Joint Submission of the

New South Wales Young Lawyers

Human Rights Committee

and

Family Law Committee

Department of Community Services

Statutory Child Protection in NSW:

Issues and Options for Reform

3 April 2007

Authors:

Rocelle Ago | Maxine Andronicos | Sarah Bassiuoni | Christie Hall

Rebecca Harper | Pat Hansen | Christopher Paul | Kate Rafton

Contacts: Louise Jardim

Chair, NSW Young Lawyers Human Rights Committee

hrc.chair@younglawyers.com.au

Olivia Conolly

Chair, NSW Young Lawyers Family Law Committee

flaw.chair@younglawyers.com.au

Human Rights and Family Law Committees
NSW Young Lawyers
Level 6, 170 Philip Street
Sydney NSW 2000

BY EMAIL: actreview@community.nsw.gov.au

3 April 2007

Dear Sir/Madam,

Statutory Child Protection in NSW: Issues and Options for Reform

NSW Young Lawyers is made up of law students and legal practitioners in their first 5 years of practice or under the age of 36. The Human Rights Committee is concerned with a range of human rights issues in both Australia and abroad. The Family Law Committee focuses on all areas of family law and children's issues.

The Committee is grateful for the opportunity to make a submission regarding the discussion paper entitled *Statutory Child Protection in NSW: Issues and Options for Reform.*

The Committee's submission largely focuses on the importance of prevention in child protection and child abuse; ensuring that a child's views are heard, respected and considered; the impacts variation could have on indigenous communities and families; the vital role of the Court and our international obligations.

If you have any questions in relation to the matters raised in this submission, please contact Louise Jardim (hrc.chair@younglawyers.com.au) or Olivia Conolly (flaw@younglawyers.com.au), Committee Chairs.

Yours faithfully,

1 Protecting Children – Our Principles and Our Priorities

Protecting Children – Reviewing Principles and Priorities

In matters concerning child protection and child abuse, there is no wiser saying than prevention is better than cure. Prevention is the only alternative because the research shows that there is no cure from abuse. Abuse stays with a child throughout her/his life. It can lead to vicious cycles where the abused becomes an abuser.

The emphasis of any child protection legislation, policy or program must be on prevention.

Crisis intervention comes too late for many - it means that government agencies are always one step behind. The current system is burdened with workloads that cannot be cleared. The principles and priorities listed in the discussion paper require some re-evaluation to emphasize prevention.

Children come first

All government bodies, national and state, along with international organisations concur that child protection policies and legislation must be framed around *the best interests of the child*.

Not only must **children be placed first** by a protection system but also within homes and the community. Families and communities need to be re-educated about the value of children in general.

Responsible parenting is important

Parenting is not a known behaviour; it is a learnt skill which some people need greater assistance and direction with than others. In a study of accessibility of child abuse prevention services for families, *'concerns were expressed about the fact that these families were not being assisted because the services were overwhelmed with tertiary clients requiring intervention'*[1].

Government policy should establish dedicated programs that are accessible and aimed at parents requiring assistance in creating a successful family.

[1] K Koras 'How accessible are child abuse prevention services for families?' (2003) Family Matters 64: 48-51

Community responsibility to keep children safe

Communities play an important part in protecting children when community values recognise the affect of child abuse upon everyone. Communities respond to issues of child protection when they are properly informed. Responsibility will only be accepted when the community attitude is against child abuse.

Policies need to include the provision of community education which focuses on changing their attitudes towards violence, children's rights and physical punishment.

Identifying children at risk

The *Children and Young Persons (Care and Protection) Act 1998* ("**the Act**") certain persons are mandatory reporters who are required by law to provide risk of harm reports to the Department of Community Services ("**DoCS**").

The current system is unable to cope with the numerous cases reported. There are children who are not identified because those responsible for reporting are fearful of putting a family into a system that does not offer the support they need.

Programs that are devoted to **assisting parents prior to abuse** occurring are needed. The **early identification** of children at risk can lead to greater support for the family as a whole and may avoid abuse altogether.

Supporting families

In 2004, a review by the Victorian government recognised the need for early intervention in supporting families and proposed the following actions:

a) longer and more intensive work with families without the need for court orders;
b) more structured processes for diverting families into services such as family group conferencing; and
c) more flexible case planning responses to ensure families are engaged with community based services.[2]

The NSW government must consider similar proposals to ensure that officers are *'in a position to support both families as a whole and the parents in particular'*[3].

[2] L Bromfield 'Proposed reforms to Victorian child protection legislation, policy and programs' Child Abuse Prevention Newsletter (Spring 2004)12(2): 12-17
[3] Department of Community Services 'Statutory Child Protection Issues in NSW. Issues and Options for Reforms" Discussion Paper (October 2006) 3

Responding to Risk

It is imperative that priority be given to children who are at greatest risk of harm. Direction of child protection resources towards programs for early intervention and prevention should reduce the number of children requiring emergency intervention and thus reduce the burden on the system overall.

Early intervention and prevention programs have the added benefit of enabling child protection officers to compile a profile on families prior to any abuse occurring thereby providing them with '*the best available information about the situation of a child and family to inform their decisions*'[4].

Stability and support for children who are removed

The decision to remove a child from her/his family is always a difficult. Consideration must be had to possible reunification when weighing stability and support for children who are removed. **Simultaneous planning models that would plan for both permanent care and reunification should be employed.**

Such programs provide greater support for a child as s/he knows of where her/his future lies. In creating a steadfast timeline for reunification, clear targets are set which, if not met, allow for a smooth transition to a permanent care plan.

Supporting children and young people who are leaving care

Part of the transition from leaving care should be about the resolution of disputes. DoCS should investigate the possibility of providing **restorative justice programs** similar to those emerging in the criminal justice system.

[4] Ibid

2 What has been said about the legislation

The Act has been subject to ongoing amendment since its introduction. More recent amendments include the provisions for permanency planning to address the need to improve stability for children in out of home care.

The role of the courts in child protection matters
The paper considers the possibility of the abolition of the Children's Court and the substitution of a tribunal, drawing analogies with the Guardianship Tribunal and Mental Health Review Tribunal. However, the retention of judicial review in matters involving children is supported by the *United Nations Convention on the Rights of the Child*:

> Article 9(1):
>
> *"State parties shall ensure that a child shall not be separated from his or her parents against their will, except where competent authorities* ***subject to judicial review*** *determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in particular cases such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to a child's place of residence."* [emphasis added]
>
> Article 19(1):
>
> *"State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.*
>
> Article 19 (2):
>
> *"Such protective measures should as appropriate include appropriate procedures for the establishment of social programmes to provide necessary support for the child and for those who had the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore* ***and, as appropriate, for judicial involvement****."* [emphasis added]

Matters dealt with by tribunals are primarily of an administrative nature. Often there are a limited number of parties involved and the issues to be determined are narrow. However, this is not the case with child protection matters. Care hearings require consideration of complex legislation and in many cases, extensive expert evidence.

The judicial independence of Children's Magistrates and judges of the District Court is more likely to be recognised and accepted by parties affected by their decisions. Tribunal members do not generally have the same degree of independence.

The majority of overseas jurisdictions and in every jurisdiction in Australia children's care and protection matters are within the jurisdiction of a court. Specialist children's courts are established in every Australian jurisdiction.

The Court has power under the Act to compel the removal of a child or to prohibit persons (or the Department) from acting in a particular way. It is submitted that the Court is better equipped to effectively exercise such powers of compulsion.

The issue of contact is a complex and contentious one. It is difficult to see how a generalised approach to contact would always be in the best interests of a child. A Court which has all the relevant evidence would be better equipped to determine an appropriate contact regime, bearing in mind the specific circumstances of an individual child.

Contact orders made by the Children's Court are **minimum** contact orders. If the parties agree to a variation of the contact arrangements, then it is open to them to do so without further reference to the Court.

3 The Child Protection Challenge

3.1 Number of Child protection reports

Leaving aside the issues of method of statistical analysis, the large increase in reports should be noted. It is therefore necessary for services to be increased to meet this demand.

Such data supports a need for a large increase in trained employees of helpline and case workers within DoCS. The increase in reports and the frequency of same, it is essential that services be capable of addressing each report.

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

The Committee has no comment on this section.

3.3 Who is being reported?

Age and gender of children and young people reported.

The largest number of reports is for infants under 12 months. This group also represents children who are at then greatest risk of abuse due to their inability to self report and the increased dangers to their safety due to their limited physical ability to resist abuse.

There has been a significant increase in the reports for children aged between 13 to 17 years. This may be a result of a widening of the mandatory reports definition. This may also reflect society's greater reflection upon the definition of abuse in respect of children in this age bracket.

The decrease in male reports from ages 12 to 17 may be a result in an increase in male children's ability to resist abuse at this age as opposed to female children's ability to resist abuse, or self report. Although further information is provided as to the variance between reporting of male and female children, this working group does not comment further on this issue.

Aboriginal children and young people

The statistical inequality in reporting appears representative of the overall disadvantage suffered by all indigenous people within social services.

3.4 Who is reporting risk of harm?

It is pleasing that policy changes within the areas of education, health and policing may have caused the sharp increase in reporting by these mandatory reports. Penalties imposed upon mandatory reporters for non-reporting would have significant influenced the process of reporting.

3.5 The nature of risks identified in reports

It is imperative to allow caseworkers greater flexibility to identify risks upon the KiDS system. This will allow caseworkers to more easily identify matters which have a varying range of issues which may require further investigation. It should also avoid understating issues which are relevant to assessing the immediate risk to a child.

By clearly identifying the issues faced by a family, caseworkers can address ways to assist that family toward a resolution of the crisis, which is in accordance with the requirements of the Act.

Caseworkers must work toward reuniting families and away from simply removing children when the situation has reached a crescendo and is causing a significant risk of immediate harm

Significant issues can be identified, assessed and addressed by ensuring the adequacy of reporting systems.

3.6 What proportion of reports require action?

Although the Helpline is an integral part of the reporting process further **internal quality controls need to be established** so as to ensure assessments of risk are based upon the quality of the report received. Such a method would require more procedures, but **would ensure that reports which are significant in nature, are not ignored based upon a single individuals assessment**.

3.7 Children and young people in out of home care

The number of placements for children in OOHC is concerning. It is not appropriate that 15.9% of children are forced to endure four or more placements during their current care period, particularly considering that the average time spent in care is only 4.2 years.

It is not in a child's best interest to be subjected to numerous placements while under the care of the minister.

This statistical information may reflect that many children who are in care suffer behavioural problems which in turn may cause numerous changes to placements while attempting to address those behavioural issues. However, the changes in placement simply exacerbate the behavioural problems.

DoCS needs to provide better support to Foster families and training to assist them to cope with children who have severe problems.

The support should include both training and ongoing support in the form of respite, continual review and reassessment and referrals to educational, behavioural, psychological and health professionals on a regular basis.

4 Strengthening the Child Protection System

4.1 Mandatory reporting

The discussion paper seeks to address concerns about significant increases in the number of reports following the introduction of mandatory reporting under s 27. The key concern is that the increase in reports made bears little correlation to the finding of more children or young persons at risk of harm within the meaning of s 23.

The discussion paper's response to this concern is encapsulated in the conclusions stated on p.21: *"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."* **The second part of this objective is not stated in the Act and would be a clear departure from the legislative philosophy which currently underpins the Act.**

It is understandable that DOCS desires these outcomes. The problem, however, is that these outcomes are not stated or explained in the Act. **The pursuit of these outcomes could be made into an objective of the Act. The concept of reports to DoCS acting as an "early warning system" could appear in s 8.**

An objects clause is also warranted at the head of Part 2. Recommendation (iii) on pages 23-4, regarding the addition of a neglect risk factor in s 23, seems to supports the DoCS approach.

Neglect is a risk factor which must be monitored within the child protection system. To promote the neglect option without also making clearer in the objects of the Act is inappropriate. The concern with behaviours, which may contribute to a risk of harm in the future, appears somewhat inconsistent, and makes the basis for the principle unclear.

Option (i) on page 22-3 answers this issue. It is still focused on identifying cases from the reporting where there is a 'real likelihood'. The basis for the recommendation is solid but note that it does not further the aims stated above.

We agree in principle with recommendation (ii) on page 23 regarding an amendment to s.23 where there is evidence of serious and persistent drug abuse by the carer parents.

4.2 Exchanging Child Protection Information

The current legislation provides consistency and clarity for both reporters and DoCS in that it:-

1. enables risk of harm reports to be made confidentially without concern that identity may be disclosed; and
2. enables DoCS to consistently apply a blanket confidentiality rule when engaging in exchange of information with other agencies.

It is not recommended to modify or vary the current legislation in any way.

Protection of Identity of Reporters

The primary concern relates to reports made concerning risk of harm. Current statistics indicate that at present, the majority of reporters are non-mandatory. Hence, if the legislation were amended to allow DoCS to disclose details of reporters to other agencies, community perception may change and reports of harm will decrease.

DoCS is dependent on non-mandatory reporters to ensure the safety of children in the community. If reporters cannot feel that their confidentiality will be maintained, non-mandatory reports may decrease significantly, possibly placing children's welfare at risk.

In respect to mandatory reporters, if confidentiality is not maintained, there may be repercussions for agencies and service providers concerning staff safety.

Any proposal to vary provision for release of identity of child risk of harm reporters should only be in a planned and specific manner. At best, a variation of this aspect of the legislation should only concern release of confidential information to crime enforcement agencies, such as the Police and Integrity Commission, to aid in prosecutions.

If this type of amendment is considered, an additional provision should be inserted to ensure that the leave of the court is first obtained prior to release of such information and that the court has determined that the public interest outweighs any fears concerning the need to maintain confidentiality.

The release of confidential information should not be left in the hands of the individual DoCS case worker on a case by case basis.

Information obtained from other agencies

There has been a suggestion to broaden the scope of exchange of information to allow DoCS to disseminate information obtained pursuant to section 248 with other agencies to aid in support of parents.

It is not recommended that the legislation be varied in this manner.

DoCS currently has the ability to liaise and consult with other service providers to aid families where risk of harm reports have been received. The risk that exchange of confidential information could be abused is too great to outweigh any perceived benefit in disclosing information to other agencies in assisting parents. DoCS can continue in their current role of consulting without the need to exchange confidential information received.

4.3 The Best Interests of the Child

The discussion paper notes that section 9 of the Act provides a cornerstone principle but does not define how to determine what constitutes the best interests of the child. Indeed it may be said that each person in the Children's Court may well claim that their view of what constitutes the best interests of the child is the correct one, and each party may see the decision they want as being in the best interests of the child. The Act guidelines presented in the report do clarify what is meant by the principle in a helpful way.

The DoCS report seeks to remove family concerns from the equation entirely with the proposal that the principle of least intrusive intervention should be discarded. The argument put forward is that the "least intrusive intervention" principle conflicts with the permanency principle. This is so only if child protection practitioners see the children's interests as invariably in the opposite direction to the parent's interests.

"The least intrusive intervention" principle does not require that children are only removed from families as a last resort but it does mean that where the child's needs can be met be support services to the family as a whole then that should be attempted.

Removal from family should only happen when the family cannot provide what the child needs and when the family cannot use support services that would help them to care properly for their child.

Foster Care

It seems that from DoCS perspective when a child is removed from home is that the child should be placed permanently with alternate carers, and this usually means either kin carers or foster carers. The thrust of this section in the report assumes that once placed in foster care the child is ensured of a permanent home. Great care needs to be taken with this assumption.

Some research indicates that about 20% of children who enter care do not find stability and the best indicator of lack of stability of foster care placement is that there has been a previous placement.[5]

In NSW, we still have the situation where many children taken into foster care end up experiencing multiple placements. DoCS discussion paper points out that in 2004-2005 "less than half of the children in care had one placement, while 15.9 per cent had four or more placements in their current care period"[6].

The fact that there is such a high rate of placement breakdown, and change in caregivers, makes this option very risky for children. If 15.9 percent of children had four or more placements in their current care period then it is possible that over a span of 18 years and multiple care periods there are many children who experience unacceptably high changes in placements. This cannot be allowed to continue. The fact is that DoCS cannot guarantee that a permanent care plan results in permanent care.

There are two requirements flowing from this. **The "least intrusive intervention" principle should remain.** If however the decision is made to remove the "least intrusive intervention" principle then there must be increased protection for children and acknowledgement of their views and wishes**.**

It is not good enough to have departmental caseworkers and their managers decide what is best for children without careful consideration of the children's views. **Children's views should also be presented to Children's Court**, regardless of their age once they are of primary school age, whenever a decision is made to remove children from the family home. **The child's voice should be heard.**

Adoption without consent

The proposal to use adoption without parental consent as a means to strive for more permanency and stability in children's lives is an appropriate alternative to long term foster care for some children (especially the very young). **This change must be handled carefully especially in relation to indigenous children and their families.**

[5]Barber, J. and Delfabbro, P (2004) *Children in foster care.* London: Routledge.
[6]Department of Community Services, 2006, 30 -31, emphasis added.

To simply increase the number of indigenous children removed from their families and to place these children for adoption would lead to claims of another "stolen generation"[7]. There would be a paralysing degree of anger within indigenous communities if there is any repeat of increased numbers of forced removal of children from indigenous families.

Before any extension of adoption without parent consent for indigenous children there must be consultations with indigenous communities and leaders. Preferably there must be some involvement of indigenous communities in decision making for adoption.

Decisions on permanency of placement

The time line proposed for making permanent decisions is not adequately dealt with in the discussion paper. The six month time line is the one set by the recent amendments introducing parent responsibility contracts [ss 71(i), 38 (3), 38A, 38B, 38C, 38E, 38F, 61A].

This time period is not a realistic one where parents are expected to make major changes in their lives in relation to issues such a substance use. The six month timeline seems to be geared towards DoCS case management timelines rather than in the best interests of the child.

A two year period should be preferred over a six month timeline to allow for real changes to be made.

If appropriate contact between foster carers, the children and birth families are maintained throughout such a period then the child has maximum potential to maintain important relationships for the child while living in a safe and stimulating environment. If there are urgent reasons for an individual child to have a permanent decision before a two year period has ended then such a case should be put to the Court and the Court should have discretion to make appropriate orders for the individual child.

The use of formulae such as decision pathways is not appropriate when the needs of individual children must be considered.[8]

[7] Report of the National Inquiry in to the Separation of Aboriginal and Torres Strait Islander Children from Their Families, (1997) *Bringing Them Home*. Commonwealth of Australia, Human Rights and Equal Opportunity Commission.
[8] Department of Community Services, 2006, at 31.

Rights, powers and duties of parents and people responsible for children

On page 33 of the discussion paper, s 8(a) reads as *"having regard to the rights, powers and duties of their parents or other persons responsible for them".* It has been recommended that it is replaced with *"having regard to the capacity of their parents or other persons responsible for them".*

The proposed amendment is not well drafted. There is a risk here that the phrase "capacity of their parents" may be taken to mean that if a parent is in poverty or suffers some disability, then that is sufficient to warrant removal of children from their care. Although such a conclusion is prevented by s 71(2), it is essential to phrase the objects of the Act in such a way that this protection is not undermined.

It is suggested that s 8(a) should read as *"that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being."*

4.4 *Preventing Harm to Children: Body Piercing*

The proposal put forward is reasonable and provides appropriate protection to young people. While there may be some concern about the loss of liberty for young people, this is a reasonable requirement in the context of potential permanent physical harm to young people.

4.5 *The Role of the Courts in Child Protection Matters*

The proposal by DoCS is to diminish the role Children's Court with a tribunal similar to the Mental Health Tribunal and Guardianship Tribunal.[9] It is proposed that the Children's Court should function only to make interim and final orders for parental responsibility and resolution of disputed child protection decisions.[10] This would remove from the Children's Court the power to review and make decisions in relation to "emergency child protection actions, contact, supervision and monitoring and review of parental responsibility arrangements."[11]

The argument presented is that:

- Child protection is, or should not be, an issue that deals with balancing of competing interests;
- Child protection decisions should not be made by adversaria contest;
- Child protection cases should not have to meet the usual legal standards in terms of proof of harm;

[9] Department of Community Services, 2006, at 37.
[10] Department of Community Services, 2006, at 38.
[11] Department of Community Services, 2006, at 38.

- Current Children's Court proceedings are too adversarial; and
- There is no need for a court system to deal with child protection matters.

This argument is not valid. Effectively it would mean that very serious decisions about removal of children in emergency situations, the degree of contact children have with family members after removal from the family home would be left to administrative decision makers. In addition, the way the proposed limited role of the Children's Court would appear to protect DoCS from having to establish that the parents have a case to answer.

The intention to remove any hint of adversarial proceedings portrays the view that there is certainty that DoCS and its officers are always correct and that there is never an error in their assessment or judgment.

A careful examination of the proposal reveals the argument put that an adversarial approach is not appropriate. Why is this? The decision being made is not about whether a patient needs to be in hospital but is about whether to remove children from their family of origin. It is as important a decision as that of concern in the Stolen Generation Report.

Logically, the only way to prevent adversarial actions is for the parents to either concede to DoCS decision or for parents and other family carers to be stripped of any rights to legal representation and an opportunity to put their argument. **Such a position is not appropriate.**

Parents, even if accused of child neglect or abuse, are entitled to have an opportunity to put their case to an impartial court before decisions are made that mean the end of their parental responsibilities.

Given the appropriate emphasis on permanency planning it is important that there is early scrutiny of DoCS decision making and actions. Good case management and speedy decision making is important for the children's sake. Based on experience, it seems that the delays in decision making are not because of magistrates or lawyers who represent parents or other interested parties.

Most often the delay is because the Department has not finalised its care plan or some other work that is required before a court decision is made about parental responsibility. Indeed, one comment from a non-government agency (personal communication, 2007) was that the delays in decision making about children's futures was a result of the Department's use of temporary care agreements. Such agreements are not subject to court scrutiny: *Children and Young persons (Care and Protection) Act 1998,* ss 41, 151.

DoCS citing examples from Norway and Denmark ignores the place of the court system in child protection in the majority of western countries. It seems aimed at

reducing the accountability and external scrutiny of DoCS decisions and actions in a way which deprives children of their right to have protection of the court system towards protection of their best interests.

Contact issues

DoCS report proposes that the Children's Court should not be involved in reviewing contact arrangements. This concerns decisions about when, how and how frequently children will see their parents and other significant people in their lives after their removal from the family home.

It is acknowledged that contact arrangements are controversial and time consuming. The complexity is multiplied by the need to have supervision of contact in most cases where parental responsibility has been allocated to the Minister. The Department wishes these decisions to be administrative ones that are not subjected to court scrutiny.

The arguments put forward are as follows:

- The Court is not "as extensively" involved in contact arrangements in other child protection jurisdictions in Australia, except for the Australian Capital Territory and the Northern Territory.
- The old Act in NSW allowed for Court involvement in contact issues only when the case was in progress.
- Legislative reviews in other states have led to the conclusion that "it was not appropriate to extend the role of courts in relation to contact orders" because of the importance of flexibility to respond to individual circumstances and needs. The need to avoid return to Court to alter arrangements was also highlighted.
- Contact is seen as disruptive and distressing for a child and the carers of the children.
- The recommendation by Dr Dorothy Scott that decision-making about contact should be based on available evidence.
- To meet the best interests of the child decisions about contact arrangements should be "mindful of the individual needs, capacities and circumstances of each child."

DoCS recommendations are that where restoration is the goal there should be frequent and direct contact, but that where long term out of home care is planned contact should be less frequent and can be by indirect means. There are several problems with this rationale for removing the Children's Court from the decision making arena about contact arrangements.

The arguments put forward are contradictory.

The argument put forward in Victoria, South Australia and Western Australia following the Family Law Council Report was against court involvement in order to promote **flexibility** in contact arrangements.

DoCS makes it clear that the preference is for very limited contact between children and their birth parents when long term out of home care is planned. Far from having a flexible decision making process in mind to account for the individual needs of each child the current DoCS practice is to apply a formula of contact times of year when restoration is not considered possible.

Flexibility should be favoured.

This formula, presented by Barnardos, was based on a small study of adoption in another country. No Australian or overseas research on foster care which supports the formula which now seems to be applied in the DoCS care plans is known.

Children may be distressed by contact for a number of reasons and this includes the possibility that the children are missing their birth family, including parents and children. Decisions about contact need to be made in terms of the individual child's needs and interests and not because of the needs of foster carers.

It is difficult to follow the argument that the Courts should not be involved in contact decisions because they were not so involved under the regime of the previous Act. The previous Act was considered inadequate and the new Act was passed after careful consideration of important issues relevant to the needs of children.

Given the frequency of foster care breakdown, and the frequency with which children seek to return to their birth family, the current trend to reduce children's contact with birth families it seems antithetical to the best interests of children. **The voice of the child should be heard by an impartial body and that is in the Children's Court.**

In practice, DoCS sometimes proposes a contact regime that is appropriate considering the individual circumstance and especially when the child is reluctant to have contact and where abuse has been substantiated. But in many instances, especially in relation to situations where the concern is about neglect rather than physical or sexual abuse, DoCS does not always make good decisions.

There have been occasions when:

- A child was crying in distress because the Department would not allow the child contact with school friends after removal from the family home;
- A group of children were distressed about the lack of contact with parents who had been accused of neglecting them; and

- A child was feeling that their behaviour had caused their removal from the family home and the lack of contact between the child and birth parents.

It is the Children's Court that has the capacity to examine the individual circumstances of each child and to examine the reasoning given by the DoCS for their plans. **This level of accountability and the capacity for parents and children to be represented to argue their case is the only way to ensure the best interests of children in such circumstances.**

Further Issues

Department of Community Services' responsibilities to adhere to International standards

UNICEF combined with the Inter-parliamentary Union released a report highlighting governments' responsibilities when handling children's care and child protection. At present, Australia's child protection arrangements are world class, with the NSW model being singled out by the United Nations in its report on Australia. As such, any new proposal would need to ensure that compliance with international standards were retained. Under the proposed reforms it is doubtful that NSW could retain this standard.

- Conditions of removal from parental care (Article 9)

Article 9(1) of the Convention of the Rights of the Child states:

> *'State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'*

The article clearly insists that all decisions concerning the removal of a child from their parents should be determined under judicial review.

The proposed reforms are framed in such a way as to remove the involvement of a judiciary and replace it with a Tribunal system which would only attain quasi-legal status. Should the Tribunal reforms be structured in such a way as to become the first tier in the process with appeals possible to the children's court and beyond, it only serves the extend the process for all parties involved. This longer process would clearly be against the best interests of the child.

Further, removal of the decision making role from the Court structure would only increase the costs of running the child protection matters as all the necessary structures associated with such cases are already in place within the Courts structures. To have these re-established under a different umbrella would only duplicate the process and the costs, which could be re-directed into preventative and investigative programs.

- Periodic review of placements (Article 25)

International standards require that all decisions to place a child into care should be subject to periodic reviews to reassess the situation and make any changes as may be necessary in the best interests of the child.

It goes without saying that any review should be subject to judicial review to ensure that it is competently carried out and that the child is given the opportunity to participate in their future. The court's current system which provides links between the court and the affect child through the appointment of legal aid solicitors, specifically trained to assist in guiding the child through the process, combined with the support services established within the court system, ensuring that periodical reviews are not only conducted but that they take place in continuation of the original familiarity of the court structure which has been previously understood by the child.

The proposed reforms if implemented would only provide an extra layer to an already stressful process whilst minimizing the seriousness of such cases by having them heard in the first instance at a quasi-legal setting. The present system has achieved positive recognition from international authorities indicative of its success. The removal of the court's involvement at first instance would affect this standing and develop a costly duplicate process that is not in the best interest of the child or the community.

Conclusion

DoCS decision to review the statutory provisions in NSW relating to child protection should be applauded. Law reform is a vital process of every democratic society. However change in this area of the law should only be implemented to enhance the system of protection and elevate the interests of the child.

The difficulties of legislating and working in child protection are numerous and cannot be overstated. The long-lasting impact of child protection decisions makes it vital that all decisions are transparent and reviewable. Diminishing the role of the Children's Court is not only dangerous but sets NSW on a path which may breach our international obligations.

The impact any changes could have upon indigenous and other minority communities need to be carefully considered.

Focusing on prevention and introducing further flexibility to DoCS procedure is a good start on the road of reform.