supported in their parenting, are central to any determination regarding the child's welfare. The question is, how are these determinations to be made?

Research on children and the law has suggested that collaborative, inquisitorial and, where possible, non-court mechanisms should be preferred in decision-making processes concerning children.<sup>9</sup> Practically speaking, proceedings that seek to act in the best interests of the child cannot be strictly adversarial in nature.<sup>10</sup> As a result, alternative dispute resolution ('ADR') and 'less adversarial

- 4 Richard Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law' (2011) 25 *Australian Journal of Family Law* 1, 1.
- 5 Heather Douglas and Tamara Walsh, 'Mothers, Domestic Violence and Child Protection' (2010) 16(5) *Violence Against Women* 489.
- 6 See, eg, Patrick Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179; Donald Thomson, 'Beyond the Rhetoric of Best Interests of the Child' (2005) 7 *Australian Journal of Professional and Applied Ethics* 58; Michael King, 'The Right Decision for the Child' (2007) 70(5) *Modern Law Review* 857, 861–2.
- 7 See Vicky Kordouli, 'Relocation — Balancing the Judicial Tightrope' (2006) 20 *Australian Journal of Family Law* 89, 90. She suggests that the narrow approach is confined to issues that directly impact on the child's wellbeing. See also Jonathan Crowe and Lisa Toohey, 'From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the *Family Law Act*' (2009) 33(2) *Melbourne University Law Review* 391.
- 8 Mothers are most likely to find themselves interacting with child protection systems, and are most likely to have care responsibilities for children regardless of whether they are sole parents or in relationships with men; see, eg, Jane Lewis and Elaine Welsh, 'Fathering Practices in Twenty-Six Intact Families and the Implications for Child Contact' (2005) 1 *International Journal of Law in Context* 81.
- 9 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [4.32], [16.17], [17.42]–[17.54]; Jodi A Quas et al, 'Childhood Sexual Assault Victims: Long-Term Outcomes of Testifying in Criminal Court' (2005) 70(2) *Monographs of the Society for Research in Child Development* i; Rosemary Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59(2) *Australian Social Work* 157, 158; Joan Pennell and Gale Burford, 'Family Group Decision Making: Protecting Children and Women' (2000) 79(2) *Child Welfare* 131; Paul Boland, 'The Los Angeles County Children's Court: A Model Facility for Child Abuse and Neglect Proceedings' (1990–91) 18 *Pepperdine Law Review* 247. In the context of family law, see *Truman v Truman* (2008) 216 FLR 365, 370.
- 10 This is because the purpose of the proceedings is to determine what is in the best interests of the child; see Margaret Harrison, 'Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings' (Report, Family Court of Australia, April 2007) 33–4.



trials' are used extensively within family law systems.<sup>11</sup> They have also been taken up in the child protection context in the form of court-ordered conferences and family group conferences.<sup>12</sup> When matters do progress to court, proceedings are conducted in a less formal manner; judicial officers are legislatively directed to deal with matters in a manner that is as informal as possible, the rules of evidence generally do not apply, and courts are permitted to inform themselves in such a manner as they see fit.<sup>13</sup>

Children's lives are irrevocably altered after any child protection intervention which results in their removal, regardless of whether the removal is necessary or justified.<sup>14</sup> From the point of view of parents, the termination of their parental responsibilities may be considered comparable in gravity to other forms of state intervention including the deprivation of liberty.<sup>15</sup> Yet if children are not removed, their wellbeing may be endangered. In matters where the legal and social consequences for individuals are serious in nature, the High Court has observed that procedural rules should be rigorously enforced and evidence should be proved to a higher standard.<sup>16</sup> Child protection decisions are serious decisions, supporting the need for a strong focus on process.

Drawing on interviews with lawyers working in the child protection field in Queensland, this article explores the tension between the desirability of collaborative approaches on the one hand and the need for procedural fairness

- 11 As to ADR, see Wendy Faulkes, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) 1 *Australian Dispute Resolution Journal* 61; Kathy Mack, 'Court Referral to ADR: The Legal Framework in Australia' (2004) 22(1) *Law in Context* 112; Juliette Ford, 'Collaborative Law: Family Lawyering in the 21<sup>st</sup> Century' (2006) 18(4) *Australian Family Lawyer* 20; Rachael Field, *The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: Some Issues for Women* (Masters by Research Thesis, Queensland University of Technology, 1996). As to less adversarial trials, see Rosemary Hunter, 'Child-Related Proceedings under Pt VII Div 12A of the *Family Law Act*: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227; Paul Boers, 'The Less Adversarial Approach to Determining Children's Cases' (2005) 18(1) *Australian Family Lawyer* 6; Richard Chisholm, 'Less Adversarial Proceedings in Children's Cases' (2007) 77 *Family Matters* 28; John Faulks, 'A Natural Selection? The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia' (2010) 35(1) *University of Western Australia Law Review* 185.
- 12 Different terminology is used across the jurisdictions: in Queensland, they are called 'family group meetings'; in the Australian Capital Territory, they are called 'family group conferences'; in South Australia, they are called 'family care meetings'.
- 13 *Children and Young People Act 2008* (ACT) ss 712, 716; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93; *Care and Protection of Children Act 2009* (NT) s 93; *Child Protection Act 1999* (Qld) s 105; *Children's Protection Act 1993* (SA) s 45; *Children, Young Persons and Their Families Act 1997* (Tas) s 63; *Children, Youth and Families Act 2005* (Vic) s 215; *Children and Community Services Act 2004* (WA) ss 145–6. See also Chief Justice Alastair Nicholson, 'Child Sexual Abuse: Problems in Family Law' (1989) 4 *Australian Family Lawyer* 1; Chisholm, 'Child Abuse Allegations in Family Law Cases', above n 4, 1.
- 14 David M Rubin et al, 'The Impact of Placement Instability on Behavioural Well-Being for Children in Foster Care' (2007) 119(2) *Pediatrics* 336; Joseph J Doyle, 'Child Protection and Child Outcomes: Measuring the Effects of Foster Care' (2007) 97(5) *American Economic Review* 1583.
- 15 Indeed, incarcerated parents, particularly mothers, often report that separation from their children is the aspect of imprisonment that is most difficult to bear; see Katherine Houck and Ann Booker Loper, 'The Relationship of Parenting Stress to Adjustment among Mothers in Prison' (2002) 72(4) *American Journal of Orthopsychiatry* 548.
- 16 See particularly *Briginshaw v Briginshaw* (1938) 60 CLR 336, 341–2. See also Nicholson, above n 13; Chisholm, 'Child Abuse Allegations in Family Law Cases', above n 4, 22, 25. Both emphasise that the mere possibility of abuse is not equivalent to a finding of an unacceptable risk.

on the other. After examining the suggestions for change put forward by the interviewees, we conclude that there may be ways to improve current decision-making practices in child protection which foster collaborative approaches without compromising the need for procedural fairness.<sup>17</sup>

## II BACKGROUND: DECISION-MAKING IN CHILD PROTECTION MATTERS

### A *The Nature of Child Protection Decisions*

ADR and informal approaches to court proceedings have not been free from criticism.<sup>18</sup> They may be generally considered less appropriate in situations where at least one of the parties to proceedings is a vulnerable person, because serious power imbalances may arise where one party is better prepared or represented than another.<sup>19</sup> Indeed, direct communication between parties may be damaging in certain circumstances, such as where proceedings bring together a victim and perpetrator.<sup>20</sup> Stricter adherence to the rules of evidence, and other procedural rules, may be necessary in some cases for parties' protection.<sup>21</sup>

In the context of child protection, there are various problems and risks associated with ADR and less formal proceedings. The individuals involved are particularly vulnerable. Parents and children who are being separated often experience profound grief and loss, and parents and children who fear separation may be terrified. In some cases, the child and/or the parents have been abused, and many are socio-economically disadvantaged and under-educated.<sup>22</sup> In contrast, child protection departments are often perceived to be, and indeed may be, well resourced, emotionally detached and supported by an experienced team of lawyers. These factors militate against a congenial, collaborative approach to dispute resolution in child protection matters.

- 17 See the similar observation made by John Dewar in the family law context: John Dewar, 'Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia' (2010) 24 *Australian Journal of Family Law* 139, 149.
- 18 In a child protection context, see Linda Crush, 'When Mediation Fails Child Protection: Lessons for the Future' (2007) 23 *Canadian Journal of Family Law* 55.
- 19 In a family law context, less adversarialism is considered inappropriate in situations involving allegations of abuse and vulnerability (including people with mental illness and low levels of education); see Rosemary Hunter, 'Practitioners' Views of the Children's Cases Program' (2007) 19(4) *Australian Family Lawyer* 23, 30. See also Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 42, 45–6; Gay Clarke and Isla Davies, 'Mediation — When Is It Not an Appropriate Dispute Resolution Process' (1992) 3 *Australian Dispute Resolution Journal* 78.
- 20 Sheehan, above n 9, 169; James Ptacek, 'Resisting Co-Optation' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2009) 5, 19–21.
- 21 Criminal proceedings are the best example of this; see Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 243, 251; *Connelly v DPP* (1964) AC 1254, 1354 (Lord Devlin); *Bunning v Cross* (1978) 141 CLR 54.
- 22 See David McConnell and Gwynnyth Llewellyn, 'Social Inequality, the "Deviant Parent" and Child Protection Practice' (2005) 40(4) *Australian Journal of Social Issues* 553; Julia Brophy, 'Child Maltreatment in Diverse Households: Challenges to Law, Theory and Practice' (2008) 35 *Journal of Law and Society* 75.

This paper will first provide some background regarding child protection law and practice in Australia, with a particular focus on Queensland. The methods of this study will then be explained, and the key concerns raised by participants — procedural fairness and quality of evidence — will be discussed. This will be followed by an examination of the roles that adversarial and problem-solving methodologies might play within child protection decision-making processes, and some potential avenues for reform will be canvassed.

## **B Recent Trends in Child Protection**

In recent years, government departments with responsibility for child protection have been subjected to intense media and public scrutiny. Inquiries around Australia have accused child protection departments of ‘failing’ children by allowing them to remain in abusive or neglectful homes.<sup>23</sup> In response to such criticism, most child protection departments have increased staff numbers and child protection laws have been reviewed and reformed. This has allowed for an increase in the number of families targeted for child protection interventions, a fact that is reflected to some extent in the available Australian statistics. Nationally, in the five years to 2009–10, the number of children subject to child protection orders increased by 57 per cent, and the number of children in out of home care increased by 51 per cent.<sup>24</sup> One explanation for this is that children are remaining in care for longer periods of time, perhaps because families are increasingly unable to address family dysfunction.<sup>25</sup> There are significant variations between jurisdictions but there is evidence to suggest that, in some Australian jurisdictions, child protection departments may have become more risk averse, obtaining more orders overall as opposed to implementing less intrusive forms of intervention.<sup>26</sup> This is understandable considering the high level of attention that adverse child protection outcomes attract from the community and the media.

Regardless, the current rate of removal of children from their families by child protection departments has been described as unsustainable.<sup>27</sup> Certainly, the supply of foster carers is insufficient to meet demand. Increasingly, children are being placed with foster carers who already have a number of children in their

23 Judy Cashmore and Frank Ainsworth, ‘Audit of Australian Out of Home Care Research’ (Audit, Association of Children’s Welfare Agencies, October 2004).

24 Australian Institute of Health and Welfare, *Child Protection Australia 2009–10* (2011) vii, viii. Note, however, that in Victoria, the number of children on care and protection orders decreased by 2.2 per cent between 2007–08 and 2008–09: at 25.

25 See Clare Tilbury, ‘A “Stock and Flow” Analysis of Australian Child Protection Data’ (2009) 4 *Communities, Children and Families Australia* 9.

26 See, eg, Maria Harries, Bob Lonne and Jane Thomson, ‘Protecting Children and Caring for Families: Re-Thinking Ethics for Practice’ (2007) 2(1) *Communities, Children and Families Australia* 39. Similar concerns have been noted in the UK; see Nigel Parton, ‘The “Change for Children” Programme in England: Towards the “Preventative-Surveillance State”’ (2008) 35(1) *Journal of Law and Society* 166.

27 Dorothy Scott, ‘Think Child, Think Family’ (2009) 81 *Family Matters* 37.

care, and many older children are being housed in residential units and shelters because foster care cannot be secured for them.<sup>28</sup>

In all Australian States and Territories, a child may be considered ‘at risk of harm’ or ‘in need of care and protection’ if there is no one available who is ‘willing or able’ to care for, or protect, the child.<sup>29</sup> Research suggests that many parents whose children are subject to child protection orders are willing to work towards becoming better, protective parents. Regrettably, there are many situations in which parents want to care for their child — that is, they are ‘willing’ — but they are unable to do so as a result of circumstances beyond their control including poverty, homelessness, family violence and/ or physical or mental illness, coupled with a lack of appropriate support.<sup>30</sup>

Complex family situations are common in child protection matters, and difficult decisions must be made regarding the kind of intervention that is appropriate in the circumstances. As in other ‘protective jurisdictions’ (such as guardianship and mental health), contestable issues arise in relation to capacity and consent, and the wishes and interests of the various parties, some of whom are particularly vulnerable. Because each case is different, it is impossible to design a blueprint for intervention that will suit every family. Substantial discretion is needed to formulate a plan that will maximise protective and supportive outcomes for children in their individual circumstances. This makes the integrity of the decision-making processes all the more important. The identity of the decision-maker, the processes by which decisions are made, and the manner in which decisions are enforced, will all be critical to the ongoing health and wellbeing of children and families. The roles of the various players must be finely balanced to ensure fairness, accountability and safety.

### **C Child Protection Decisions and Decision-Makers**

In most Australian jurisdictions,<sup>31</sup> the decision-making process is shared between officers of the government department responsible for child protection,

28 Ciara Smyth and Tony Eardley, *Out of Home Care for Children in Australia: A Review of the Literature and Policy*, 2008, 6–8; Department of Human Services (Vic), *Public Parenting: A Review of Home-Based Care in Victoria* (2003) 12.

29 *Children and Young People Act 2008* (ACT) s 350(1)(d); *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23(1)(b), (b1) (unable or unwilling to arrange for the child to receive medical care or an education); *Care and Protection of Children Act 2009* (NT) s 20(c); *Child Protection Act 1999* (Qld) s 10(b); *Children’s Protection Act 1993* (SA) s 6(2)(c); *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1)(c); *Children, Youth and Families Act 2005* (Vic) ss 162(1)(a)–(b); *Children and Community Services Act 2004* (WA) s 28(2)(b).

30 Tamara Walsh and Heather Douglas, ‘Legal Responses to Child Protection, Poverty and Homelessness’ (2009) 31(2) *Journal of Social Welfare and Family Law* 133; Douglas and Walsh, ‘Mothers, Domestic Violence and Child Protection’, above n 5; Australian Law Reform Commission, *Family Violence: A National Legal Response*, Report No 114 (2010) vol 1, 898–901.

31 Given limited space, it is difficult to provide a comprehensive overview of all of the Australian child protection systems as there is significant diversity. For a good overview of current systems see: Victorian Law Reform Commission, *Child Protection: Protection Applications in the Family Court Final Report*, Report No 19 (2010), especially chs 3–4.

tribunals,<sup>32</sup> and the court (most often the Children's Court).<sup>33</sup> Children's Courts are generally presided over by Magistrates or District Court judges, but they tend not to be specialist 'problem-solving' courts in the sense that those who preside over the court do not necessarily do so on a regular basis, and are not generally required to have any special training or experience in children's matters.<sup>34</sup>

The initial decision to remove a child at risk of harm, or to undertake an investigation or assessment, is generally made by officers of the relevant government department.<sup>35</sup> In Queensland, 'child safety officers' are authorised to take a child into custody for the purposes of investigation and assessment if they reasonably believe the child is at risk of harm and is likely to suffer harm if he or she is not taken into custody.<sup>36</sup> They can exercise this power with help, and using such force as is reasonable in the circumstances.<sup>37</sup>

In most jurisdictions, officers of the child protection department will then need to apply to the relevant court for an assessment order.<sup>38</sup> In Queensland, the child safety officer must apply to the Children's Court within eight hours of removing the child.<sup>39</sup> The Queensland Children's Court can make either a temporary assessment order (for a stated time not exceeding three days),<sup>40</sup> or a court assessment order of up to four weeks duration,<sup>41</sup> in circumstances where more than three days is

32 In Australia, specialist tribunals no longer exist for child protection matters. In ACT, NSW, Queensland, Victoria and WA, generalist tribunals deal with child protection matters (ACT Civil and Administrative Tribunal; NSW Administrative Decisions Tribunal; Queensland Civil and Administrative Tribunal; Victorian Civil and Administrative Tribunal; WA State Administrative Tribunal).

33 Termed 'Youth Court' in South Australia. As to Children's Courts, see Rod Blackmore, 'Children's Courts Are 100 Years Old ... and We Still Deserve Better' (2005) 43(3) *Law Society Journal* 26; Australian Law Reform Commission, *Seen and Heard*, above n 9, [17.56]–[17.58]. Internationally, see Paul Boland, 'The Los Angeles County Children's Court: A Model Facility for Child Abuse and Neglect Proceedings' (1990–91) 18 *Pepperdine Law Review* 247; Jean Koh Peters, 'How Children Are Heard in Child Protective Proceedings in the United States and Around the World in 2005: Survey Findings, Initial Observations and Areas for Further Study' (2005–06) 6 *Nevada Law Journal* 966.

34 Australian Law Reform Commission, *Seen and Heard*, above n 9, [17.56]. For further information on specialist and 'problem-solving' courts in Australia, see particularly Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8.

35 *Children and Young People Act 2008* (ACT) ss 360–1, 406; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 30, 34, 43; *Care and Protection of Children Act 2009* (NT) ss 32, 46, 51; *Child Protection Act 1999* (Qld) s 18; *Children's Protection Act 1993* (SA) s 16; *Children, Young Persons and Their Families Act 1997* (Tas) ss 20–1; *Children, Youth and Families Act 2005* (Vic) s 241 (protective intervener may take a child into safe custody); *Children and Community Services Act 2004* (WA) ss 37, 41.

36 *Child Protection Act 1999* (Qld) s 18.

37 *Ibid* s 18(3).

38 *Children and Young People Act 2008* (ACT) div 14.3.3; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 52, 53; *Care and Protection of Children Act 2009* (NT) pt 2.3 div 4 sub-divs 1–2; *Child Protection Act 1999* (Qld) ch 2 pts 2–3; *Children's Protection Act 1993* (SA) pt 4 div 4; *Children, Young Persons and Their Families Act 1997* (Tas) pt 4 div 2; *Children and Community Services Act 2004* (WA) ss 35, 36 (taking a child into provisional protective care with a warrant). In Victoria, protective interveners are authorised to undertake investigations without a court order; see *Children, Youth and Families Act 2005* (Vic) pt 4.6.

39 *Child Protection Act 1999* (Qld) ss 18(7), 25.

40 Although the order may be extended once by the Court: *ibid* ss 27–9, 34.

41 With the possibility of one extension of no more than four weeks duration; *ibid* s 49.

necessary to complete an investigation and assessment.<sup>42</sup> Once an investigation or assessment has taken place, the officer will need to apply to the court for a child protection order to be made, if this is considered necessary.<sup>43</sup> The type of child protection order most often made in Queensland is an order granting custody or guardianship of the child to the department or another suitable person, however supervisory orders and orders directing parents to do or refrain from doing certain things are also allowed for.<sup>44</sup> Alternatively, the officer may be able to convince the parents to enter into an agreement with the department for the child to be removed and placed in care. In Queensland, this is termed ‘Intervention with Parent’s Agreement’ (‘IPA’).<sup>45</sup> Under an IPA, the department enters into a formal agreement with parents for the short-term placement of the child in the care of someone other than the parents.<sup>46</sup> The order may be extended or ended by agreement and will end if the court makes a conflicting child protection order.<sup>47</sup>

Once a child is placed in out-of-home care, a departmental officer generally has responsibility for developing a ‘case plan’ for the child, which includes goals to be achieved, services to be delivered, as well as the amount of contact the parents will have with their child.<sup>48</sup> In Queensland, the administrative decisions made by child safety officers, including contact decisions, are reviewable by the Queensland Administrative and Civil Tribunal (‘QCAT’),<sup>49</sup> however, in practice, case plans are not often subjected to judicial scrutiny.<sup>50</sup>

42 Ibid ss 38, 44, 47.

43 In Queensland, see *ibid* s 54.

44 See *ibid* s 61. Guardianship/custody orders and interim/temporary orders account for around 90 per cent of all orders made: Australian Institute of Health and Welfare, above n 24, 33. A wider variety of orders is available in other jurisdictions, for example, in NSW, the court may order a parent to attend services (see generally *Children and Young People (Care and Protection) Act 1998* ss 73–7, 85) and in Victoria, the court may make an order requiring a parent to give an undertaking to do or refrain from doing specified things (*Children, Youth and Families Act 2005* (Vic) ss 272–3, 278–9).

45 Equivalent arrangements are available in other jurisdictions: see, eg, *Children and Young People Act 2008* (ACT) pt 12.3 (Voluntary care agreement); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38Aff (Parent Responsibility Contract); *Care and Protection of Children Act 2009* (NT) s 46 (Temporary placement arrangement); *Children’s Protection Act 1993* (SA) s 9 (Voluntary custody agreements); *Children, Young Persons and Their Families Act 1997* (Tas) s 11 (Voluntary care agreement); *Children, Youth and Families Act 2005* (Vic) ss 135–56 (short term child care agreement and long term child care agreement); *Children and Community Services Act 2004* (WA) s 75 (Negotiated placement agreement).

46 *Child Protection Act 1999* (Qld) s 51ZD. Note that Victoria distinguishes itself by having service providers negotiate and enter into the equivalent of an IPA with parents, rather than departmental officers; see *Children, Youth and Families Act 2005* (Vic) ss 135(1), 145(1).

47 *Child Protection Act 1999* (Qld) s 51ZI.

48 In Queensland, see *ibid* s 51B; in NSW, see *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38; in Victoria, see *Children, Youth and Families Act 2005* (Vic) s 167.

49 *Child Protection Act 1999* (Qld) ch 2A. In Victoria, provisions in the equivalent ‘care plan’ can be reviewed by VCAT: *Children, Youth and Families Act 2005* (Vic) s 333.

50 Note, however, that in NSW and the ACT, the (equivalent) ‘care plan’ may be registered with the Children’s Court. The Court is then empowered to make other orders by consent for the purpose of giving effect to a ‘care plan’ (see further below). In Victoria, a ‘care plan’ may make provision for contact arrangements, however the Victorian Children’s Court is also empowered to make decisions regarding contact: see *Children, Youth and Families Act* (Vic) ss 263(8), 283(1)(e)(i), 284(1)(e)(i), 287(1)(d)(i), 291(3)(f), 321(1)(d)–(e).

Extensive use is made of ADR in child protection matters. For example, courts and tribunals can order that a conference take place prior to formal proceedings, in an attempt to achieve settlement and avoid the matter going to a hearing (hereafter termed 'court-ordered conferences'). Participation of parties (including child protection officers, parents, carers and sometimes children themselves) in a court-ordered conference may be mandatory,<sup>51</sup> or at the discretion of the judicial officer.<sup>52</sup> Court-ordered conference convenors are neutral parties, and may be legislatively required to possess knowledge and understanding of child protection issues.<sup>53</sup> Court-ordered conferences are commonly ordered in Australian child protection matters; in one Victorian study, it was found that Children's Court magistrates referred parties to a pre-hearing conference in approximately 40 per cent of cases.<sup>54</sup>

Another form of conferencing used in child protection matters is that initiated by child protection departments for the purpose of developing case plans or otherwise reaching decisions related to the care of a child. These conferences are known variously as 'family group meetings' ('FGMs'),<sup>55</sup> 'family group conferences',<sup>56</sup> 'family care meetings',<sup>57</sup> or 'mediation conferences'.<sup>58</sup> This form of conferencing originated in New Zealand in the late 1980s and is now used extensively in Australia, the UK and the US.<sup>59</sup> In Queensland, once a child becomes subject to an order, a FGM is convened by the department for case planning to 'provide family-based responses to children's protection and care needs' and to 'ensure an inclusive process for planning and making decisions relating to children's wellbeing and protection and care needs'.<sup>60</sup> Regular FGMs are held to review the child's case plan and to determine the amount of progress that the parties have made towards set goals. In Queensland, the Children's Court is also empowered to order that an FGM take place.<sup>61</sup>

51 See, eg, *Child Protection Act 1999* (Qld) s 70.

52 *Ibid* s 68(1)(e); *Children, Youth and Families Act 2005* (Vic) s 217; *Children and Community Services Act 2004* (WA) s 136.

53 See, eg, *Children's Court Rules 1997* (Qld) r 19. According to Canadian research, it is critical that child protection mediators possess specialist skills and are well-trained: see Crush, above n 18, 57.

54 Sheehan, above n 9, 159.

55 *Child Protection Act 1999* (Qld) ss 51G–51P.

56 *Children and Young People Act 2008* (ACT) ch 3; *Children, Young Persons and Their Families Act 1997* (Tas) ss 30–3.

57 *Children's Protection Act 1993* (SA) ss 27–30.

58 *Care and Protection of Children Act* (NT) s 49. See also *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 37–8.

59 See Joe Hudson et al, *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, 1996); Leon C Fulcher, 'Cultural Origins of the Contemporary Family Group Conference' (1999) 5(4) *Child Care in Practice* 328; Marie Connolly, 'Family Group Conferences in Child Welfare' (2007) 19 *Developing Practice: The Child, Youth and Family Work Journal* 25. In Australia, see Nathan Harris, 'Family Group Conferencing in Australia 15 Years On' (Child Abuse Prevention Issues Report No 27, National Child Protection Clearinghouse, 2008); Phillip Swain, 'Letting the Family Decide? Family Group Conferences and Pre-Hearing Conferences in Victoria's Child Protection System' (1996) 7 *Australian Dispute Resolution Journal* 234.

60 *Child Protection Act 1999* (Qld) s 51G.

61 *Ibid* s 68(1)(d).

In summary, there are a range of decision-makers and decision-making processes that can impact on the lives of children and families in child protection matters. Some decisions are made administratively, others are judicial in nature, and at times, the line between the two is blurred. Bearing in mind the substantial numbers of children who are removed from their homes, and the serious and potentially long-lasting interventions into the lives of children and parents that results from this, it is critical that all decision-making in child protection matters be rigorous, transparent and fair.

### III RESEARCH METHODS

There is already a significant body of research that draws on the views of child protection workers to explore the way decisions about child protection are made.<sup>62</sup> There is also a significant body of work which focuses on lawyers' perceptions and experiences of systems and processes relevant to (for example) criminal law,<sup>63</sup> and family law.<sup>64</sup> However, there is a paucity of research that draws on views of lawyers in relation to child protection processes. This is despite the fact that lawyers are often important participants in the child protection decision-making process, who have a strong influence on the choice of process and the way procedures are managed. In order to explore lawyers' views regarding the way decisions are made in child protection matters, 21 interviews with 26 lawyers were undertaken in Queensland (in five of the interviews there were two participants). A snowball sampling method was employed whereby interviewed lawyers recommended other child protection lawyers for interview.<sup>65</sup> All of the interviewees had extensive experience in child protection law. Some of the lawyers worked within organisations, such as Legal Aid Queensland, community legal centres and advocacy organisations. Others were in private practice and did child protection work on a pro bono basis or under grants of aid. We stress that the participants all represented parents or children, although three of the participants

62 See Gai Harrison and Rachel Turner, 'Being a "Culturally Competent" Social Worker: Making Sense of a Murky Concept in Practice' (2011) 41 *British Journal of Social Work* 333; Rebecca O'Reilly et al, 'Child Protection Workers: What They Do' (2011) 5(1) *International Journal of Multiple Research Approaches* 122; Jane Thomson, 'Child Protection Workers' Perceptions of Foster Carers and the Foster Care System: A Study in Queensland' (2007) 60(3) *Australian Social Work* 336; Yvonne Darlington, Judith A Feeney and Kylie Rixon, 'Child Protection Workers: Practice Challenges at the Intersection of Child Protection' (2005) 10(3) *Child and Family Social Work* 239; Judy A Gibbs, 'Maintaining Front-Line Workers in Child Protection: A Case for Refocusing Supervision' (2001) 10(5) *Child Abuse Review* 323.

63 See Asher Flynn, 'Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-Trial Process' (2010) 34 *Criminal Law Journal* 48; Russell Boyd and Anthony Hopkins, 'Cross-Examination of Child Sexual Assault Complainants: Concerns about the Application of s 41 of the *Evidence Act*' (2010) 34 *Criminal Law Journal* 149.

64 See, eg, Patrick Parkinson, Judy Cashmore and Atlanta Webster, 'The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation' (2010) 24 *Australian Journal of Family Law* 313; Catherine M Lee, Christine P M Beauregard and John Hunsley, 'Lawyers' Opinions Regarding Child Custody Mediation and Assessment Services: Implications for Psychological Practice' (1998) 29(2) *Professional Psychology: Research and Practice* 115.

65 Patrick Doreian and Katherine Woodard, 'Fixed List Versus Snowball Selection of Social Networks' (1992) 21(2) *Social Science Research* 216.



had worked for child protection departments in the past. The participants possessed a broad range of experience of child protection matters. The interviews were undertaken in Brisbane, Townsville and Cairns to ensure that both a metropolitan and regional perspective could be gathered.<sup>66</sup> Semi-structured interview guides were created and the same guide was used in each interview. The guide focused on facilitating an in-depth analysis of current practices and challenges associated with working as a lawyer in the child protection field, with a particular focus on their experiences within the various decision-making forums, and what they perceived lawyers had to offer at each stage of the decision-making process.<sup>67</sup>

At the outset it is important to concede the limitations of this approach. The findings reported on here are based on accounts of lawyers who work mostly with parents within the child protection system in Queensland. It is, thus, a view of the child protection system through one set of professional lenses, and cannot be understood as a literal description of the system as a whole.<sup>68</sup> Given that lawyers generally work in an adversarial environment, their role is to represent their clients' interests according to their clients' instructions, and they are likely to see their clients' position in the most favourable light possible. As a result, they may employ the 'rule of optimism' in their work, excusing certain 'deviant' behaviours as cultural practices, assuming parents' 'natural love' for their children, and inappropriately minimising concerns related to child safety.<sup>69</sup> Regardless, the views of lawyers do represent an important account of the operation of the child protection system in Queensland. Lawyers are important actors in the child protection system and their perceived alienation suggests a lack of confidence in the system. Also, their perceptions have the potential to influence the manner in which child protection decisions are made because their approach will affect the practices of other agents within the system.

Thematic analysis of interviews revealed that the lawyers overwhelmingly lacked confidence in the decision-making processes within the child protection system in Queensland. The interviewees' particular concerns can be distilled into two key themes: denial of procedural fairness and concerns regarding evidence and proof. A contextualised discussion of these themes is undertaken below, whereby the qualitative data yielded is both presented and analysed. This is followed by a general discussion on the merits of adversarialism and problem-solving approaches in a child protection context, drawing on the suggestions put forward by the lawyers that were interviewed.

66 In fact, many of the lawyers interviewed in Cairns and Townsville regularly travelled to remote Aboriginal and Torres Strait Islander communities to assist parents and children involved in child protection matters there, so some insights in relation to practices in remote areas were also obtained.

67 Ethical approval was obtained from the Ethics Committee at the University of Queensland. Each interview ran for between 60 and 90 minutes.

68 Robert Dingwall, 'Accounts, Interviews and Observations' in Gale Miller and Robert Dingwall (eds), *Context and Method in Qualitative Research* (Sage, 1997) 51, 52, 54.

69 Robert Dingwall, John Eekelaar and Topsy Murray, *The Protection of Children: State Intervention and Family Life* (Blackwell, 1983) 82. See also Adam Tomison, 'Spotlight on Child Neglect' (Child Abuse Prevention Issues Report No 4, 1995) 7.

#### IV PROCEDURAL FAIRNESS IN THE MAKING OF ADMINISTRATIVE DECISIONS

The principles of natural justice or procedural fairness (used interchangeably here) have always been central to the common law and its protections against abuses of State power.<sup>70</sup> In *Kioa v West*, Mason J explained that it is a ‘fundamental rule of the common law doctrine of natural justice’ that ‘generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.’<sup>71</sup> This is often referred to as ‘the hearing rule’. In addition, the principles of natural justice forbid participation in a decision by a person who is affected by ostensible or actual bias.<sup>72</sup> This is often referred to as ‘the bias rule’. The dictates of the rules of procedural fairness are those ‘which are appropriate and adapted to the circumstances of the particular case’,<sup>73</sup> having regard to the intention of the legislature, and any expectations that the particular Act brings about.<sup>74</sup> The decision-making process as a whole, rather than just isolated ‘sub-decisions’, must be looked to in order to determine whether or not procedural fairness has occurred.<sup>75</sup>

When considering the obligations on a decision-maker, and whether a particular decision-making forum is subject to the rules of natural justice, the courts have considered the following: the statutory framework and any evidence of Parliament’s intentions; the degree of power the forum has over individuals that come within its jurisdiction; the functions and independence of the decision-maker; the nature of the decision being made; the importance of the decision and the gravity of its consequences; and the finality of the decision including potential avenues for appeal.<sup>76</sup> In *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*, Kirby J also considered the degree of confidence the community could have in the forum, and whether public confidence would be shaken if procedures were seen to be unfair or biased.<sup>77</sup> In that case, Kirby J cited the Canadian decision of *Newfoundland Telephone Co v Board of Commissioners*

70 See especially *Cooper v Wandsworth Board of Works* (1863) 143 ER 414. See also *Ridge v Baldwin* [1964] AC 40, 64–5; *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109–110, 112–3, 118; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360. See also John McMillan and Neil Williams, ‘Administrative Law and Human Rights’ in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, 1998) 63, 82.

71 (1985) 159 CLR 550, 582. See also S A de Smith, *De Smith’s Judicial Review* (Sweet and Maxwell, 2007) 347.

72 See especially *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

73 *Kioa v West* (1985) 159 CLR 550, 585. See also *Wiseman v Borneman* [1971] AC 297, 308 (Lord Reid).

74 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 412.

75 *South Australia v O’Shea* (1987) 163 CLR 378, 389–90, 405, 410.

76 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 146, 150; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 294; *Australian National Industries Ltd v Spedley Securities (in liq)* (1992) 26 NSWLR 411, 413, 423, 427; *Gas and Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48, 59. See also Kristina Stern, ‘Procedural Fairness — Its Scope and Practical Application’ (2007) 56 *Australian Institute of Administrative Law Forum* 2.

77 (2001) 206 CLR 128, 150.

of *Public Utilities*, where Cory J said: 'All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine.'<sup>78</sup> Administrative decision-makers are free from many of the constraints that apply to courts, and they necessarily undertake some inquisitorial functions.<sup>79</sup> However, the High Court has stated that the rules of natural justice are so fundamental to legal and governance systems that it 'would require very clear legislative provisions to relieve an adjudicative statutory body from the obligation to comply with such deeply entrenched principles.'<sup>80</sup>

## **A Natural Justice in Child Protection Matters**

In the child protection context, very important decisions are routinely made by departmental officers. These include the initial decision made by child protection officers to remove a child judged to be at risk of harm, and those decisions (related to case planning and contact) that are made in FGMs, or equivalent ADR forums that are convened and chaired by departmental officers. It is our contention that the rules of natural justice should apply to FGMs and their equivalents in other jurisdictions, as well as to removal decisions made by departmental officers.<sup>81</sup> Following the courts' considerations outlined above, there are at least three reasons for this: the grave consequences of the decision, the lack of legislative guidance on procedural rights and the need to maintain public confidence in the system.

### **1 The Gravity of the Consequences**

Decisions made by departmental officers have grave consequences for children and their families.<sup>82</sup> This was confirmed by the lawyers interviewed in this study, who emphasised the power that departmental officers possess, both in terms of the decisions they are empowered to make on their own, and in FGMs. One participant said:

They [child safety officers] are powerful in the eyes of the clients, because they have the power to remove children. They're not deemed powerful when they're before the courts, because the court's power overrules their particular powers, but when they are out and about and they come to your

78 Ibid 151; *Newfoundland Telephone Co v Board of Commissioners of Public Utilities* [1992] 1 SCR 623, 636.

79 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 146 (Kirby J).

80 Ibid 147. See also *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 204. See also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4<sup>th</sup> ed, 2009) 422; Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103.

81 It is well established that the rules of natural justice apply to decisions made by administrative decision-makers; see generally *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In relation to FGMs, it is generally accepted that the rules of natural justice should apply in ADR contexts; see *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

82 See Crittenden and Ainsworth, above n 1.

house and say ‘we want to speak to you about this,’ and you say, ‘well, I don’t want to speak to you, get lost’, they’ll turn around and say, ‘well, if you don’t speak to us we will remove your children’ ... And that’s a continual threat that’s being put to people. They — even though a person is legally represented — they will talk with those people and tell them various things and make various promises: ‘And if you leave Johnny, we’ll give you the kids, and we’ll get a court directive that Johnny can’t see the kids.’ Now that’s really starting to act as a de facto family court.

## **2 Lack of Legislative Guidance on Procedural Rights**

In Queensland the relevant statutory provisions generally provide little guidance regarding the procedures that should be adopted by departmental officers when making these decisions. Much of the detail is left to the department to determine, and is generally in the form of policies and procedures rather than in statutory instruments. The legislative provisions in Queensland concerning FGMs, for example, are concerned only with who may or should attend, and notice requirements.<sup>83</sup> The impression given in the legislation is that the meetings should be informal, inclusive and collaborative, with maximum family participation and with a view to reaching agreement between the parties on a plan for the child’s care and protection.<sup>84</sup>

In this study, the participants reported that FGMs tended to be run in a manner inconsistent with these legislative purposes. Participants’ comments to this effect included:

Family group meetings, whilst in an idealistic world you could get your own clients to attend those, a lot of the feedback I’ve had is that they didn’t feel as if they were totally involved in the process of developing case plans or reviewing those case plans. They didn’t understand a lot of what was going on and they felt like they had no option but to sign off on the case plan even if they weren’t happy with it.

... very often the convenor would try to operate the meeting on the basis of the agenda that the Department have.

The department are too controlling. They will talk right over the top of them. They talk over the top of me.

The lawyers said that, in cases they had been involved in, departmental officers often set the agenda, chaired the discussion and, in many instances, imposed a pre-determined plan upon the family.

83 See *Child Protection Act 1999* (Qld) ss 51G–51YB.

84 In Queensland, see especially *ibid* ss 51G, 51J.

## **B Breaches of Natural Justice: Lawyers' Experiences**

In the interests of protecting children, it is extremely important that public confidence in the child protection system is maintained. Where it is undermined, community members might be discouraged from making reports in instances where they suspect child abuse or neglect has occurred. Indeed, in Queensland, there is some indication that a lack of confidence in the system has led some community service providers to stop reporting cases of abuse and neglect because they believe, based on their past experiences with the department, that they are better placed than the department to assist the family.<sup>85</sup>

In an environment such as this, where important decisions are being made by administrative officials and there is little statutory guidance for decision-makers and no legislated procedural safeguards, it is suggested that the principles of natural justice should apply.

Yet, the lawyers interviewed in this study were generally of the view that the principles of natural justice can be, and sometimes are, ignored in the making of child protection decisions. For example, many of the lawyers were concerned that their clients were not given a fair hearing in the sense that they were not meaningfully encouraged to participate in the decision-making processes. As one participant said:

I think fairness is immediately taken away if you are not able to participate in a decision that has been made about you.<sup>86</sup>

More specifically, many of the lawyers we interviewed spoke about the difficulties their clients experienced participating in family group meetings. Overwhelmingly they expressed the view that their clients needed legal representation to participate, partly because they were so distressed and emotionally vulnerable. One participant said:

Most parents are distressed, angry and upset and can't articulate all the real important stuff. A lot of them will go to family group meetings and cry and then of course they just lose that ability. It's too close for them. It's too emotional.

The rules of procedural fairness in the context of administrative decision-making require that a person's attention be drawn to the critical factors on which the decision is likely to turn so that the person can have an opportunity to deal with them.<sup>87</sup> Yet many of the lawyers interviewed reported that the department did not make their current child protection concerns clear to parents, and that this limited parents' capacity to identify and address the issues in dispute. Participants made comments such as:

85 Douglas and Walsh, 'Mothers, Domestic Violence and Child Protection', above n 5, 502.

86 As to participatory approaches in child protection, see Karen Healy, 'Participation and Child Protection: The Importance of Context' (1998) 28 *British Journal of Social Work* 897.

87 *Kioa v West* (1985) 159 CLR 550, 587.

The only way to deal with these cases so they don't become protracted is to pin child safety down from the outset about what is the nature of the allegations and what is it that you think our client should be doing.

Further, the lawyers interviewed stated that parents were often actively discouraged by the department from seeking legal advice. Indeed, some of the participants maintained that even those parents who were represented were encouraged to engage in discussions with the department without consulting their lawyer. While legal representation is not essential to natural justice, it can assist in its observance, particularly in situations involving the rights and interests of vulnerable individuals who may not understand or be able to participate in the processes otherwise. The lawyers in this study remarked:

The clients will get documents that you won't get, you know, the department will go behind your back and arrange meetings with your client and talk with your client. The client may well compromise their position quite seriously in these so called 'meetings' that the department sets up without your knowledge. There's just an absolute contempt for the legal representation.

A lot of the time when the client has first come to see us and DOCS then engaged and they say, 'well, we have a solicitor, we'd like them there.' — 'Why do you need a solicitor, what have you done wrong?'

I've been told that people have been told, 'don't worry about seeing a lawyer — it'll be worse for you because it will string it out longer.'

The lawyers we interviewed also described situations of both actual and ostensible bias on the part of the FGM convenor. Participants said:

The chairperson who's always employed by the Department of Child Safety, even though they are from a different division, they still are effectively seen by the clients as part of the process.

I've had family group meetings where the person that removed the child is convening the meeting.

The importance of a convenor being neutral in the context of mediation and conciliation is well established.<sup>88</sup> Independence and neutrality is absolutely necessary for rigorous and fair decision-making, and to eliminate the risk of bias or the perception of bias. Perceptions are important because those impacted by decisions will find it difficult to accept a decision that they believe has been unfairly reached.<sup>89</sup> As one participant said regarding case planning and contact decisions:

88 *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360, 364–9. In a child protection context, see Paul Ban, 'Dialogue and Alignment in Preparing Families for Family Group Conferences' (2009) 20 *Australasian Dispute Resolution Journal* 33, 39. As to the role of convenors, see Shirley Jackson and Kate Morris, 'Family Group Conferences: User Empowerment or Family Self-Reliance?' (1999) 29 *British Journal of Social Work* 621.

89 Philip Jamieson, 'The Psychology of Procedural Fairness' (2009) 19 *Journal of Judicial Administration* 127.

I fail to see where there is procedural fairness where the department can bring an application and an order be made right there and then granting custody to the department and then the department then has a say on whether or not there is any contact [between the parent and the child].

In short, generally the lawyers in this study described child protection decision-making processes as being non-collaborative, highly adversarial and sometimes coercive in nature. They described officers of the department as having a set agenda and an expectation that their recommendations would be accepted and implemented by the court. Indeed, one participant made the following remark:

Often in family group meetings, the departmental worker will say 'when we get the order'. I mean it's inflammatory to the parent and inflammatory to me as well.<sup>90</sup>

### **C Procedural Fairness: Conclusions**

It is not suggested that the approach of decision-makers is unlawful. Rather the flexibility of system may have contributed to the development of a very relaxed approach to procedural fairness. However, if it is accepted that the rules of procedural fairness do apply to decisions made by child protection officers (and it is argued that they should), then it appears from the results of this study that these rules are often not being adhered to. The comments made by the lawyers interviewed suggest that the hearing rule and the bias rule are sometimes not adhered to when child protection officers make an initial decision to remove a child, and when they make determinations as part of the FGM process. This failure to comply with the rules of natural justice compromises the capacity of decision-makers to achieve the best possible outcomes for children, and it means that the fundamental rights of parents and children are being breached. It may also have serious implications for child protection departments. It may open their decisions up to legal challenge, since a person is entitled to have a decision set aside if natural justice principles have not been observed.<sup>91</sup> This is appropriate, particularly since it has been found that in many cases where decisions are remitted because a court has held that the rules of natural justice were not initially observed, the decision-maker will subsequently arrive at a different outcome when the rules are adhered to.<sup>92</sup> Further, if the rules of natural justice are regularly breached, lawyers may feel frustrated with and alienated from the system. This is important because it can impact on the nature of their advocacy, and lead to excessive adversarialism.

90 One lawyer added that the court may demonstrate bias by 'rubber stamping' the department's applications:

I've certainly struck the situation in the past with magistrates who say, 'well, I've read the department's position, I will always make this type of order.' And you go, well, that's basically the grounds to ask that the magistrate disqualify themselves on the reasonable apprehension of bias, because they're not prepared to look at the individual case.

91 *Kioa v West* (1985) 159 CLR 550, 603. For an example in the context of child protection, see *Re Katherine* [2004] NSWSC 899, and see generally *J v Lieschke* (1987) 162 CLR 447.

92 Robin Creyke and John Macmillan, 'Judicial Review Outcomes: An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82.

The rules of procedural fairness exist to ensure that the decision is made based on the best available material, so a decision-maker's observance of the rules of natural justice is critical if the best outcomes are to be achieved for children and families.

## V QUALITY OF EVIDENCE IN THE CHILDREN'S COURT

Child protection matters are dealt with in a less formal manner in court than traditional civil proceedings. In Children's Courts around Australia, the rules of evidence do not bind the court, proceedings are to be conducted with as little formality and technicality as possible, and courts are permitted to inform themselves in such a manner as they see fit.<sup>93</sup> The premise behind this is clear — in order for the court to make the best decision possible to bring about protective outcomes for children, all pertinent information should be made available to the court. Yet, it must be borne in mind that while procedural rules may be relaxed, they can never be completely discarded. This has been noted by the High Court in other contexts, for example, in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*, Evatt J remarked:

Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence.' Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.<sup>94</sup>

It is well established that regardless of any applicable rules of evidence, a tribunal must, as a matter of law, base any decisions it makes on 'rationally probative evidence'. That is, decisions should not be made based merely on matters of 'suspicion or speculation' where certain conduct may or may not have occurred.<sup>95</sup> Evidence must always be relevant,<sup>96</sup> and reliable,<sup>97</sup> and there is no reason in law to suggest that this is less the case in child protection matters than any other. Indeed, this seems particularly important in a child protection context because of

93 *Children and Young People Act 2008* (ACT) ss 712, 716; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93; *Care and Protection of Children Act 2009* (NT) s 93; *Child Protection Act 1999* (Qld) s 105; *Children's Protection Act 1993* (SA) s 45; *Children, Young Persons and Their Families Act 1997* (Tas) s 63; *Children, Youth and Families Act 2005* (Vic) s 215; *Children and Community Services Act 2004* (WA) ss 145–6.

94 (1933) 50 CLR 228, 256. See also *Local Government Board v Arlidge* [1915] AC 120, 132, 137, 147.

95 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 156.

96 *Casey v Repatriation Commission* (1995) 60 FCR 510. See also *Goldsmith v Sandilands* (2002) 190 ALR 370, 377; *Nicholls v The Queen* (2005) 219 CLR 196.

97 *R v Board of Visitors of Hull Prison; Ex parte St Germain* [No 2] [1979] 1 WLR 1401, 1411; *Grey v The Queen* (2001) 184 ALR 593; *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 175 ALR 209.



the degree of discretion granted to child protection officers, and the gravity of the implications of decisions made for children and families.

### **A Relevant and Reliable Evidence**

Most of the lawyers interviewed in this study commented that the evidence being presented by child protection officers against parents in court was often dubious in nature. The lawyers said that it was common for child protection offers to 'exaggerate weak material' which was prejudicial to parents. They said that it was common for material to be admitted which was 'full of hearsay', 'full of innuendo', and 'full of opinion which can't be backed up'. Indeed, they provided many examples of situations in which child protection officers had adduced evidence which was misleading or incorrect. They said:

You will have seen affidavits that are 20 pages long that say nothing. Somebody told somebody that somebody said this about that child — possibly once happened — that sort of thing.

Virtually there are no rules of evidence, the way that they run it. We're dealing with a lot of hypotheticals. Probability is taken on someone's personal opinion or their own belief systems ... A lot of the information that's presented to court is either not relevant or is vastly exaggerated so that they can convince the magistrate to give an opinion.

We'll be at a family group meeting and we'll agree to certain things and then we go to court and they'll say, no we didn't agree to that and I was there. They lie about the child's wishes. They say that the child has told them what they want — given the child's only four. They don't provide a copy of the conversation or the questions.

If they dared present some of those documents to the Family Court, they'd want to have a ceremonial burning of the documents.

Many participants said that child protection officers relied on unsubstantiated notifications, criminal charges that have resulted in acquittals and 'histories' of alcohol or drug abuse where the person may have been clean for some time, to prove their case. Many participants made remarks along these lines:

They'll go to court and they'll have this history that could be seven or eight pages long but of the notifications, maybe only five or six of them have been confirmed ... it'll cover a period of years. It won't be, you know, all of these things happened in three or four days. It'll be over a period of years.

So it went to trial and he was acquitted. It wasn't even that it was charges dropped. But Child Safety doesn't care about that. They said, it doesn't matter — we've substantiated it anyway.

Some of these comments appear inflammatory. They might be explained by the tendency of lawyers to identify closely with their clients. It might also be speculated that lawyers generally have a preference for adversarial processes,

given the nature of their training. However, these comments are not without some support. For example, the NSW Supreme Court addressed these same issues in the case of *Re Georgia and Luke [No 2]*.<sup>98</sup> There, the Court stated:

The [DOCS] officer refers to a '*history of mental health issues*'. There is not the slightest evidence before this Court of a '*history of mental health issues*', whatever that vague phrase is intended to mean. Where the liberty of the subject is concerned, precise evidence justifying deprivation of liberty is required by the Court. The Court will not countenance the removal of a child from his or her parents on evidence of this type. If DOCS has information in its files which can properly be described as a '*history of mental health issues*', that information must be presented to the Court with particularity. The Court will not condone the removal of a child from his or her parents on nothing more than DOCS' assurance that it has good reason for doing so.<sup>99</sup>

And later:

The [DOCS] officer refers to '*the history of domestic violence*' between the parents. Again, although this is a highly emotive phrase, there is no evidence of any particularity at all of any domestic violence. I repeat the remarks I have made above: children are not to be taken from their parents on the basis of vague and prejudicial 'evidence' such as this.<sup>100</sup>

## **B The Weight of Evidence**

Some of the participants we interviewed noted that magistrates will vary in the weight they ascribe to such 'evidence', and that even where a fact-finder does not weigh such 'evidence' heavily, its prejudicial effect can linger. Participants also expressed concern that parents would be unable to effectively challenge such 'evidence', even where they may have reasonable objections to it, or dispute its interpretation. One said:

If the parent says it didn't happen or doesn't accept any of the evidence, you're punching at shadows if you don't know where the material is or where it's come from or give them an ability to respond ... you don't really know what you're answering.

All the court has before them is the evidence that DOCS have. They don't always show their hand. They don't give everything to the court, they only give the court what favours their case ... So our clients are prejudiced from the beginning. DOCS won't tender the full file and present file notes of

98 [2008] NSWSC 1387 (19 December 2008).

99 *Ibid* [51] (emphasis added).

100 *Ibid* [54] (emphasis added).

what really happened or give file notes of conversations that really did occur. It's trial by ambush.<sup>101</sup>

The lawyers in this study were overwhelmingly of the view that it was difficult for parents to receive a 'fair trial' and they supported a strong focus on process, including stricter enforcement of the rules of evidence, to level the playing field. One of our participants said:

There's [sic] no penalties to these people. They can write whatever they like. If we as officers of the court misinform the court, there's [sic] severe penalties to us. But we go against people who have a free ticket to write and say what they want, and then we have to try to combat that.

The lawyers we interviewed believed that, at the very least, there should be a requirement that the evidence meet some threshold standard of probity. One said:

I think it's about the system saying that there is a threshold that should be met and if you don't meet the threshold, the matter gets struck out. If it gets struck out, you have to go away and prepare your material properly.

One judge has expressly supported this view in the family law context; Carmody J said 'just because the case is a family one where the dominant principle is welfare does not mean that unsatisfactory evidence can be afforded a greater weight than it can properly bear.'<sup>102</sup>

### C The Burden of Proof

Related to this is the issue of proof. In all Australian jurisdictions, legislation states that, in child protection matters, evidence must be proved on the balance of probabilities.<sup>103</sup> However, many of the lawyers in this study believed that a lesser standard was being applied by some magistrates in Children's Court matters. They said that, at times, some magistrates seemed to be 'rubber stamping' the department's applications for orders.<sup>104</sup> Participants said:

101 In Queensland, issues around disclosure by government departments were raised in the 2008 review of the Queensland civil and criminal justice systems. Moynihan noted there that '[t]imely disclosure minimises delay and supports the effective use of public resources', it 'fosters negotiation and reduces wasting of resources', and it also 'serves to balance the inequality of power and resources between the executive government [and its citizens]': Martin Moynihan, 'Review of the Civil and Criminal Justice System in Queensland' (Report, Queensland Government, December 2008) 86.

102 *Murphy v Murphy* [2007] FamCA 795 (29 January 2007) [240].

103 *Children and Young People Act 2008* (ACT) s 711; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 93(4)–(5); *Care and Protection of Children Act 2009* (NT) s 95; *Child Protection Act 1999* (Qld) s 105(2); *Children's Protection Act 1993* (SA) s 45(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 63(4); *Children, Youth and Families Act 2005* (Vic) s 215(1)(c); *Children and Community Services Act 2004* (WA) s 151.

104 This finding is not limited to Queensland. One recommendation of the Tasmanian Commissioner for Children in a recent inquiry was that courts seek to 'prevent the perception that statutory intervention is undertaken by the Executive Government without judicial oversight': Paul Mason, 'Inquiry into the Circumstances of a 12 Year Old Child Under the Guardianship of the Secretary' (Final Report, Commissioner for Children, July 2010) 4.

It seems that it doesn't matter what a respondent has got to say, it is purely what the department has got to say. That is even less than a balance of probabilities.

It's this 'might be at risk' that gets me.

Of course, the lawyers were not oblivious to the pressures placed on magistrates in child protection matters. They made comments including:

I can see what's in the back of the magistrate's mind — they don't want to be on the front page of the Courier Mail a couple of weeks after they've made a decision to have children returned because the department said there was a slight risk of something happening. They believe that will be their fault.

The magistrate will err on the side of caution ... The magistrate's like, well, you know, if I do this I could be putting the child at risk.

### **D Challenging the Evidence**

Regardless of the concerns expressed by lawyers interviewed on how evidence was dealt with by decision makers, the legislation does require that a certain evidentiary standard be met before the court can consent to the removal of a child. It is imperative that this be complied with to prevent unfair and damaging outcomes both to children and to their families. The lawyers we interviewed believed that the only way to ensure that these standards are tested and affirmed is by ensuring that parents appear with advocates.

In cases where they consider the court erred in its assessment of the probity or weight of the evidence, or that the standard of proof was applied incorrectly, it may be open to lawyers to appeal the decision of the Children's Court.<sup>105</sup> However, as has been discussed, the rules of evidence do not bind the Children's Court, and the court is permitted to inform itself in such a manner as it sees fit. As a result, it may be difficult to develop a strong case for appeal based on the strength of the evidence. It will be very difficult to prove that a judicial officer placed more weight on an aspect of the evidence than was warranted, for example. Even where a lawyer does identify a strong case, he or she will require instructions from a client who may be exhausted by the processes they have already confronted and unwilling to continue. Cost is also an issue, and lawyers in many cases will find that finances or legal aid are not available. They may be unwilling to continue to act on a pro bono basis for the client.<sup>106</sup>

105 In Queensland, the appellate court is the Court of Appeal; see *Child Protection Act 1999* (Qld) ss 117–21.

106 For a discussion on legal aid, pro bono and child protection matters, see Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35 *Melbourne University Law Review* 621.

## **VI COLLABORATION WITHOUT COMPROMISING FAIRNESS**

In the context of administrative decisions (that is, decisions of child protection officers), such as the initial decision to remove a child and determinations made at FGMs, a number of participants commented that parents were being denied procedural fairness because, on a practical level, they were unable to know or answer the case being made against them, or were interacting with (potentially) biased decision-makers. With regard to the court system, participants stated that many children were being removed from their parents based on evidence that lacked probative value. Participants believed that, as a result, children were being removed from their parents, not reunified with their parents, or delayed in reunification with their parents, unnecessarily.

Much of the literature suggests that the role of child protection officers should be to work with families to bring about protective outcomes for children.<sup>107</sup> In many cases, this would involve providing practical support to families, and ensuring that they were engaged with required services.<sup>108</sup> Most importantly, it would involve getting to know the child, the parents and other important individuals in the child's life so that decisions could capitalise on the strengths of that particular family unit, and take into account the wishes and capacities of the individuals concerned. The lawyers interviewed had diverse and inconsistent views about the appropriate approach to decision-making. Some recommended greater collaboration between families and the department while others advocated for increased adversarialism.

### **A Greater Collaboration: Supporting Families**

Some of the lawyers in this study made recommendations to this effect. They suggested that child protection authorities should 'work with families, not against them', and that the emphasis should be on supporting families to keep their children at home. This is a resource-intensive approach, and would require a wide range of services to be made available to families, including respite, welfare and practical assistance, and social and emotional support.<sup>109</sup> The lawyers we interviewed differed in their views on whether child safety departments were the appropriate body to deliver these services, however many suggested that the department should at least play a role in brokering these services. These lawyers said that the role of lawyers should be to assist in this process, supporting families in an ongoing dialogue with the department which is aimed at bringing about

107 See, eg, James Wood, 'Report of the Special Commission of Inquiry into Child Protection Services in NSW' (Report, State of NSW, November 2008), see especially Recommendation 10.1; Queensland Crime and Misconduct Commission, 'Protecting Children: An Inquiry into Abuse of Children in Foster Care' (Report, 5 January 2004); Maria Harries, Bob Lonne and Jane Thomson, 'Protecting Children and Caring for Families: Re-Thinking Ethics for Practice' (2007) 2 *Communities, Children and Families Australia* 39.

108 Walsh and Douglas, 'Legal Responses to Child Protection, Poverty and Homelessness', above n 30.

109 *Ibid.*

protective outcomes for children through delivery of services and support to families. They made comments including:

I think that we could all work a lot more collaboratively to make sure that people pass through the system in what is a very stressful, sensitive and difficult time, but in which hopefully there's a lot of learning which will help parents to understand how not to get involved again with Child Safety because they are fulfilling their parental duties.

[The system] needs to be changed so it's not so adversarial but rather an ongoing — I suppose — attempt to mediate and an opportunity for everybody to be able to have ongoing discussions rather than collection of evidence. I suppose the issue really is the department being far more flexible in their approach and working with the parents and their legal representatives.

On the other hand, some of the lawyers we interviewed believed that calls for this kind of approach were not realistic because it would not be possible for child protection officers to work in a supportive way with parents. Some stated that child protection officers would experience role conflict if they were directed to undertake the policing and enforcement of child protection, as well as undertaking supportive, therapeutic duties. One participant said:

The department isn't a therapeutic body. I feel that if they're going to do any constructive work with families it really should be another agency doing the work, because you can't take the kids and expect to have a good relationship with the families and work constructively with them. It's just too difficult and I think it creates a lot of fear in the family.

Many participants lacked faith in the FGM process, and argued that any culture shift would be difficult, if not impossible, to achieve within the existing framework. One lawyer said:

I've had matters where they've had three family group meetings where nothing has been achieved, and I'm just reaching a point where, really, what I need to do is cross-examine workers. What's the point of sitting around trying to sort this out? But I mean that's what the system relies on — that the parent will just give up.

Consistent with this comment, the NSW Supreme Court in *Re Georgia and Luke [No 2]*, mentioned above, stated that there seemed to be a culture of 'intransig[ence]' within the department, involving 'gross abuse of power'.<sup>110</sup> The Court remarked: 'Why are the DOCS officers taking this attitude? I regret to say that I am driven to only one conclusion: an intransigent refusal to acknowledge a mistake, regardless of the consequences to the children.'<sup>111</sup>

110 [2008] NSWSC 1387 (19 December 2008) [25], [74].

111 *Ibid* [25].

## **B Greater Adversarialism: Using the Courts**

It was on the basis of these kinds of observations that many of the lawyers we interviewed actually advocated for a more adversarial approach to be taken in child protection matters, rather than a more collaborative, inquisitorial one. This is perhaps not surprising given that lawyers' training equips them for this approach. Nevertheless, many believed that the court, rather than ADR processes, was the most appropriate forum in which to resolve child protection matters. One said:

If you are removing kids from a family of origin there needs to be an accountable system that reviews that and oversights [sic] it. I think it should be the legal system. I think how the legal system does that can be changed and modified and adapted, but to do that, the professionals in the system need to advocate around those changes rather than complain about it being a hopeless system.

Some of the lawyers made suggestions as to how the system might be modified to enable the legal system to fulfil this role more effectively. Two of the lawyers in this study suggested that a system of case management be introduced into the Children's Court. This would mean that greater judicial control of proceedings would be taken, with a view to 'facilitat[ing] the just, quick and cheap resolution of the real issues in the dispute or proceedings'.<sup>112</sup> They said:

We need case management in this system. It's outrageous the time that the Department takes to litigate these matters and the time they're before a court. It's outrageous the amount of times they go for mention where nothing happens. It's outrageous the ability the Department has to adjourn when they should be put to proof and go to final hearing. If there is a consideration under the Act that there be a timely resolution, it's about children and young people's lives and decision-making around families. It's not around a court calendar and convenience.

## **VII IDEAS FOR REFORM**

Two key suggestions emerge from the interviews in relation to the improvement of existing decision-making systems. As noted earlier, some lawyers suggested that a case management plan could be developed while some lawyers suggested improvements to FGMs. There are a number of models that could be drawn upon if such reforms were to be considered. These ideas are discussed below.

112 *Civil Procedure Act 2005* (NSW) s 56(1).

## **A Case Management in the Children's Court — How Could It Be Done?**

Case management in its most basic sense has been effectively implemented in a number of civil law areas. By increasing judicial control over the manner in which proceedings are conducted, case management has the potential to help address due process and evidence concerns by ensuring that only evidence that is considered helpful by the court is raised.

In the *Civil Procedure Act 2005* (NSW), case management principles are firmly embedded and are to be used across the board.<sup>113</sup> Under that Act, courts are instructed to eliminate unreasonable delays, by (for example) giving directions that limit the time taken by the hearing, or the number of documents tendered in evidence, and other directions aimed at facilitating the speedy determination of the real issues between the parties in civil proceedings.<sup>114</sup>

The 2006 amendments to the *Family Law Act 1975* (Cth) contained a number of provisions that provided for a 'less adversarial approach' to be adopted in children's cases.<sup>115</sup> One version of this approach, the Children's Cases Program, was first piloted in Sydney.<sup>116</sup> Under this approach, the judge takes a more controlling and directive role. By the first day of the hearing, affidavits will have been filed and the judge will have read the material. This enables the judge to discuss with the parties, on the first day of the hearing, how the case will progress and what evidence will be most valuable, and thus acceptable, to the court. Lawyers present evidence and make submissions in much the same way as usual, however judges encourage greater participation from the parties, inviting them to speak for themselves where possible. Further, the court is supported by a 'Family Consultant' who acts as an advisor to the court, and something of an expert witness, regarding the needs of the child and what would be in his or her best interest.<sup>117</sup>

113 See Ronald Sackville, 'The Future of Case Management in Litigation' (2009) 18 *Journal of Judicial Administration* 211.

114 *Civil Procedure Act 2005* (NSW) ss 59–63.

115 See *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

116 Two evaluations of this program were undertaken: see Rosemary Hunter, 'Evaluation of the Children's Cases Pilot Program: A Report to the Family Court of Australia' (Report, June 2006); Jennifer E McIntosh, 'The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being' (Final Report to the Family Court of Australia, Family Transitions, March 2006). See the detailed discussion of these evaluations in Hunter, 'Child-Related Proceedings under Pt VII Div 12A of the *Family Law Act*', above n 11.

117 Children's Court Clinics, established first in Victoria, undertake a similar role: psychiatrists and psychologists undertake independent assessments of children's needs and wishes and present these findings to the court so that a balanced picture is ultimately put forward: see Patricia Brown and Prue Holzer, 'The Victorian Children's Court Clinic' (2006) 14(2) *Child Abuse Prevention Newsletter* 15.



Certainly, the literature suggests that there are a number of features that are essential to successful 'problem-solving' courts.<sup>118</sup> The judicial officer must be closely involved in each case. This means that, where possible, the same judicial officer should take the case from start to finish. Further, the judicial officer needs to have sufficient court time available to work closely with individuals. The presence of support people is also critical. This includes the involvement of specialist court liaison officers who have experience and knowledge of the issues being addressed by the court, and can provide specialised advice and assistance to the court.<sup>119</sup> Other service providers may also attend court, so that immediate referrals to support agencies may be made. A collaborative approach is essential, whereby the judge, court liaison officer, parties, lawyers and service providers work together to create a plan that will assist the person to achieve agreed goals.<sup>120</sup>

Children's Courts would benefit from these features. Research has shown that people are often more willing to accept a decision, even if it goes against them, if they feel they have been treated fairly and listened to.<sup>121</sup> In child protection matters, this could be achieved by devoting more time to each case, and by encouraging parents (and children, where appropriate) to actively participate in proceedings.<sup>122</sup> If an experienced and specialised court liaison officer was available to undertake an assessment with all members of the family, and make recommendations regarding the child's best interests and the support services available to assist the family, the court would not be forced to rely so heavily on the (often one-sided) assessment conducted by the child protection department. If parents could be referred to services on the spot to support them in their parenting role, a court might feel less compelled to support the department's application for removal.

118 Problem solving courts are those that deal with a particular cohort of individuals (usually defendants), or a particular legal issue; examples include Drug Courts, Domestic Violence Courts, Mental Health Courts and Special Circumstances Courts. See especially Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) ch 9; Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23 *Law and Policy* 125; Harry Blagg, 'Problem-Oriented Courts' (Research Paper, Law Reform Commission of Western Australia, March 2008).

119 The Children's Court Clinic attached to the Melbourne Children's Court provides specialist advice to the Court and support to children, thereby providing something of a court liaison role. Indeed, the Australian Law Reform Commission recommended that similar clinics be introduced in Children's Courts around Australia: Australian Law Reform Commission, *Seen and Heard*, above n 9, [13.121]–[13.122].

120 The Special Circumstances Courts in Melbourne and Brisbane, and the Neighbourhood Justice Centre in Melbourne, provide excellent models of this kind of approach, offering 'on-the-spot' service delivery to persons experiencing disadvantage who interact with the court system: see Anne Condon and Annie Marinakis, 'The Enforcement Review Program' (2003) 12 *Journal of Judicial Administration* 225; Tamara Walsh, 'The Queensland Special Circumstances Court' (2007) 16 *Journal of Judicial Administration* 223; *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic); Sarah Murray, 'Keeping It in the Neighbourhood? Neighbourhood Courts in the Australian Context' (2009) 35(1) *Monash University Law Review* 74.

121 Jamieson, above n 89.

122 Justice Peter W Young, 'Current Issues: Are Trial Courts Too Summary?' (2001) 75 *Australian Law Journal* 585.

## B Improving Family Group Meetings

The description of FGMs provided by lawyers in this study suggests that FGMs are unlike most other ADR processes.<sup>123</sup> FGMs, unlike guardianship boards and mental health tribunals, are generally not chaired by neutral persons; rather the chairperson is most often an employee of the same Department that is seeking, or has obtained, a child protection order in respect of the child. Guardianship boards take an informal, collaborative approach to reaching a decision, which is very different to the adversarial environment of many FGMs. Mental health boards and tribunals are generally more adversarial in nature, but their decisions are often scrutinised by a judicial officer, unlike the plans arrived at in FGMs which are rarely subject to judicial scrutiny.

According to the lawyers interviewed in this study, the FGMs that are held in Queensland bear little resemblance to the ‘family group conferences’ upon which they were modelled. Family group conferences originated in New Zealand in the 1980s as a means of helping families in conflict to develop plans to ensure the safety and wellbeing of children.<sup>124</sup> Under the New Zealand model, family group conferences are facilitated by an independent person, and are held at a venue that maximises family participation.<sup>125</sup> The key feature of family group conferences is that they put the family at the centre of the decision-making process, based on a belief that families are able to make their own decisions to protect children if they are properly prepared and informed.<sup>126</sup> There are three stages to the process: the information stage where the family is informed by professionals of the results of any assessments, and what supports are on offer to the family; the ‘quiet time’ stage where the family is given an opportunity to discuss this information privately; and the final stage where everyone comes together to formulate and implement a plan.<sup>127</sup> The plans formulated by parents and professionals at family group conferences are intended to be an alternative to a court order, as parents are empowered to bring about their own protective outcomes for their own children.<sup>128</sup>

Preparation is considered one of the keys to success in the New Zealand family group conferencing model. It is during this time, prior to the first formal meeting, that the convenor gets to know family members, and all parties are appraised on what the current child protection concerns are.<sup>129</sup> According to the lawyers

123 Note that the description of the lawyers in this study concurs with the reports of other professionals involved in child protection matters; see Heather Douglas and Tamara Walsh, ‘Mothers and the Child Protection System’ (2009) 23 *International Journal of Law, Policy and the Family* 211.

124 Peter Marsh, ‘Partnership, Child Protection and Family Group Conferences — The New Zealand Children, Young Persons and Their Families Act 1989’ (1994) 6 *Journal of Child Law* 109.

125 See Ban, above n 88, 39.

126 Leone Huntsman, ‘Family Group Conferencing in a Child Welfare Context: Literature Review’ (Research Report, NSW Department of Community Services, July, 2006).

127 See generally Ban, above n 88; Elaine Walton, Margaret McKenzie and Marie Connolly, ‘Private Family Time: The Heart of Family Group Conferencing’ (2005) 19(4) *Protecting Children* 17; Carol Lupton and Paul Nixon, *Empowering Practice? A Critical Appraisal of the Family Group Conference Approach* (Bristol, 1999).

128 See Harris, above n 59.

129 Ban, above n 88, 34.

interviewed in this study, there is very little preparation done with the family prior to a FGM in Queensland. For those who are represented, the lawyer will undertake this role, but for those who are not, no preparation may be done with them at all. One participant said:

We might do a lot of preparation prior to going into the family group meeting with encouraging the department to identify the issues prior to us attending the meeting which they don't do with a lot of clients who are going on their own even though they're meant to. So the client just turns up, no idea, no preparation, and is sort of put on the spot to try to respond.

Based on the comments of the lawyers we interviewed, changes are required to the Queensland FGM model if it is to work effectively. First, all FGMs should be convened by an independent facilitator, that is, someone neutral rather than an employee of the department. This would remove the existence, or the perception, of bias. Interestingly, some participants in this study had had some experience with FGMs that were convened by people other than the departmental officers. Due to staff shortages, on some occasions in south-east Queensland, the department will engage an external organisation to convene some FGMs.<sup>130</sup> These FGMs were spoken of very positively, and seemed to conform much more closely to legislative intentions, and the New Zealand model. Research conducted in Victoria has indicated that the importance of a skilled neutral party acting as a convenor cannot be underestimated. Acting in a conciliatory manner, running conferences informally and listening to parents have been found to be key indicators of conference success.<sup>131</sup>

Second, a genuine discussion needs to occur with families, instead of an adversarial approach being taken to proceedings. A fact-finding process needs to be engaged in which provides all sides with an opportunity to be heard, and which allows parents to respond to allegations made by the department regarding their parenting. This would allow for all versions of what is 'real' to be considered and respected. The facilitator should rely on external professionals, including independent social workers or psychologists, or separate representatives where possible,<sup>132</sup> to make recommendations as to what is in the best interests of the child, so that the views of the department are not solely relied upon for this purpose.

Further to this, there should be some greater accountability surrounding the case plans that are ultimately drafted. Since case plans effectively represent a 'legal outcome', they should be subject to judicial scrutiny. This could be achieved simply by following the New South Wales model. In New South Wales, 'care plans' developed by agreement in the course of ADR processes may be registered with the Children's Court and the Court may make orders giving effect to the care plan where it is satisfied that it is consistent with the Act, has been freely

130 That external organisation is the Logan Youth and Family Service.

131 Sheehan, above n 9; Anne Markiewicz, 'The Pre-hearing Convenor: A Skilled Practitioner Chairing Conferences in the Children's Court of Victoria' (1996) 21(4) *Children Australia* 22.

132 Separate representatives are lawyers whose purpose is to make recommendations regarding the best interests of the child based on a process of assessment; Megan Giles, 'The Separate Representation of Children in Child Protection Proceedings' (2001) 21(1) *Proctor* 18.

entered into, and parties other than the department have received independent advice concerning its provisions.<sup>133</sup> If all case plans were registered with the Children's Court, and only implemented if these prerequisites were met, the FGM process would be made more transparent and accountable, which is critical to the protection of the fundamental rights of children and families.

## VIII CONCLUSIONS

In *J v Lieschke*, Wilson J of the High Court said: 'Neglect proceedings are truly a creature of statute, neither civil nor criminal in nature. They are therefore sui generis.'<sup>134</sup>

Decision-making in a child protection context does have many unique qualities. Difficult decisions must be made regarding a vulnerable group whose wishes often cannot be ascertained, but whose lives will be profoundly affected by any intervention initiated. The amount of distress caused by any intervention, or threat of intervention, is enormous, and this trauma is often ongoing regardless of the ultimate outcome of proceedings.

Despite the evidence that collaborative, and preferably out-of-court, decision-making processes are most appropriate in disputes involving children and families, the lawyers interviewed for this study consistently claimed that, in their view, informality can sometimes lead to a lack of procedural fairness. Bearing in mind the seriousness of child protection determinations, this would appear inappropriate. Yet, in the view of many lawyers interviewed in this study, children were being removed from their family unit in situations where the evidence against the parents lacked probative value.

The lawyers in this study believed that child protection officers conducted themselves in a highly adversarial manner. The excessive scrutiny placed upon child protection departments by the community, and particularly the media, makes it understandable that child protection officers might take an over-cautious approach to their work. However it must be borne in mind that the lawyers interviewed for this study generally acted for parents of children identified to be at risk. They are, therefore, likely to see their clients in the best possible light and this may impact on their perceptions of the system. Also, lawyers' primary training is in adversarial technique and some may begin with an attitude against settlement.<sup>135</sup> At least one participant in this study recognised that the manner in which lawyers conduct themselves also impacts on the extent to which collaboration is possible. She said:

133 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38. A similar scheme operates in the ACT, see *Children and Young People Act 2008* (ACT) ss 390–3.

134 (1987) 162 CLR 447, 451.

135 See, eg, David Luban, 'Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers' (2003) 91 *California Law Review* 209.

I think some lawyers in the way they litigate also adds to the adversarial nature ... My view is that these young children and young people are watching that and are learning from that and, from a simple point of view, if that's the framework they operate in, that's how they're going to communicate ... It's about thinking about what are the longer term implications? How do I teach or how do I demonstrate or how do I role model how I communicate?

Regardless, the risk is that if the lack of confidence in the child protection system that was expressed by lawyers interviewed for this study is not addressed in some way, lawyers are likely to resort to ever higher levels of adversarial behaviour. This would seem to be ultimately counterproductive from the perspective of the best interests of children, understood in its 'wide' sense.<sup>136</sup> While the changes we suggest may not lead to different outcomes in individual cases, we argue that given the gravity of the decisions made in this context a strong focus on process is important. Any successful system of decision-making in child protection matters will require lawyers, other relevant professionals, and the department, which is after all the statutory parent of many of these children, to model collegiality and collaboration, within a system that values fairness and accountability.<sup>137</sup> It seems that only then will the best protective outcomes for children, and supportive outcomes for families, be achievable.

136 See Kordouli, above n 7.

137 Lack of collaboration between domestic violence support workers acting for mothers of children who are subject to child protection intervention and child protection workers has been discussed elsewhere: see Douglas and Walsh, 'Mothers, Domestic Violence and Child Protection', above n 5.

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : JT -v- CHIEF EXECUTIVE OFFICER,  
DEPARTMENT FOR CHILD PROTECTION &  
FAMILY SUPPORT [2014] WASC 200

**CORAM** : COMMISSIONER SLEIGHT

**HEARD** : 28 & 29 MAY 2014

**DELIVERED** : 3 JUNE 2014

**FILE NO/S** : SJA 1003 of 2014

**BETWEEN** : JT  
Appellant

AND

CHIEF EXECUTIVE OFFICER, DEPARTMENT  
FOR CHILD PROTECTION & FAMILY SUPPORT  
First Respondent

A CHILD  
Second Respondent

---

**ON APPEAL FROM:**

**Jurisdiction** : CHILDREN'S COURT OF WESTERN AUSTRALIA

**Coram** : MAGISTRATE C P CRAWFORD

**File No** : CC 481 of 2013

---

*Catchwords:*

Interim application by parent dismissed - Appeal - Child in provisional care - Failure of Chief Executive Officer to apply for an order as soon as practicable - whether protection proceedings invalid - Whether Chief Executive Officer required to return child to parent - Whether error of fact - Review of discretionary interim orders

*Legislation:*

*Children's Court of Western Australia Act 1988 (WA)*  
*Children and Community Services Act 2004 (WA)*  
*Criminal Appeals Act 2004 (WA)*  
*Criminal Procedure Rules 2004 (WA)*  
*Interpretation Act 1984 (WA)*  
*Mental Health Act 1996 (WA)*

*Result:*

Appeal allowed  
Interim order made for child to be returned to the appellant

*Category:* A

**Representation:**

*Counsel:*

Appellant : In person  
First Respondent : Ms C J Thatcher  
Second Respondent : Mr S Walker

*Solicitors:*

Appellant : Not applicable  
First Respondent : State Solicitor for Western Australia  
Second Respondent : Rajesh Saharan

**Case(s) referred to in judgment(s):**

ABC v Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 8 CLR 199  
Australian Broadcasting Corporation v O'Neil [2006] HCA 46; (2006) 227  
CLR 57  
Avsar v Binning [2009] WASCA 219  
Beecham and Group Ltd v Bristol Laboratories Pty Ltd [1968] HCA 1; (1968)  
118 CLR 618  
Cash Converters Pty Ltd v Hila Pty Ltd (1993) WAR 471  
Chief Executive Officer, Department for Child Protection v B (a child) [2008]  
WASC 174  
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118  
House v The King [1936] HCA 40; (1936) 55 CLR 499  
Ibrahim v Herring [No 3] [2011] WACA 265  
Johnson v Cetin [2011] WASC 344  
Michael v The State of Western Australia [2007] WASCA 100  
Minister for Immigration and Multicultural Affairs v Jia Legeng [2001] HCA  
17; (2001) 205 CLR 507  
O'Connell v The State of Western Australia [2012] WASCA 96  
PR v Chief Executive Officer of the Department of Child Protection [2008]  
WASC 228  
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;  
(1998) 194 CLR 355  
PVS v Chief Executive Officer, Department for Child Protection [No 2] [2011]  
WASC 318  
S (a child) v Chief Executive Officer of the Department of Child Protection  
[2008] WASC 229  
The Commonwealth v Baume [1905] HCA 11; (1905) 2 CLR 405  
Warren v Coombs [1979] HCA 9; (1979) 142 CLR 531



1     **COMMISSIONER SLEIGHT:** This is an appeal by a mother against an order made by her Honour Magistrate Crawford dismissing an application dated 14 November 2013 for an interim order that the mother's daughter be returned to her.

2             A brief history of the matter is as follows:

- (1)     On 12 October 2013 the child was taken into the provisional protection and care of the Chief Executive Officer (the CEO) of the Department for Child Protection & Family Support (the Department) pursuant to 37 of the *Children and Community Services Act 2004* (WA) (the CCS Act).
- (2)     On 30 October 2013 the CEO made an application for a protection order (time-limited). The application sought a protection order for a period 12 months. The return date on the application was 4 November 2013. On the return date the application was adjourned and has been further adjourned several times. As yet the substantive application has not been heard.
- (3)     On 14 November 2013 the mother filed an application for a variety of interim orders, including that the child be returned to the mother; and/or alternatively, the mother have more contact with the child.
- (4)     On 20 December 2013 the mother's application for an interim order was heard by the magistrate who dismissed the mother's application for return of the child and adjourned the application for increased contact. The mother appeals against the decision to dismiss her application for an interim order for the return of the child to the mother's care.

### **Right of appeal**

3             The right of appeal is contained in s 42 of the *Children's Court of Western Australia Act 1988* (WA) which provides a right of appeal against 'any finding, order, or other decision on the hearing of an application under Part 4 or 5 of the [CCS Act]'

4             The application by the mother for an interim order was an application under pt 5 of the CCS Act and therefore the decision of the magistrate may be the subject of an appeal. This is notwithstanding that the order made by the magistrate was on an application for an interim order. The right of an appeal given by s 42 of the *Children's Court of*

*Western Australia Act* is not limited to the findings, orders or other decisions related to an application to finally determine protection proceedings: *PR v Chief Executive Officer of the Department of Child Protection* [2008] WASC 228 [33]; *S (a child) v Chief Executive Officer of the Department of Child Protection* [2008] WASC 229 [15] - [49]; *Chief Executive Officer, Department for Child Protection v B (a child)* [2008] WASC 174 [3]. The fact that an appeal lies on an interim order is recognition of the important issues that can arise on an interim basis in protection proceedings dealing with the potential impact of the protection and care of children and the rights of parents.

5 Section 41 of the *Children's Court of Western Australia Act* provides that the right of appeal is made under and subject to pt 2 of the *Criminal Appeals Act 2004* (WA). This provision creates some awkwardness as pt 2 of the *Criminal Appeals Act* is by its provisions primarily concerned with appeals against criminal decisions made by a court of summary jurisdiction. Part 2 provides that the grounds of appeal may be made on one or more of the following grounds:

- (a) that the court of summary jurisdiction -
  - (i) made an error of law of fact, or of both law and fact;
  - (ii) acted without or in excess of jurisdiction
  - (iii) imposed a sentence that was inadequate or excessive;
- (b) that there has been a miscarriage of justice.

6 Pursuant to s 9 of the *Criminal Appeals Act*, leave to appeal is required in all cases. The appeal by the mother will need to come within the grounds of appeal as allowed under the *Criminal Appeals Act* (clearly the issue of sentencing does not arise in this case) and also leave will need to be obtained: *S (a child) v CEO of the Department of Child Protection* [22] - [23].

### **Grounds of appeal**

7 To explain the grounds of appeal in these proceedings, it is important to note that the mother is self-represented. The appeal notice lodged by the mother is handwritten by her on a Form 20. The appeal notice contains numerous annotations which creates some confusion in identifying precisely the grounds of appeal. In the appeal proceedings the mother lodged four very lengthy affidavits. These affidavits contained some new evidence but were largely in the form of written submissions.

A procedural order was made during the hearing of the appeal that the affidavits would be treated simply as written submissions and any factual material contained in the affidavits would be disregarded. From these written submissions, the oral submissions presented by the mother and from a written summary presented by the mother on the second day of the hearing, I believe that the grounds of appeal can be fairly reduced to the following:

- (1) The learned magistrate made an error of fact or law in finding that an opinion expressed by a consultant psychiatrist Dr Stevens was for the limited purpose of ascertaining whether there was a psychiatric or other mental illness which would warrant an involuntary admission under the *Mental Health Act 1996* (WA) and this assessment was of an entirely different nature to the issue of the risk to the child.
- (2) A miscarriage of justice occurred because on the material before the learned magistrate she ought to have granted an interim order for an immediate return of the child to the mother.
- (3) A miscarriage of justice occurred because of procedural unfairness. The unfairness being:
  - (a) a bias in favour of the CEO;
  - (b) the hearing took place without the mother and the representative of the child being served with an affidavit of [suppressed] sworn on 8 November 2013 and filed by the CEO in the proceedings;
  - (c) the learned magistrate failed to take into account the contents of an affidavit sworn and filed by the mother on 14 November 2013.

8 The appeal initially came before Corboy J for hearing on 27 March 2014 but, unfortunately, the appellant mother did not attend and the appeal was adjourned. At the hearing on 27 March 2014 Corboy J made orders joining the child as a second respondent and leave was given for the child to be represented by counsel. Counsel appearing for the child gave notice that there may be a need for the court to consider whether the substantive application for a protection order in the Children's Court was invalid as a result of the failure of the CEO to comply with a requirement under s 38 of the CCS Act to make an application within two working days after the child was taken into provisional protection and care

pursuant to s 37 of the CCS Act. Further written submissions were invited on this issue and both the first respondent and the second respondent filed supplementary written submissions dealing with this issue.

9 On the hearing of the appeal this issue was fully agitated and, in order to bring the issue formally before the court, I invited the mother to make an application to amend her grounds of appeal by adding additional grounds. The mother made an application to add the following further grounds:

1. The learned magistrate acted outside her jurisdiction in that the substantive application was not filed within two working days of the child being taken into provisional protection and care.
2. Alternatively, there has been a miscarriage of justice in that the learned magistrate failed to consider the legal consequences of the failure of the Chief Executive Officer to make an application for a protection order within two working days of the child being taken into provisional protection and care.

10 Counsel for the child did not object to these further grounds of appeal being added. Counsel for the CEO conceded that no unfairness or prejudice could be identified by the additional grounds being added and acknowledged that the first respondent had an opportunity to present submissions concerning the issue. The additional grounds of appeal in my opinion raise very important issues both for this case and future cases. Given that the first respondent and second respondent had been given an opportunity to present submissions on the issue, I concluded no unfairness arises to the respondents and leave should be given for the amended grounds to be added to the notice of appeal. For the purposes of this judgment I will treat the additional grounds of appeal as grounds 4 and 5.

### **Material before the magistrate**

11 The hearing dismissing the mother's application for an interim order took place on 20 December 2013. At the commencement of her oral reasons the learned magistrate identified the evidence before her as consisting of the following affidavits.

- (1) An affidavit of [suppressed] sworn 30 October 2013 (filed as the original affidavit in support of the application by the CEO for a protection order);
- (2) An affidavit of [suppressed] sworn 19 December 2013;

- (3) An affidavit of the mother sworn 14 November 2013 and filed on 15 November 2013; and
- (4) An affidavit of the mother sworn 17 December 2013 and filed on 18 December 2013.

12 However, there were two further affidavits filed in the proceedings; firstly an affidavit of [suppressed] (officer of the department) sworn on 8 November 2013 and filed on 11 November 2013 by the CEO; and secondly, an affidavit of the mother sworn and filed on 14 November 2013. It is clear from exchanges during the hearing before the magistrate and from her reasons that the magistrate took into account the contents of the affidavit of [suppressed] but there remains a question on this appeal as to whether the mother and the representative of the child had been served with this affidavit. It is not clear from the decision of whether the magistrate was aware of the affidavit of the mother sworn and filed on 14 November 2013. These issues will be revisited later in this decision in consideration of ground 3 of the appeal.

13 The magistrate did not take any oral evidence on the hearing of the application. The deponents to the affidavits were not called to give evidence and therefore no cross-examination on the contents of the affidavits took place.

### **The evidence**

#### **(a) Uncontested background evidence**

14 The uncontested evidence of the mother is that she is aged 35, is a [nationality suppressed] who has lived in Australia for approximately seven years. The child is an 8-year-old daughter. The father of the child works and lives outside Australia and has not materially participated in the care of the child. The mother is an intelligent woman and is well qualified. She has a number of university degrees in [nationality suppressed]. She completed a master's degree in Human Resources from the Curtin University of Technology in Western Australia in 2010.

#### **(b) Affidavits filed by CEO**

##### ***(i) Affidavit of [suppressed] sworn 30 October 2013***

15 The first affidavit filed by the CEO is an affidavit of [suppressed] sworn 30 October 2013. The affidavit deposed to the following:

- (1) On 18 September 2013 the police attended the home of the mother after she had contacted the police requesting assistance due to being 'itchy all over' and not being able to sleep. At the time the mother was living in a high rise apartment. After attending the apartment the police contacted the Department due to concerns about the home environment. The police reported that the premises had a significant amount of rubbish on the floor, the contents of the fridge were old and expired, the police observed the child sleeping on the mattress which the mother complained was causing itchiness and the police observed cockroaches in the cupboard. The police also reported that the mother stated that she had not allowed herself or the child to shower in the apartment for several months due to the water making her sick. The police contacted an ambulance service. Paramedics attended the premises but provided no medical treatment.
- (2) On 20 September 2013 the Inner City Mental Health Services (ICMHS) contacted the Department and reported that they had visited the premises occupied by the mother on 19 September 2013. ICMHS reported that the mother presented with entrenched delusions that the water in her home was having an adverse effect on herself and the child. ICMHS reported that the mother was not prepared to engage with the service.
- (3) On 27 September 2013 the Dean of a private junior school attended by the child stated his concerns to the Department of the mother's mental health. The Dean reported that the mother believed that people were after her, the air conditioning in her car had been contaminated and that she and the child were sleeping in a hotel because there was something in the bed at their apartment which was causing a rash to the mother. The Dean raised concerns with the Department that the mother was threatening to disappear and was using other Christian names for herself and the child. The Dean reported a meeting with the mother outside the school office where the mother was on the ground in a foetal position while the child was in the car.
- (4) On 1 October 2013 ICMHS contacted the mother but the mother was not prepared to discuss where she and the child were residing other than to report that they were residing in a hotel.
- (5) On 3 October 2013 the Department was contacted by a real estate agent who expressed concern about the child's care and wellbeing.

The agent reported that the apartment occupied by the mother and the child had an awful smell, he had observed soiled nappies, and observed food and dirty clothes everywhere. Annexed to the affidavit was a series of photographs of the interior of the premises taken by the agent. The photographs are very small and of poor quality, although one can discern from the photographs some untidiness.

- (6) On 9 October 2013 the mother agreed to meet with two officers of the Department at a café. The mother informed the departmental officers that she and the child were now living in an apartment closer to the centre of Perth. The mother explained that she wished to return to [nationality suppressed] as she did not have support in Australia. The mother also reported that she did not feel safe in her new apartment as she had observed two men following them on two separate occasions. The departmental officers noted that the child presented as 'happy, clean and well kept'.
- (7) On 11 October 2013 the mother reported to departmental officers that she had been to police to complain about a person who had allegedly entered her apartment on 6 October 2013 and spoke to the child. Again at this meeting the departmental officers noted that the child presented as 'happy, clean and well kept'.
- (8) On 11 October 2013 the Department was contacted by the Princess Margaret Hospital (PMH) Child Protection Unit. The person from the unit reported that the mother and child had attended the emergency unit and the unit was concerned regarding the mother's presentation and information she was providing. An email from the unit to the Department annexed to the affidavit reported as follows:

Mother has reported that on Sunday (time unknown) she went to take the rubbish out but then decided to go for a walk leaving [the child] at home by herself for approx 1hr. PMH ED have been then informed that during this period of time whilst [the child] was alone a man who is not known to the family has entered the home on six occasions. [The child] has made various comments about how this man accessed the house initially indicating she didn't know, then mentioning possibly seeing a swipe card and then her letting him in on one occasion. It is reported that on each occasion when the man entered the home that he searched a room and has sprayed some chemical. It was further reported that mother left her iPhone on recording the front door but that this man has managed

to access Mother's phone by using her passcode and deleting this footage.

The email by PMH to the Department further stated that the child when examined appeared quite well, is articulate and healthy in appearance.

- (9) On 12 October 2013 at about 1.00am a doctor at PMH notified the Department that the mother of the child had returned to PMH. The mother told the doctor that she had returned to the hospital with the child as she was concerned the child may have some sort of toxic poisoning after returning to the apartment earlier that day. The doctor stated that he believed that the mother appeared to be having delusional thoughts/suffering with psychosis and as such he had concerns for the child's wellbeing. The doctor reported that the child presented as clean and appropriately dressed. The doctor also reported that the mother alleged the child had been sexually assaulted during one of the alleged break-ins.
- (10) On 12 October 2013 the ICMHS assessed the mother and determined that she required assessment by a psychiatrist. They sought to persuade her to attend the clinic on 14 October 2013 for assessment but the mother declined stating that she did not believe that there was anything wrong with her. It was explained to the mother that under the *Mental Health Act* she could be taken to hospital for assessment involuntarily.
- (11) On the same date officers from the Department spoke to the mother of the need for the child to be cared for whilst she was placed in hospital for assessment. It was explained to her that as she could not nominate someone to care for the child then the child may need to be taken into care under s 37 of the CCS Act. The mother agreed to voluntarily attend the mental health clinic on Monday 14 October 2014 for assessment. A worker from ICMHS expressed to the Department the opinion that the child was spending so much time alone and feeling neglected that she was 'feeding' into her mother's delusions. It was determined by the Department that concerns for the child remained and she was taken into care purportedly pursuant to s 37 of the CCS Act.
- (12) On 14 October 2013 the mother attended ICMHS and was subsequently transported to the Bentley Hospital for assessment and treatment. She was discharged from the Bentley Hospital on 17 October 2013. On discharge the Department was supplied with



a letter from Dr David Stevens, Consultant Psychiatrist. The letter stated as follows:

I saw [the mother] at the Bentley Hospital in my capacity as a Consultant Psychiatrist following her referral for assessment. We assessed her over a period of two days in the hospital environment which allowed a thorough clinical review. She was open with us in discussing events leading to admission including events relating to the wellbeing of her daughter. As you are aware, we also liaised with a CPFS representative and took the collateral information into account in assessing [the mother's] mental state.

Our clinical impression is that [the mother] is a concerned mother under stress. I could find no evidence at this time of a psychotic or other mental illness that would lead to functional impairment. I also consider her to be of very low risk to harm herself or others in the community. In my opinion there were insufficient grounds for involuntary admission and that her care was best provided in the community. Further, treatment with medications is unlikely to be helpful for [the mother] at this stage.

We have discharged [the mother] from the inpatient unit today and are referring her for follow up outpatient support at Inner City Mental Health Service. This is the community mental health service that covers her geographic area. We will recommend that they see [the mother] to support her and monitor her mental state during this stressful time. [The mother] is aware of this plan and is grateful for this support.

- (13) On 22 October 2013 officers of the Department met with the mother and explained to her the concerns they had as to her mental health and the impact it might be having on her care for the child. The Department requested the mother to meet with the ICMHS as recommended in the discharge summary and the mother agreed.
- (14) On 22 October 2013 the Department was contacted by ICMHS and informed that the mother had notified the service that she was no longer willing to engage with them.
- (15) On 24 October 2013 a contact visit was arranged between the mother and the child under the supervision of an officer of the Department, the contact occurred for about 30 minutes. The mother expressed concern to the child and the departmental officer in regards to the child's teeth being unclean and the child having red rashes on her face. The Department officer could not observe any of these features.

(16) On 28 October 2013 the mother attended a signs of safety meeting with officers of the Department and officers of CMHS. The mother was informed that the Department had to make an informed assessment about whether the mother had the capacity to safely care for the child and that the mother would not expose the child to unnecessary or invasive tests. The mother agreed to work with the Department and CMHS and attend her psychiatric assessment for the treatment plan. She also agreed to a referral to a support service and parenting capacity development through a service like Wanslea. The officer of the Department also explained to the mother that the Department would need to see a period of engagement with the mental health service and family support services to assess reunification between the mother and the child.

(17) The affidavit concluded by a summary which included the following :

I am also concerned that [the mother] is not currently able to demonstrate insight into the risk of harm to [the child] arising from living in a chaotic and fear filled environment, and consequent lack of stable housing. I have also not been able to establish that [the child] has been provided with adequate supervision and care while in [the mother's] care, although [the mother] herself acknowledges that she has left [the child] alone without warning. Despite believing someone has been 'breaking into our house', [the mother] has not recognised the potential harm to [the child] beyond the risk of chemical poisoning, demonstrating very limited awareness of more common risks to a young girl.[49]

(18) The affidavit also listed the basis for the application which was summarised as follows:

The Department believes that [the child] is vulnerable and at considerable risk of further psychological and emotional harm if she remains in her mother's care while her mother continues to present with symptoms of delusional paranoia, and at a protection order is necessary to ensure the safety and well-being.

**(ii) Affidavit of [suppressed] sworn on 8 November 2013**

16 The second affidavit filed by the CEO, being the affidavit of [suppressed] sworn on 8 November 2013, deposes to the history of the matter, including the following:

- (1) The Department arranged a telephone contact between the mother and the child on 15 October 2013 and 22 October 2013.
- (2) On 24 October 2013, the Department received from the father of the child emails between the father and the mother. [Suppressed] in her affidavit states that these emails suggest that the mother characterised the Department as having 'snatched' the child.
- (3) Supervised contact occurred on 24 October 2013. Prior to the meeting, the mother was instructed that there was to be no whispering and that certain topics were inappropriate. During the meeting, the mother had to be reminded about the prohibition of whispering and discussing with the child when she was likely to be returned and questions about contact with her father. At the end of the meeting, the mother informed officers of the Department that she would not leave the meeting without the child. This led to a stand-off which was not resolved until sometime after 5.30 pm.
- (4) On 31 October 2013, the Department received from PMH an inpatient discharge summary relating to the mother's attendance at the hospital on 12 October 2012. The discharge summary included a note that stated that the child had disclosed to nursing staff the following:

Mummy leaves me at home all day by myself, sometimes I don't eat for two days. Mummy works at Red Rooster. Sometimes, when I'm allowed to shower, it's cold but that's only a few times a week. We don't ever wash our clothes. My address isn't the same as the sticker.
- (5) On 4 November 2013, the mother attended supervised contact at the Fremantle office of the Department. At the end of the contact, the mother physically restrained the child and would not let her go. Over a period of two hours, staff members attempted to intervene and persuade the mother to let the child go. At one point, police were called but before their attendance, the mother released the child. Annexed to the affidavit is a report from an officer of the Department, [suppressed], and a report of a departmental psychologist, [suppressed], concerning this contact visit. The report of [suppressed] indicates that in order to persuade the mother to release the child, [suppressed] informed the mother that if she continued to behave in this manner then the next step was for the child to be placed in the CEO's care until she was 18. The

failure of the mother to release the daughter was characterised by [suppressed] in her report in the following way:

It appeared to me, while the mother was lucid, she appeared to be unable to reason, rationalise, or to think through the implications, her conversation remained fixated on that they needed to go home together and then when would contact occur again. She would not entertain any other conversation. I interpreted this as the mother being unable to move past or rise above her own emotional distress or needs for the needs of her daughter. Her delusional thinking has been raise [sic] in the past, I would welcome a discussion with City Mental health psychiatry to explore what other psychiatric factors may be interplaying that limits the mother's ability to entertain other thoughts or reasoning.

Throughout this situation it remains clear that the mother and daughter share a close, warm attachment. The daughter's mature presentation, (though also acknowledging parentified traits) shows that the mother has laid some good psychological foundations for the daughter. In this regard, contact needs continue, however so as prevent a similar situation occurring, I would suggest to reduce this to phone contact until the mother can demonstrate some change. Such as engaging with City Mental Health.

- (6) Annexed to the affidavit of [suppressed] is a copy of a series of emails between the child's father and the mother; and a copy of a written statement obtained from the father. The emails reveal that on 13 October 2013 (a day after the child was taken into the care of the CEO) the mother wrote to the father who was in Kazakhstan complaining that the Department had 'snatched' the child from her and stressing that the child was only 7 and the mother did not know of her whereabouts and with whom she was staying. The mother sought the assistance of the father. The tone of the emails from the mother became vitriolic when the father indicated he was unable to do anything. The written statement of the father indicated that the father supported the Department's intervention. The statement indicated that the father and the mother had been married in early 2006 in [nationality suppressed] and that the father brought the mother to Australia in 2006 for the birth of their daughter. The father separated from the mother in late 2007.

**(iii) Affidavit of [suppressed] sworn 19 December 2013**

- 17 A third affidavit was filed by the CEO, being an affidavit of [suppressed] sworn and filed on 19 December 2013. The affidavit deposed to the following:

- (1) On 19 November 2013, the mother attended supervised contact with the child and had to be reminded several times not to whisper. (The affidavit otherwise did not complain of any incident at the contact visit).
- (2) On 20 November 2013, the father arrived in Perth and had supervised contact on 21 November 2013 and unsupervised contact on 28 November 2013.
- (3) On 26 November 2013, the mother attended supervised contact with the child. During the contact, the mother became angry that the daughter was wearing thigh-length shorts and T-shirt, which the mother considered inappropriate for the child's age.
- (4) On 6 December 2013, a contact meeting was arranged. The child arrived 10 minutes late and the mother 38 minutes late. The child presented some books from school, but the mother threw these on the ground.
- (5) The mother failed to attend a contact meeting on 13 December 2013. A further contact meeting was arranged for 19 December 2013.

18 The affidavit concluded by stating:

The Department is still of the view that [the mother] is not currently able to demonstrate insight in the risk of harm to [the child] arising from living in a chaotic fear filled environment, and the consequent lack of stable housing. [The mother] continues to believe that she has been poisoned and harmed by external persons including Mr Chester.

It is the opinion of the Department that a rigorous psychiatric assessment be completed for [the mother] for the purpose of receiving a discreet assessment of [the mother's] mental health functioning and subsequently her parenting capacity.

**(c) Affidavits of the mother**

**(i) Affidavit of mother sworn and filed on 14 November 2013**

19 The first affidavit filed by the mother was sworn and filed on 14 November 2013. In this first affidavit the mother deposed that:

- (1) The mother confirmed that she had attended PMH and complained about a strange man entering her apartment and spraying something around the apartment. The mother said that these

allegations were based upon what she had been told by her daughter as the mother was out of the apartment at the time. As a result of raising this matter the mother was informed by the Department that they believed that she was suffering from delusions and mental disorder. On 12 October 2013 the mother was handed a letter (which was annexed to the affidavit) dated 12 October 2013. The letter stated that as a result of an assessment by authorised officers of the Department it was believed that there was an immediate and substantial risk to the wellbeing of the child. The letter further stated as follows:

An application for a Protection Order *may* be made to the Children's Court within two working days. The first court appearance is likely to be held within three working days of the application being filed in court. You will be provided with formal notice of this, advising you of the date, time and addressed to you to attend. Any decision not to proceed with the application for a Protection Order and return your child to you will be discussed with you in the next two working days. (emphasis added)

The letter went on to explain that until hearing of an application before the court the child would be in the care of the CEO under s 37 of the CCS Act. The letter also explained that if an application was filed that the mother would have the right to apply to the court for interim orders.

- (2) The mother deposed that she was not allowed to speak to her daughter on 12 October 2013 once the departmental officers had informed her they intended to take the child into the care of the CEO. This caused the mother to be very upset.
- (3) The mother stated that she agreed to the psychiatric assessment proposed in order to get her daughter back.
- (4) On 16 October 2013 (by which time the mother was in the Bentley Hospital) the Department permitted the mother to speak to the daughter on the telephone. The telephone conversation lasted 30 minutes.
- (5) After the mother was discharged from the hospital on 17 October 2013, she made several phone calls to the Department hoping to see her daughter. She was told that [suppressed] would phone back but no return calls were made. She made further telephone calls to the Department but on each occasion was told that [suppressed] was busy or was at meetings.

- (6) On 25 October 2013 the contact meeting between the mother and the child took place at the Department's offices. The meeting lasted approximately 30 minutes. The mother acknowledged she found it very difficult to say goodbye at the end of the meeting.
- (7) On 31 October 2013 the mother received an email from the Department advising that a meeting with the daughter would take place on 1 November 2013 at 4.00 pm. The mother requested that the meeting take place near the City. The reason for this request was that she had a 3.00 pm appointment with the duty lawyer at the Children's Court, her car had broken down and she would be unable to get to Fremantle, where the Department proposed to conduct the meeting, in time using public transport. The request was contained in emails, copies of which were annexed to the affidavit. [suppressed] refused to agree to the change of the location of the meeting and as a result the mother was unable to attend.
- (8) On 4 November 2013 a supervised contact meeting was arranged between the mother and the daughter which lasted almost two hours. The mother acknowledged that she and her daughter found it very difficult to separate at the end of the meeting and they were both crying.
- (9) A further supervised contact meeting was meant to take place on 11 November 2013. However the mother was contacted by the Department and the contact meeting on 11 November 2013 was cancelled because the Department officer meant to supervise the meeting was ill.

***(ii) The second affidavit by the mother sworn on 14 November 2013 and filed on 15 November 2013***

20 A second affidavit was sworn by the mother on 14 November 2013 (a typed affidavit) and filed at the Children's Court on 15 November 2013. This second affidavit responded to various matters raised in the affidavit of [suppressed] dated 30 October 2013. In the affidavit the mother agreed that she had called the police in relation to issues concerning her apartment. Further she agreed that she complained to the Dean of the primary school of the child concerning her vehicle. She admitted that in this discussion she became emotional but she disagreed that she was on the ground in a foetal position. She also agreed that she had raised an allegation at PMH concerning an allegation that strangers had entered her new apartment. She stated that she also requested the doctors to conduct

urine tests, routine blood tests and skin reaction tests to determine whether the daughter had suffered any harm.

21 Annexed to both affidavits of the mother are copies of a Bentley Hospital inpatient discharge letter. I will refer to the contents of this more fully later in this decision. It provides details of the purpose of the assessment of the mother when she was admitted into the hospital on the 14 October 2013, the assessments made and the conclusions from such assessments.

(iii) ***The third affidavit of the mother sworn on 17 December 2013***

22 The third affidavit filed by the mother sworn on 17 December 2013 largely was in the form of submissions. Annexed to the affidavit were a number of character references which attested to the mother being in the past a very dedicated and caring mother. The affidavit also annexed a copy of a residential tenancy agreement which confirmed that the mother had a lease of an apartment for a period up to 3 April 2014.

**Nature of appeal**

23 An appeal under pt 2 of the *Criminal Appeals Act* is in the nature of a rehearing (*Criminal Procedure Rules 2004* (WA) r 64). The appeal court must decide an appeal on the evidence and material that was before the lower court (*Criminal Appeals Act* s 39(1)), although the appeal court may admit other evidence (*Criminal Appeals Act* s 40(e)).

24 While, by virtue of these rules, the appeal to the Supreme Court is by way of a rehearing, the task of the court is nonetheless to discern error: *Avsar v Binning* [2009] WASC 219 [37]. In cases involving a rehearing the judgment of the appellate court, while respecting the judgment of the court of trial, must not shrink from overturning the judgment where its independent assessment shows that it is required for the judgment to be overturned: *Warren v Coombs* [1979] HCA 9; (1979) 142 CLR 531, 551; *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 [125] - [128]; *PVS v Chief Executive Officer, Department for Child Protection [No 2]* [2011] WASC 318 [147]. In the process of reviewing a decision the appellate court is not excused from the task of weighing conflicting evidence and drawing its own conclusions: *Fox v Percy* [127]. These principles are applicable to an appellate court reviewing factual findings and conclusions after trial. However, in this matter, the magistrate was not in the position of a trial judge or magistrate and, as will be discussed later in this decision, was not required to determine conflicts in the evidence. Instead, the role involved an examination of the



evidence presented by the CEO and the mother and then to make a judgment (that is, make a discretionary decision) as to whether it was appropriate to grant the interim orders sought. The principles to be followed by an appellate court when reviewing a discretionary judgment are set out in the leading authority of *House v The King* [1936] HCA 40; (1936) 55 CLR 499 (Dixon, Evert & McTiernan JJ), as follows:

The manner in which an appeal against an exercise of discretion should be determined is governed by established principle. It is not enough that the judges composing the appellate court consider, if they had been in the position of the primary judge, they would have taken a different view. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows erroneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. Such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

25 In summary, these principles mean that an appellate court should not overturn a discretionary judgment unless the lower court has acted on an error in principle (which is the basis of grounds 4 and 5 of the appeal), an error in fact (which is the basis of ground 1 of the appeal) or the decision is plainly unjust (which is the basis of grounds 2 and 3 of the appeal).

### **Magistrate's reasons**

26 The magistrate in her reasons acknowledged that the hearing was effectively conducted on the evidence as set out in the affidavit material which was untested. She acknowledged that this placed the court in a difficult position. The magistrate then went on to state as follows:

So on the affidavit material I have said that prima facie there is a foundation for concern about the likelihood of harm to the child. For example, evidence about the mother's behaviour with respect to the previous accommodation and, in summary, that appears to amount to a smell leading to moving the child and herself around temporary accommodation for, it appears, approximately two months while she arranged alternative accommodation which she and the child moved into prior to the child being apprehended.

Secondly, in terms of giving examples of what is raised in the affidavits which is part of the foundation for concern about the likelihood of harm of the type relied upon by the department; that includes information suggesting delusional beliefs about water being poisoned with chemicals and adversely impacting on the child's diet, hygiene and feelings of safety in domestic surroundings, concern communicated about delusional beliefs and odd behaviour emanating from the school and Princess Margaret Hospital.

In relation to the latter, for example, the child protection unit there reporting mother requesting that the child be chemically tested on 11 October and on 12 October the mother reporting to Princess Margaret Hospital the child had some sort of toxic poisoning. Now, amongst the evidential material there is a detailed report about contact on 1 November 2013; that is a report prepared by a family resource employee [suppressed]; it is dated 8 November 2013.

Now, no dispute was evident when that particular - no dispute by the mother was evident as to the content of that report when the matter was raised this afternoon; rather, the behaviour on the particular occasion was justified on the basis that the mother had not seen the child, she had been in Bentley for psychiatric assessment and had not had the opportunity to see the child. As a human being and as a parent she was emotional. I note that on the basis of that report in a very crude summary it appears that the mother held onto the child at the conclusion of contact and continued to do so for nearly two hours so that the child could not be returned in the usual way to the foster carer.

The situation necessitated the police being called and I refer, in particular, to paragraph 20 of this report which reads:

'[Suppressed] attempted to reason with [the mother] without success. [The mother] became emotional and began to cry. [The child] - - -'

So that is [the child].

'- - - then also started crying. They clung to each other. [The child] did not speak at all, [the mother] kept asking when she could see her daughter again. Unfortunately, the staff present did not have that information; however, [suppressed] noted the details of [the mother's] email address and promised she would be notified the next day. [the mother] repeatedly stated, "I will come to see her tomorrow." As we could not confirm her request she continued sitting with [the child] in her arms.'

Now, that is merely one paragraph, but it demonstrates, if true - and as I - have said it is not evident that there is any dispute about the content of the report - if true, it demonstrates that [the child] became upset in that situation and, as I have indicated, the report refers to the police having to

be called. Now, irrespective of Dr Stevens' assessment which is annexed to the affidavit of the mother filed 18 December 2013 - it is annexure A. It is a report Dr Stevens dated 17 October 2013. At paragraph 2 it reads:

'Our clinical impression is that [the mother] is a concerned mother under stress. I could find no evidence at this time of a psychotic or other mental illness that would lead to functional impairment. I also consider her to be of risk to harm herself or others in the community. In my opinion there are insufficient grounds for involuntary admission and that her care was best provided in the community. Further treatment with medications is unlikely to be helpful for [the mother] at this stage.'

It goes on to say:

'We have discharged [the mother] from the inpatient unit today and are referring her for follow-up outpatient support Inner City Mental Health Service. We will recommend they see [the mother] to support her and monitor her mental state during the stressful time.'

Now, it is clear from paragraph 2 that the purpose of the assessment by Dr Stevens was to ascertain whether there was a psychotic or other mental illness that would warrant involuntary admission and in relation to that he assessed that the answer was no. I note that his opinion about whether there is a psychotic or other mental illness is that there is no psychotic or other mental illness that would lead to functional impairment.

I am not satisfied that his assessment is that there is no mental illness; rather, there is no psychotic or other mental illness that would justify involuntary admission rather than care in the community and, further, he effectively says no mental illness which leads to functional impairment. Now, the mother heavily relies upon that; however, I note, firstly, that the evidence includes a range of behaviours which have been reported by different individuals of institutions including Princess Margaret Hospital, including the school, - including officers of the Department of Child Protection and that the court is required to assess, effectively, whether there is evidence justifying the concern of the department that the child has suffered, or is likely to suffer harm by emotional abuse and/or psychological abuse and that the child's parents have not protected or are unlikely or unable to protect the child from harm or further harm of that kind.

So the assessment the court has to make is of an entirely different nature; an entirely different character than the assessment which Dr Stevens was required to make. Now, I consider on the basis of the evidence adduced through affidavits sworn on behalf of the department that there is evidence regarding the behaviour of the mother which justifies the concern that the child is likely to suffer harm as a result of emotional and/or psychological abuse and that the mother is unlikely or unable to protect the child from harm at the current time and that is based upon the evidence of the

mother's behaviour from various sources which is contained in the departmental affidavits and I include there the emails as between the mother and the father.

If I am wrong about that then in the alternative I consider that there is a significant risk of emotional and/or psychological harm which may be minimised by supervision and support to the mother by the department and other agencies; however, I have no confidence that the mother would cooperate with the department were the child to be placed with her. It is clear from the affidavit material that the mother has repeatedly behaved in a way that puts her own needs, her own concerns first and there is also evidence of a refusal to cooperate or engage with the department.

Now, the mother says she has made many efforts to contact the department without success. I note from the most recent affidavit filed by the department that was filed yesterday that there was one contact missed and on another occasion the mother was 40 minutes late and there have been other times when the department has tried to contact her to no avail. At this stage, what needs to happen, what is in the best interests of [the child] ... is that [the mother] works with the department and that includes observing the rules of contact, talking about issues of concern to her outside the contact environment.

If [the mother] is concerned about the frequency of contact or what the child is wearing then those are issues which, quite properly, [the mother] should raise, but outside the contact environment raise with the case officer so as to try to discuss the matter and resolve it, but not in the child's presence and I consider also what needs to happen is [the mother] needs to cooperate with the department in an assessment by clinical psychologist of [the mother] and her capacity to put the child's interests and needs first and, if appropriate, contact be increased.

27 The magistrate in her decision went on to acknowledge that, in ascertaining the best interests of the child, the court should take into account cultural factors (see s 8(1)(j) of the CCS Act) and that this had been raised by the mother and counsel for the child in their submissions. The magistrate recommended that the Department investigate the issue further with the cooperation of the mother.

### **Grounds 4 and 5**

28 I believe that it is appropriate that I deal with the additional grounds 4 and 5 first. It is not in dispute in this matter the CEO failed to lodge an application for a protection order within two working days of the child being taken into provisional protection and care. Grounds 4 and 5 can be dealt with together because they both raise what are the legal consequences of the CEO failing to lodge an application within two working days of the child being taken into provisional protection and care.

29 During the course of the hearing of the appeal there emerged two primary issues; firstly, whether a failure of the CEO to lodge an application for a protection order within two working days after the child was taken into provisional protection and care invalidates the substantive application lodged by the CEO on 30 October 2013 and thereby invalidates the proceedings of the hearing of the application made by the mother for an interim order for return of the child (ground 4); and secondly, if the delay by the CEO does not invalidate the substantive application, whether the failure of the CEO to make a substantive application within two working days has the effect that the CEO was required to release the child from the CEO's provisional care and protection at the expiration of two working days and return the child to the mother (ground 5).

30 To decide these issues it is necessary to consider the provisions of the CCS Act and the obligations that fall on the CEO.

31 The CCS Act provides for a number of different procedures to deal with the provisional protection and care of children. Firstly, s 35 provides that an authorised officer, who believes that a child is in need of protection, may apply to the court for a provisional protection and care warrant. This application is made under s 120 which provides for a procedure for the making of an application in an emergency by various forms including by telephone. Secondly, s 37(2) provides that an authorised officer or a police officer may, at any time, take a child into provisional protection and care without a warrant, if the officer suspects on reasonable grounds that there is an immediate and substantial risk to the child's wellbeing. Thirdly, s 44 provides that a substantive application can be made by the CEO for a protection order. There are four types of protection orders that can be applied for. One type is a time-limited protection order. That is the type of order sought by the CEO in the substantive proceedings in the Children's Court in this matter. Once substantive proceedings are commenced, the CEO can apply for a provisional protection and care order by way of an interim order under s 133(2).

32 The focus in this matter is on a provisional protection and care seizure of a child under s 37 of the CCS Act. If the power under s 37 to take a child into provisional protection and care is exercised by a police officer then the police officer must notify the CEO as soon as practicable (s 37 (4)).

33 The wording of CCS Act suggests that a protection and care seizure of a child under s 37 is meant to be a temporary arrangement by the use of the word 'provisional'. Other provisions of the CSS Act reinforce this. Section 38(2) provides in relation to a child taken under s 37 relevantly as follows:

(2) If the child is not already the subject of protection proceedings when the child is taken into provisional protection and care and the CEO decides not to make a protection application or other application under this Part in respect of the child, then ... the CEO must ensure that, as soon as practicable after the child is taken into provisional protection and care, the child is returned to or placed in the care of -

(a) a parent of the child;

34 Section 38(4) requires that where the CEO decides to make an application for a protection order the CEO must in circumstances of the present case make such an application not more than two working days after the child is taken into provisional protection and care under s 37 (a similar provision exists where the child is taken into provisional protection and care under a warrant issued under s 35). Section 38(4) provides as follows:

If the CEO decides to make a protection application or other application under this Part in respect of the child, the CEO *must* make the application -

- (a) if the child is taken into provisional protection and care in a prescribed area of the State, as soon as practicable after the child is taken into provisional protection and care; or
- (b) otherwise, as soon as practicable, but in any event not more than 2 working days, after the child is taken into provisional protection and care. (emphasis added)

35 In this matter the child was not taken into provisional protection and care in a prescribed area and therefore s 38(4)(a) has no application.

36 Submissions were presented by counsel for the first and second respondents as to the effect of the word 'must' in s 38(4). Counsel for the CEO submitted that the meaning of the word 'must' ought to be given a meaning something less than the word 'shall' which has a prescribed meaning in the *Interpretation Act 1984* (WA). Section 56(2) of the *Interpretation Act* provides that where in a written law the word 'shall' is used in conferring a function the word shall be interpreted to mean that the function conferred 'must' be performed. I see no reason to interpret

the word 'must' in s 38 (4) of the CCS Act to mean anything less than the word 'shall' and that the obligation which falls on the CEO under the subsection is obligatory. In my opinion, the use of the word 'must' if anything places greater emphasis on the obligatory nature of the function of the CEO.

37 Counsel for the CEO also contended that the subsection should not be interpreted as placing an obligatory obligation on the CEO because, in practical terms, in many instances it would be impossible to comply with a requirement to file an application for a protection order within two working days. It should be noted that the CEO may be prevented from making an application within two working days if the child is taken into protection and care by a police officer and the police officer does not notify the CEO early enough for the CEO to make an application for a protection order within the prescribed two working days. I reject the contention that in many instances it would be impossible to comply with the two working day requirement. This is a matter of resources and if Department is under-resourced then that is not a reason to place an interpretation on the legislation which is contrary to its plain meaning. Likewise, the notification by a police officer to the CEO of the exercise of a power under s 37 is a simple task and one that normally would not cause a delay in making an application to the court within two working days.

38 The primary submission of the CEO was that the CCS Act should not be interpreted to mean that the CEO was barred from making an application for a protection order if he failed to do so within two working days after taking into protection and care a child pursuant to s 37. It is contended that such an interpretation barring the CEO from making an application would prevent the CEO from access to the protective procedures of the CCS Act where delay has occurred inadvertently. It is submitted that to deny the CEO access to the legislation to obtain a protection order would defeat the overall purpose of the legislation and potentially create a situation where a child in need of protection would be denied the legislative protection.

39 Counsel for the child submitted that the obligatory nature of s 38(4) meant that the failure of the CEO to make an application within two working days of the child being taken into provisional protection and care meant that the current substantive proceedings before the Children's Court were invalid and therefore the magistrate did not have any jurisdiction to hear the interim application. It was contended that this did not prevent the CEO making a fresh application and therefore the protection offered by the legislation was not defeated. I reject this submission as being

inconsistent. If it is permissible to commence fresh proceedings then there is no reason why the application filed by the CEO on 30 December 2013 was not valid.

40 I agree with the submission of the CEO that if the effect of the subsection was to invalidate the current substantive proceedings in the Children's Court, then this would also invalidate further proceedings which would defeat the purpose of the CCS Act to provide protection to children who were in need of protection. For these reasons I do not agree that the delay by the CEO in making an application for a protection order invalidated the substantive protection proceedings and meant the magistrate was acting without jurisdiction. Accordingly, on ground 4 I give leave to appeal but dismissed the appeal.

41 However, it is a different issue to consider what are the consequences of the power of the CEO under s 37 to retain the care of the child if the CEO does not make an application for a protection order within two working days.

42 Section 29(3) of the CCS Act relevantly provides that a child ceases to be in provisional protection and care if the child is returned to or placed in the care of a person under s 38(2) or the court makes an interim order to place the child back with the parent or another person.

43 The power vested in the CEO of provisionally taking a parent's child under s 37, that is without applying to the court for a warrant, is an extreme power, to be exercised only in cases of significant risk. It is not a power that ought to be exercised without great care and consideration. Amongst the considerations the legislation recognises are those contained in s 9(a) and (b) which provide a bias for the wellbeing of children to be protected by placement with their parents and the Department providing support to the parents.

44 What consequences flow from a failure of the CEO to apply to the court for a protection order within the time frame prescribed by s 38(2) involves a question of statutory construction. A primary object of statutory construction is to construe the relevant provisions so that they are consistent with the language and purpose of all the provisions of the statute. The meaning of the provisions must be determined by reference to the language of the instrument viewed as a whole. The context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed. Thus the process of construction must always begin by examining the



context of the provision that is being construed: s 18 of the *Interpretation Act; Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 381 - 382.

45 The CCS Act in pt 2 sets out the objects and principles of the legislation. Section 6, s 8 and s 9 provide as follows:

**6. Objects**

The objects of this Act are -

- (a) to promote the wellbeing of children, other individuals, families and communities; and
- (b) to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and
- (c) to encourage and support parents, families and communities in carrying out that role; and
- (d) to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care; and
- (e) to protect children from exploitation in employment.

...

**8. Determining the best interests of a child**

- (1) In determining for the purposes of this Act what is in a child's best interests the following matters must be taken into account -
  - (a) the need to protect the child from harm;
  - (b) the capacity of the child's parents to protect the child from harm;
  - (c) the capacity of the child's parents, or of any other person, to provide for the child's needs;
  - (d) the nature of the child's relationship with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;
  - (e) the attitude to the child, and to parental responsibility, demonstrated by the child's parents;
  - (f) any wishes or views expressed by the child, having regard to the child's age and level of understanding in

determining the weight to be given to those wishes or views;

- (g) the importance of continuity and stability in the child's living arrangements and the likely effect on the child of disruption of those living arrangements, including separation from -
    - (i) the child's parents; or
    - (ii) a sibling or other relative of the child; or
    - (iii) a carer or any other person (including a child) with whom the child is, or has recently been, living; or
    - (iv) any other person who is significant in the child's life;
  - (h) the need for the child to maintain contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;
  - (i) the child's age, maturity, sex, sexuality, background and language;
  - (j) the child's cultural, ethnic or religious identity (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders);
  - (k) the child's physical, emotional, intellectual, spiritual, developmental and educational needs;
  - (l) any other relevant characteristics of the child;
  - (m) the likely effect on the child of any change in the child's circumstances.
- (2) Subsection (1) does not limit the matters that may be taken into account in determining what is in the best interests of a child.

## **9. Principles to be observed**

In the administration of this Act the following principles must be observed -

- (a) the principle that the parents, family and community of a child have the primary role in safeguarding and promoting the child's wellbeing;

- (b) the principle that the preferred way of safeguarding and promoting a child's wellbeing is to support the child's parents, family and community in the care of the child;
- (c) the principle that every child should be cared for and protected from harm;
- (d) the principle that every child should live in an environment free from violence;
- (e) the principle that every child should have stable, secure and safe relationships and living arrangements;
- (f) the principle that intervention action (as defined in section 32(2)) should be taken only in circumstances where there is no other reasonable way to safeguard and promote the child's wellbeing;
- (g) the principle that if a child is removed from the child's family then, so far as is consistent with the child's best interests, the child should be given encouragement and support in maintaining contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;
- (ha) the principle that if a child is removed from the child's family then, so far as is consistent with the child's best interests, planning for the child's care should occur as soon as possible in order to ensure long term stability for the child;
- (h) the principle that decisions about a child should be made promptly having regard to the age, characteristics, circumstances and needs of the child;
- (i) the principle that decisions about a child should be consistent with cultural, ethnic and religious values and traditions relevant to the child;
- (j) the principle that a child's parents and any other people who are significant in the child's life should be given an opportunity and assistance to participate in decision making processes under this Act that are likely to have a significant impact on the child's life;
- (k) the principle that a child's parents and any other people who are significant in the child's life should be given adequate information, in a manner and language that they can understand, about -

- (i) decision making processes under this Act that are likely to have a significant impact on the child's life; and
  - (ii) the outcome of any decision about the child, including an explanation of the reasons for the decision; and
  - (iii) any relevant complaint or review procedures;
- (1) the principle set out in section 10(1).

46 Section 46 of the CCS Act provides that on a protection application, the Court must consider not making an order. The section provides that the court must not make a protection order in respect of a child unless the court is satisfied that making the order would be better for the child than making no order at all.

47 It is helpful in considering the interpretation of s 38 to consider the Second Reading Speech relating to the introduction of the Bill which later became the CCS Act. The Minister said the following (see Hansard pages 14,244b - 14,247a, 4 December 2013):

The Bill provides a new way of responding to the complex social issues that have emerged in recent decades. The legislation provides the framework to improve best practice that is evidenced-based. There is overwhelming research that supports the view that children's well-being is best maintained in their families and communities, and that the experience of being 'in care' can result in its own set of negative consequences. It is also evident from research that there is clearly a need for investment in services to support families at risk of child abuse or neglect before they become involved in the child protection system.

...

Part 4 deals with the protection and care of children and is the largest part in the Bill. A critical aspect of child protection is the criteria used to determine when a child is in need of protection. A major reform in the Bill is to focus on significant harm to the child, and the parents' ability or willingness to protect the child from harm.

The Bill achieves a balance between statutory child protection powers for authorised officers and adequate safeguards against the misuse of those powers. The Bill requires a warrant from the Children's Court before a child can be taken into the provisional protection and care of the CEO, except in emergency situations when the child is at immediate and substantial risk. This is a major improvement on current practice under the Child Welfare Act, which provides for children who are in need of protection to be apprehended into the care of the Department without any

prior approval from the court. The Bill emphasises that the removal of the child from the family is such a critical decision in a child's life that it requires the court sanction.

48 Consistent with this Second Reading Speech I conclude that the legislation places a heavy emphasis upon the requirement of the CEO to bring an application before the court as soon as practicable after a child is taken into care under s 37 of the CCS Act. In my opinion this recognises the principle that I earlier stated that to take a person's child away from a parent is a very serious matter.

49 In my opinion the intention of the legislature is that where a child is taken into provisional protection and care the CEO is under an obligation to bring the matter before the court almost immediately so as to provide the court with jurisdiction to review the actions of the CEO by either hearing an application for a protection order or by providing the parent an opportunity to seek an interim order for return of the child. It is significant that in the absence of the CEO making an application for a protection order, there is no procedure in the legislation which enables a parent to challenge or seek a review of the CEO's decision to take a child into provisional protection and care pursuant to s 37. In my opinion, for this reason the combined effect of s 29(3) and s 38(2) and (4) of the CCS Act is that if the CEO does not make an application within two working days as required then he is to be taken, as at that time, to have decided not to make an application and therefore is required under s 38(2) to return the child taken to the parent. In the alternative, in this case the only reasonable inference that can be drawn is that during the two day working day period the CEO had decided not to make an application at that time which gave rise to an obligation to return the child. What s 38 prevents is the CEO postponing an application to make an application to a later time. This interpretation does not prevent the CEO from at some stage in the future applying for a protection order if the circumstances warrant such an application and seeking an interim order for provisional protection and care. However, what the CEO is not permitted to do, as the CEO did in this case, is to retain the child in the CEO's care without making an application within the time limits prescribed by the legislation.

50 This interpretation of the legislation is consistent with the general purpose and policy of the provisions of the CCS Act. If such an interpretation is not placed upon the provisions then the requirement under s 38(2) that the CEO must make an application would achieve no purpose. It is a known rule of interpretation of statutes that a construction of a statutory provision which makes the provision useful and pertinent is

to be preferred to one which would otherwise make the provision insignificant: *Project Blue Sky Inc v Australian Broadcasting Authority* [71]; *The Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405, 414.

51 There are other provisions of the CCS Act which support the interpretation I have given that there is an obligation on the CEO to bring the matter before the court as soon as practicable after the taking of the child. Section 38(5) requires that if a protection application is made, the court must endeavour to ensure that the first listing date is not more than five working days after the application is made.

52 Based upon the interpretation I have given to the legislation, the application before the magistrate proceeded on incorrect premise that the child was legally under the protection and care of the CEO, that the mother had an onus on her interim application to establish reasons for return of the child to her and the effect of dismissing the application was that the child remained in the protective care of the CEO until the substantive application was heard. In view of this error I am satisfied a miscarriage of justice occurred. Accordingly on the ground 5 I will give leave to appeal and allow the appeal.

### **Ground 1**

53 The magistrate in her reasons for decision characterised the psychiatric evidence of the assessments made by Dr Stevens as being restricted to whether there was a psychotic or other mental illness that would justify an involuntary admission rather than care in the community; and whether there was any mental illness which would lead to functional impairment.

54 I concluded that this was an error in fact. The Bentley Hospital inpatient discharge letter, which was annexed to both affidavits of the mother sworn on 14 November 2013, states on page 1 the reasons for the admission of the mother to the Bentley Hospital as being 'admitted for assessment of mental state, risk to reputation and *risk to safety of child*' (emphasis added). It is clear from this document that the assessment undertaken by Dr Stevens at the Bentley Hospital went beyond simply the narrow areas suggested by the magistrate. This is also confirmed by further comments in the discharge letter which include on page 2 the following:

[The mother] was admitted as an involuntary patient to the locked ward for psychiatric assessment. She was placed on a Form 4 and assessed over the

following two days. She presented as distressed and on questioning, she expressed overvalued ideas about her water being contaminated in her previous apartment as her clothes became bleached and her skin irritated.

She thought that someone may have tampered with her water but was open to challenging: She agreed that it was more likely that the water was different to what she is used to or that her laundry detergent was abrasive. Collateral information was sought from the Child Protection (CPFS) over the course of the admission. They investigated the veracity of the claims about a stranger following [the mother] and her daughter and about him having entered her flat whilst her daughter was there alone. They found that the direct information from [the] daughter supported that these were not delusions but true descriptions given by [the] daughter. There was no evidence of psychotic phenomena during psychiatric interviews and on the ward. [The mother] was, however, very concerned and distressed about the welfare of her daughter and about being away from her.

It was felt that medications would not be useful for [the mother] at this time, and that resolution of psychosocial stressors and supportive outpatient mental health review would be of most use. The Form 4 was allowed to lapse and [the mother] was discharged from our care after meetings with the CPFS.

[The mother] is to attend a court hearing tomorrow where CPFS will apply for two year guardianship of [the] daughter. A supporting letter was written by the treating team for the court, indicating the findings of our clinical assessment. [The mother] also needs to attend to financial and work issues, as well as moving her belongings from her previous residence.

55 The letter went on to state that the mother was referred back to ICMHS for outpatient follow up and mental state monitoring.

56 As stated earlier in this decision, the affidavit of [suppressed] sworn and filed on 30 October 2013 in support of the CEO's application for a protection order, summarised the basis of the CEO's application as follows:

The Department believes that [the child] is vulnerable and at considerable risk of further psychological and emotional harm if she remains in her mother's care while her mother continues to present with symptoms of delusional paranoia, and that a protection order is necessary to ensure her safety and wellbeing.[14]

57 Given the findings contained in the Bentley Hospital inpatient discharge letter, the learned magistrate ought to have given considerable weight to these findings and the opinions expressed by Dr Stevens. It appears that the magistrate may have only taken into account the letter of

Dr Stevens and not taken into account the greater details which are provided in the Bentley Hospital's inpatient discharge letter. The contents of this discharge letter demonstrate the assessment made by Dr Stevens was highly pertinent to the issue of the risk to the child and the magistrate made an error of fact in her characterisation of the purpose of the assessment.

58 For the above reasons, I give leave to appeal on ground 1 and allow ground 1 of the appeal.

## **Ground 2**

59 The starting point in considering ground 2 is to consider the nature of the task undertaken by the magistrate and to consider the extent to which it can be reviewed by this court on appeal.

60 On an application for a protective order, the court may make an order if it finds 'the child is in need of protection' (s 45). What constitutes a child 'in need of protection' is defined in s 28(2). Relevant to this case is s 28(2)(c), which provides that a child is in need of protection if:

[T]he child has suffered, or is likely to suffer, harm as a result of any one or more of the following -

- (i) physical abuse;
- (ii) sexual abuse;
- (iii) emotional abuse;
- (iv) psychological abuse;
- (v) neglect,

and the child's parents have not protected, or are unlikely or unable to protect, the child from harm, or further harm, of that kind.

61 The CCS Act provides no guidance as to what criteria are to be applied on an application for an interim order that a child be returned to a parent. The discretion to grant an interim order is clearly a wide discretion. The exercise of the discretion clearly must take into account the provisions of the CCS Act, including the matters to be taken into account in determining the best interests of the child and the principles to be observed (s 7, s 8, s 9 and s 46).

62 A discretion to grant an interim order is not unusual in a variety of areas of law. The considerations and emphasis will depend upon the



statutory regime in question: *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 8 CLR 199, 1 (Gummow & Hayne, with whom Gaudron J agreed). In the civil jurisdiction, the granting of an interim injunction is governed by two main inquiries; whether the claimant has made a prima facie case and whether the balance of convenience favours the granting of the interim relief. How strong the evidence must be to establish a prima facie case depends upon the nature of the rights asserted and the practical consequences that are likely to flow: *Australian Broadcasting Corporation v O'Neil* [2006] HCA 46; (2006) 227 CLR 57, 65 - 71 (Gummow & Hayne JJ).

63 In cases where the application seeks interlocutory mandatory relief (such as a right to re-enter), it is said that the interlocutory mandatory injunction should be granted only if the court has a high degree of assurance that the applicant will succeed at trial. However, ultimately the question is the balance of the risks of injustice. In considering that balance, the court must also take into account the nature and consequences of the particular relief sought: *Cash Converters Pty Ltd v Hila Pty Ltd* (1993) WAR 471, 483 - 484. Where the court makes an assessment of the strength of the claimant's case, the court does not undertake a preliminary trial, and does not give or withhold interlocutory relief upon a forecast as to the ultimate result of the case: *Beecham and Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; (1968) 118 CLR 618, 622; *Johnson v Cetin* [2011] WASC 344 [39] (Edelman J).

64 In this matter, the magistrate appeared to apply a test of whether, on the evidence provided by the Department, it justified a concern of the Department that the child was likely to suffer harm as a result of emotional and/or psychological abuse, and that the mother is unlikely or unable to protect the child from harm at the current time. That is a test which placed an emphasis on the concerns of the Department and whether its concerns were justified.

65 Alternatively, the magistrate stated that she believed that there was a significant risk of emotional and/or psychological harm which may be minimised by supervision and support to the mother by the Department and other agencies, but she had no confidence that the mother would cooperate.

66 In my opinion a court on an application for an interim order for return of a child needs to give consideration to the whole of the evidence presented on the application, not just the evidence presented by the Department, and on forming a view of the strength of the Department's

case, and having given consideration to the statutory regime and of the consequences of an order being made or not made, decide whether to exercise the discretion.

67 It was not argued on the appeal before me that the magistrate made an error in law as to the test to be applied on an application for an interim order. Therefore, it would not be appropriate for me to make any ruling as to whether the magistrate applied the correct test.

68 However, the question remains whether the discretion exercised by the magistrate should be reviewed and interfered with, taking into account the principles of *House v The King* referred to earlier in this decision.

69 Of course, for the reasons I have given in relation to grounds 1 and 5 of the appeal, I have already reached the decision that an error has occurred and therefore it is open for this court to re-exercise the discretion. However, putting aside the errors that I have identified on grounds 1 and 5, I otherwise conclude that the decision of the magistrate in the circumstances was against the best interests of the child, plainly unjust and ought to be set aside. I reach this conclusion for the following reasons:

(1) The magistrate made an important finding that the child had not been harmed up to the point of time of the date of the hearing. At page 35 of her Honour's decision, she stated as follows:

Now, the first thing to be said in relation to that is that there is no evidence of actual harm suffered by the child; so I am saying harm of the kind which the Department relies upon at this point of time, however, there is a prima facie a foundation for concern about the likelihood of harm and I will come back to that in a moment [2].

(2) According to the affidavit of [suppressed] of 30 October 2013 when departmental officers met with the mother and the child on 9 and 11 October 2013, the child presented as 'happy, clean and well kept'.

(3) The report of [suppressed] in relation to the contact visit on 4 November 2013 noted that the mother and daughter had a close, warm attachment and that the daughter had a mature presentation, which showed that the mother had laid some good psychological foundations for the daughter.

(4) The decision of the magistrate relied substantially upon the concerns expressed to the Department by the police, a real estate

agent, the Dean of the primary school that the child attended and the PMH. Counsel for the first respondent also paid particular emphasis upon the PMH report which indicated that the child had complained that she had not been fed and washed properly. It was these matters which caused the Department to suspect that the mother was suffering from delusional paranoia. However, when the mother was thoroughly assessed over a three day period in hospital, the expert opinion was that she was not suffering from any delusional mental state and that she was a mother stressed and required support. In any event, the concerns arising from the complaints received by the Department, must be put in the context of the magistrate's significant finding that no harm had been suffered by the child.

- (5) The second major factor taken into account by the magistrate was the emotional episodes that occurred on 24 October 2013 and 4 November 2013, when the mother refused to release the child from her bond and allow the supervised contact meeting to be terminated. The mother does not deny that she found it very difficult to end these contact meetings. However, her behaviour must be judged in the context of the behaviour of the officers of the Department. The Department took the child into care on 12 October 2013. It was explained to the mother that the purpose of the CEO taking the child into provisional protection and care was that there was nowhere for the child to stay whilst the mother was admitted to hospital for assessment. The 12 October 2013 was a Saturday. The mother was released from the Bentley hospital on 17 October 2013. By that time the two working days prescribed under the legislation for the CEO to make an application to the court had expired. The CEO had not made the application to the court as required by the legislation. The officers of the Department must have been aware of the statutory obligation. It is referred to in a letter handed to the mother on 12 October 2013. On release from the hospital the mother had every reason to believe that the child would be returned to her as the Bentley hospital had concluded that she was not suffering from delusional paranoia suspected by the Department. On 22 October 2013 the mother met with departmental officers but the child was not returned to her. Still the CEO had not applied to the court for an order. On 24 October 2013 the first contact visit occurred between the mother and the child. This was seven days after discharge of the mother from the hospital. Up until that point the

mother had only two telephone contacts. Still the CEO had not applied to the court for an order. It was on 24 October 2013 that the first incident occurred where the mother resisted terminating the contact visit as she wanted to take the daughter home with her. This is hardly surprising given the conclusions reached by Dr Stevens and particularly as he concluded that the mother was a concerned mother under stress. It is extraordinary that departmental officers did not recognise the emotional trauma that the mother was going through by the Department refusing to release the child to her. This was a refusal which was not authorised by the legislation and was in the context of a flagrant disregard by the Department of the CEO's obligation to apply to the court for a protection order within two working days. The further contact visit on 4 November 2013 again occurred in the context that the mother was still being denied return of the child. It is remarkable that [suppressed] in her report did not acknowledge the enormity of the emotional trauma that was being caused to the mother by the child not being returned and attributed the mother's focus on wanting to take the child home with her as some form of 'delusional thinking'. It is also of concern that [suppressed] when trying to persuade the mother to release the child at the end of the contact visit on 4 November 2013 threatened the mother that the child would be taken into the care of the CEO until the child was 18 years of age if the mother did not cooperate. This revealed an attitude, consistent with the delay in the Department bringing the matter before the court, that the Department could decide unilaterally what was to be the outcome in terms of protection and care of the child.

- (6) The magistrate also in her decision relied upon the emails between the mother and father as indicating that the mother was in a mental state that she was unlikely to be able to protect the child. However, in my opinion, the magistrate, by taking into account these emails as supportive of the Department's position, failed to give proper consideration of the mother's circumstances. Her only child (then aged 7) had been taken away from her, she had no family support in Australia and was understandably feeling desperate and worried at the time.
- (7) Further contact visits occurred on 19 November 2013, 26 November 2013 and 6 December 2013 largely without incident.

(8) There was a countervailing and significant risk of emotional and psychological harm to the child if an interim order was not made returning the child to her mother. This was a significant risk given the age of the child, the acknowledged close relationship between the child and the mother and the separation of the child from the [nationality suppressed] cultural influences that the mother provided.

70 For the above reasons, I give leave to appeal on ground 2 and allow the appeal on this ground.

### **Ground 3**

71 Ground 3 of the appeal raises questions of procedural fairness. There is a fundamental obligation of a judge or magistrate to ensure that a fair hearing occurs according to the law. The concept of a fair hearing means fairness to all parties. It is the duty of the judicial officer conducting the hearing to ensure that the hearing is conducted in accordance with due process, fairly and impartially. It is necessary that the judicial officer conducting the proceedings control the proceedings. This may mean that the judicial officer will intervene in order to prevent irrelevant matters being raised and pursued: *Michael v The State of Western Australia* [2007] WASCA 100 [65], [69] (Steytler J); *O'Connell v The State of Western Australia* [2012] WASCA 96 [103] - [104] (Mazza J).

72 Where a party contends that bias existed, the party must show that the mind of the decision-maker was so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments might be presented. Actual bias would exist where the decision-maker has prejudged the case against the party or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the party and was not open to persuasion in favour of that party. An allegation of actual bias must be 'distinctly made and clearly proved': *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 [36], [69], [72], [127]; *Ibrahim v Herring [No 3]* [2011] WACA 265 [12] (Mazza J).

73 The mother contends that the learned magistrate manifested bias against the mother by yelling at her, cutting her off during submissions and ignoring her evidence and the evidence of Dr Stevens. I am not able to reach any conclusion as to whether the learned magistrate yelled at the mother and, in any event, this would not constitute procedural unfairness except in a very extreme case. Having read the transcript of the hearing, I am not satisfied the mother was 'cut-off' and not prevented from fairly

presenting her oral submissions. In relation to the contention that the magistrate ignored the evidence of the mother and the evidence of Dr Stevens, this is not an issue of bias but whether the learned magistrate's decision was supported by the evidence. This is an issue which has already been dealt with in ground 2.

74 On the hearing of the appeal, when I made enquiries as to what material was before the magistrate, both the mother and counsel for the child contended that they had not been served with a copy of the affidavit of [suppressed] sworn on 8 November 2013. This affidavit was an important part of the case presented by the CEO. It contained a description of what allegedly occurred at the supervised contact visits on 24 October 2013 and 4 November 2013 and contained as annexures written reports of [suppressed], [suppressed] and a PMH inpatient discharge letter. For reasons disclosed earlier in this decision, all of these annexures were important items of evidence. Counsel for the CEO indicated that her instructions were that the affidavit of [suppressed] was served on the mother on 15 November 2013. I requested an affidavit of service be filed which was filed subsequent to the hearing of the appeal and indicates that an envelope containing the affidavit was left for the mother at the reception area of the Fremantle office of the Department and this was collected by the mother on 15 November 2014. Counsel for the CEO did not contend that the child's representative had been served with the affidavit.

75 I note from the transcript of the hearing before the learned magistrate that both the mother (ts 12) and counsel for the child (ts 30) both acknowledged that they had received a copy of the report of [suppressed] which was an annexure to the affidavit. It appears from the transcript that counsel for the child (not counsel who appeared on the appeal) may have only been given a copy of the report during the hearing as he indicated to the magistrate that he was unable to respond to it as he was still considering the content of the document.

76 The failure of the CEO to serve a copy of the affidavit of [suppressed] on the representative of the child is a serious deficiency. Although this is an appeal by the mother, it is a significant part of the process to ensure a fair hearing that the representative of the child is fully served with copies of the evidence before the court so that submissions can be presented which emphasise factors which the magistrate should take into account in considering what are the best interests of the child. This is particularly so where, as in this case, the mother is self-represented

and the submissions of the representative of the child were substantially supportive of the submissions of the application of the mother.

77 On the basis of the transcript, I conclude that the learned magistrate did not take into account the affidavit of the mother sworn and filed on 14 November 2013. This affidavit contains some important evidence from the mother of difficulties she experienced in attending and arranging with the Department supervised contact meetings. I conclude that these difficulties caused frustration and are factors to be taken into account when considering the mother's emotional responses during contact meetings on 24 October 2013 and 4 November 2013.

78 I conclude that on the material before me there is a serious doubt as to whether a fair hearing occurred and accordingly I will grant leave and allow ground 3 of the appeal.

### **Orders**

79 Having allowed grounds 1, 2, 3 and 5 of the appeal, the order of the learned magistrate should be set aside. The next question is whether I should grant the mother's application for return of the child or remit the matter back to the Children's Court for rehearing. This is a difficult question. This court has the power to do either under s 14 of the *Criminal Appeals Act*. For the reasons that I have given in this decision on ground 2 of the appeal, I conclude, on the basis of the evidence before the magistrate, that an interim order should have been made for return of the child to the mother.

80 It is contended by counsel for the CEO that to make an order for return of the child to the mother is likely to unduly influence the outcome of the substantive application by providing an indication by this court of what the ultimate outcome ought to be on the substantive application and therefore unduly influence the outcome of those proceedings. I have no hesitation in rejecting this proposition. The decision that I make on this appeal is relevant only to the application by the mother for interim orders. The court hearing the substantive application will have to decide that application on the basis of the evidence before it.

81 Counsel for the CEO also contends that I should remit the matter back for rehearing of the interim application so that the court can be provided with further evidence as to the current circumstances and events that have occurred since the making of the order on 20 December 2013. It is submitted that this is necessary in order to ensure the wellbeing of the child. I acknowledge that there is considerable merit to this submission.

82           However, on the basis of my interpretation of the legislation the CEO is obliged to return the child to the mother immediately and therefore the order that I should make is for the child's return.

83           Alternatively, on the material before me, I am of the opinion that the longer the delay in returning the child to the mother, the greater the risk the child will suffer emotional and psychological harm by the separation from her mother. I take into account that on the child being returned to the mother pursuant to any order made by me, the Department has wide powers of enquiry under s 31 of the CCS Act to monitor the situation. I believe the well-being of the child can be further secured by making additional orders that:

- (a)       The mother is not to withdraw the child from her current school pending the hearing of the CEO's application for a protection order except with leave by an order of the Children's Court. (This requirement is designed to achieve stability in the child's life).
- (b)       The mother is to inform the Department within 24 hours of the details of any change of address of the appellant and the child.
- (c)       The matter be remitted back to the Children's Court before a different magistrate for consideration of what further orders (if any) might be made to provide ongoing support and monitoring on an interim basis. (Although the magistrate had concluded that the mother was unlikely to cooperate, I believe the situation will change once the child is returned to the mother).
- (d)       There be liberty to apply to the Children's Court by the CEO for a variation or revocation of the interim order made by me for return of the child to the mother on the grounds that new factual circumstances have arisen since the hearing before the magistrate on 30 December 2013 justifying a variation or revocation (this order is designed to extend the right under s 134 of the CCS Act to apply for a variation or revocation on new facts and circumstances that have arisen from the date of any interim order so the application can be based upon new facts or circumstances that have arisen since the 30 December 2013).

84           I will hear submissions as to the time needed to effect a release of the child to the mother before making final orders.