

# A decade later: issues in the care and protection of children

By Judy Cashmore

**A decade on from the joint report by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84, (1997), many of the issues that were of concern in relation to child protection and children in out-of-home care are just as pertinent now as they were then—and some are more urgent and troubling.**

In 1995–96, there were 91,734 child protection notifications across Australia to state and territory departments. A decade or so later, that figure has risen to 309,517, an almost threefold increase, and much of it due to the very substantial increase in New South Wales from 28,930 to 189,928.<sup>1</sup> At the same time, the number of substantiated<sup>2</sup> notifications or reports across Australia has nearly doubled from 29,833 in 1995–96 to 58,563 in 2006–07. The proportion of reports that are substantiated has varied from 25% to 60% across jurisdictions over the decade. The reasons for the increases are complex and probably associated with a combination of social problems such as family violence, parental substance abuse, and mental health problems.<sup>3</sup> The variations in the substantiation rate are most likely related to changes in policy and practice.

The trend in the number of children in out-of-home care is similar—it has doubled over the last decade or so, from 13,979 in June 1996—to 28,441 children in June 2007. Some of this increase is due to children remaining in care for longer periods, again a result of an increasing frequency of parents being unable to cope and provide adequate parenting.

There has been greater recognition over the last decade or so of the need for primary and secondary prevention at both the state and federal levels of government, in order to reduce the extent and severity of child abuse and neglect and to promote children's well-being. This has resulted in some investment in various early intervention programs and services that are still being evaluated.<sup>4</sup> But there are serious problems with children not receiving the services they need, partly because of the lack of coordination between departments and other agencies across portfolios and between state and federal jurisdictions. The problems with children falling through the gaps between child protection and juvenile justice outlined in the *Seen and Heard* report<sup>5</sup> continue.

There are still inadequate and insufficient alternatives to the court process, such as family group conferences, pre-hearing conferences and other forms of alternative dispute resolution that involve children and their families.<sup>6</sup> In New South Wales, for example, the *Children and Young Persons (Care and Protection) Act 1998* makes specific provision for alternative dispute resolution processes, but there has been little progress in implementing these. There are often long delays before matters are resolved in the Children's Courts. There are insufficient drug and alcohol and mental health services for parents, especially those that recognise and cater for parent's care-giving responsibilities. There are very limited mental health services for children, a shortage that is exacerbated by the increase in the numbers of children and families needing such services. This means that although many children are being reported to the statutory departments in each state, they are less likely to receive the services that they and their families need to help resolve their



Judy Cashmore has a PhD in developmental psychology and is currently a research academic in the Faculty of Law, University of Sydney. Judy is also Adjunct Professor and Chair of Advisory Board, Centre for Children and Young People, Southern Cross University, and President, Defence for Children International (Australia).

## The investigative process

Where reports or notifications to state departments or to the police concern allegations of criminal offences against children—mostly sexual abuse or child sexual assault—most states and territories in Australia now have specialist investigative units or teams to investigate these cases.<sup>7</sup> In several states, these consist of teams of co-located police and caseworkers such as the Suspected Child Abuse and Neglect (SCAN) teams in Queensland and Joint Investigative Response Teams in New South Wales.<sup>8</sup> In most states there is also now provision for the investigative interviews with child complainants to be electronically recorded and presented as part of the evidence-in-chief in court, as recommended in *Seen and Heard* (Recommendation 93) but there has been no adoption beyond Western Australia of the practice of allowing the whole of the child's evidence to be taken prior to trial and video taped for presentation at trial (Recommendation 94).<sup>9</sup>

Several evaluations and a Victorian Law Reform Commission report have also pointed to a fairly high rate of complaints being withdrawn and not proceeding to prosecution, with some suggestion that police in particular may be discouraging child complainants and their families from continuing with allegations of sexual and physical offences against children, especially where they are young and there is a low expectation of a conviction against an accused who does not plead guilty. Despite the increased recognition of child sexual abuse, it is clear that much remains unreported, with many children not disclosing the abuse for some time, even years, and others not disclosing it at all. Once reported, there is a high level of attrition in the number of cases progressing from the initial report to the police or to child protection authorities, through investigation, the preparation of briefs of evidence and then again before and during the trial process.<sup>10</sup> The estimates suggest that only between five and 10 per cent of cases that proceed to court from initial report and substantiation are finalised by plea or by verdict, and only about half of these result in a conviction.

## Children in out-of-home care

Where the state takes action to remove children from the care of their parents and takes on parental responsibility, it is reasonable

to argue that the state has a duty of care and obligation to provide better care and to ensure that the various physical and emotional needs of these children are met. There are, however, continuing concerns about the care that many children and young people in out-of-home care receive, as outlined in the *Seen and Heard* report and in the *Non-government Report to the UN Committee* in 2005, and a number of other formal inquiries and reports during this period. These concerns include:

- o the lack of stability, permanence and emotional security for children in their out-of-home care placements;
- o a limited range of options for placing children in care, especially for children and adolescents with complex needs;
- o inadequate contact for children with their families and other significant people;
- o the poor educational performance, and inadequate physical, dental and mental health of children in care.

## Indigenous children and young people

An intractable and apparently worsening situation is the plight of Indigenous children. The over-representation of Aboriginal and Torres Strait Islander children in the child protection system continues—in 2007 Indigenous children were 5.4 times more likely to be the subject of a substantiated report than other children—and were 8.3 times more likely to be in out-of-home care than other children across Australia.<sup>12</sup> These figures are likely to underestimate the over-representation because there is evidence that children's Indigenous status is not consistently recorded.<sup>13</sup> Despite numerous inquiries, reports, and calls for action to redress the serious problems for Indigenous children over the last decade, there has been little action or federal leadership until the contentious intervention in the Northern Territory in July 2007, now subject to a review.

In its Concluding Observations in 2005, the UN Committee on the Rights of the Child urged the Australian government to:

prioritise working with, and continue to work with Indigenous community leaders, agencies and communities to establish a range of best practice solutions for Indigenous children and young people.

It also recommended that the Government:

intensify its cooperation with Indigenous community leaders and communities to find, within Indigenous families, suitable solutions for Indigenous children in need of alternative care.

Clearly, the reaction of numerous Aboriginal women, in particular, the Northern Territory intervention, is testament to the contravention of this recommended consultative approach.

**Continuing government responsibility after care**

Despite the vulnerability of many young people leaving care, they are expected to become independent earlier than other young people who have not been in care. Most have few social or family supports, are less likely to have completed school, gained employment or have somewhere stable to live. They are more likely to have mental health problems, children of their own at a young age, and difficulty making ends meet. A longitudinal study in New South Wales found, however, that those who were stable and felt secure in care, had completed Year 12, and had social and emotional support beyond leaving care, were faring quite well and much better than their peers without these resources.<sup>14</sup>

While there is some indication that some state departments are beginning to provide more support for these young people, the picture is very uneven across states, and within states between metropolitan and rural and regional areas. Not all young people have leaving and after care plans as recommended (Recommendation 181) or as required by legislation in some states. The recent discussion paper on a National Child Protection Framework (May 2008) released by the Federal Labor government does, however, make recommendations for improved and continuing assistance for young people ageing out of care.<sup>15</sup>

**Determining the extent to which children's best interests are being met**

On a positive note, most states now have a charter of rights for children in care<sup>16</sup> (including a right to participation) or are in the process of establishing one, and have established complaints or auditing mechanisms for children in care.<sup>17</sup> Whether these provisions have been properly implemented and are operational is unclear.

It is very clear, however, that more effort

and investment is needed to bring together systematic data, research and evaluation in relation to the impact of child protection and out-of-home care policies, practices and legislation, to determine the extent to which children's best interests are being met within these systems, and whether the participation principle has had any effect on practice. Relatively recent audits of child protection and out-of-home care research found that there were considerable gaps in the research and indicated that there was a very low level of investment in research compared with the expenditure on services within the systems.<sup>18</sup>

The continuing and increasing concern is the capacity of the child protection and out-of-home care systems to respond to this ever-increasing demand and to be effective in protecting the safety and development of children already within the system and those being reported to it. The *Seen and Heard* report stated that the:

Claims that the state and territory family services departments are mismanaged, underfunded and failed to care adequately for children' were confirmed by the submissions to that Inquiry (para 17.6).

More recent inquiries in most states, and the clamour for changes following the deaths of children in New South Wales and elsewhere indicate the need for a radical rethinking of the way these systems work. These problems are not unique to Australia but are endemic in jurisdictions across the Western English-speaking countries that have adopted the US–Anglo model. For example:

It is apparent that at this time, the start of the 21st Century, child protection in Australia and in many places in the world is in a state of crisis. Child death inquiries abound, politicians and populations panic, simple and complex solutions to the 'problem' are accompanied by increasingly strident rhetoric about protecting more and more children from ever more toxic events and families and about punishing offenders. Workers get caught up in a cycle of fear as they undertake punishing hours of hard work working for the welfare of children and young people while desperately trying to avoid being the next media victim themselves. Families become ever more alienated as they undergo assessments of their parenting and receive little help so they don't ask for help again

and expend valuable energy avoiding the arm of the welfare.<sup>19</sup>

A number of academic and other commentators here and overseas<sup>20</sup> have been urging a serious rethink of the system. A 2007 report by PeakCare in Queensland, for example, provides a history and a critique of the need for a radically new direction focusing on a number of principles. The suggestions include developing a public health model; focussing on child and family wellbeing; developing a new ethical framework and value base, not just based on risk; returning to relationship-based practice; developing a renewed emphasis on locality-based services and prevention; and informing management from the frontline. Advocating for children's best interests in the child protection and out-of-home care system now means challenging the very assumptions, policies and practices of the current system and looking for new approaches. It also presupposes a renewed emphasis on early intervention with a particular focus on promoting children's well-being, not just preventing abuse and neglect.

#### Endnotes

1. These are the figures for 1995–1996 and 2006–07. There was also a numerically smaller but ten-fold increase in Tasmania from 741 in 2002–03 to 7,248 in 2003–04.
2. After an investigation has been finalised, a notification is classified as 'substantiated' or 'not substantiated'. A notification will be substantiated where it is concluded after investigation that the child has been, is being or is likely to be abused, neglected or otherwise harmed. States and territories differ somewhat in what they actually substantiate. All jurisdictions substantiate situations where children have experienced significant harm from abuse and neglect through the actions of parents. Some jurisdictions also substantiate on the basis of the occurrence of an incident of abuse or neglect, independent of whether the child was harmed, and others substantiate on the basis of the child being at risk of harm occurring. (Australian Institute of Health and Welfare (2008).
3. Australian Institute of Health and Welfare. *Child protection Australia 2006–07*. Child welfare series no. 43 (2008).
4. These include the *Federal Communities for Children and Invest to Grow* programs and the New South Wales *Brighter Futures* early intervention program, and the Child FIRST (Child and Family Information Referral and Support Teams) initiative in Victoria.
5. *Seen and Heard: Priority for Children in the Legal Process* (ALRC 86, 1997).
6. Recommendations 169 and 170.
7. Although physical assaults against children are also criminal offences, it seems that they are much less likely to be prosecuted than sexual offences.
8. There has, however, been no move to set up child advocacy centres, similar to those operating in the US and as recommended by the *Seen and Heard* report (Recommendation 92).
9. The aim is to preserve the child's early report of events after disclosure in an accurate and complete format and to allow the fact-finder to see how the child presented at the time, especially where there are long delays before the case gets to court. Where the tape is presented in court as the child's evidence-in-chief, the child does not need to recount viva voce what happened and there is some evidence that this may help to reduce the stress of testifying.
10. P Parkinson, S Shrimpton, H Swanston, B O'Toole & RK Oates. The process of attrition in child sexual assault cases: a case flow analysis of criminal investigations and prosecutions *Australian and New Zealand Journal of Criminology*. 35(3). (2002) pp 347–362.
11. While all states have legislation and/or policies that respect children's right to have contact with their families of origin, the relevant departments and agencies do not have the capacity to ensure that it always happens, that it includes grandparents and siblings, and is adequately supported.
12. Australian Institute of Health and Welfare (2008), pp 29, 62.
13. The *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (Alternative Report, 2005) stated, example, that 'two recent audits concerning children on orders in Queensland and in the Australian Capital Territory, for example, found that some Indigenous children who had been wards of the state or in foster care arrangements for many years were not recorded as Indigenous.
14. Cashmore & Paxman. 2006.
15. Australian Government Department of Families, Housing, Community Services and Indigenous Affairs *Australia's children: Safe and well: A national framework for protecting Australia's children. A discussion paper for consultation* (May 2008).
16. New South Wales: [http://www.community.nsw.gov.au/DOCS/STANDARD/PC\\_100213.htm](http://www.community.nsw.gov.au/DOCS/STANDARD/PC_100213.htm); Victoria: <http://ocsc.vic.gov.au/publications.htm>; South Australia: [http://www.gcyp.sa.gov.au/cgi-bin/wf.pl?pid=&hi=&mode=show&folder=documents/Charter%20of%20Rights&file=20\\_The%20Charter%20of%20Rights.htm](http://www.gcyp.sa.gov.au/cgi-bin/wf.pl?pid=&hi=&mode=show&folder=documents/Charter%20of%20Rights&file=20_The%20Charter%20of%20Rights.htm).
17. For example, a Child Guardian in Queensland, the Children's Guardian in New South Wales, a Child Safety Commissioner and an Advocate for Children in Care in Victoria.
18. Cashmore, J. & Ainsworth, F. 'Out-of-home care: Building a research agenda, *Children Australia*. 28 (2) (2003). Special issue. Cashmore, J., Higgins, D.J., Bromfield, L.M. & Scott, D.A. 'Recent Australian child protection and out-of-home care research: What's been done – and what needs to be done? *Children Australia* (2006), 31 (2), 4–11.
19. Harries, M., Lonne, B. and Thompson, J. *Beyond buzzwords – principles and themes for reforming child protection practice. Challenging practices*: Paper presented at third conference on International Research Perspectives on Child and Family Welfare (2005), Mackay.
20. Scott, D. *The Child Protection Crisis in Australia – a Way Forward*. Address to Parliamentarians Against Child Abuse. Parliament House, Canberra, September 5 2006; Harries, M., Lonne, B. and Thompson, J., *Beyond buzzwords – principles and themes for reforming child protection practice. Challenging practices*: Paper presented at third conference on International Research Perspectives on Child And Family Welfare. Mackay (2005); Melton, G. B. (2005) *Mandated reporting: A policy without reason*. Commentary prepared for a virtual discussion sponsored by the International Society for Prevention of Child Abuse and Neglect, October 2003; PeakCare Queensland. *Rethinking child protection: A new paradigm?* (2007).

Continued on page 72

Continued from pp 32: 'Juvenile justice'

- 22 *Children's Court Act 1992* (Qld) s 20(g).
- 23 *Young Offenders Act 1994* (WA) ss 17A, 17B.
- 24 *Young Offenders Act 1997* (NSW) s 27(2).
- 25 *Young Offenders Act 1997* (NSW) s 3(g).
- 26 *Seen and Heard*, pp 518–521.
- 27 *Young Offenders Act 1997* (NSW) ss 7(b), 22(1)(b), 39(1)(b).
- 28 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 33.
- 29 Arie Freiberg and Neil Morgan, 'Between bail and sentence: the conflation of dispositional options' (2004) *Current Issues in Criminal Justice* 220.
- 30 See, eg, the discussion in NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) at p 257. See also Georgia Brignell, *Bail: An Examination of Contemporary Issues—Sentencing Trends & Issues* No 24 (2002) Judicial Commission of New South Wales.
- 31 NSW Department of Juvenile Justice, *Annual Report 2005–06*.
- 32 See NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2006* (2007) summary tables at pp 9 and 4 respectively.
- 33 The proportion of children and young people appearing in court for breach bail conditions rose from 14% in 2003–04 to 20% in 2006–07. In 2006–07 almost one quarter of all Aboriginal children appearing in court in NSW were there for breach of bail conditions.
- 34 *Children (Criminal Proceedings) Act 1987* (NSW) s 9.
- 35 Mark Allerton et al, *NSW Young People in Custody Health Survey: Key Findings Report* (2003), NSW Department of Juvenile Justice; and Dianna T Kenny et al, *NSW Young People on Community Orders Health Survey 2003–06*, (2006). Both reports are available at [www.djj.nsw.gov.au/publications.htm](http://www.djj.nsw.gov.au/publications.htm).
- 36 The amendments were to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).
- 37 See the Second Reading Speech by the Attorney General, the Hon. John Hatzistergos, Legislative Council, NSW Parliament, Full Day Hansard Transcript, 15 November 2007, p 54. Designated government agencies now have standing to apply to the court for a direction about the appearance in person of the child. The court can require the child's presence at court, providing this is in the interests of the administration of justice. The child's legal representative will also be able to make submissions to the court in support of the child's presence at the court during the proceedings.
- 38 Hansard, Legislative Council, 17 October 2007.

Continued from pp 12: 'Seen and Heard revisited'

26. Report, p 428.
27. [http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child\\_protection\\_discussion\\_page.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child_protection_discussion_page.htm).
28. Report, chapters 18, 19 and 20.
29. Sentencing Young Offenders in Australia. *Reform*, Winter 2005 Issue 86.
30. Report, p 483.
31. 'A Last Resort? The Report of the Inquiry into Children in Immigration Detention' Human Rights & Equal Opportunity Commission, 2004.
32. Report, pp 578–581.
33. For further information, contact the authors of this article.