

DoCS

Discussion Paper for Review

Statutory child protection in NSW

Issues and options for reform



NSW Department of
Community Services



New South Wales
Government

MINISTER'S FOREWORD

Most families and communities love and nurture their children. Tragically, some children do not experience this and are exposed to risk of harm by the actions or neglect of others.

The role of a child protection system is to recognise this grim reality and to establish processes through which we can identify and protect those children who are at risk.

The task has never been easy and is arguably getting harder. As this paper will show, there is an exponential growth in child protection reports. There are high and increasing levels of drug use and domestic violence in our community and this places children at risk. There are changes in the profile of the children that are the subject of reports. There are more children coming into and staying in Out-of-Home Care.

We have a system that is under pressure.

The purpose of this Discussion Paper is to reaffirm the fundamental principles and priorities that need to be in place to keep children safe and then to be sure that the legislation to give effect to those principles – the *Children and Young Persons (Care and Protection) Act 1998* - is as good as it can be. We need to take into account the nature, size and complexity of the child protection task and the approaches that are being adopted by both Australian and overseas jurisdictions.

I appreciate the invaluable input that has been provided through submissions and through the Ministerial Advisory Committee, which was charged with reviewing the issues raised in submissions together with available data and research and providing advice to the Government. These contributions have been essential to understanding those aspects of the legislation that may need to be strengthened to achieve a better result for children and the options for statutory reform that could be pursued to achieve this.

I hope this Discussion Paper will further support our collaboration towards building the best possible child protection system for NSW.

A handwritten signature in black ink that reads "Reba Meagher". The signature is written in a cursive, flowing style.

REBA MEAGHER
MINISTER FOR COMMUNITY SERVICES

1. PROTECTING CHILDREN – OUR PRINCIPLES AND OUR PRIORITIES

Children come first

Families and communities are complex, but the centrepiece of any child protection system must continue to be the interests of children. This will mean that there are situations where parental interests may need to be secondary to the interests of a child, to the point where a child needs to be removed and placed in the parental responsibility of another person to avoid or to stop harm.

Responsible parenting is important

Children are vulnerable and dependent on the support of their family, not just in their early years but also as they struggle with the challenges and pressures of adolescence. Parental behaviour is therefore an important element of ensuring that children are safe from harm, and one of the important roles of a child protection system is to promote responsible parenting.

Community responsibility to keep children safe

We want children to be safe and secure both within and outside of their homes and we want to avoid any exploitation of their inherent vulnerability. This is a job that needs to be shared by us all. We have a responsibility to treat children protectively and to ensure that those around us do likewise.

Identifying children at risk

We need those who have contact with children to be watchful and protective and to have an effective mechanism for raising concerns about the safety and well-being of children with whom they come into contact, be they immediate concerns or concerns about the potential for a child's circumstances to be harmful over time.

Supporting families

Where families are vulnerable we want to be in a position to support both the family as a whole and the parents in particular so that the children do not have to be brought in to the child protection system unnecessarily.

Responding to risk

We want to be sure that child protection workers have the best available information about the situation of a child and family to inform their decisions and that child protection resources are directed as a priority to those children who are at greatest risk of harm.

Stability and support for children who are removed

Unfortunately there will be situations where the level of risk and/or the nature of the harm that has been experienced are such that it is in the best interests of a child to remove them from their family and to place them with alternative carers. Where this occurs, it is essential that stability for the child be achieved as early as possible and that they are well supported throughout their time in care. The research is very clear that outcomes for children in care diminish dramatically if they experience multiple placements once brought into care.

Supporting children and young people who are leaving care

Research demonstrates that effective preparation for leaving care and support through the transition from care and after care can have a significant impact on the ability of a child or young person to build a successful future.

2. WHAT HAS BEEN SAID ABOUT THE LEGISLATION

The *Children and Young Persons (Care and Protection) Act 1998* has now been in place for over five years, although it has been proclaimed in stages over this period so that the commencement of new legislative requirements was matched with the availability of systems and resources.

Section 265 of the Act requires that a review be initiated five years after commencement, to consider whether the policy objectives of the Act remain valid and whether the Act remains appropriate for achieving those objectives. A report on the review is to be presented to the Parliament by 5 December, 2006.

The review took place between August 2005 and July 2006. A public submission process was established to support the review. This involved the distribution of a public issues paper and an open invitation for individuals and organisations across the community to identify issues associated with the operation of the Act and to put forward ideas for reform. Forty seven submissions were received.

In addition, a Ministerial Advisory Committee, comprising key child welfare experts was charged with providing advice to the Government, having regard to the issues raised in submissions and relevant data and research (including comparative information on child protection legislation in both Australian and overseas jurisdictions). The Committee was chaired by Leonie Manns and was comprised of high level representatives from the Association of Child Welfare Agencies, the NSW Council of Social Services, the Aboriginal Child, Family & Community Care State Secretariat (NSW), DoCS, the Commissioner for Children and Young People, and Dr Judy Cashmore. The advice of the Committee was presented on 26 July, 2006.

The issues and suggestions canvassed in the public submissions, together with the advice of the Ministerial Advisory Committee, have led to the development of this Discussion Paper and informed its contents.

The unmistakable common ground in contributions to the review has been that the primary emphasis in the legislation should be to guide child protection intervention in a manner that promotes the best interests of children and that there is some room for improvement in this respect. There was also strong support for continuing to build the early intervention system in NSW in order to prevent entry into care.

However, there is a very wide range of opinions about the best way to respond to these challenges. Of particular note was the depth and breadth of opinion on some of the most fundamental aspects of the child protection framework, including:

- The operation of mandatory reporting.
- The need for more effective protection of children from parents and carers with a demonstrated history of harming children.
- That the detailed provisions of the Act may operate in such a way that parental rights may inappropriately dominate at key decision points.
- The need to improve stability for children who must be removed from their parents.
- Whether the broad scope of the role of the Children's Court across the full spectrum of child protection orders is appropriate.

The literature and proposals in the submissions suggest that significant reforms are both possible and strongly advocated to improve child protection outcomes in NSW.

In some areas reform can and should occur immediately. For example, improved protection should be provided for children (and particularly newborn babies) who are exposed to harm from parents or carers from whom multiple children have previously been removed, or from a parent or carer or who has been identified as 'a person of interest' in relation to a child death.

Child protection must have a preventative dimension. At the very least, an effective child protection system should avoid long and protracted processes in situations where children are at risk of harm from a parent or carer that has previously been found to abuse or seriously neglect children. With this in mind the Government resolved to progress immediate changes to the legislation to avoid exposure of children to serial abusers.

There is a similar imperative to improve protection for newborn babies, by strengthening the links between mandatory reporting and prenatal reporting and by ensuring that there is effective information exchange between agencies that are involved with the pregnant mother and the family. This is also being pursued as a priority.

Immediate action is also important to strengthen parental responsibility and accountability. The Government has therefore introduced a new scheme of Parent Responsibility Contracts to improve the ability to manage those situations where a child is at risk of harm primarily because of the anti-social behaviour of one or more parents. The Parental Responsibility Contract provides a formal mechanism by which DoCS can reach an agreement with those parents on actions that will be taken to improve the ability of those parents to accept and discharge their responsibilities. Effective use of this approach will help to avoid the need to place children in out-of-home care (OOHC) and to help build a safe and viable family life for them. Refusal by a parent to enter a PRC can be used by the Department as a basis for seeking a Children's Court order for reassignment of parental responsibility.

There are other aspects of the legislation where the way forward is much less clear and the divergence of opinion more profound. That is the position in relation to mandatory reporting, dealing with the interests of parents in child protection cases, and the role of the specialist Children's Court.

In these areas, there is a need to test the options and the assumptions that underpin them. This needs to be done with reference to:

- more detailed information and data about the size and operation of the current child protection and out-of-home care systems;
- fuller analysis of the NSW child protection framework relative to the approaches taken in other Australian and overseas jurisdictions; and,
- an understanding of the potential benefits/costs of any proposed changes.

That is the purpose of this Discussion Paper.

3. THE CHILD PROTECTION CHALLENGE

Any adjustments to the legislative framework for child protection need to be informed by a clear appreciation of the nature, size and complexity of the child protection task.

The data set out below are drawn primarily from the DoCS computerised client information system (KiDS). In cases where further inquiry is warranted, this is supplemented by analyses of other data held by DoCS. At the time of writing this paper the 2005/06 data were being analysed for annual reporting purposes. Where this has been completed the 2005/06 data are used. In other cases the 2004/05 data are used.

The summary observations arising from the data are:

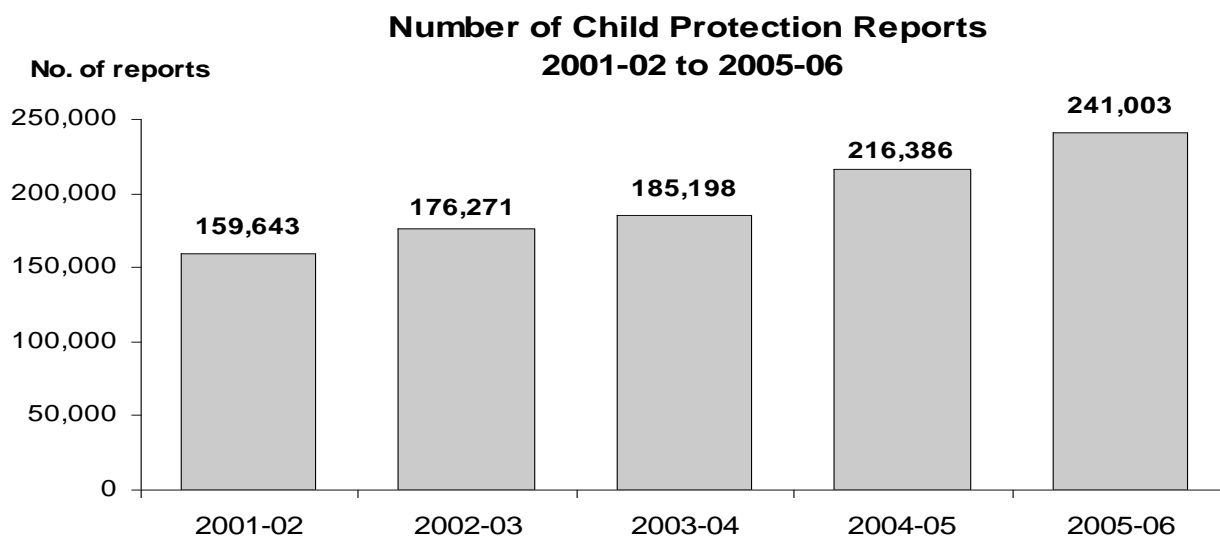
- The number of child protection reports continues to increase.
- There is an average of 2.1 reports for each child reported.
- An increasing proportion of risk of harm reports are from non-mandatory reporters.
- A substantial and constant proportion of all reports is referred by Helpline caseworkers for further assessment
- Children under 1 year of age continue to be a significant proportion of child protection reports.
- Aboriginal children continue to be overrepresented in the system.
- Domestic violence is the highest primary risk factor identified in reports.
- Alcohol and drug use is also a very significant factor in reports.
- The number of parental appeals against the orders of the Children's Court is increasing substantially.
- Children are spending longer in care.
- Children often experience multiple placements while in care.

3.1 Number of child protection reports

Data on the number of reports made to the DoCS' Helpline in the last five years demonstrate that there is increasing demand for child protection services. The current statistical probability is that one in every five children in NSW will be reported to DoCS at some point before they turn 18 years of age.

Over the last five years child protection reports have grown by 51 per cent, from 159,654 in 2000/01 to 241,003 in 2005/06. The 2005/06 figures show an increase of 11.4 per cent on the number of reports received in 2004/05. At this volume of reporting, DoCS Helpline currently receives a report at an average rate of 1 report every 2.2 minutes.

FIGURE 1: NUMBER OF CHILD PROTECTION REPORTS 2001/02 TO 2005/06



Source: CIS & KIDS statistical extracts, DoCS Information & Reporting

3.2 How many children are the subjects of child protection reports?

A child may be the subject of multiple reports, so it is necessary to identify the number of children that are involved in the total number of reports.

Since 2001/02 there has been a 29 per cent increase in the overall number of children involved in child protection reports, from 84,965 in 2001/02 to 109,568 in 2005/6.

For each child reported, there is an average of 2.1 reports.

3.3 Who is being reported?

Age and gender of children and young people reported

The largest number of reports continues to be for children below 12 months of age. Over the last five years there has been a 42.5 per cent increase in the number of children under 12 months involved in reports. In 2005/06 almost 9 per cent of children reported were less than 12 months old.

In 2005/06, 1 in 4 reports involved 13 to 17 year old children, compared to 1 in 5 reports in 2001/02. A larger proportion of these reports are about 13 to 15 year old females (61.7 per cent)

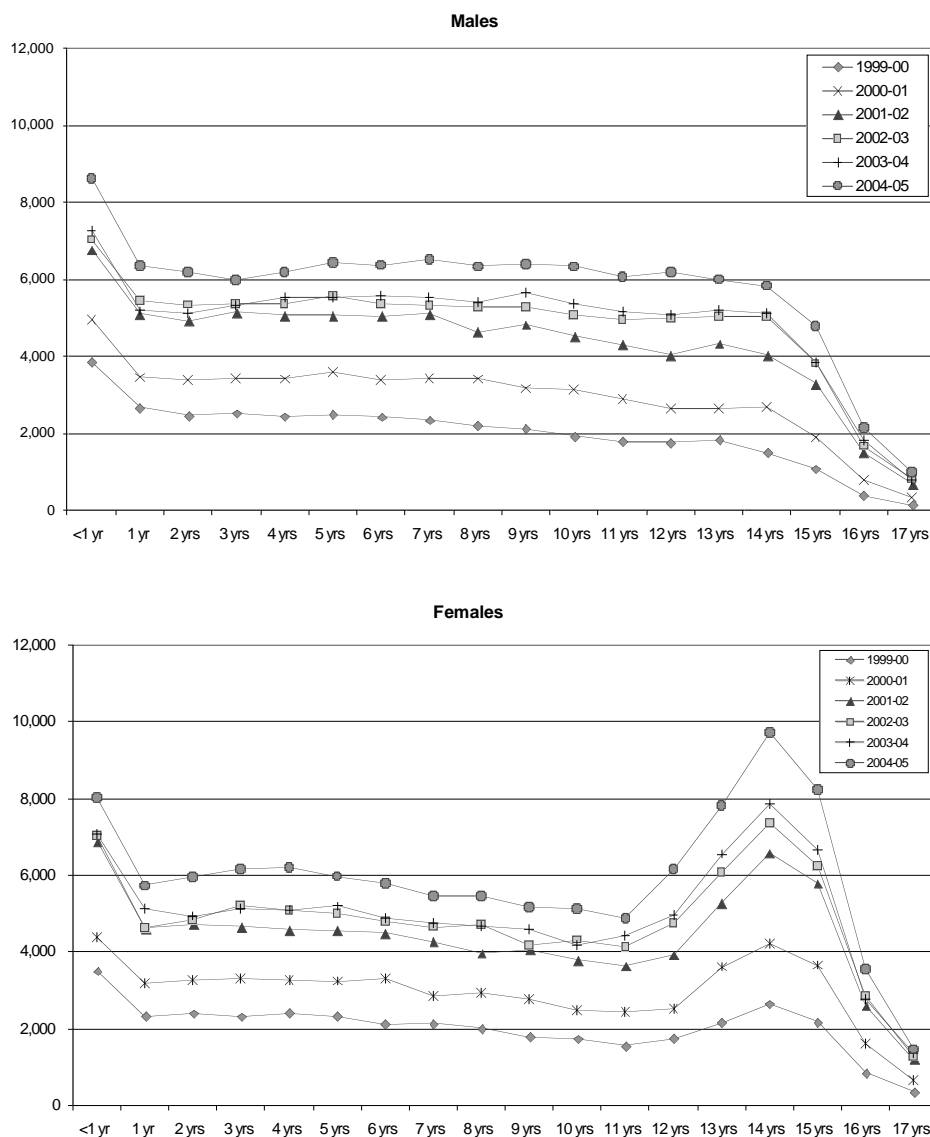
Over the last five years there has been very little variation between the proportion of females and males involved in child protection reports. While there are more males compared to females under the age of 12 that are reported, in the age group 12 to 17 years significantly more females than males are involved in reports.

Figure 2 shows the distribution of the number of reports by age has been quite different for males and females over 1999/00 to 2004/05 and that it is becoming more so for females.

Males under the age of 12 months have consistently had the most reports per year. However, this age group had the lowest percentage increase over 1999/00 to 2004/05 (124 per cent compared with 190 per cent overall).

The age distribution of reports has changed considerably for females between 1999/00 to 2004/05. The peak in reports involving 14 and 15 year old females is increasing. In 1999-00, 22 per cent of reports of females involved 13-17 year olds, compared with 29 per cent in 2004-05.

FIGURE 2: NUMBER OF REPORTS BY AGE AND SEX, 1999-00 TO 2004-05



Aboriginal children and young people

Indigenous children are over represented in child protection.

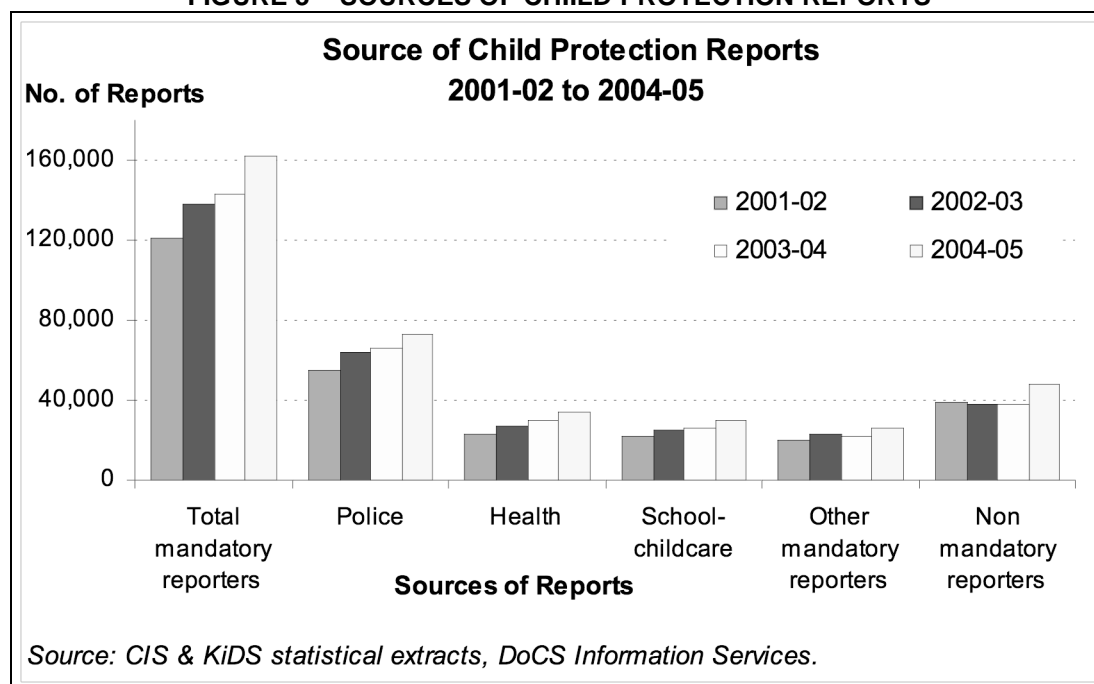
Of the 80,018 children and young people that were referred for further assessments in 2004/05, a total of 9,600 (12 per cent) were Indigenous children and young people. In 2004/05, 17.2 per cent of the total NSW Indigenous population aged 0-17 years were involved in reports referred for further assessment.¹

3.4 Who is reporting risk of harm?

For the period 2001/02 to 2004/05:

- The number of child protection reports received from mandatory reporters has increased by 34.7 per cent, from 120,508 in 2001/02 to 162,287 in 2004/05;
- The number of the reports from non-mandatory reporters increased more sharply (by 38.2 per cent) from 38,953 in 2001/02, to 54,099 in 2004/05;
- Three out of four child protection reports received by DoCS were from mandatory reporters;
- Two-thirds of all reports to DoCS come from three groups of mandatory reporters – police, health and school/education;
- The largest child protection reporting group to DoCS is NSW Police. Over the last five years there has been a 46.2 per cent rise in reports by Police and more than one in three reports come from police; and
- Among non-mandatory reporters, the largest number of reports comes from families (around 15 per cent of all reports).

FIGURE 3 – SOURCES OF CHILD PROTECTION REPORTS



¹ Department of Community Services , Annual Statistical Report 2004/05.

The source of re-reports is also of interest. While relatives have remained the most likely source to re-report within one-month (22.1 per cent of reports by relatives in 2004/05), the percentage increase in such short term re-reports has been the largest for Health (about a 16-fold increase) and Police (more than an 11-fold increase) over the time period.

3.5 The nature of risks identified in reports

The data presented below are delivered from the coded fields in the KiDS system. Caseworkers are restricted to three entries and these entries relate to the current incident rather than the history or background to the problem. This means that underlying problems, such as parental drug or alcohol abuse, are likely to be understated.

Caseworkers enter more detailed information in text fields on the system and on hard copy files. This information is more difficult to extract, but will be accessed for special investigations.

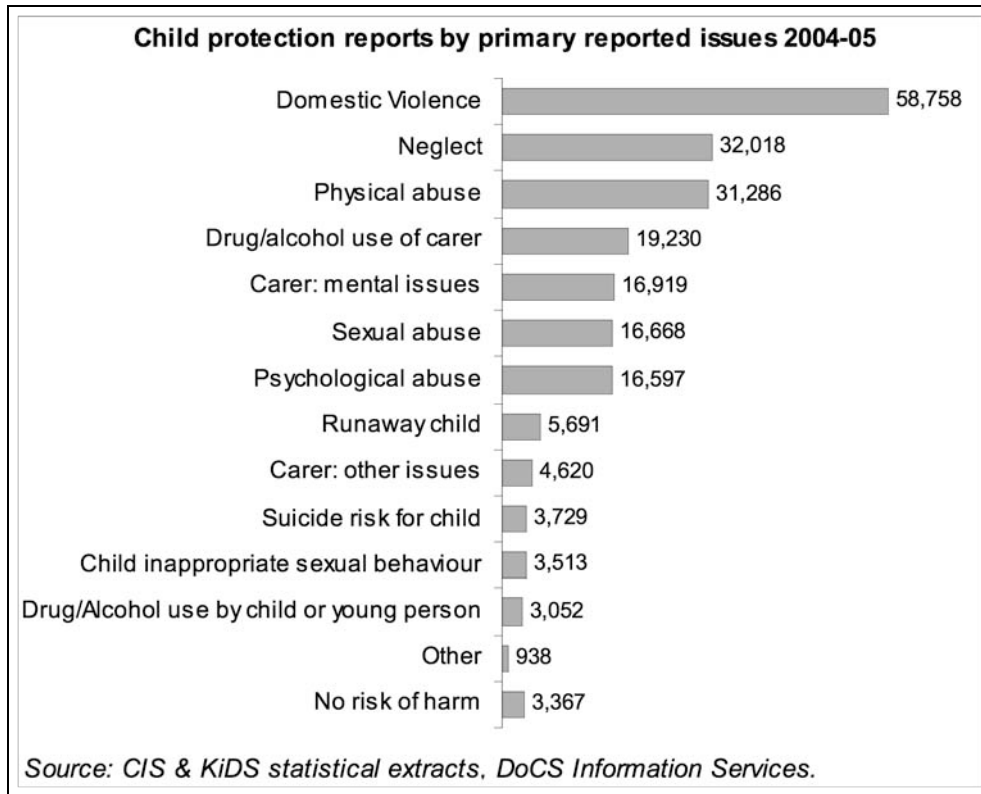
In 2004/05, domestic violence was the most common primary reported issue with one in four child protection reports (27.2 per cent) involving domestic violence. Neglect was the second most common primary reported issue, accounting for 14.8 per cent of all reports. The types neglect included inadequate supervision for the child's age and inadequate shelter or homelessness.

Physical abuse accounted for 14.5 per cent of all primary reported issues, with the main concerns being hitting, kicking or striking and risk of physical harm or injury.

The emotional state of the carer, the psychiatric disability of the carer and suicide risk or attempt of the carer accounted for a further 7.8 per cent of primary reported issues.

Psychological abuse and sexual abuse each accounted for 7.7 per cent of primary reported issues.

FIGURE 4: ISSUES IN CHILD PROTECTION REPORTS

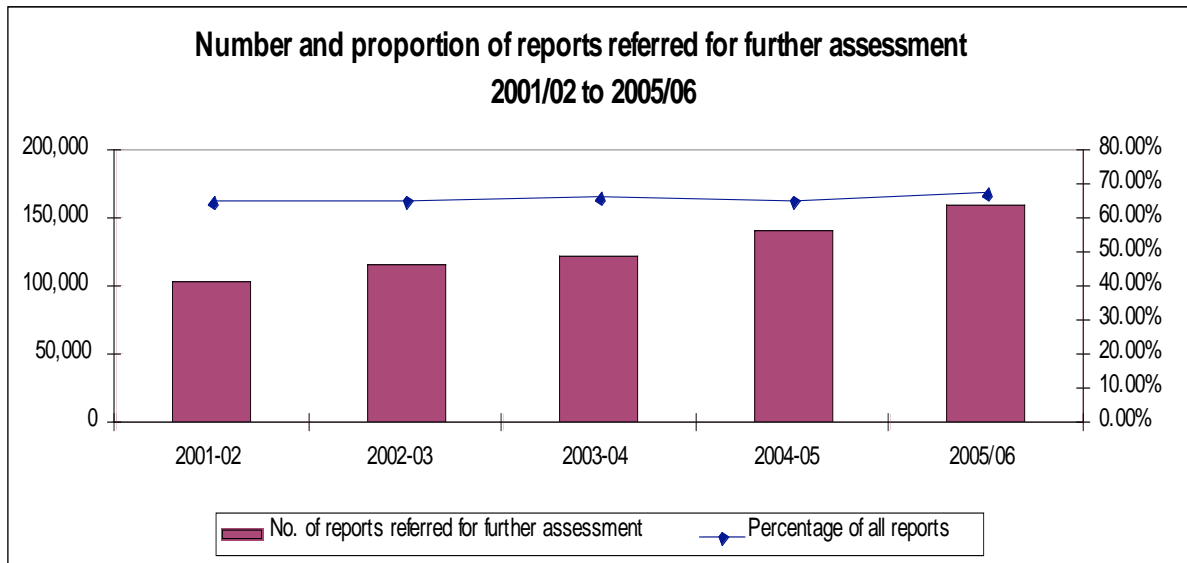


While the review of primary risk factors recorded on the KiDS system indicates that one in ten reports (8.9 per cent) were concerned with drug and alcohol use by the carer, further detailed review of case files relating to drug and alcohol reports has been undertaken and this indicates a much more substantial prevalence of cases relating to carer substance abuse. The case file reviews indicate that carer alcohol abuse is associated with up to 42 per cent of cases, and parental drug abuse in up to 40 per cent of cases. This is much more in keeping with surveys of caseworkers that indicate parental drug or alcohol use is a major factor in a high proportion of child protection cases.

3.6 What proportion of reports requires action?

In 1999/00, initial Helpline assessment determined that 67.24 per cent of all reports made required further assessment, and this proportion remains at around 67 per cent under the revised mandatory reporting regime.

FIGURE 5: REPORTS REFERRED TO CSC/JIRT FOR ASSESSMENT

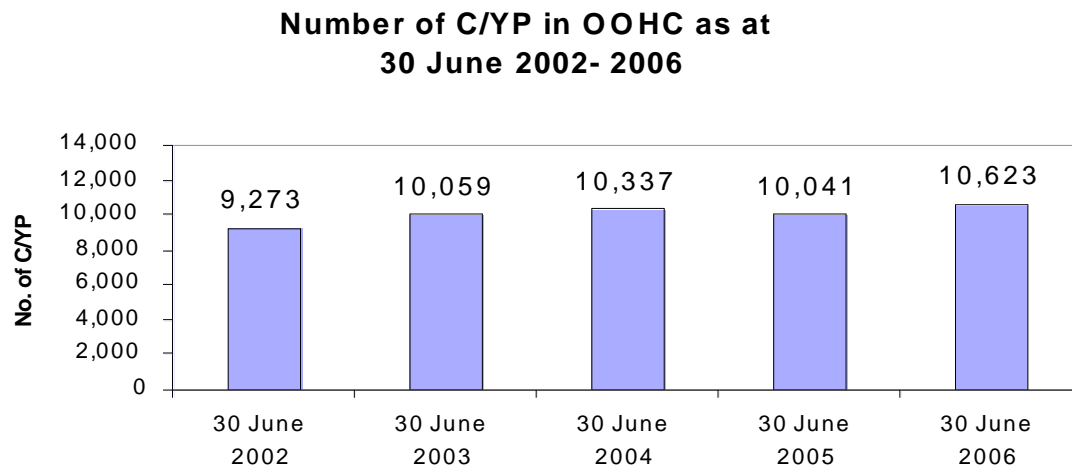


3.7 Children and Young People in Out-of-Home Care (OOHC)

The number of children and young people in care has increased from 9,273, as at 30 June 2002, to 10,623, as at 30 June 2006, a 14.6 per cent increase.

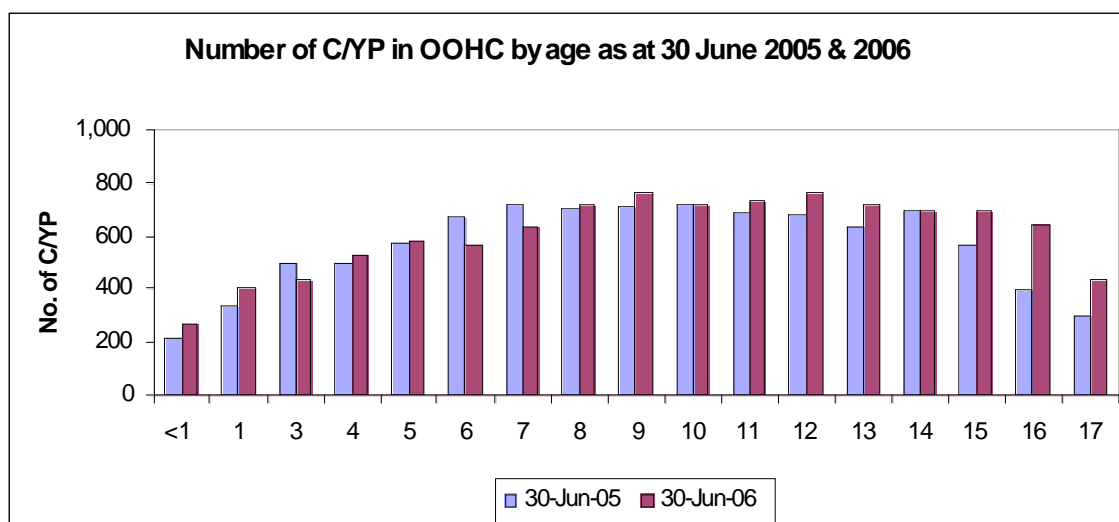
The rate of children in care per 1,000 of the child population has increased from 5.8 to 6.7 between 2002 and 2006.

FIGURE 6:



Around twenty per cent of children and young people in care were under five years old. Nearly half the children and young people are between 6 and twelve years of age, and around two-thirds are between five and 14 years of age. Around 12 per cent of children and young people in out-of-home care were between 15 and 17 years of age.

FIGURE 7: AGE OF CHILDREN ENTERING CARE



Children are spending increasing periods of time in OOHC. Between 2001 and 2005, there was a significant decrease in care periods of up to two years and a dramatic rise in the proportion of care periods of more than four years. As at June 2005, children and young people spent an average of 51.2 months (or 4.2 years) in care.

TABLE 1: OOHC by length of current care episode, as at 30 June 2005

Length of current care episode						5year
	2001	2002	2003	*2004	2005	% change
0 to <1 month	346	269	276	221	207	-40.2
1 month to <3 months	465	469	458	324	445	-4.3
3 months to <6 months	615	505	673	498	489	-20.5
6month to <1 year	1,190	986	1,079	904	841	-29.3
1 years to <2 years	1,690	1,652	1,510	1,533	1,306	-22.7
2 years to <3 years	1,312	1,379	1,334	1,200	1,243	-5.3
3 years to <4 years	955	1,051	1,181	1,169	988	3.5
4 years to <5 years	622	780	916	993	1,006	61.7
5 + years	1,955	2,175	2,625	3,092	3,516	79.8
Unknown	1	7	7	403		
Total	9,151	9,273	10,059	10,337	10,041	9.7

Source: Integrated Substitute Care Database Annual Statistical Extract-1995/1996, Information Services, NSW Department of Community Services

Children often have a number of different placements over the time they do spend in care. As at June 2006, 32.4 per cent of children and young people who were in care for more than five years had a single placement. In 2004/05, 15.9 per cent had four or more placements in their current care period.

Of the total of 10,623 children and young people in care at 30 June 2006, 8,229 (or 77.5 per cent) were on a final care and protection order. Of these final care and protection orders, 26.2 per cent of final care and protection orders were for Indigenous children and young people.

4 STRENGTHENING THE CHILD PROTECTION SYSTEM

4.1 MANDATORY REPORTING

The purpose of mandatory reporting

Child protection systems worldwide are set up to identify and differentiate actual or potential high risk cases so that children are protected, unwarranted interventions are minimised and resources are deployed efficiently.

The task is far from easy. The risk and the harm to children and young people can take many different forms and be at varying degrees of intensity. Children and young people may be at risk of harm either at a single point in time through an extreme situation, or over an extended period because of a pattern of behaviour of those in whose care they are placed. Further, the patterns of behaviour that pose a risk of harm may be relatively visible or less visible – as in cases of chronic neglect where the harm may not appear to be immediate, but where the pattern of treatment, if left unchecked, will cause harm.

Mandatory reporting schemes are a key element of many child protection systems and there are practical and policy underpinnings to mandatory reporting requirements.

From the practical perspective, mandatory reporting recognises that there are some persons and professionals who will come into frequent contact with children and their families, and who will therefore be well placed to observe whether children are at risk or actually suffering harm. Creating a duty to report places the interests of children at the centre of professional thinking and resolves potential conflicts with professional ethics (such as obligations to maintain client confidentiality), which may otherwise cause some professionals to be concerned about reporting suspected cases of child abuse.

At a broader level, mandatory reporting acknowledges that child abuse is an issue that is a concern for the whole community. It is a means of ensuring that there is a broad, watchful approach to detecting and responding to abuse and neglect of our most vulnerable citizens.

We have high expectations of mandatory reporting - we hope that it will operate in a manner that helps to identify both immediate and potential risk of harm and to detect different forms of harm or future harm.

The important issue is whether the legislation optimises the ability to identify the most serious and genuine cases of harm and direct resources to those cases. We want to ensure that there is not an unacceptable level of reports where there is not actually a risk of harm.

This is a fine balance.

Mandatory reporting in NSW

Mandatory reporting was initially introduced in NSW in 1977, although the scope of the requirements has expanded over time. Initially the mandate to report only applied to medical practitioners and certain education staff and the nature of abuse required to be reported at that time was limited to physical and sexual abuse. Mandatory reporting under the *Children and Young Persons (Care and Protection) Act 1998* is considerably broader than this and broader than the scheme that applies in most Australian jurisdictions.

Western Australia does not have a mandatory reporting requirement in its child protection legislation (although some persons in child care services are required to report under other legislation). Other jurisdictions do have mandatory reporting within the child protection schema, but the range of types of harm that are subject to reporting are more limited than NSW - in that they are largely confined to physical and sexual abuse and to more apparent and severe abuse.

The *Children and Young Persons (Care and Protection) Act 1998* amended the range of mandatory reporters from specified professionals to include all professionals working partly or wholly with children in health care, welfare, education, children's services, residential services, or law enforcement services, in line with the recommendations of the Wood Royal Commission and the *Review of the Children (Care and Protection) Act 1987*.

The criteria for triggering mandated reporting have also been expanded. The term "*at risk of harm*" was introduced in the 1998 Act and captures a wide spectrum of behaviours that may trigger child protection action, not just the more extreme forms of abuse.

Section 23 of the Act states that a child or young person is at risk of harm if "*current concerns*" exist for the safety, welfare or well-being of the child or young person because of the presence of any one or more of the following circumstances:

- *the child's or young person's basic physical or psychological needs are not being met or are at risk of not being met*
- *the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care*
- *the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated*
- *the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm*
- *a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm.*

The only other state with such a broad definition of risk is Queensland.

Section 24 provides for the making of a report by a person who has "reasonable grounds" to suspect that a child or young person is, or that a class of children or young persons are, at risk of harm.

Trained Helpline staff screen all child protection reports, identifying those that meet the criteria of risk of harm under section 23. They gather information using a set of structured questions and review the Department's previous involvement with the child and their family. Broadly, this initial assessment focuses on whether the child has actually been harmed and takes into account the circumstances, the likelihood and consequences of future harm to the child. Based on the outcome of the assessment, Helpline makes a preliminary determination as to whether a child or young person may be in need of care and protection. If so, the matter is forwarded with a recommendation for the priority of

response to a Community Services Centre (CSC)² or a Joint Investigative Response Team (JIRT)³ for further assessment or investigation. If there is no basis for DoCS' intervention and no further action is required, the matter is closed at the Helpline and is forwarded by the Helpline to a CSC/JIRT for "information only".

Secondary assessment for determining the risk of harm is conducted by either the CSC or JIRT. *Secondary Assessment* entails application of the *NSW Risk Assessment Framework* to assess risk of harm and make professional judgements about safety, harm consequences and the probability of future harm in respect of a child or young person. These judgements inform the decisions to substantiate (or not) harm and/or risk of harm and the determination as to whether the child or young person is in need of care and protection.

Case allocation judgments are guided by Intake Assessment Guidelines. These guidelines specify those cases that should not be closed without assessment and this applies to cases where there is a high level of risk to the child or a high level of vulnerability, including those where the initial assessment requires a response within 72 hours and one or more of the following circumstances applies:

- the parenting capacity of the primary caregiver is impaired by factors (such as serious misuse of drugs/alcohol, unmanaged mental illness, suicide risk)
- siblings of the child reported are already in care
- there are signs of serious neglect
- there is domestic violence involving a weapon
- there is a recent pattern of reports on the child or sibling but detailed investigation has not yet occurred.

Issues and options for reform of the NSW mandatory reporting scheme

Opinions on the role and future of mandatory reporting vary widely, and tend to relate to perspectives about the volume of reports received. As noted earlier in this paper, there has been an exponential growth in child protection reporting over the last 8 years. In 1998/99, there were approximately 72,000 child protection reports made to DoCS and by 2005/06, this had grown to 241,003 child protection reports.

There are those who point to the escalation in reports to argue that mandatory reporting is inherently flawed. The underlying assumptions are that the increase in the number of reports is directly attributable to mandatory reporting (i.e. the expanded definition of issues that can be reported, the lower threshold for the circumstances that can be reported, combined with extension of the range of mandatory reporters) and that mandatory reporting increases the number of reports that do not actually involve a risk of harm. This is the argument put most recently by Scott.⁴

² These are the field offices of the Department of Community Services that are located in 80 locations in NSW. They are staffed by caseworkers and specialist support staff.

³ Joint Investigation Response Teams (JIRT) are specially trained police and Department of Community Services case workers who work with NSW Health to conduct joint investigations when a child abuse report may involve a criminal act.

⁴ Scott, D. "Sowing the Seeds of Innovation in Child protection", 10th Australasian Child Abuse and Neglect Conference, Wellington, New Zealand, February 2006.

The sheer weight of numbers is taken to be a sign that mandatory reporting *per se* disrupts the functioning of the child protection system and that a retreat from mandatory reporting is required. Scott goes so far as to say that “child protection systems which catch large numbers of children in their nets are dangerous systems”, and instead advocates that there be a population based, public health approach to child protection. This appears to involve public health prevention strategies and broad measures to address social disadvantage, with child protection services providing a consultative services to primary care services such as health and education and focusing on those children who need statutory protection or who are already in care. The unanswered issue is how the child protection system is expected to identify those children in need of statutory protection, and this inevitably returns us to the issue of systems for reporting and screening cases involving children at risk.

As was noted above, mandatory reporting aims to deliver important practical and policy benefits, and a much more detailed analysis is required to inform decisions about the future of mandatory reporting. Particularly important questions include:

- Is mandatory reporting a primary cause of the increase in reports, or is it being wrongly blamed by some commentators?
- Does mandatory reporting capture a high proportion of children who do not warrant investigation (i.e. ‘false positives’)?
- If there are ‘false positives’, can the system cope efficiently with them?
- Are there options for improving mandatory reporting?

• **Is the increase in reports attributable to mandatory reporting?**

Trends in reporting in jurisdictions without mandatory reporting and other changes in the child protection landscape that occurred at or around the same time as mandatory reporting suggest that there are factors that are unrelated to mandatory reporting that have an impact on the volume of reports.

Significantly, child protection agencies nationally and internationally have experienced significant increases in reporting over recent years – irrespective of whether they have mandatory reporting requirements in place. Note also that in NSW there is a trend to significant increase in reporting from non-mandatory reporters (up from 39,135 in 2001/02 to around 59,000 in 2005/06 – an increase of more than 50 per cent).

These factors suggest a broader community awareness of child protection and an increased shared commitment to reporting observed risks that is unrelated to mandatory reporting.

The behaviour of mandatory reporters has also been cited as a factor driving the volume of reports. In the NSW context, specific mention has been made of the broad scope of the circumstances that may attract a report, combined with the penalties for failing to report. These are seen as factors that may have led to a report to DoCS even when a referral to a community and/or agency or direct support could readily address the problem. However, the increased reporting trend by mandatory reporters was evident long before the introduction of the new legislation and cannot be solely attributed to the expanded scope of mandatory

reporting. As was noted in the discussion paper prepared for the review of the 1987 Act:

'the agency may be notifying (reporting) to ensure the Department (DoCS) has a record of the incidents giving rise to concern even if there is no immediate need for it to get involved'.⁵

Furthermore, most agencies working with children, whether government or community based, have their own reporting charters/policies which place obligations on employees to report. Arguably, most professionals coming in contact with children about whom they had concerns would continue to report in the absence of a legislative requirement. It should be noted that one reason cited for the broadening of the categories in the 1998 legislation was the confusion that existed between various organisational reporting mandates (which were broader) and the 1987 legislative mandate.⁶

If mandatory reporting cannot be said to have caused the increase in reports, this begs the question of whether narrowing the scope of mandatory reporting would make any difference to the volume of reports.

- **Does mandatory reporting generate reports where there is no risk of harm?**

Quite aside from the question of the cause of the increase in reports, to focus on the sheer volume of reports (however they may have come about) is probably to focus on the wrong issue.

Mandatory reporting is a mechanism for detecting and providing information on child abuse and neglect. If the reports being made are confirmed as identifying cases that at least warrant investigation or assessment (i.e. the reports appear to concern genuine cases of actual or potential abuse or neglect) then the volume of reports is simply a reflection of the reality of the child protection problem with which we are faced as a community.

The data show that a substantial and constant proportion of reported cases is referred to Community Services Centres following initial screening at the Helpline (around 65 per cent of the annual total of reports over the period 2001/02 to 2004/05).

Advocates for paring back mandatory reporting may seek to argue that the 35 per cent of reports not referred to CSCs is a measure of the inefficiency of mandatory reporting.

However, the strong counter argument is that, even where a report is treated as information only (and is closed before referral to a CSC), the information that is recorded as a result of the report is valuable contextual information for any subsequent reports. The argument tracks back to the fundamental purposes of mandatory child protection reporting. As a matter of principle we want mandatory reporting to be both a siren that calls us to action where there is a crisis for a child and an early warning system that should work to avoid such crises. A higher

⁵ Review of the *Children (Care and Protection) Act 1987* Discussion Paper 1: Law and Policy in Child Protection, p 40.

⁶ *Review of the Children (Care and Protection) Act 1987 Recommendations for Law Reform*, November 1997, p 23

volume of reports may well be precisely what we want from a mandatory reporting system, *provided those reports are well judged and of a quality that enables effective case assessment.*

Of course we need to be sure that we have effective systems for screening all reports that we do get. This includes recording the information that is in a report even where the initial assessment indicates that there is no immediate risk of harm and that the case can be closed. It also means ensuring that cases where the initial assessment signals a high risk receive priority in assessment and case allocation processes. There is a need to consider whether this assessment and allocation process could be further assisted by refinements to mandatory reporting.

The importance of contextual information over time needs to be stressed in relation to the effective detection and management of child neglect. As an area of child protection work, neglect has received far less definitional, research and treatment attention than other abuse types.⁷ This is in spite of increasing knowledge about the seriousness of neglect and the frequency of its occurrence. There is a perception that neglect is a less serious problem than physical and sexual child abuse and cases are less likely to be confirmed.⁸ Interventions are also less likely to succeed than for other forms of abuse.⁹

Cases of neglect that lead to a fatal incident are typically complex and chronic in nature. These deaths can be grouped into two general categories. One category is those children who died from chronic physical and medical neglect including malnutrition, or other illnesses, but that would have been treatable had the children been presented for medical care. The second group of deaths arise out of a chronically neglectful lifestyle where, usually as a result of overwhelming problems of their own, parents are unable to make safe decisions regarding the care of their children, for instance children who die from car accident, drowning, or injury.

The NSW Ombudsman's Report of Reviewable Deaths in 2004 found that neglect accounted for 45 per cent of the issues associated with risk of harm reports concerning the 72 children who died that were known to DoCS. The report also identifies that in 2004, 6 children died as a direct result of neglect. Aboriginal children were over represented in these figures.

It should also be noted that there is a strong correlation between chronic neglect presentations and parental drug and alcohol use, poverty, domestic violence and mental health problems. In these cases the presenting problem for the parent distracts them from providing the necessary care for their child and frequently dominates the case planning and intervention strategies provided by statutory and non-statutory child protection workers.

⁷Zuravin, S. *Child Neglect: A Review of Definitions and Measurement Research in Harold Dubowitz (ed) Neglected Children: Research, Practice and Policy, Sage Publications, California. 1999. at 24-46*

⁸Garbarino, J and Collins, C. *Child Neglect: The Family with the Hole in the Middle in Harold Dubowitz (ed) Neglected Children: Research, Practice and Policy, Sage Publications, California. 1999.*

⁹Ibid

Following this line of argument, narrowing the basis for reporting would increase risk to children because it would reinforce the tendency to focus child protection work primarily on crisis scenarios and direct the system away from information on the broader range of issues that impact on the ultimate well-being and safety of a child. This is not an outcome that would be consistent with the principles of the Act.

The important point is that mandatory reporting is both a channel for managing urgent and highly visible abuse cases and a means of securing early information about children and families who are vulnerable but not yet in crisis. Mandatory reporting is a primary pathway into the Early Intervention Program and a means of identifying those children whose level of risk at a point in time may be relatively low, but whose cumulative exposure to risk is potentially life threatening as we see with many neglect cases. We do not want to lose either benefit through changes that respond simply to the volume of reports.

- **Could and should mandatory reporting be improved?**

Arguably, the real issues are whether there is sufficient clarity about what must be reported and why, and whether reports are of sufficient quality to facilitate the most effective assessment and allocation of the report.

The better the quality of reporting, the more effective mandatory reporting will be as a system for triggering child protection action. There is also an efficiency aspect. The variable quality of reporting generates a need for extensive follow up work with the reporter or in researching the DoCS' client information system for basic information and cross-referencing. If a report is not complete or accurate there is a risk that a child or young person at risk of harm will not be able to be identified or effectively assessed. The corollary of this is that a complete report which is a clear statement of the nature of the risks that are present will facilitate more effective decision-making on the actions required to address the problem and will also help to avoid serial reporting.

Problems with the quality of reporting appear to be a function of reporters not understanding the relationship between their mandate and the definitions in section 23 of the Act, or in some cases it may be simple non-compliance with the mandate regardless of the definitions in section 23. There are also known sources of harm that are not explicitly mentioned in section 23.

The real questions posed by the above discussion are (i) whether to increase the strength of the filter on the reports received and (ii) if so, where to apply that strengthened filter- i.e. whether to have mandatory reporters apply stricter filters or whether this would best occur at the point of assessment.

In discussing this we must recognise that some categories of mandatory reporters, e.g. police, are neither trained social workers nor really 'professionals working with children'. If we set the reporting threshold higher (ie apply the filtration at the reporter level) then we are asking reporters to form a judgement about the circumstances of the individual child and the risk(s) to that child. This is arguably difficult for non-trained reporters.

For example, the current approach to reporting for police attending domestic violence incidents is that police operational guidelines require individual police officers to report if a child is present or is usually present in the household. This

is a generic approach to risk assessment: the circumstances of domestic violence are known to be a risk factor in child abuse and neglect and any child in these circumstances may therefore be at risk. No assessment is required of the risk to the particular child. The consequence is that the assessment of the risk to the particular child is shifted to DoCS' caseworkers. The initial assessment and filtering occurs at the Helpline, with some refinement possible once a report arrives at a Community Service Centre.

It is arguable that it is better not to complicate the role of non-professional mandatory reporters and that increased filtering should be applied at DoCS once a report is received. However, this requires:

- refinement of the filtering mechanisms and confidence in their application;
- a capacity to classify reports and deal with them via the appropriate statutory or non-statutory channels; and
- a shift in focus from the number of reports to the number of children assessed as requiring a statutory response (ie investigation using statutory powers).

Options for facilitating improved reporting practices are canvassed below.

(i) Require reporters to provide clearer evidence of a real risk

The current evidentiary threshold for reporting is “reasonable grounds to suspect” harm. This involves two parameters that are open to subjective interpretation by the reporter. “Reasonable grounds” is an undefined concept under the *Children and Young Persons (Care and Protection) Act 1998*, and open to broad interpretation, which may widen the inclination to report. “Suspicion” of risk of harm is also an imprecise concept that does not indicate what degree of evidence is required to meet the threshold.

Requiring clearer evidence of risk of harm to accompany reports could assist in avoiding reports that do not have a firm basis in fact. This would involve legislative amendments that introduce a higher standard as a basis for reporting harm, such as a requirement for “reasonable evidence” of a risk of harm. It may also assist in improving the quality of reporting, as it would necessarily require all reporters to provide a greater degree of information to support the report.

It should be noted that many other Australian jurisdictions (Victoria, Queensland, the ACT and Tasmania) also require a higher level of probability that the risk is present – using the qualifying condition of likelihood. That is, something adverse is more than a mere possibility, it is more likely to occur than not. Introducing the term “real likelihood” of harm occurring to section 24, would achieve this result. The primary advantage of this approach is that it would enable DoCS to focus resources on cases where there is evidence to support a claim of a real likelihood of harm (as opposed to a mere possibility of harm).

The potential effect of the suggested changes on reporting numbers in NSW is difficult to predict. Data published by DoCS for the period March 2004 to March 2005 indicate that for 35.8 per cent (91,466) of reports received, further assessment/investigation was not required or not possible. If, over time, the suggested change led to a significant reduction in the number of reports being

received where no further assessment/investigation was required, then casework resources would be focussed more on case assessment and response.

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

As noted, illicit drug use is a factor in a large number of cases.

While it cannot be said that parental substance abuse inevitably causes harm to children, there is a significant body of evidence to support the assertion that parental drug misuse (and particularly use of illicit drugs) is inherently risky for children. A recent review, *Drug Use in the Family: Impacts and Implications for Children* points to research on the impacts on children of illicit drug use which demonstrates significantly elevated rates of behavioural and emotional problems and a heightened prevalence of child maltreatment:

“The risk of child abuse and neglect is substantially higher in families with drug abusing parents...and the presence of a substance abuse disorder in a parent has been identified as the strongest predictor of subsequent new cases of child abuse and neglect 12 months later”¹⁰

If this is the case, then effective early intervention and child protection would be assisted by explicit reference to parental misuse of illicit substances as a trigger for a child protection reports. An addition to the section 23 list of circumstances in which the well-being of the child or young person is at risk of harm of the following nature would achieve this:

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

(iii) Strengthen focus on neglect or ‘cumulative risk’ cases

There are two changes to be considered to achieve this.

The first is to consider whether there is a need to be clearer about the circumstances in which a child might be considered to be at risk. Section 23 currently provides that a child is considered to be at risk of harm if “*current concerns* exist for the safety welfare and well-being of the child or young person...” This phrase appears to be open to the interpretation that the perceived risk and/or harm must be immediate and present.

Noting that perceived future risk is important in a child protection context, the provision could be strengthened by clarifying that a risk of harm may be reported even if the child is not being harmed at the present time but there is a previous history of causing a risk of harm or harm to a child and a known pattern of behaviour is re-emerging. For example, we would want to receive reports where the reporter is aware that a person has relapsed into drug use and they are parenting or caring for a child and have either previously caused harm to that

¹⁰ Dawe, S., Frye, S., Best, D., Lynch, M., Atkinson, J., Evans, C., Harnett, P.H. (in press) *Drug Use in the Family: Impacts and Implications for children*. Australian National Council on Drugs, published on website at www.griffith.edu.au/centre/gphrc/staff/dawe.htm. pp 59-60.

child or another child removed as a result of their drug problem (even if this drug use has not yet caused harm to the child and the risk is a future risk).

The proposal could be reflected in an amendment to section 23 to the effect that a child or young person may be considered to be at risk on the basis that “concerns exist for the current safety, welfare or well-being of the child or young person or if there is evidence of behaviour which could cause future harm”. This may in fact increase the number of reports, but this is not in itself a problem if the reports enhance our ability to avoid future harm (and therefore future reports) or to detect a pattern of escalating reports or repeat reports from different sources.

The second possible change is to add neglect of a child as an explicit basis on which a report could be made. The terminology in section 23 is theoretically sufficiently broad to include neglect scenarios. However, the majority of other states list neglect explicitly as a behaviour placing a child at risk of harm. Note for instance: ss 8-13 of the South Australian *Children’s Protection Act* 1993; ss13-14 of the Tasmanian *Children and Young people and Their Families Act* 1997; and, s3 and s148 of the Queensland *Child Protection Act* 1999. A similarly explicit approach in NSW would enable more effective ‘triaging’ of reports.

The ultimate aim is to ensure an effective response to these reports (including a pathway into the Early Intervention program) and to avoid a sequence of reports in which accumulating risk is difficult to detect. This would also help to counter any tendency to treat a pattern of lower level risk of harm in a less responsive fashion

4.2 EXCHANGING CHILD PROTECTION INFORMATION

The integrity of mandatory reporting under the child protection system relies on a common understanding that the information provided by a reporter will only be used for the purposes of child protection. A reporter should also have a high level of confidence that they will be protected from adverse personal consequences that could otherwise arise from making a report.

The policy aim is to avoid a situation where those who know about abuse or neglect of children do not report it because they are fearful of the consequences for themselves or because they are concerned that the information will be used in a manner that they did not intend.

The *Children and Young Persons (Care and Protection) Act* 1998 meets these requirements through section 29. Under section 29, a person who has made a report in good faith cannot be considered to be breaching professional rules, conspiratorial, malicious or defamatory. The confidentiality of reporters is also protected in two ways.

The first relates to protection of the contents of a report. No one can be compelled to produce a copy of a report in any proceedings, and in any event a report can only be used in care proceedings (in the Children’s Court or on appeal from the Children’s Court).

The second protection is for the identity of the reporter. The identity of the reporter is not to be disclosed at any time except with the consent of the reporter or leave of the Court (or other relevant body).

Somewhat in tension with the need to contain the circulation of child protection information is the fact that it is important to be able to share relevant elements of the information with agencies that could be in a position to provide services to support the child or the family in question.

Section 248 therefore enables DoCS to exchange of information which relates to “the safety, welfare and well-being of a particular child or young person or class of children or young persons” with a “prescribed body”. Prescribed bodies include, but are not limited to, organisations such as police, schools and hospitals. The overarching concept remains that the exchange of the information can occur to facilitate child protection (not for broader purposes) and that DoCS carefully manages this information exchange. There is currently no ability for agencies that receive child protection information from DoCS to share it with another agency (irrespective of whether that other agency is prescribed or not).

Limits on information access and exchange and the requirement that the information can only be used for child protection purposes have been the subject of considerable discussion throughout the review and in other spheres. For instance, the Department is prevented from disclosing the identity of a reporter to investigative agencies such as the Ombudsman or Police, even when they are investigating the possible commission of a crime and revelation of the reporter’s identity would assist the investigation.

The Ministerial Advisory Committee recommended that the confidentiality and protection of reporters needed to be upheld, while acknowledging the complexity of the existing arrangements and the needs of investigating agencies such as the Police, ICAC and the Ombudsman. On balance, the Committee advocated that there should not be a power to pass information to third parties without consent, except where it concerns the health of a child.

The Ombudsman has recommended a more open approach to sharing information in his *Report of Reviewable Deaths in 2004* and again in a submission to this review. The specific proposal is that any “prescribed agency” should be able to supply information to other specified agencies where the supply of information relates to the safety, welfare and well-being of children or young people.

An even broader approach has been advocated in the context of police matters, where it has been suggested that all information held by DoCS should be available to a law enforcement agency investigating a matter of serious import. If this approach were applied it would enable, for instance, information that a child is at risk from parental drug use to support police action against the carer for drug offences.

What we have to remember in this context is that a child protection report is an unsubstantiated claim at the time it is made and that it is initiated by the reporter for the purpose of protecting a child, not for prosecuting the parent.

On its face, the Ombudsman’s approach could be seen to chart a reasonable path through the competing public interests of maintaining the confidentiality of reporters and facilitating improved protection of children. However, it is difficult to see how the proposition would work in practice.

The present arrangement enables DoCS to apply the test of whether the information provided would assist in protecting the safety, welfare and well-being

of a child or young person. It is accepted that it is not necessarily clear as to what information meets this requirement (and what information does not) and the answer will generally lie in having a clear understanding of what it might be used for. Determination of the question by one agency helps to overcome this problem and enables consistency in practice. The existing provisions also ensure that once information has been exchanged no further disclosure of that information occurs.

The ability for several agencies to exchange information supplied to them by DoCS would make it very difficult, if not impossible, to restrict the use of that information to child protection purposes. The ability to exchange information that relates to safety, welfare and well-being will inevitably be interpreted much more widely and to do so would be to risk a serious strain on the integrity of the child protection system.

Even if the prescribed body was to establish clear business rules around the exchange of information, concern has been expressed that documents released to the prescribed body would remain on the files of that body. This would be the case even if DoCS subsequently finds that the risk of harm to the child cannot be substantiated (perhaps because information received is not accurate). At some later time the file may be subpoenaed, or otherwise accessed, without anyone realising that sensitive and/or unsubstantiated information (such as the identification of carers or highly personal information concerning children) is contained on the file.

Noting the risks that arise from a broad model of information sharing across a range of agencies, another way forward would be to facilitate information exchange between specific agencies and in a more specific range of circumstances, and to place additional safeguards around that process.

Working from the principle that information should be shared in those circumstances where the public benefit of release of the information outweighs all other considerations, one approach would be to enable the exchange of information where it would support criminal prosecutions. For instance, the legislation could be amended to allow the Director-General of DoCS to release information to police and/or other law enforcement agency in cases where the information is required to assist in the investigation of a serious crime involving harm to persons and particularly children (including murder, sexual assault, and aggravated sexual assault), but only with the approval of the Court and only if the Court is satisfied that this is in the public interest. The Court could also specify any conditions to apply to the release and/or use of the information.

4.3 THE BEST INTERESTS OF THE CHILD

Promoting the best interests of a child

The objects and principles in Sections 8 and 9 of the Act are the primary guide for the actions of any person with a role in the child protection system: caseworkers, service providers and the Courts. They are therefore central to the effectiveness of the child protection system.

Section 9(a) conveys the cornerstone principle that interventions should serve the best interests of the child or young person:

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

Some jurisdictions provide detailed guidance on the manner in which the best interests of the child are to be addressed. This is the approach that is adopted in the ACT *Children and Young People Act 1999*, where Section 13 (1)(b) provides that in making a decision or taking action in relation to a child or young person, a person applies the best interests principle if:

“The person takes into account the following matters so far as they are relevant:

- (i) the need to protect the child or young person from harm
- (ii) if the child or young person has been abused or neglected – the importance of responding to his or her needs
- (iii) the capacity of each parent , or anyone else to provide for his or her needs
- (iv) the wishes stated by the child or young person and the factors ,... that the person considers relevant to the weight that should be given to the child or young person’s wishes;
- (v) the nature of his or her relationship with each parent and anyone else who is significant in his or her life;
- (vi) the attitude to the child or young person, and to parental responsibilities, demonstrated by each parent;
- (vii) the importance of continuity in the child’s or young persons care and the likely effect on the child of disruption to that continuity....
- (viii) The practicalities of child or young person maintaining contact with his or her parents, siblings or family members
- (ix) The age maturity, sex and background of the child or young person.”

The noteworthy feature of this approach is that it ensures that parents are included in the equation in terms of what they can offer to the child as parents – not in terms of what would meet their own interests or preferences. This is a more child-centred approach than applies in NSW.

In NSW, the “best interest” principle is not as expansive and arguably not as clear, in terms of dealing with the relationship between the interests of children and the interests of parents. While the general statement of principle in section 9(a) should ensure that the interests of the child are the primary guide in decisions to remove or to promote increased parental responsibility and accountability if a child is to remain with the family, this is not necessarily what occurs in practice. Two elements of the legislation appear to be contributing to this.

The first is that Section 9(a) explicitly mentions the paramountcy of the best interest of the child where the child has already been removed. While the section does not intend to confine the application of the "best interest principle" to

children in OOHC, the formulation of the section invites the conclusion that parental rights have a higher degree of significance in pre-removal scenarios.

Furthermore, other elements of the statutory principles in section 9 seek to infuse decision making with consideration of the broader family interest and parental rights, with the consequence that the primacy of the child's interests is often displaced or at the very least diluted in practice. The "least intrusive intervention principle" in Section 9(d) is regarded as particularly problematic in this regard:

"In deciding what action is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed **must be the least intrusive intervention in the life of the child or young person and his or her family.....**" (Emphasis added).

The interplay between the principles in section 9 and the objects set down in section 8 of the Act arguably compounds that problem. Note in particular section 8(a) which provides:

"that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, **taking into account the rights, powers and duties of their parents** or other persons responsible for them." (Emphasis added)

While it may not be intended, the practical effects of the least intrusive intervention principle, the framing of the best interests principle, and the reference to parental rights in the objects of the Act appear to be that the child-centred principle of decision making is disrupted. It has been observed that case decisions appear to become more of an exercise in reconciling the interests of the child and family than in pursuing the best course of action for the child or young person. Avoidance of disruption to the birth family becomes a matter of primacy. The NSW Ombudsman's submission to the review opined as follows:¹¹

"We are concerned about how s.9 (d) is being interpreted and applied in practice...Our investigations and reviews have identified cases where the level of protective intervention following reports of risk of harm was not commensurate with the apparent level of risk to the child or young person...[P]ractitioners in this area have advised us that the 'least intrusive' principle is often interpreted as a presumption in favour of keeping a child in their family even if this involves ongoing significant risks to the child's safety. If this is the case, there might be merit in either removing or amending s.9 (d)"

Stability in care, as early as possible, is an essential goal

The review has also highlighted a concern that the 'least intrusive intervention principle' is in unproductive tension with the policy goal of providing stability for children in out-of-home care.

¹¹ Submission from NSW Ombudsman to the Review of the Children and Young Persons (Care and Protection) Act 1998, 3 March 2006, published on DoCS website.

An important message from the research is that children and young people require a stable foundation from which their relationships, identity, values, skills and cultural awareness can develop. This allows children and young people to feel a sense of belonging and stability which provides for continuity of relationships in the family, school and other settings and promotes attachments to caregivers.¹²

In most cases, birth families provide a secure and permanent environment for growth and development. However, there will be cases where the best interests of the child or young person can only be met if they are removed to a less risky or less harmful environment.

Where a child must be placed in care, there are two factors which influence the impact of the out-of-home care experience.

The first is the number of placements that a child experiences. Data show that drift and instability in care have significant adverse short and long-term effects on children's emotional and social development and well-being. Children living in unstable care arrangements find it difficult to develop and retain secure attachments and can suffer delays in development, long-term behavioural problems, learning difficulties and problems forming positive relationships. Children in multiple unstable foster care arrangements demonstrate poor outcomes in adulthood across a range of indicators. Negative effects commonly include poor health status, lower educational levels, higher unemployment and homelessness rates, higher incidence of imprisonment, drug abuse and mental health problems.¹³ Many academic studies point to placement stability as the key factor in providing better outcomes for children and young people in care in all spheres of life.¹⁴

The second key determinant of outcomes for children is the age of the child at the time of entry to care. The younger a child is on entering care, the more critical early achievement of stability becomes, primarily because the first two years of a child's life are the most critical for the development of attachment relationships.¹⁵

Thoburn¹⁶ also reinforces the importance of early decision making towards securing longer term placement, particularly where the child is very young. If a placement occurs before the child is less than 6 months of age the disruption rate is less than 5 per cent. If a child is more than 10 years of age at placement the disruption rate is 50 per cent.

In many jurisdictions this expert opinion is leading to a statutory requirement that decisions as to whether a child should be restored or removed to be permanently placed in the parental responsibility of another person should not take longer than twelve months and in some case the timeframe is even tighter.

In Australia, Victoria and Queensland have moved in this direction.

¹² Emlen (1977), cited in Maluccio, A.N. (1984) 'Permanency Planning: A redefinition'. *Australian Child and Family Welfare Journal*, Vol. 9, No. 2 Winter

¹³ Joint Council on International Children's Services (2005) White paper on international child welfare legislation, Alexandria, USA, published on website <http://www.jcics.org/>, 23 October 2006

¹⁴ Gauthier, Y, Fortin, G, and Jellieu G. (2004) 'Clinical applications of attachment theory in permanency planning for children in foster care: The importance of continuity of care', *Infant Mental Health Journal*, Vol 25 (4), 379-296; Fahlberg, V. (1982) A.N (1982) Attachment and Separation. British Association for Adoption and Fostering, London; Maluccio, A.N. (1984) 'Permanency Planning: A redefinition'. *Australian Child and Family Welfare Journal*, Vol. 9, No. 2 Winter

¹⁵ Marvin, R.S and Brittner, P.A. 'Normative Development: the ontogeny of attachment', in Cassidy, J Shaver PR (eds): *Handbook of Attachment*, Guilford Press, New York, 1999.

¹⁶ Thoburn, J. (2003) The risks and rewards of adoption for children in public care, *Child and Family Law Quarterly*, Vol 15, No 4, pp 391-401

The Victorian *Children, Youth and Families Act 2005* pays particular attention to reducing harm caused by delays in decision making and instability in care arrangements. It requires that permanency issues be addressed through the making of 'stability plans' for children to address their long term needs in out-of-home care, where reunification is unlikely. Where a child is under two, plans must be in place by twelve months. Where the child is between two and seven years of age, plans must be in place by 18 months. For older children, the plan must be made within a total care period of two years. A stability report must be prepared as part of the seeking of Court orders.

Queensland's child protection legislation is more general in this area, but provides that case planning must be carried out in a way that gives priority to the child's needs for long-term, stable care and continuity of relationships. It is also noted that the Queensland Department of Child Safety recently released a discussion paper exploring options for improving permanency for children in care. One option put forward is the introduction of a Permanency Order, which has similarities to adoption.

The United Kingdom's National Adoption Standards 2003 state that "*a plan for permanence should be made for each child within six months of being continuously looked after, and delivered promptly*".

In the United States, federal legislation requires that a definitive permanency plan for the child must be made within a 12 month timeframe.

In summary, stabilising placements as quickly as possible is increasingly recognised as a critical aspect of supporting the developmental well-being of children in OOHC, but submissions and the advice of the Ministerial Advisory Committee suggests that more needs to be done to achieve this goal in NSW.

The current arrangements for promoting placement stability

The permanency planning amendments to the *Children and Young People (Care and Protection) Act 1998* were introduced in 2001, in an effort to address concerns that the requirement to pursue the least intrusive intervention with the family would lead Courts and agencies take a less confident approach to removal where this would break the cycle of abuse and neglect.

The goal was to provide a basis for responding to failed attempts at restoration and a common experience of drift in care. The amendments to the principles therefore included the addition of a new statutory principle (section 9 (f)) which requires decision-makers to focus on which option is most likely to achieve a stable and nurturing environment at the earliest possible time.

Additional permanency planning provisions are also included in Section 78A, 83, 84 and 85A. These sections include a firm recognition (in Section 78A(2)) that permanent placement assists longer term security, and sets in place additional checks and balances if permanent placement of an Aboriginal or Torres Strait Islander child with a non-indigenous carer is being considered.

Notwithstanding these provisions, it appears that more is required.

An unacceptably high proportion of children and young people continue to experience short-term and multiple placements that can be disruptive and damaging to them. In 2004/05, less than half the children in care had one

placement, while 15.9 per cent had four or more placements in their current care period.

The imperative to take additional steps to achieve permanency is also informed by recognition that children and young people are now spending an average of 4.2 years in out-of-home care, which is longer than in the past. Furthermore, many are coming to attention at an early age. Children under 12 months represent the largest proportion of children entering care and in 2004/05, 38.3 per cent of entries into care were less than five years of age. This provides an opportunity to consider an alternative long-term solution where restoration is not going to be viable.

In NSW the annual number of adoptions of children in OOHC continues to hover at around 20, which is 0.2 per cent of the OOHC population. In comparison, with an active permanency planning policy in place, the UK achieves the adoption of around 3,800 children per annum (2005 figures), which is 6.2 per cent of their care population .

In 2005, DoCS established a permanency planning policy that promotes early decision making about the realistic likelihood of restoration and alternate permanent placements, based on comprehensive assessment and care planning. This policy framework is currently being tested in the field. Field testing confirms that practitioners remain unclear about the manner in which they should deal with permanent placement planning alongside the least intrusive intervention requirement. In some cases no clear decision will be made about the likelihood of restoration, in order to give the family more time to ready themselves for the return of the child.

Many cases therefore result in short-term orders, where short-term care arrangements are made in the expectation that the child would return to the family when the order expires. At least some of these orders are subsequently extended, with the result that stability and permanency for the child or young person has been effectively delayed for a significant period.

As noted by Harriet Ward¹⁷ in relation to permanency issues, no decision, in fact, is a decision. That is, by failing to make an early decision about the likely success of restoration we effectively make a decision to subject a child to instability and all the adverse outcomes that are likely to flow from that.

The 2001 amendments added the principles of permanency planning to the legislation, perhaps without recognising the extent to which its impact could be diluted by the retention of the least intrusive intervention provision. Furthermore the permanency planning principle (in section 9(f)) is at a very high level of abstraction, and does not provide detailed guidance on permanency planning processes or specify timelines within which decisions should be made.

There is an argument that stability and permanency would be assisted if the conflict between least intrusive intervention and permanency planning principles were addressed and if the decision pathway and principles in permanency planning were clearer. Support for clear time limits within which caseworkers must settle the issue of whether there is a realistic prospect of restoring a child to

¹⁷ Ward, H, *Practical Messages From Research On Costs Of Care Provision*, Key Note Address to DOCS, Research to Practice Seminar Series, August 2006.

the natural parents (particularly for younger children in care) is seen to be a part of this approach.

Options for strengthening the focus on the best interests of the child/young person

One positive way to improve the focus on the interests of the child or young person who is at risk of harm and/or already in care, could be to amplify the guidance on what actions would represent acting in the best interests of a child (including the manner in which the parent-child relationship should be addressed in decision making on restoration or permanent alternative placement). This would obviate the need for a separate “least intrusive intervention” principle. Under this approach the principles might be revised along the following lines.

POSSIBLE BEST INTERESTS PRINCIPLES IN CHILD PROTECTION LEGISLATION

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

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

(a) a child or young person must (wherever a child or young person is able to form his or her own views) be given an opportunity to express views freely on a matter concerning his or her safety, welfare and well-being. Those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances in which a decision is to be made or action taken.

(b) account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person in all actions and decisions made under this Act that significantly affect a child or young person, and be reflected in any care planning and cultural care plan for the child or young person.

(c) If a child or young person is in need of care and protection and is temporarily or permanently withdrawn from his or her family environment then:

(i) the earliest practicable consideration must be given to the possibility and appropriateness of restoration to the birth family. A decision on the viability of restoration should, other than in exceptional circumstances, be taken within 6 months of the child or young person entering out-of-home care where the child is under 2 years of age and, for any other child or a young person, within 12 months of entry into out-of-home care.

(ii) the child's or young person's placement should not be disrupted unless required for the safety, welfare and well-being of the child or young person.

(iii) unless it is contrary to his or her best interests and taking into account

the views of the child or young person, the child or young person should retain relationships with people significant to the child or young person, including birth or adoptive parents, siblings, extended family, peers, family friends and community.

(d) In considering whether restoration of a child or young person is possible and appropriate the relevant considerations are whether restoration:

(i) could be achieved within a timeframe that is likely to minimise significant developmental disruption to the child or young person.

(ii) will provide the child or young person with the opportunity to meet developmental milestones appropriate to that child or young person, and in any event, whether restoration can and should (other than in exceptional circumstances) occur within 2 years of the child or young person entering out-of-home care.

(e) If restoration is not considered possible and appropriate for a child or young person in out-of-home care, then the provision of a safe, secure, nurturing and stable environment is to be sought for the child or young person in a timely manner. In seeking this, regard is to be had to:

(i) the circumstances and needs of the child or young person;

(ii) the views of the child or young person;

(iii) the principle that, the younger the age of the child, the greater the need for early decisions to be made in relation to a stable and permanent placement;

(iv) the need to avoid the instability and uncertainty arising from a succession of different placements or other care arrangements;

(v) the paramount consideration in all decisions and actions, as set out in (a), is to take priority over any interests of parents; and

(vi) proposed contact between a child or young person and other significant people in his or her life being designed to meet the needs of the child or young person.

It would also be necessary to amend the objects of the act in a consistent manner, so that section 8(a) could read:

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

4.4 PREVENTING HARM TO CHILDREN: BODY PIERCING

Some children and young people tend to view body piercing as a socially acceptable trend, fashion statement and expression of individuality.

However, increasingly children and young people are piercing parts of their bodies where health concerns may arise and where serious long-term consequences are possible. For example, it could be argued that piercing of the tongue in the developmental stages of a child's life may lead to speech impediments which have the potential to negatively impact on educational and social outcomes in both the short and longer term.

Section 230 of the *Children and Young Persons (Care and Protection) Act 1998* already contains provisions that make it an offence for a person to tattoo a child or young person without written consent of a parent of the child or young person. The consent must specify the part of the body that may be tattooed and the manner of tattooing. This offence is based on the concern that tattooing is generally regarded as irreversible (noting that removal of a tattoo will disfigure the skin) and that the process of tattooing can have serious health effects if it is not conducted in a safe and sterile environment.

There is no similar requirement for businesses providing body piercing to require parental consent for piercing of children under a specified age or to require consent for particular types of piercing.

The reason for the exclusion of body piercing is that it is generally regarded as a readily reversible process. There are also a number of cultural groups with traditional practices which include body piercing for children of a young age.

However the need for parental consent for unusual body piercing needs to be considered.

In providing its advice on the review of the Act, the Ministerial Advisory Committee recommended that (with the exception of ear, eyebrow, nose or lip) body piercing of children under 16 years of age should be an offence if it is undertaken without the consent of a child's parent. The Committee also recommended that consent could be provided in the form of the parent accompanying the child or in writing (noting that in the tattooing context written consent is required).

4.5 THE ROLE OF THE COURTS IN CHILD PROTECTION MATTERS.

The nature of child protection cases

Child protection matters are very different from the usual legal contest and there is an important policy question as to how the framework for child protection should respond to these differences.

The Australian legal system primarily deals with the balancing of competing interests: the public interest via the conduct of individuals in criminal matters and the competing interests of individuals in civil matters. The process used is an adversarial contest between two or more parties. Child protection is not (or should not be) about balancing competing interests. It is about identifying the risk(s) to a child and protecting that child from the risk(s). An adversarial contest is unlikely to be the best way to arrive at a sound decision on such issues.

The difficulty of proving harm to the usual legal standards is another aspect where the tension between legal method and intervention to address a child protection risk is evident.

We should also note national and international literature which suggests that there are serious consequences that arise from a false Court finding that abuse is not occurring or is not likely to occur. These consequences relate to the impact on both the parent and the child. In a review of the impact of Court procedures in child protection in England, Hayes has observed¹⁸:

“Where an attempt to obtain a care order has wrongly failed this can prove to be one of the worst outcomes for a child. The parents are likely to be hostile to the helping agencies, and determined to conceal the truth from them. They may, for example, fail to take the child to a doctor...or to allow her to attend a local nursery. So no-one is in a position to keep a watchful eye on the child for signs of significant harm. In a case where an application was brought because the child confided in adults ... but where she perceives that her account of what happened was not believed by the Court, the child is unlikely to trust in the ability of adults to come to her aid in the future.”

If it is agreed that child protection matters have an inherently different character and dynamic to typical legal disputes, then we need to ask whether different arrangements are required to best enable us to conduct care matters in a manner that promotes the best interests of children and that is fair to all parties. Simply, how can the law reconcile safeguarding children from suffering harm with the obligation to dispense justice to parents?

The role of the Court in NSW

The approach to the dilemma in the NSW legislation is to have a specific purpose Children’s Court and to seek to have that Court operate in a less legalistic fashion.

The NSW Children’s Court provides judicial oversight of decisions made under the *Children and Young Persons (Care and Protection) Act 1998*. The Act provides a very broad reach for the Court:

- The Court reviews and if appropriate formalises, the emergency removal of a child by the Department of Community Services. Section 46 enables the Court to make an Emergency Care and Protection Order, if it is satisfied that the child is at serious risk of harm.
- The Court may (under sections 76 and 77) place a child under the “supervision” of DoCS for up to 12 months if it is of the view that the child is in need of care and protection.
- Under sections 79 and 81 the Court may make an order allocating parental responsibility to: one or both parents; the parent(s) and Minister jointly, the Minister; or, another suitable person.

¹⁸ Hayes, M. “Reconciling protection of children with justice for parents in cases of alleged child abuse” *Legal Studies*, v 17 No 1, March 1997.

- The Court is to consider a Care Plan before it can issue a final order under sections 79 and 81.
- The Court can monitor and review a parental responsibility order (under section 82)
- Under section 86, the Court is empowered to permit or deny contact between the child and their parents and can stipulate minimum contact arrangements as part of this. It may also require that any contact that is ordered be supervised (in section 86(1) (b)).

The *Act* seeks to acknowledge and respond to the different character of child protection matters through provisions relating to the proceedings of the Court. Specifically, section 93 articulates the principle that care proceedings are not to be conducted in an adversarial manner. The section also advocates minimal legal formality and technicality and enables the Court to set aside all or part of the rules of evidence.

The Review of the Act has generated substantial commentary in relation to this aspect of the legislative framework for child protection. The key issues were:

- Whether the Children’s Court role should be more limited and whether there should be alternative structures for resolving child protection matters
- Specifically, whether the Court’s role in ordering contact is appropriate
- Whether there should be limits on the grounds on which final Court orders can be appealed or a restricted process for doing so.

(i) The Scope of the role of the Children’s Court

Arguments relating to the scope of the role of the Children’s Court have generally followed two threads.

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

One example was a suggestion of the tendency of the Court (and the District Court) to either reject or place little value on evidence that a parent has a history of involvement with a child death or has previously had children permanently removed from their care in care proceedings relating to another child. The practical and unwanted effect of this was that caseworkers were consequently failing in preventative action to have children removed – the Courts were seeking evidence of actual harm in preference to a risk demonstrated by a pattern of behaviour on the part of the parent or carer. This has suggested to caseworkers that they should wait for more definitive evidence of “actual harm” to the child in question. To the extent that this exposes children to harm that could be prevented it is unacceptable as a matter of public policy and inconsistent with the fundamental legislative principle that the best interests of children be the pre-eminent consideration in child protection interventions.

The Government has recently taken steps to amend the legislation to redress the specific impediments to the consideration of parental history in care proceedings, but the broader problem remains. That is, there is a demonstrable inclination for

proceedings to default to long-established legal principles that undeniably serve justice well in the vast majority of legal matters, but which are arguably less suited to child protection cases.

The serious issue that arises from this is whether it would be more appropriate to manage child protection matters outside of the Court system (and certainly without a specialist Court). This is the approach that is taken in comparable human service areas such as the protection of mentally ill people or others with diminished capacity (where the *parens patriae* jurisdiction of the Supreme Court is the limit to the Court interface in determining care arrangements).

The model that is used in decision-making relating to the protection and care of persons with a mental illness or reduced capacity (through illness or disability), is that care and protection decisions are made through professionally constituted non-legal or quasi-legal structures. This retains a necessary level of structure and transparency to decision making, while also ensuring that the decisions are guided by appropriate professional scrutiny of the case details and the options for working in the best interest of the child.

The NSW Mental Health Review Tribunal¹⁹ is one possible model. This Tribunal is a specialist, quasi-judicial body with powers to make and review orders associated with the treatment of people with a mental illness. Each matter is brought before a Tribunal panel, of three persons – a lawyer (as chair), a psychiatrist and one other person with experience in the mental health field.

The Guardianship Tribunal model adopts a similar approach. These Tribunals operate in all states and typically involve the appointment of members with professional skills across disciplines such as psychiatry, medicine, social work and law, who will be in a position to assess the needs of a person who has impaired decision-making capacity.

Non-legal or quasi-legal processes for child protection proceedings are in place in a number of overseas jurisdictions.

In Norway, the care system operates without involvement of the Court. Care decisions including orders are made by the County Social Welfare Board on recommendations of the child welfare service. The head of the child welfare service can make temporary orders in emergency situations subject to the matter proceeding to the County Social Welfare Board within a set time period. Decisions of the child welfare service in removal cases may be appealed to the County Social Welfare Board. The Board comprises a chairperson with legal training and experience, a committee of experts and a committee of laymen.

A similar system operates in Denmark, where decisions about the welfare needs of a child, including removal of a child from the care of a parent, are made by the municipal authority (local government) through a children and young persons committee (which appears to be comprised solely of public servants, although human service professionals are involved in assessment processes).

¹⁹ The Tribunal is established under the *Mental Health Act 1990*.

However, if there is a desire to retain a specialist Children’s Court, another option would be to refocus the Court on those aspects of child protection matters where there is a significant and/or final decision to be made, or where there is an ongoing conflict that needs to be resolved to avoid ongoing uncertainty for the child. Applying this approach, consideration could be given to confining the role of the Court to:

- Decisions which result in a substantial and/or permanent shift of legal responsibility for a child. This would effectively focus the work of the Court on interim and final orders for parental responsibility and remove the Court’s role in areas such as review of emergency child protection actions, contact, supervision, and monitoring and review of parental responsibility arrangements.
- Resolution of disputed child protection decisions. This would provide an avenue of appeal on a point of law for persons who are dissatisfied with a child protection decision.

(ii) The role of the Court in ordering contact

This is the area of Court involvement that attracted the most strident proposals for change in the Act review process, not the least of the reasons for this being that the NSW arrangements for Court-ordered contact are significantly broader than in the past and are generally much more expansive than the arrangements in other jurisdictions. Changes to the legal framework in the area of contact appear to warrant consideration irrespective of whether broader reforms to the scope of the Court’s role are to be entertained.

Section 86 of the *Children and Young Persons (Care and Protection) Act 1998* establishes a highly formalised and extended system of Court-ordered contact. The Court has the power to allow or deny contact between a child and the birth parents in the context of both interim and final orders, and to specify the minimum arrangements for this contact (including that the contact be supervised by DoCS). Prior to the current legislation there was limited Court involvement in contact – Court-ordered contact was limited to the period during which a case was **before** the Court. There was no provision for the Court to make final orders relating to contact. This was dealt with through undertakings between the parties (which the Court had no power to enforce) and administrative decisions by the agency supervising the placement. Generally, contact was managed as part of the ongoing case planning and review task.

It is noted that only ACT and the Northern Territory have a similar level of Court involvement in contact as that which applies in NSW. In Victoria and Tasmania, Court involvement in contact is limited in practice to interim or short-term orders. In Western Australia there is no Court involvement.

Recent legislative reviews in Victoria, South Australia and Western Australia have considered the issue in depth, following a recommendation by the Family Law Council in its *Family Law and Child Protection* report²⁰ that “States and Territories should be encouraged to amend their laws to make it possible for Children’s and Youth Courts to make orders concerning residence and contact as an outcome of

²⁰ Family Law Council, *Family law and child protection*, Final Report, September 2002.

child protection proceedings brought by the child protection authority”. Each of these states resolved it was not appropriate to extend the role of the Courts in relation to contact orders. The primary reasons that were cited for a decision not to involve the Courts were: the importance of continuing to give parties the flexibility to make their own longer-term arrangements in ways that are able to effectively respond to individual circumstances and needs; and to avoid the need to have to come back to the Court every time a variation of contact arrangements is considered appropriate.

The intention of enabling the Court to make contact orders at the point of interim and final orders in the 1998 Act, appears to have been to allow the Court to deal more holistically with protective issues for a child and to avoid inconsistency in both the nature and frequency of contact between parents and their children. The Review of the *Children (Care and Protection) Act 1987* also cited the resentment of parents who felt powerless to insist on contact.

It is widely accepted that maintaining contact between children in care and their birth families is important for a range of reasons:

- helping the child attain good mental health;
- resolving issues of loss and trauma; and
- achieving a strong sense of personal identity and genealogical connectedness.

However, it is also recognised that contact can be disruptive and distressing for a child and/or the alternative carers with whom the child is placed, to the point where inappropriate contact regimes may threaten the stability of an alternative placement. This raises specific issues in relation to the role of the Court.

For those who oppose the substantial legalised framework in relation to contact in NSW, the fundamental concern appears to be that the complexities and sensitivities of contact decisions are such that they are not susceptible to effective resolution by the Courts.

Expert opinion and research in this area recommends that the process of determining the frequency, duration and who should be involved in the contact be guided by decision-making frameworks that utilise a strong theoretical and evidence base.²¹ Further, arrangements for contact should be mindful of the individual needs, capacities and circumstances of each child. For example, a child can be overwhelmed by contact that is too frequent, too long or accommodates the needs of a number of adults to visit the child, separately or together.

When a plan is in place for a child or young person to be restored to his or her birth parents, the literature recommends frequent and direct contact to maintain the parent-child relationship and facilitate the restoration. When a decision has been made for the child or young person to remain in long-term care, the literature argues that while contact is beneficial in preserving links and maintaining identity, it can be less frequent and take place by indirect means²²

²¹ Scott, D. (et al) *Contact Between Children in Out-of-Home Care and Their Birth Families - A Review of the Literature*. 2005. Commissioned by the Department of Community Services.

²² Taplin, S. *Is all contact between children in care and their birth parents 'good' contact - A discussion paper*. NSW Department of Community Services, Centre for Parenting and Research, 2005.

The need to maintain or encourage ‘attachment’ between a child and his or her birth parent(s), generally the mother, is often cited as a reason for more frequent contact. However, both the concept of attachment and the evidence that frequent, face-to-face contact promotes attachment are not easily established.²³

It is also inevitable that the circumstances of the child, the birth parents or the foster family will change over time, just as the developmental needs of the child will vary over time. These changes will in turn require reconsideration and adjustment to the contact regime. As Selwyn²⁴ notes:

“Contact by itself is not going to promote good outcomes for children. Contact is a process through which relationships can be repaired, maintained, or ended temporarily or permanently. It is dynamic, changing across time as individual circumstances change...The role of the social worker, once a thorough assessment has been completed and concluded that contact should continue, is to facilitate this work by ensuring that arrangements are made that are feasible, safe and supported by all parties.”

In summary, the dominant practice perspective is that settling an appropriate contact regime involves a detailed appreciation of a complex range of factors relating to the dynamics of each of the family groups involved and the nature of the child’s connection with each of those groups. The extension of this argument is that a Court is not the best mechanism for achieving this complex reckoning.

Anecdotal evidence is that Court decisions in relation to contact are frequently made without significant evidence being advanced as to factors relevant to contact and without effective consideration of the case plan goals. The resulting determination may in fact serve to undermine case plan goals and inadvertently contribute to placement breakdown and subsequent drift in care.

At present, where a contact order is in place as part of final orders, parties are required to go back to the Children’s Court each time a change to contact arrangements is sought. Most children and carers find the Court process stressful and unsettling, and it is also costly. Generally, best practice in relation to contact is that it is managed actively through case planning and review processes and a return to this arrangement should be seriously considered.

The efficacy and impact of the current NSW arrangements of the ordering of contact and a number of options for change were considered by the Ministerial Advisory Committee as part of this review. The Committee formed the view that there is no inherent reason why contact should be set by a Court and that agreement between parties is the most desirable and flexible outcome.

In a scenario under which the Court could not make contact orders, the case plan would be the primary vehicle for determining contact arrangements. The main benefits of this option include:

²³ Ibid

²⁴ Selwyn, J. Placing older children in new families: changing patterns of contact, in Neil, E. and Howe, D. (eds) *Contact in adoption and permanent foster care: Research, theory and practice*, British Association of Adoption and Fostering, London, 2004, 162.

- more attention to comprehensive assessment and case planning by caseworkers including contact provisions that support case plan goals and foster permanent and stable placements for children
- early and effective engagement with birth families and/or foster carers in relation to contact arrangements
- inbuilt flexibility to alter contact arrangements as the needs and circumstances of parties change without the need to return to the Court.

The main risks are that designated agencies may seek to minimise the need for contact, and particularly where a long term out-of-home care placement is the case plan goal that case plans could default to minimum standards and not sufficiently take into account individual circumstances and needs.

The Ministerial Advisory Committee therefore envisaged that there be clear guidelines for administrative decisions (including the processes that should be followed in setting contact arrangements) and an avenue for parties to appeal decisions. Referral to the Court was seen as one option for resolving disputes provided that contact orders made by the Court are time limited.

Under this model the Court (or an alternative quasi-legal body such as a Tribunal) would only be empowered to make contact orders as part of final orders when parties could not agree and such orders would only be able to be made for two years, after which time contact would be determined by the agency with case responsibility as part of case planning and management processes.

If this approach were to be adopted, the position that ought to be adopted in relation to contact associated with interim orders requires consideration. In this scenario, concerns about the capacity of the Court to deal with the complex individual and family dynamics still apply. However, the concern about the need for a more efficient and flexible approach to adjusting the arrangements over time is not as relevant because interim orders are not generally for lengthy periods. There is also the reality that the power imbalance between the Department and the parents is at its most acute during the period where the Department is yet to address the longer term position in relation to parental responsibility.

It might therefore be argued that the power of the Court to order contact when it makes an interim order should be retained, even if the power to make contact orders as part of final orders is removed.

If the Court is to retain the ability to order contact (in relation to interim orders and/or final orders), there is also a need to address concerns about the capacity of the Court to require that the contact be supervised. The Act currently allows for an order for contact to be supervised only by the Director-General and only with his consent. This provision to require supervision of contact is not available in the vast majority of other jurisdictions.

In practice, the Court will frequently make orders that specify the need for supervision of contact. Unless there is a challenge from DoCS there appears to be a presumption of DoCS' consent. Given the nature and complexity of cases and the changes in circumstances over time (e.g. relocation of parents or children) the Court may not be in the best position to judge the need for supervision in relation to contact in particular circumstances and there will certainly be difficulties in establishing the type and nature of contact that would

be in the best interests of the child. The results of the current arrangement are that the need for supervised contact is not always well established and that there is an unrealistic expectation of the capacity of DoCS to supervise contact. The requirement for supervision arguably would be best addressed in the development of case plans and placement support.

Given the role of the supervising designated agency in casework relating to the child or young person, the legislation could be amended so that the Court has no role in relation to determining supervision arrangements. Under this approach the need for supervision of contact would be one of the factors assessed by caseworkers in settling contact regimes in case plans and reviews.

(iii) Managing Appeals to final orders for parental responsibility.

Recent data reflect a dramatic increase in appeals to final orders. Cases can be subject to appeal in the District Court either on their merits or on a point of law.

We are seeing a dramatic increase in the number of cases appealed in the District Court:

- 2003/04 - 21
- 2004/05 - 54
- 2005/06 - 92

Importantly, close to 90 per cent of these appeals are from parents and other family members and the majority are appeals against final orders. Increasingly, casework resources are being directed to re-arguing single cases for child protection interventions.

While it is important that care proceedings be characterised by procedural fairness, it should also be recognised that decisions which are designed to meet the best interests of a child may often, by virtue of their very nature, not be in the interests of the parents.

It is entirely appropriate that child protection decisions be subject to review where there is a concern about a flawed or a flaw in the legal reasoning supporting a decision. However, it is difficult to see how serial review of the facts of a child protection case can be justified, particularly when the result is ongoing uncertainty for a child in care and noting that the appeal process typically takes a number of years.

Having regard to the importance of arriving at clear and authoritative decisions on the care arrangements for a child that is found to be at risk of harm, it may be desirable to limit the ability to appeal a final order of the Children's Court.

Two options could be considered. Appeals could be limited to errors of law, with no capacity to seek a review of the merits of the case. Alternatively, if there is a desire to maintain a merit review capacity, then there could be limits placed on this. One course of action could be to provide that the District Court will only review cases where the appellant can satisfy the Court that:

- review of the decision would be in the best interests of the child or young person - and the basis for that belief ; and
- there is the prospect of a significantly different outcome in the matter on the basis of available evidence.

5. YOUR VIEWS ARE IMPORTANT

Making changes to deliver better outcomes needs to be done in partnership with stakeholders – practitioners, academics, policy makers, carers and children and young people, and the community at large.

Your views on the proposals contained in this document are welcome.

Your views will inform the Government's decisions on the directions and substance of further legislative reform in this highly sensitive area.

SUBMISSIONS ON THE ISSUES AND OPTIONS PRESENTED IN THE DISCUSSION PAPER CAN BE PROVIDED TO:

The Secretariat
Review of the Children and Young Persons (Care and Protection) Act 1998
NSW Department of Community Services
Locked Bag 28
Ashfield NSW 1800
Telephone: 1300 362 280
Email: actreview@community.nsw.gov.au

SUBMISSIONS CAN BE PROVIDED UP TO 30 MARCH 2007