Children's Court of New South Wales

LEGAL AID CARE AND PROTECTION CONFERENCE
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JUDGE PETER JOHNSTONE
PRESIDENT OF THE CHILDREN'S COURT OF NSW

"THE CHILDREN'S COURT – DRIVING A PARADIGM SHIFT"

INTRODUCTION:

1. This paper has been prepared for the Legal Aid Care and Protection Conference 2016, the general topic of which is 'Challenging Complacency'. My paper is to be presented to attendees on Friday 12 August 2016. The topic I will be addressing today is titled, 'The Children's Court – Driving a Paradigm Shift'.[1]

2. First, I wish to acknowledge the traditional custodians of the land on which we meet today, the Gadigal people of the Eora Nation, and pay my respects to their Elders past and present.

3. Thank you for inviting me to speak at such an important forum. As professionals working within this jurisdiction, it is particularly important that we safeguard the integrity of justice in all of its processes and ensure that we challenge complacency in all of its iterations.

4. These are complex times, calling for comprehensive change. The Royal Commission into Institutional Child Sexual Abuse is in its final stages and is due to hand down its recommendations in 2017. Earlier this year we received the benefit of the recommendations and report of the Victorian Royal Commission into Family Violence and, the Government has just

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

established a Royal Commission into youth detention, which may extend to a national Royal Commission.

5. The establishment of these Royal Commissions represents the public interest inherent in placing children and young people's safety, welfare and well-being at the forefront of the Government and community's consciousness.

6. Family violence and the over-representation of Aboriginal and Torres Strait Islander children and young people in the care and protection and criminal justice systems are not diametrically divergent issues. They are linked by the trifecta of social, cultural and economic disadvantage that characterise some of the most trying and confronting issues of our time. Inaction entrenches and perpetuates disadvantage. We must challenge complacency, break down this trifecta and drive cultural change by implementing practical and achievable strategies.

7. Empowerment or lack thereof, is another area where family violence and the over-representation of Aboriginal children and young people in the care and crime jurisdictions, converge. Empowerment plays a vital part in providing vulnerable people with the voice, and the platform, to meaningfully participate and engage in the decisions that affect their lives. Disempowerment silences and oppresses, and creates apathetic complacency amongst the communities it has infected.

8. Therefore, as professionals working within two areas that are so interconnected, we are charged with the task of addressing both the nature and effects of complacency. The two strategies I will be discussing today are concerned with ameliorating these causative elements of complacency.

9. Accordingly, this paper will be structured in two parts, directed at addressing these issues.

10. Part 1 will provide an update on the key amendments to the *Crimes (Domestic and Personal Violence) Act* 2007 (CDPV Act), concerning children and young people, and the associated project of improving the accessibility of justice through the simplified wording of standard orders. Part 2 will explore the reform of cultural care planning, including the introduction of a comprehensive cultural care plan template. Penny Hood, Director of Innovation Co Design and Implementation at the Department of Family and Community Services (DFaCS), will discuss the roll-out of these reforms within DFaCS and provide advice on the implications of this transition.

PART 1: AMENDMENTS TO THE CDPV ACT

11. I appreciate that you are all familiar with the context leading up to the amendments to the CDPV Act and, you are no doubt aware of the devastating impacts of family violence. Despite this, I am still minded to direct some of this discussion to the context and impetus for the reforms, for the benefit of both completeness and to remind ourselves of the need to stay alert to this issue.

12. The Royal Commission into Family Violence was established on Sunday 22 February 2015. It provided its report and recommendations to Government on Tuesday 29 March 2016 and was tabled in Parliament on Wednesday 30 March 2016.[2]

13. From the perspective of the loss and harm experienced over a number of generations, as a result of family violence, the Royal Commission was long overdue. Its establishment came in the wake of a number of family violence related tragedies, reflecting enhanced public awareness of the nature and extent of family violence and recognising that existing responses to family violence were not adequately addressing the problem.[3]

[2] Royal Commission into Family Violence: Report and Recommendations, Victorian Government, March 2016
[3] See also: Australian and NSW Law Reform Commission Report (2010) *Family Violence – A National Legal Response* and Legislative Council Standing Committee on Social Issues (2012) *Domestic Violence Trends and Issues in NSW*

14. In her statement to the Commission, Rosie Batty eloquently summed up the need for change:

"I think changing the culture is about raising awareness in the public domain to such a level that what we learn can't be unlearnt, and what we know can't be unknown. I think it is imperative to raise the issue to the point where everyone knows it's an issue, everyone knows the statistics and everyone understands the different forms of family violence."[4]

15. The terms of reference specifically addressed the need to challenge a culture of complacency by safeguarding the interests of children and young people affected by family violence, and tailoring outcomes to Aboriginal and Torres Strait Islander children and young people.[5]

16. Whilst my interest in the reform to the CDPV Act is concerned with its broader application and implications, for the purposes of my brief discussion of the reforms today, I will focus on the specific changes relevant to the intersection of family violence with the care and protection jurisdiction of the Children's Court.

17. The Royal Commission recognised the prolific and extensive effects of family violence, part of which involved focussed attention on the discrete needs of children and young people:

"Family violence can have serious effects on children and young people but they do not always receive necessary support. There is insufficient focus on their needs and on therapeutic and other interventions they may require to mitigate the effects of the violence. Although the children are remarkably resilient, and many who experience violence and abuse go on to lead full and productive lives, there are many who will need counselling and/or other support to overcome the impacts of the abuse, which may otherwise render

[4] Statement of Batty, 6 August 2015 at [22] in above n 2 at p. 13
[5] Above n 2

them vulnerable to becoming a victim of family violence as an adult, or using violence themselves. If we do not provide this support, the effects of family violence suffered by children may be carried on to the next generation."[6]

18. In addition, the Commission noted the short-term and long-term consequences of children and young people experiencing family violence, such as: behavioural and mental health problems, disrupted schooling, homelessness, poverty and intergenerational disadvantage.[7] From the Children's Court's perspective, it is often these consequences that result in children and young people 'crossing-over' into the criminal jurisdiction.

19. However, children and young people are often silent victims of family violence, falling through the cracks of the ambit of many service providers, traditionally focussed upon supporting women.[8]

20. The Commission noted that:

"The negative effects of family violence can be particularly profound for children, who can carry into adulthood, the burden of being victimised themselves or witnessing violence in the home."[9]

21. However, the Commission emphasised the importance of ensuring that labelling is avoided, stating that:

"We know, too, that family violence victims – including children – demonstrate enormous resilience in the face of great adversity. Many of these survivors go on to live full and happy lives, develop healthy relationships and use their experience to help others."[10]

[6] Above n 2 at p. 8
[7] Above n 2 at p. 22
[8] Above n 2 at p. 23
[9] Above n 2 at p. 17
[10] Above n 2 at p.17

22. Significant to the reforms, the Commission also stated that:

"There should be no onus on victims of family violence to manage risk; it is the unacceptable nature of perpetrators' behaviour that should be the focus of attention."[11]

23. Turning now to the specific reforms from the perspective of the Children's Court. The reforms to the CDPV Act, contained in the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016 commenced on the 28th of June 2016 and included a range of amendments to the CDPV Act.[12] I will only be referring to those that have specific implications for the Children's Court, however I advise that you familiarise yourself with the amended Act for completeness.[13]

24. Firstly, a new s 40A was introduced to empower the Children's Court with jurisdiction to make an ADVO in care and protection proceedings. These amendments will allow the Children's Court to make an ADVO with the child the subject of care proceedings to be named as the protected person, as well as that child's siblings and any adult affected by the same circumstances.[14]

25. The amendments also extend the jurisdiction of the Children's Court to vary or revoke any existing ADVO, on the application of a party, or on its own motion, where care proceedings are before the Court and where the circumstances justify the making of the order. The Secretary of DFaCS and the Commissioner of Police will be notified and given the right of appearance before the Children's Court. The Court was empowered with this jurisdiction in order to avoid concurrent proceedings arising from similar facts or circumstances.[15]

[11] Above n 2 at p.23
[12] *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016 at schedule 1
[13] *Crimes (Domestic and Personal Violence) Act* 2007
[14] Above n 12 at schedule 1, s 40A
[15] Ibid

26. An additional measure to protect children and young people was introduced with a new s 41A, which operates to prohibit the defendant in an application for an ADVO from personally cross-examining a child. This amendment is consistent with the Local Court Practice Note for Domestic and Personal Violence Proceedings, which states that a child cannot be cross-examined by an unrepresented defendant and may only be questioned by a person appointed by the Court who is an Australian Legal Practitioner or other suitable person.[16]

27. A related amendment to s 40 allows evidence admitted in the District or Supreme Court in the hearing of a serious charge to be subsequently admitted in the Local and Children's Court in a related ADVO application, where the ADVO is remitted back to that Court for final determination.[17]

28. The introduction of s 41A and the amendment to s 40 is consistent with a trauma-informed approach and the need to put mechanisms in place to ensure that victims are not exposed to additional trauma and distress by having to give their evidence more than once. This is particularly critical for children and young people.

29. Amendments were also made to s 72 to ensure that the Commissioner of Police is notified of any application made to vary or revoke a police-initiated order. Importantly, the amendments also require that, where a person applies to vary/revoke a police-initiated AVO, and one of the protected persons is a child, the application requires leave of the Court before such an application can be heard.[18] This ensures that safeguards are embedded to protect children and adult victims from intimidation and coercion to consent to applications for variations and revocations.

[16] Above n 12, schedule 1, s 41A and Local Court Practice Note for Domestic and Personal Violence Proceedings (2012).
[17] Above n 12, schedule 1, s 40
[18] Above n 12, schedule 1, s 72. Also note that s 72(5)-(8) of the CDPV Act has been repealed so that a defendant can no longer apply for an ADVO to be revoked after it has expired.

30. Finally, s 48 of the CDPV Act was amended to clarify the requirements with respect to ADVOs to protect children. The amendments made clear that the requirement for police to appear on behalf of the child applies only where the child is the sole person for whom protection is sought. This change is critical as it ensures that women and men with or without children can make an application for an ADVO in the same way, and overcomes the existing reluctance of some communities to involve police. This will ensure that children are protected, despite the existence of any historical distrust of police.

31. These reforms have supplemented work undertaken by the Department of Justice and the Department of Premier and Cabinet, to improve the accessibility of language used in AVOs, and as a result, to improve understanding of, and compliance with, these orders. These newly worded AVOs have been termed 'Plain English AVOs' or PEAVOs and amend s 36 and s 50 of the CDPV Act.[19]

32. Improving the understanding and accessibility of AVOs by using tailored, simple language and removing complex legal language is critical in the Children's Court jurisdiction and is consistent with work the Court has undertaken, in its criminal jurisdiction, through its 'Explaining Legal Terms to Children' quick reference guide.[20]

33. These reforms represent an important shift in the siloed application of practice and procedure and will hopefully operate to drive cultural change in the family violence sphere.

[19] Above n12, schedule 1, s 36 and s 50.
[20] 'Explaining Legal Terms to Children' Quick Reference Guide, accessible at http://www.childrenscourt.justice.nsw.gov.au/Documents/EXPLAINING%20LEGAL%20TERMS%20TO%20CHILDREN_QRG%20v0.4.pdf

PART 2: REFORMED CULTURAL CARE PLANNING

34. The Children's Court has been collaborating with relevant agencies to drive cultural change on a number of levels, one of which is cultural care planning for both Culturally and Linguistically Diverse children and Aboriginal and Torres Strait Islander children. The focus of my discussion will be on the impetus for these reforms with specific reference to Aboriginal and Torres Strait Islander cultural care planning.

35. Throughout my time as President of the Children's Court, I have acted as a staunch advocate for change regarding the over-representation of Aboriginal and Torres Strait Islander children and young people in the care and protection jurisdiction of this Court. In order to address this issue, I have steadfastly supported comprehensive and tailored cultural care planning for Aboriginal and Torres Strait Islander children.

36. I do not suggest that cultural care planning is a panacea to this irrefutable and complex issue. However, I submit that adequate, appropriate and comprehensive cultural care planning can act as a step toward challenging complacency and driving a paradigm shift.

37. In order to arrive at this view, I have undertaken a great deal of research, both experiential and formal, to establish the nexus between cultural identity and socialisation. Aronson-Fontes has conducted extensive research into culture and child protection and synthesises the role of culture as follows:

"...culture defines what is natural and expected in a given group. We all participate in multiple cultures: ethnic, national and professional, among others. We carry our cultures with us at all times and they have an impact on how we view and relate to people from our own and other cultures."[21]

[21] Aronson-Fontes, L (2005) 'Child abuse and Culture: Working with diverse families', Guildford Press, New York at p.4

38. In relation to Aboriginal children and young people, a range of Aboriginal and Torres Strait Islander organisations have highlighted that connection to family, culture and community are central to the safety, welfare and well-being of Aboriginal young people.[22] As Libesman states:

"Cultural care is about being part of a family, community, extended network, knowing where you belong, and knowing what the difference is between two nations."[23]

39. The *Children and Young Persons (Care and Protection) Act* 1998 (the *Care Act*) also places culture as a critical consideration in decision-making for both non-Aboriginal and Aboriginal children and young people.[24] For Aboriginal children and young people, the Aboriginal and Torres Strait Islander child placement principles make clear that the identity and socialisation needs of Aboriginal and Torres Strait Islander children and young people will be met most successfully in placements that foster Aboriginal culture and identity.[25]

40. It is clear that a fundamental understanding and positive association with Aboriginal cultural identity can manifest in positive life-course outcomes and that:

"Aboriginal children do better if they remain connected to their culture."[26]

41. A positive characterisation of Aboriginality can act as a protective factor in ensuring that culture is used constructively, rather than destructively. Cultural competence in this context is about challenging labels that associate Aboriginality with antisocial behaviour.

[22] Libesman, T. (2011) 'Cultural Care for Aboriginal and Torres Strait Islander Children in Out-Of-Home Care' Secretariat National Aboriginal and Islander Child Care at p. 11- 14.
[23] Ibid at p. 10
[24] *Children and Young Persons (Care and Protection) Act* 1998: Parts 1 and 2
[25] Ibid at s 13
[26] Commission for Children and Young People (2015) 'Inquiry into compliance with the intent of the Aboriginal child placement principle (ACPP) in Victoria', at p.7

42. Ms Eileen Cummings, Chair of the Northern Territory Stolen Generation Aboriginal Corporation succinctly captures this challenge:

"Children have always been loved and respected and nurtured and taught in the Aboriginal way. It is important that these values and systems are encouraged and that Aboriginal people are empowered to ensure the systems are once again taught to their children to bring back pride and dignity to the Aboriginal people and communities. Too often the focus is wholly on the negative, not the positive, of Aboriginal child rearing and the Aboriginal practices which give young people their identity, their values, their role and their purposes in life."[27]

43. Whilst all children and young people in care require a range of supports to address trauma and abuse, there is an additional need for Aboriginal and Torres Strait Islander children to be provided with cultural support through tailored counselling and collaboration, to assist in maintaining links to their family and culture.

44. Ms Megan Mitchell, National Children's Commissioner, stated that it is necessary to collaborate and engage with Aboriginal communities in order to drive a paradigm shift and improve outcomes for children and young people:

"That includes things like improving the number of Aboriginal people that are in child-protection and home-care workforce so that you can have effective engagement with families so that they become part of the solution and so that they are driving and owning the problem and solution. If we keep disempowering these communities and families, we will just create more of the same intergenerational disadvantage."[28]

[27] Ms Eileen Cummings, Chair, Northern Territory Stolen Generations Aboriginal Corporation, *Committee Hansard*, Darwin, 2 April 2015, p.28
[28] Ms Megan Mitchell, National Children's Commissioner, *Committee Hansard*, Sydney, 18 February 2015, pp 5-6

45. Using this research as my foundation, I have formed the view that culture is central to the identity formation and socialisation of children and young people.

46. Culture carries a young person through their formative years and provides a sense of belonging in this world. If a child is removed from their parents, culture remains important – whether the child is at an age in which they are cognisant of this process or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.

47. Hence, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focussed cultural planning for Aboriginal children and young people.

48. As you are aware, the *Care Act* is to be administered under the 'paramountcy principle', that is, that the safety, welfare and well-being of the child is paramount: s 9(1). In addition to this paramountcy principle, the *Care Act* sets out other particular principles to be applied in its administration: s 9(2).

49. One of these principles is that account must be taken of concepts such as culture, language, identity and community.

50. It is a principle to be applied in the administration of the *Care Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as possible: s 11.

51. Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.

52. Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is prescribed: s 13(1). In summary, the order for placement is, with:

    a) a member of the child's or young person's extended family or kinship group, as recognised by the community to which the child or young person belongs,
    b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs
    c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence,
    d) a suitable person approved by the Secretary after consultation with:
        (i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
        (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

53. Before it can make a final Care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7).

54. Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:

    (a) have regard, in particular, to the principle 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, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement: s 9(2)(e),

    (b) meet the needs of the child: s 78A(1)(b), and

    (c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).

55. The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

56. The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.

57. I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4:

    "The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately

addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.

58. I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed by the Court, in conjunction with FaCS, AbSec, ALS, and Legal Aid. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

59. I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.

60. I now hand over to Penny Hood, Director of Innovation Co Design and Implementation at FaCS, to detail the roll-out of the redesigned cultural care plan template to caseworkers and the work FaCS is undertaking to ensure that cultural planning becomes a core and mandatory part of caseworker activity.