# `Children's Court Clinic

## Professional Development Day
## 30 October 2009

## The Crucial Role of the Children's Court Clinic Assessment Report in Decision Making by the Children's Court of New South Wales

I thought it might be useful to explain in this paper the legislative framework within which the Children's Court makes decisions and particularly the legislative framework pertaining to the making of an assessment order by the court. In relation to the legislative framework I acknowledge and adopt parts of the paper delivered to you by retired Children's Magistrate Mr John Crawford (now an Acting Children's Magistrate). It was delivered at your professional development day last year. I also acknowledge and adopt parts of the address given by former Senior Children's Magistrate His Honour Mr Scott Mitchell at your professional development day in 2007.

The Children's Court, in relation to care proceedings, operates under the provisions of the **Children and Young Persons (Care and Protection) Act** 1998 (the Care Act). It is important to note that the Act sets out a number of objects and principles to be applied in all decision making under the Care Act. Section 9(a) of the Act provides as follows:

> *"In all actions and decisions made under this Act (whether by legal or administrative process) concerning a particular child or young person the safety, welfare and well-being of the child or young person must be the paramount consideration. In particular the safety, welfare and well-being of a child or young person who has been removed from his or her parents are paramount over the rights of the parents."*

This important principle reflects Articles 3 and 9 of the *United Nations Convention on the Rights of the Child 1989.*

A further important principle to be applied in decision making under the Care Act is set out in s 9(d) which states:

> *"In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development."*

Another important principle to be applied relates to the need to make early decisions with respect to out-of-home placement. Section 9(f) states:

> *"If a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child or young person's circumstances,* ***the younger the age of the child****,* ***the greater the need for early decisions to be made in relation to a permanent placement****" (my emphasis).*

Under the Care Act the Community Services Division of the Department of Human Services (formerly known as DoCS) can remove a child from the care of his or her parent or parents in limited circumstances without the need of a court order. Under s 43(1) of the Care Act if the Director General or a police officer is satisfied on reasonable grounds:

> *(a) that a child or young person is at immediate risk of serious harm; and*
> *(b) that the making of an Apprehended Violence Order would not be sufficient to protect the child or young person from that risk,*
>
> *the Director General or police officer may … remove the child or young person from the place of risk in accordance with this section.*

However, if the child is removed the Department must apply to the Children's Court no later than the next sitting day of the Children's Court after the removal of the child and the Department must seek a care order – that order may be an emergency care and protection order (ECPO), an assessment order or an order for parental responsibility including an interim order. An interim order is an order made pending the making of a final order. Commonly, the Court before making a final order of parental responsibility will make an interim order of parental responsibility to the Minister or another suitable person.

The Children's Court can make an ECPO if it is satisfied that the child or young person **is at risk of serious harm**. This order, however, has effect only for a maximum of 14 days and can be extended once only for a further maximum period of 14 days.

The vast majority of cases which come before the Children's Court relate to children or young persons who have already been removed from the care of their parents by the Department. However, the Department can seek a variety of orders which may not necessarily require that the child be removed from the care of the parents, for example, the Department may agree for the child to remain with the parents on condition that they comply with supervision orders or undertaking orders made by the court.

In practice, however, the most common care order sought by the Department in the Children's Court is an order allocating parental responsibility under s 79 of the Care Act. Usually the Department initially seeks an order allocating parental responsibility to the Minister. In some cases the Department will later amend their application and

seek that parental responsibility be placed with another suitable person, for example, the child's grandparents. The Court may allocate parental responsibility (or aspects thereof) to:

(a) one parent to the exclusion of another;
(b) a parent (or parents) and the Minister jointly;
(c) another suitable person; or
(d) the Minister.

The Court can also make **contact orders** with respect to a child the subject of care proceedings. Contact orders may regulate the duration and frequency of contact between the child on the one hand and on the other the parents, relatives and persons significant in the child's life. The contact orders that are made in the Children's Court may only be minimum levels of contact; it is then a matter of discretion for the Department as to whether there will be further contact in addition to the minimum levels of contact. The Children's Court, when making contact orders, can order that contact be supervised by the Department or another person.

Before the Children's Court can make a care order and in particular an order allocating parental responsibility the Court must first be satisfied that the child or young person **is in need of care and protection** (this is called by lawyers "*establishment*" or "*the making of a finding*"). If the Court is not satisfied that the child or young person is in need of care and protection then it has no power to make a care order. The Court does, however, have power to make an emergency care and protection order without making a finding that the child is in need of care and protection. The grounds upon which a child may be found to be in need of care and protection are set out in s 71(1) of the Care Act and include that:

*(a) there is no parent available to care for the child or young person as a result of death or incapacity or any other reason;*
*(b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection;*
*(c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated;*
*(d) subject to subsection 71 (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met by his or her parents or primary care givers;*
*(e) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living.*

Section 71(2) of the Care Act, however, provides that the Children's Court cannot conclude, pursuant to s. 71 (1) (d), that the basic needs of a child or young person are likely not to be met only because of a parent's or primary care giver's disability or poverty.

Once the Children's Court is satisfied that the child or young person **is in need of care and protection** then the court can go on to consider whether it will make the care order being sought by the Department.

Under s 83 of the Care Act if the Director General applies for a care order for the removal of a child or young person the Director General must assess whether there is **a realistic possibility of the child being restored to his or her parents** having regard to:

*(a) the circumstances of the child or young person, and*
*(b) the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.*

The Act provides that if the Director General assesses that **there is no realistic possibility of restoration** a permanency plan for another suitable long-term placement for the child is to be prepared and submitted to the Children's Court for its consideration. If the Director General assesses that there **is a realistic possibility of restoration** then the Director General is to prepare a permanency plan involving restoration and submit it to the Children's Court for its consideration. Following upon the Director General making an assessment as to whether there is or is not a realistic possibility of the child being restored to his or her parents, the Children's Court must then decide whether to accept the assessment of the Director General. If the Court does not accept the Director General's assessment, it may direct the Director General to prepare a different permanency plan.

**Permanency planning**

Under s 83(7) the Children's Court cannot make a final care order unless it expressly finds:

*(a) that permanency planning for the child or young person has been appropriately and adequately addressed; and*
*(b) that prior to approving a permanency plan involving restoration there is a realistic possibility of restoration having regard to*
*(i) the circumstances of the child or young person, and*
*(ii) the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.*

Permanency planning is a pivotal concept under the Care Act. Section 84 provides that permanency planning involving restoration of the child to the parents is to include:

(a) a description of the minimum outcomes the Director General believes must be achieved before it would be safe for the child to return to his or her parents;
(b) details of the services the Department is able to provide or arrange the provision of to the child or young person or his or her family in order to facilitate restoration;
(c) details of other services that the Children's Court could request other government departments or funded non-government agencies to provide to the child or young person or his or her family in order to facilitate restoration; and

(d) a statement of the length of time during which restoration should be actively pursued.

In relation to placement of children of Aboriginal and Torres Strait Islander background in out-of-home care, a number of important principles under the Care Act must be complied with. In summary s 13 of the Act provides that, as far as is practicable the child is to be placed with a member of their extended family or kinship group.

The above is a general summary of the legislative framework within which the Children's Court must operate in making its decisions. The issues which most commonly arise for determination by the Children's Court are firstly, whether **there is a realistic possibility of restoration** of the child to his or her parents and secondly, whether **permanency planning** (as set out in the Departmental Care Plan) **has been appropriately and adequately addressed**.

It is with respect to the determination of these two important issues that the Children's Court Clinic assessment report is often of critical importance. The court is greatly assisted by being provided with independent and specialist expert opinion on issues relating to:

- the parenting capacity/responsibility of the parent/caregiver
- the nature of the relationship between the parent/caregiver and the child
- the child's individual characteristics, needs and wishes, and
- suggestions for steps to achieve desired outcomes which may include suggestions as to long-term placement, restoration plans, contact visits, counselling, treatment and what supports and interventions may be needed to assist the child to maintain attachments, or achieve meaningful connections with the parent or other significant persons in their life.

**Assessment orders**

Under s 53 of the Care Act the Children's Court may make an order for (a) the physical, psychological, psychiatric or other medical examination of a child or young person or (b) the assessment of the child or young person, or both. Under s 53(2) an assessment order authorises a person carrying out the assessment to do so in accordance with the terms of the order. The Children's Court may, for the purposes of an assessment order, appoint a person to assess the capacity of the person with parental responsibility, or who is seeking parental responsibility, for a child or young person to carry out that responsibility. That assessment can only be carried out with the consent of the person whose capacity is to be assessed.

In determining whether to make an assessment order the Children's Court must, pursuant to s. 56(1) of the Care Act have regard to the following matters:

*(a) whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere;*

*(b) whether any distress the assessment is likely to cause the child or young person will be outweighed by the value of the information that might be obtained;*
*(c) any distress already caused to the child or young person by any previous assessment undertaken for the same or another purpose;*
*(d) any other matter the Children's Court considers relevant.*

In making an assessment order, the Children's Court must ensure that a child or young person is not subjected to unnecessary assessment (s 56(2)).

Under s 58 of the Care Act if the Children's Court makes an assessment order it is to appoint the Children's Court Clinic to prepare and submit the assessment report to the Court. Under the present legislation an assessment order may only be made by the Court on the application of the Director General or a party to the application. The Act is to be amended in January 2010 to provide that the Children's Court may, of its own motion (that is without there being an application by the Director General or a party), order the Children's Court Clinic to provide the Court with such other information as may be within the expertise of the Children's Court Clinic. Under the amendment, the Children's Court may order the Children's Court Clinic to provide any such information regardless of whether an assessment order has been made in relation to the child.

It is the evidential status of the Children's Court Clinic's assessment report which allows the Court to place particular reliance upon it. Under the Act, an assessment report submitted to the Children's Court is taken to be a report to the Children's Court rather than evidence tendered by one of the parties. In other words, the Clinic's assessment report is regarded by the Court as an independent and objective report prepared by highly experienced and qualified experts and for those reasons it is usually given great weight in the proceedings. This independence and objectivity is greatly enhanced by the adherence of the Clinician to the *Uniform Civil Procedure Rules* 2005, Schedule 7 "*Expert Witness Code of Conduct*". You should therefore always comply with the Code of Conduct and explicitly state in your report that in preparing your report you have complied with the Code of Conduct.

**The concept of realistic possibility of restoration**

As I have said, whether there is a realistic possibility of restoration of the child to the parents is very commonly an issue to be determined by the Court. It is the experience of the Court that the Children's Court Clinic's assessment report is often of critical importance in making that important decision. What then does the Court understand by "***realistic possibility of restoration***?" This can best be explained by reference to the submission of the former Senior Children's Magistrate His Honour Mr Scott Mitchell to the Special Commission of Inquiry into Child Protection Services in NSW. In the submission His Honour said:

> *"The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the Court over the years requires that usually a realistic possibility of restoration be evidenced at the time of the hearing by a coherent*

> *program already commenced and with some significant 'runs on the board.' The Court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted."*

In the case of **Saunders & Morgan and Anor v DoCS** [2008] CLN 10 His Honour Judge Johnstone in the District Court, in referring to the phrase *"realistic possibility of restoration"* in s 83 of the Care Act said:

> *"The section requires, however, that the possibility be 'realistic'. That word is less easy to define but it was inserted to require that the possibility of restoration is real or practical. It must not be fanciful, sentimental or idealistic or based upon, 'unlikely hopes for the future'."*

In determining whether there is a realistic possibility of restoration the Court must also bear in mind the important principle I referred to earlier, set out in s 9(f) of the Care Act which requires that if a child is placed in out-of-home care, arrangements should be made ***"in a timely manner"*** to ensure the provision of a safe, nurturing, stable and secure environment and recognising that the younger the age of the child, the greater the need for "***early decisions***" to be made in relation to a permanent placement.

As you will all be acutely aware, the younger the child, the whole process of attachment between the child and his or her carer takes on critical importance. This is why the Court must ensure that in relation to determining whether there is a realistic possibility of restoration and determining the issue of placement it must act in a timely fashion and within a viable timeframe. This is also why the Children's Court has set strict Time Standards in relation to care cases. Under these Time Standards 90% of care cases are to be concluded with the making of final orders within 9 months from commencement in the court and 100% are to be concluded by final orders within 12 months.

**How does the court deals with expert evidence?**

Proceedings in the care and protection jurisdiction of the Children's Court are generally not subject to the strict rules of evidence, however, the court can direct that the rules of evidence will apply. The proceedings are to be conducted with as little formality and legal technicality and form as the circumstances of the case permits.

Generally evidence of an opinion by a witness is not admissible or is given little weight by the court. For example, the opinion of a lay witness that a person is or is not suffering from a mental disorder will be given very little if no weight by the court. However, there is an exception with opinions expressed by an expert witness where the opinion relates to **specialised knowledge** or a **field of expertise** of the witness.

It is important to remember that to be admissible or to be given weight by the court an expert's opinion must be **wholly or substantially** based upon the witness's **specialised knowledge** or **field of expertise**. Such specialised knowledge must come from the expert's **training, study or experience**. So if an "expert" expresses

an opinion outside his or her specialised knowledge or field of expertise then the court will give little or no weight to the opinion.

The opinion expressed by an expert witness must explain how the expressed opinion is wholly or substantially based on the witness's specialised knowledge. It is extremely important therefore that the reasoning process you adopt in expressing an opinion or reaching a conclusion is set out in your report. In other words, you must explain or demonstrate in your report how your specialised knowledge allows you to express the particular opinion. For example, in the context of a criminal case, to state simply and with no explanation that a person committed a criminal offence "*because they were suffering post traumatic stress disorder*" does not assist the court in understanding the reasoning process for expressing that opinion. The court would be likely then to place little or no weight in the opinion. However, if you explain by reference to your specialised knowledge how, and to what extent, the suffering of PTSD caused the person to commit the offence then the court will give your opinion greater weight.

In the case of **Makita (Australia) Pty Ltd v Sprowles** (2001) 52 NSWLR 705 Heydon JA (now Heydon J on the High Court of Australia) said that with respect to expert evidence,

> *"[T]he opinion of an expert witness requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight".* [at para 85]

Also, it is important to bear in mind that if your opinion is based upon accepted, observed or assumed facts you should clearly identify those facts in your report. I am not referring to every fact you have observed and every fact in the material provided to you but certainly you should refer to the important or significant facts that bear upon your opinion. This is because if the court does not ultimately make those findings of fact the weight of the opinion or opinions expressed by you may well be affected. This may happen where, for example, a DoCS file may refer to a number of "allegations" or "reports of harm" with respect to a child. Even though the DoCS file may state that the allegation is "confirmed" (which it often does) that does not mean that the court will ultimately find that the allegation is true. Indeed, the court may find that it was a deliberately false allegation.

Some other matters to bear in mind in preparing your report and giving evidence include:

1. You should keep to the terms of reference as contained in the assessment order. If you stray from them your report may be excluded. For the same reason, you should not interview people whom you are not authorised to interview. If you do interview another person you should only do so with the consent of the parent or carer or, if the child has capacity to consent, with the child's consent. Further, you should refer to any information obtained from another person in a separate part of your report because sometimes there will be legal argument as to whether that material should properly be before the court. If the court decides it should not be then that material can be easily excised from the report and you should be in a position to state whether your opinions or conclusions change as a result of not having regard to that material.

2. If there are numerous related questions it is quite appropriate to work out the totality of what is being asked and address them in combination.

3. If you believe that the assessment order in its terms prevents you from properly providing information then it is quite appropriate to write a report back to the court stating that you are unable to comply with the order for this reason. Upon receipt of your report the magistrate may review the terms of the assessment order.

4. Again, in a particular case you may feel that on the information provided, you are not able to express a concluded opinion or view. If that is the case it is quite appropriate to state that in your report. However, you should clearly state why it is that you have not been able to reach a concluded view eg the paucity of information that has been provided to you or the conflicting nature of the information provided to you.

The Children's Court is presently implementing a number of recommendations of the Wood Special Commission of Inquiry into Child Protection Services in NSW. One of those recommendations is that the status of the Children's Court should be enhanced by the appointment of a District Court Judge to head the court. It was that recommendation that resulted in my appointment to the court on 1 June this year. The Wood Inquiry took the view (as had previous inquiries into child protection in NSW) that the work of the Children's Court, particularly in its care and protection jurisdiction, is of such importance that the court should be headed by a judge.

Another important recommendation relates to the expansion of alternative dispute resolution (ADR) procedures in the court. The ADR model we ultimately adopt will most certainly involve the participation of the clinician earlier in proceedings and in the less formal setting of a mediation conference rather than a formal court hearing.

The other procedure we are proposing to expand in the court is the greater use of expert conferences where there are a number of expert reports in a case. The purpose of such a conference is to achieve, through the conferring of experts,

identification of issues in agreement and issues in dispute. Ultimately, the best result for such a conference is the obtaining of a joint report.

I trust that my thoughts here today have assisted you in gaining a better insight into the workings of the Children's Court and, in particular, how the important work of the Clinic's clinicians plays a vital role in the court's decision making processes.

Judge Mark Marien SC
**President of the Children's Court of New South Wales**
30 October 2009