

LAWYERS' VIEWS OF DECISION-MAKING IN CHILD PROTECTION MATTERS: THE TENSION BETWEEN ADVERSARIALISM AND COLLABORATIVE APPROACHES

TAMARA WALSH* AND HEATHER DOUGLAS**

Outcomes in child protection cases impact substantially on children and families. Decisions in child protection matters must, therefore, be made with due caution and sensitivity. In order for the best outcomes to be achieved for children and their families, research suggests that decisions should be made collaboratively, and proceedings should be less adversarial in nature. At the same time procedural rules should be rigorously adhered to when decisions of a serious nature are being made, particularly where State interference in individuals' lives has occurred or is being contemplated. Thus, there is a tension in the child protection context between the use of informal dispute resolution methods, and the need to safeguard the rights of children and families. This tension is explored in this paper, with particular reference to the principles of natural justice and the rules of evidence. The discussion is informed by empirical research undertaken with child protection lawyers in Queensland. The authors conclude with some suggestions for reform which reflect the ideal of collaboration without compromising the need for procedural fairness.

I INTRODUCTION

Children in the developed world are most at risk of abuse and neglect within their family home, and the experience of child abuse and neglect has deep and long lasting consequences.¹ At the same time, the removal of a child from his or her family unit is one of the most significant and traumatising events that can happen in the life of a child and his or her parents.²

Determining the best interests of children in situations where facts are often uncertain is a difficult and complex process. There are often two or more versions of the situation which are experienced as 'real' by different people,³ and evidence

* Associate Professor, TC Beirne School of Law, The University of Queensland.

** Professor, TC Beirne School of Law, The University of Queensland. The authors extend sincere thanks to Megan Middleton for her outstanding field research work, and to Caxton Legal Centre for their in-kind support. Thanks also to Grace Devereaux, Abbey Richards and Lana Stirling for their research assistance, and to all the lawyers involved for sharing their knowledge with us.

1 See, eg, Patricia M Crittenden and Mary D S Ainsworth, *Child Maltreatment and Attachment Theory* (Cambridge University Press, 1989).

2 Joseph J Doyle, 'Child Protection and Child Outcomes: Measuring the Effects of Foster Care' (2007) 97(5) *American Economic Review* 1583.

3 Michael King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57 (3) *Modern Law Review* 385, 391.

may be circumstantial or ambiguous.⁴ Each stakeholder has a different perspective on the child protection process. While a child protection worker may see a need to intervene to protect a child from family violence, a domestic violence worker supporting the mother may see a State failing to assist a mother to care for her children in a safe place,⁵ and a lawyer acting for the child's parent may see an unnecessary intrusion by the State in family life. What is in the best interests of the child is not always clear. The phrase 'best interests of the child' has been examined in depth by many scholars and commentators, especially in the context of family law disputes.⁶ Kordouli argues that a wide interpretation of 'best interests' that takes into account parental interests as far as they affect the child's welfare, has been adopted by the High Court in family law cases.⁷ We suggest the wide approach is also appropriate in child protection matters. If this is accepted, a parent's willingness to parent, and ways in which parents (mostly mothers)⁸ could be supported in their parenting, are central to any determination regarding the child's welfare. The question is, how are these determinations to be made?

Research on children and the law has suggested that collaborative, inquisitorial and, where possible, non-court mechanisms should be preferred in decision-making processes concerning children.⁹ Practically speaking, proceedings that seek to act in the best interests of the child cannot be strictly adversarial in nature.¹⁰ As a result, alternative dispute resolution ('ADR') and 'less adversarial

- 4 Richard Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law' (2011) 25 *Australian Journal of Family Law* 1, 1.
- 5 Heather Douglas and Tamara Walsh, 'Mothers, Domestic Violence and Child Protection' (2010) 16(5) *Violence Against Women* 489.
- 6 See, eg, Patrick Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179; Donald Thomson, 'Beyond the Rhetoric of Best Interests of the Child' (2005) 7 *Australian Journal of Professional and Applied Ethics* 58; Michael King, 'The Right Decision for the Child' (2007) 70(5) *Modern Law Review* 857, 861–2.
- 7 See Vicky Kordouli, 'Relocation — Balancing the Judicial Tightrope' (2006) 20 *Australian Journal of Family Law* 89, 90. She suggests that the narrow approach is confined to issues that directly impact on the child's wellbeing. See also Jonathan Crowe and Lisa Toohey, 'From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the *Family Law Act*' (2009) 33(2) *Melbourne University Law Review* 391.
- 8 Mothers are most likely to find themselves interacting with child protection systems, and are most likely to have care responsibilities for children regardless of whether they are sole parents or in relationships with men; see, eg, Jane Lewis and Elaine Welsh, 'Fathering Practices in Twenty-Six Intact Families and the Implications for Child Contact' (2005) 1 *International Journal of Law in Context* 81.
- 9 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [4.32], [16.17], [17.42]–[17.54]; Jodi A Quas et al, 'Childhood Sexual Assault Victims: Long-Term Outcomes of Testifying in Criminal Court' (2005) 70(2) *Monographs of the Society for Research in Child Development* i; Rosemary Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59(2) *Australian Social Work* 157, 158; Joan Pennell and Gale Burford, 'Family Group Decision Making: Protecting Children and Women' (2000) 79(2) *Child Welfare* 131; Paul Boland, 'The Los Angeles County Children's Court: A Model Facility for Child Abuse and Neglect Proceedings' (1990–91) 18 *Pepperdine Law Review* 247. In the context of family law, see *Truman v Truman* (2008) 216 FLR 365, 370.
- 10 This is because the purpose of the proceedings is to determine what is in the best interests of the child; see Margaret Harrison, 'Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings' (Report, Family Court of Australia, April 2007) 33–4.

trials' are used extensively within family law systems.¹¹ They have also been taken up in the child protection context in the form of court-ordered conferences and family group conferences.¹² When matters do progress to court, proceedings are conducted in a less formal manner; judicial officers are legislatively directed to deal with matters in a manner that is as informal as possible, the rules of evidence generally do not apply, and courts are permitted to inform themselves in such a manner as they see fit.¹³

Children's lives are irrevocably altered after any child protection intervention which results in their removal, regardless of whether the removal is necessary or justified.¹⁴ From the point of view of parents, the termination of their parental responsibilities may be considered comparable in gravity to other forms of state intervention including the deprivation of liberty.¹⁵ Yet if children are not removed, their wellbeing may be endangered. In matters where the legal and social consequences for individuals are serious in nature, the High Court has observed that procedural rules should be rigorously enforced and evidence should be proved to a higher standard.¹⁶ Child protection decisions are serious decisions, supporting the need for a strong focus on process.

Drawing on interviews with lawyers working in the child protection field in Queensland, this article explores the tension between the desirability of collaborative approaches on the one hand and the need for procedural fairness

- 11 As to ADR, see Wendy Faulkes, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) 1 *Australian Dispute Resolution Journal* 61; Kathy Mack, 'Court Referral to ADR: The Legal Framework in Australia' (2004) 22(1) *Law in Context* 112; Juliette Ford, 'Collaborative Law: Family Lawyering in the 21st Century' (2006) 18(4) *Australian Family Lawyer* 20; Rachael Field, *The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: Some Issues for Women* (Masters by Research Thesis, Queensland University of Technology, 1996). As to less adversarial trials, see Rosemary Hunter, 'Child-Related Proceedings under Pt VII Div 12A of the *Family Law Act*: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227; Paul Boers, 'The Less Adversarial Approach to Determining Children's Cases' (2005) 18(1) *Australian Family Lawyer* 6; Richard Chisholm, 'Less Adversarial Proceedings in Children's Cases' (2007) 77 *Family Matters* 28; John Faulks, 'A Natural Selection? The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia' (2010) 35(1) *University of Western Australia Law Review* 185.
- 12 Different terminology is used across the jurisdictions: in Queensland, they are called 'family group meetings'; in the Australian Capital Territory, they are called 'family group conferences'; in South Australia, they are called 'family care meetings'.
- 13 *Children and Young People Act 2008* (ACT) ss 712, 716; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93; *Care and Protection of Children Act 2009* (NT) s 93; *Child Protection Act 1999* (Qld) s 105; *Children's Protection Act 1993* (SA) s 45; *Children, Young Persons and Their Families Act 1997* (Tas) s 63; *Children, Youth and Families Act 2005* (Vic) s 215; *Children and Community Services Act 2004* (WA) ss 145–6. See also Chief Justice Alastair Nicholson, 'Child Sexual Abuse: Problems in Family Law' (1989) 4 *Australian Family Lawyer* 1; Chisholm, 'Child Abuse Allegations in Family Law Cases', above n 4, 1.
- 14 David M Rubin et al, 'The Impact of Placement Instability on Behavioural Well-Being for Children in Foster Care' (2007) 119(2) *Pediatrics* 336; Joseph J Doyle, 'Child Protection and Child Outcomes: Measuring the Effects of Foster Care' (2007) 97(5) *American Economic Review* 1583.
- 15 Indeed, incarcerated parents, particularly mothers, often report that separation from their children is the aspect of imprisonment that is most difficult to bear; see Katherine Houck and Ann Booker Loper, 'The Relationship of Parenting Stress to Adjustment among Mothers in Prison' (2002) 72(4) *American Journal of Orthopsychiatry* 548.
- 16 See particularly *Briginshaw v Briginshaw* (1938) 60 CLR 336, 341–2. See also Nicholson, above n 13; Chisholm, 'Child Abuse Allegations in Family Law Cases', above n 4, 22, 25. Both emphasise that the mere possibility of abuse is not equivalent to a finding of an unacceptable risk.

on the other. After examining the suggestions for change put forward by the interviewees, we conclude that there may be ways to improve current decision-making practices in child protection which foster collaborative approaches without compromising the need for procedural fairness.¹⁷

II BACKGROUND: DECISION-MAKING IN CHILD PROTECTION MATTERS

A *The Nature of Child Protection Decisions*

ADR and informal approaches to court proceedings have not been free from criticism.¹⁸ They may be generally considered less appropriate in situations where at least one of the parties to proceedings is a vulnerable person, because serious power imbalances may arise where one party is better prepared or represented than another.¹⁹ Indeed, direct communication between parties may be damaging in certain circumstances, such as where proceedings bring together a victim and perpetrator.²⁰ Stricter adherence to the rules of evidence, and other procedural rules, may be necessary in some cases for parties' protection.²¹

In the context of child protection, there are various problems and risks associated with ADR and less formal proceedings. The individuals involved are particularly vulnerable. Parents and children who are being separated often experience profound grief and loss, and parents and children who fear separation may be terrified. In some cases, the child and/or the parents have been abused, and many are socio-economically disadvantaged and under-educated.²² In contrast, child protection departments are often perceived to be, and indeed may be, well resourced, emotionally detached and supported by an experienced team of lawyers. These factors militate against a congenial, collaborative approach to dispute resolution in child protection matters.

- 17 See the similar observation made by John Dewar in the family law context: John Dewar, 'Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia' (2010) 24 *Australian Journal of Family Law* 139, 149.
- 18 In a child protection context, see Linda Crush, 'When Mediation Fails Child Protection: Lessons for the Future' (2007) 23 *Canadian Journal of Family Law* 55.
- 19 In a family law context, less adversarialism is considered inappropriate in situations involving allegations of abuse and vulnerability (including people with mental illness and low levels of education); see Rosemary Hunter, 'Practitioners' Views of the Children's Cases Program' (2007) 19(4) *Australian Family Lawyer* 23, 30. See also Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 42, 45–6; Gay Clarke and Isla Davies, 'Mediation — When Is It Not an Appropriate Dispute Resolution Process' (1992) 3 *Australian Dispute Resolution Journal* 78.
- 20 Sheehan, above n 9, 169; James Ptacek, 'Resisting Co-Optation' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2009) 5, 19–21.
- 21 Criminal proceedings are the best example of this; see Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 243, 251; *Connelly v DPP* (1964) AC 1254, 1354 (Lord Devlin); *Bunning v Cross* (1978) 141 CLR 54.
- 22 See David McConnell and Gwynnyth Llewellyn, 'Social Inequality, the "Deviant Parent" and Child Protection Practice' (2005) 40(4) *Australian Journal of Social Issues* 553; Julia Brophy, 'Child Maltreatment in Diverse Households: Challenges to Law, Theory and Practice' (2008) 35 *Journal of Law and Society* 75.

This paper will first provide some background regarding child protection law and practice in Australia, with a particular focus on Queensland. The methods of this study will then be explained, and the key concerns raised by participants — procedural fairness and quality of evidence — will be discussed. This will be followed by an examination of the roles that adversarial and problem-solving methodologies might play within child protection decision-making processes, and some potential avenues for reform will be canvassed.

B Recent Trends in Child Protection

In recent years, government departments with responsibility for child protection have been subjected to intense media and public scrutiny. Inquiries around Australia have accused child protection departments of ‘failing’ children by allowing them to remain in abusive or neglectful homes.²³ In response to such criticism, most child protection departments have increased staff numbers and child protection laws have been reviewed and reformed. This has allowed for an increase in the number of families targeted for child protection interventions, a fact that is reflected to some extent in the available Australian statistics. Nationally, in the five years to 2009–10, the number of children subject to child protection orders increased by 57 per cent, and the number of children in out of home care increased by 51 per cent.²⁴ One explanation for this is that children are remaining in care for longer periods of time, perhaps because families are increasingly unable to address family dysfunction.²⁵ There are significant variations between jurisdictions but there is evidence to suggest that, in some Australian jurisdictions, child protection departments may have become more risk averse, obtaining more orders overall as opposed to implementing less intrusive forms of intervention.²⁶ This is understandable considering the high level of attention that adverse child protection outcomes attract from the community and the media.

Regardless, the current rate of removal of children from their families by child protection departments has been described as unsustainable.²⁷ Certainly, the supply of foster carers is insufficient to meet demand. Increasingly, children are being placed with foster carers who already have a number of children in their

23 Judy Cashmore and Frank Ainsworth, ‘Audit of Australian Out of Home Care Research’ (Audit, Association of Children’s Welfare Agencies, October 2004).

24 Australian Institute of Health and Welfare, *Child Protection Australia 2009–10* (2011) vii, viii. Note, however, that in Victoria, the number of children on care and protection orders decreased by 2.2 per cent between 2007–08 and 2008–09: at 25.

25 See Clare Tilbury, ‘A “Stock and Flow” Analysis of Australian Child Protection Data’ (2009) 4 *Communities, Children and Families Australia* 9.

26 See, eg, Maria Harries, Bob Lonne and Jane Thomson, ‘Protecting Children and Caring for Families: Re-Thinking Ethics for Practice’ (2007) 2(1) *Communities, Children and Families Australia* 39. Similar concerns have been noted in the UK; see Nigel Parton, ‘The “Change for Children” Programme in England: Towards the “Preventative-Surveillance State”’ (2008) 35(1) *Journal of Law and Society* 166.

27 Dorothy Scott, ‘Think Child, Think Family’ (2009) 81 *Family Matters* 37.

care, and many older children are being housed in residential units and shelters because foster care cannot be secured for them.²⁸

In all Australian States and Territories, a child may be considered ‘at risk of harm’ or ‘in need of care and protection’ if there is no one available who is ‘willing or able’ to care for, or protect, the child.²⁹ Research suggests that many parents whose children are subject to child protection orders are willing to work towards becoming better, protective parents. Regrettably, there are many situations in which parents want to care for their child — that is, they are ‘willing’ — but they are unable to do so as a result of circumstances beyond their control including poverty, homelessness, family violence and/ or physical or mental illness, coupled with a lack of appropriate support.³⁰

Complex family situations are common in child protection matters, and difficult decisions must be made regarding the kind of intervention that is appropriate in the circumstances. As in other ‘protective jurisdictions’ (such as guardianship and mental health), contestable issues arise in relation to capacity and consent, and the wishes and interests of the various parties, some of whom are particularly vulnerable. Because each case is different, it is impossible to design a blueprint for intervention that will suit every family. Substantial discretion is needed to formulate a plan that will maximise protective and supportive outcomes for children in their individual circumstances. This makes the integrity of the decision-making processes all the more important. The identity of the decision-maker, the processes by which decisions are made, and the manner in which decisions are enforced, will all be critical to the ongoing health and wellbeing of children and families. The roles of the various players must be finely balanced to ensure fairness, accountability and safety.

C Child Protection Decisions and Decision-Makers

In most Australian jurisdictions,³¹ the decision-making process is shared between officers of the government department responsible for child protection,

28 Ciara Smyth and Tony Eardley, *Out of Home Care for Children in Australia: A Review of the Literature and Policy*, 2008, 6–8; Department of Human Services (Vic), *Public Parenting: A Review of Home-Based Care in Victoria* (2003) 12.

29 *Children and Young People Act 2008* (ACT) s 350(1)(d); *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23(1)(b), (b1) (unable or unwilling to arrange for the child to receive medical care or an education); *Care and Protection of Children Act 2009* (NT) s 20(c); *Child Protection Act 1999* (Qld) s 10(b); *Children’s Protection Act 1993* (SA) s 6(2)(c); *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1)(c); *Children, Youth and Families Act 2005* (Vic) ss 162(1)(a)–(b); *Children and Community Services Act 2004* (WA) s 28(2)(b).

30 Tamara Walsh and Heather Douglas, ‘Legal Responses to Child Protection, Poverty and Homelessness’ (2009) 31(2) *Journal of Social Welfare and Family Law* 133; Douglas and Walsh, ‘Mothers, Domestic Violence and Child Protection’, above n 5; Australian Law Reform Commission, *Family Violence: A National Legal Response*, Report No 114 (2010) vol 1, 898–901.

31 Given limited space, it is difficult to provide a comprehensive overview of all of the Australian child protection systems as there is significant diversity. For a good overview of current systems see: Victorian Law Reform Commission, *Child Protection: Protection Applications in the Family Court Final Report*, Report No 19 (2010), especially chs 3–4.

tribunals,³² and the court (most often the Children's Court).³³ Children's Courts are generally presided over by Magistrates or District Court judges, but they tend not to be specialist 'problem-solving' courts in the sense that those who preside over the court do not necessarily do so on a regular basis, and are not generally required to have any special training or experience in children's matters.³⁴

The initial decision to remove a child at risk of harm, or to undertake an investigation or assessment, is generally made by officers of the relevant government department.³⁵ In Queensland, 'child safety officers' are authorised to take a child into custody for the purposes of investigation and assessment if they reasonably believe the child is at risk of harm and is likely to suffer harm if he or she is not taken into custody.³⁶ They can exercise this power with help, and using such force as is reasonable in the circumstances.³⁷

In most jurisdictions, officers of the child protection department will then need to apply to the relevant court for an assessment order.³⁸ In Queensland, the child safety officer must apply to the Children's Court within eight hours of removing the child.³⁹ The Queensland Children's Court can make either a temporary assessment order (for a stated time not exceeding three days),⁴⁰ or a court assessment order of up to four weeks duration,⁴¹ in circumstances where more than three days is

32 In Australia, specialist tribunals no longer exist for child protection matters. In ACT, NSW, Queensland, Victoria and WA, generalist tribunals deal with child protection matters (ACT Civil and Administrative Tribunal; NSW Administrative Decisions Tribunal; Queensland Civil and Administrative Tribunal; Victorian Civil and Administrative Tribunal; WA State Administrative Tribunal).

33 Termed 'Youth Court' in South Australia. As to Children's Courts, see Rod Blackmore, 'Children's Courts Are 100 Years Old ... and We Still Deserve Better' (2005) 43(3) *Law Society Journal* 26; Australian Law Reform Commission, *Seen and Heard*, above n 9, [17.56]–[17.58]. Internationally, see Paul Boland, 'The Los Angeles County Children's Court: A Model Facility for Child Abuse and Neglect Proceedings' (1990–91) 18 *Pepperdine Law Review* 247; Jean Koh Peters, 'How Children Are Heard in Child Protective Proceedings in the United States and Around the World in 2005: Survey Findings, Initial Observations and Areas for Further Study' (2005–06) 6 *Nevada Law Journal* 966.

34 Australian Law Reform Commission, *Seen and Heard*, above n 9, [17.56]. For further information on specialist and 'problem-solving' courts in Australia, see particularly Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8.

35 *Children and Young People Act 2008* (ACT) ss 360–1, 406; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 30, 34, 43; *Care and Protection of Children Act 2009* (NT) ss 32, 46, 51; *Child Protection Act 1999* (Qld) s 18; *Children's Protection Act 1993* (SA) s 16; *Children, Young Persons and Their Families Act 1997* (Tas) ss 20–1; *Children, Youth and Families Act 2005* (Vic) s 241 (protective intervener may take a child into safe custody); *Children and Community Services Act 2004* (WA) ss 37, 41.

36 *Child Protection Act 1999* (Qld) s 18.

37 *Ibid* s 18(3).

38 *Children and Young People Act 2008* (ACT) div 14.3.3; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 52, 53; *Care and Protection of Children Act 2009* (NT) pt 2.3 div 4 sub-divs 1–2; *Child Protection Act 1999* (Qld) ch 2 pts 2–3; *Children's Protection Act 1993* (SA) pt 4 div 4; *Children, Young Persons and Their Families Act 1997* (Tas) pt 4 div 2; *Children and Community Services Act 2004* (WA) ss 35, 36 (taking a child into provisional protective care with a warrant). In Victoria, protective interveners are authorised to undertake investigations without a court order; see *Children, Youth and Families Act 2005* (Vic) pt 4.6.

39 *Child Protection Act 1999* (Qld) ss 18(7), 25.

40 Although the order may be extended once by the Court: *ibid* ss 27–9, 34.

41 With the possibility of one extension of no more than four weeks duration; *ibid* s 49.

necessary to complete an investigation and assessment.⁴² Once an investigation or assessment has taken place, the officer will need to apply to the court for a child protection order to be made, if this is considered necessary.⁴³ The type of child protection order most often made in Queensland is an order granting custody or guardianship of the child to the department or another suitable person, however supervisory orders and orders directing parents to do or refrain from doing certain things are also allowed for.⁴⁴ Alternatively, the officer may be able to convince the parents to enter into an agreement with the department for the child to be removed and placed in care. In Queensland, this is termed ‘Intervention with Parent’s Agreement’ (‘IPA’).⁴⁵ Under an IPA, the department enters into a formal agreement with parents for the short-term placement of the child in the care of someone other than the parents.⁴⁶ The order may be extended or ended by agreement and will end if the court makes a conflicting child protection order.⁴⁷

Once a child is placed in out-of-home care, a departmental officer generally has responsibility for developing a ‘case plan’ for the child, which includes goals to be achieved, services to be delivered, as well as the amount of contact the parents will have with their child.⁴⁸ In Queensland, the administrative decisions made by child safety officers, including contact decisions, are reviewable by the Queensland Administrative and Civil Tribunal (‘QCAT’),⁴⁹ however, in practice, case plans are not often subjected to judicial scrutiny.⁵⁰

42 Ibid ss 38, 44, 47.

43 In Queensland, see *ibid* s 54.

44 See *ibid* s 61. Guardianship/custody orders and interim/temporary orders account for around 90 per cent of all orders made: Australian Institute of Health and Welfare, above n 24, 33. A wider variety of orders is available in other jurisdictions, for example, in NSW, the court may order a parent to attend services (see generally *Children and Young People (Care and Protection) Act 1998* ss 73–7, 85) and in Victoria, the court may make an order requiring a parent to give an undertaking to do or refrain from doing specified things (*Children, Youth and Families Act 2005* (Vic) ss 272–3, 278–9).

45 Equivalent arrangements are available in other jurisdictions: see, eg, *Children and Young People Act 2008* (ACT) pt 12.3 (Voluntary care agreement); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38Aff (Parent Responsibility Contract); *Care and Protection of Children Act 2009* (NT) s 46 (Temporary placement arrangement); *Children’s Protection Act 1993* (SA) s 9 (Voluntary custody agreements); *Children, Young Persons and Their Families Act 1997* (Tas) s 11 (Voluntary care agreement); *Children, Youth and Families Act 2005* (Vic) ss 135–56 (short term child care agreement and long term child care agreement); *Children and Community Services Act 2004* (WA) s 75 (Negotiated placement agreement).

46 *Child Protection Act 1999* (Qld) s 51ZD. Note that Victoria distinguishes itself by having service providers negotiate and enter into the equivalent of an IPA with parents, rather than departmental officers; see *Children, Youth and Families Act 2005* (Vic) ss 135(1), 145(1).

47 *Child Protection Act 1999* (Qld) s 51ZI.

48 In Queensland, see *ibid* s 51B; in NSW, see *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38; in Victoria, see *Children, Youth and Families Act 2005* (Vic) s 167.

49 *Child Protection Act 1999* (Qld) ch 2A. In Victoria, provisions in the equivalent ‘care plan’ can be reviewed by VCAT: *Children, Youth and Families Act 2005* (Vic) s 333.

50 Note, however, that in NSW and the ACT, the (equivalent) ‘care plan’ may be registered with the Children’s Court. The Court is then empowered to make other orders by consent for the purpose of giving effect to a ‘care plan’ (see further below). In Victoria, a ‘care plan’ may make provision for contact arrangements, however the Victorian Children’s Court is also empowered to make decisions regarding contact: see *Children, Youth and Families Act* (Vic) ss 263(8), 283(1)(e)(i), 284(1)(e)(i), 287(1)(d)(i), 291(3)(f), 321(1)(d)–(e).

Extensive use is made of ADR in child protection matters. For example, courts and tribunals can order that a conference take place prior to formal proceedings, in an attempt to achieve settlement and avoid the matter going to a hearing (hereafter termed 'court-ordered conferences'). Participation of parties (including child protection officers, parents, carers and sometimes children themselves) in a court-ordered conference may be mandatory,⁵¹ or at the discretion of the judicial officer.⁵² Court-ordered conference convenors are neutral parties, and may be legislatively required to possess knowledge and understanding of child protection issues.⁵³ Court-ordered conferences are commonly ordered in Australian child protection matters; in one Victorian study, it was found that Children's Court magistrates referred parties to a pre-hearing conference in approximately 40 per cent of cases.⁵⁴

Another form of conferencing used in child protection matters is that initiated by child protection departments for the purpose of developing case plans or otherwise reaching decisions related to the care of a child. These conferences are known variously as 'family group meetings' ('FGMs'),⁵⁵ 'family group conferences',⁵⁶ 'family care meetings',⁵⁷ or 'mediation conferences'.⁵⁸ This form of conferencing originated in New Zealand in the late 1980s and is now used extensively in Australia, the UK and the US.⁵⁹ In Queensland, once a child becomes subject to an order, a FGM is convened by the department for case planning to 'provide family-based responses to children's protection and care needs' and to 'ensure an inclusive process for planning and making decisions relating to children's wellbeing and protection and care needs'.⁶⁰ Regular FGMs are held to review the child's case plan and to determine the amount of progress that the parties have made towards set goals. In Queensland, the Children's Court is also empowered to order that an FGM take place.⁶¹

51 See, eg, *Child Protection Act 1999* (Qld) s 70.

52 *Ibid* s 68(1)(e); *Children, Youth and Families Act 2005* (Vic) s 217; *Children and Community Services Act 2004* (WA) s 136.

53 See, eg, *Children's Court Rules 1997* (Qld) r 19. According to Canadian research, it is critical that child protection mediators possess specialist skills and are well-trained: see Crush, above n 18, 57.

54 Sheehan, above n 9, 159.

55 *Child Protection Act 1999* (Qld) ss 51G–51P.

56 *Children and Young People Act 2008* (ACT) ch 3; *Children, Young Persons and Their Families Act 1997* (Tas) ss 30–3.

57 *Children's Protection Act 1993* (SA) ss 27–30.

58 *Care and Protection of Children Act* (NT) s 49. See also *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 37–8.

59 See Joe Hudson et al, *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, 1996); Leon C Fulcher, 'Cultural Origins of the Contemporary Family Group Conference' (1999) 5(4) *Child Care in Practice* 328; Marie Connolly, 'Family Group Conferences in Child Welfare' (2007) 19 *Developing Practice: The Child, Youth and Family Work Journal* 25. In Australia, see Nathan Harris, 'Family Group Conferencing in Australia 15 Years On' (Child Abuse Prevention Issues Report No 27, National Child Protection Clearinghouse, 2008); Phillip Swain, 'Letting the Family Decide? Family Group Conferences and Pre-Hearing Conferences in Victoria's Child Protection System' (1996) 7 *Australian Dispute Resolution Journal* 234.

60 *Child Protection Act 1999* (Qld) s 51G.

61 *Ibid* s 68(1)(d).

In summary, there are a range of decision-makers and decision-making processes that can impact on the lives of children and families in child protection matters. Some decisions are made administratively, others are judicial in nature, and at times, the line between the two is blurred. Bearing in mind the substantial numbers of children who are removed from their homes, and the serious and potentially long-lasting interventions into the lives of children and parents that results from this, it is critical that all decision-making in child protection matters be rigorous, transparent and fair.

III RESEARCH METHODS

There is already a significant body of research that draws on the views of child protection workers to explore the way decisions about child protection are made.⁶² There is also a significant body of work which focuses on lawyers' perceptions and experiences of systems and processes relevant to (for example) criminal law,⁶³ and family law.⁶⁴ However, there is a paucity of research that draws on views of lawyers in relation to child protection processes. This is despite the fact that lawyers are often important participants in the child protection decision-making process, who have a strong influence on the choice of process and the way procedures are managed. In order to explore lawyers' views regarding the way decisions are made in child protection matters, 21 interviews with 26 lawyers were undertaken in Queensland (in five of the interviews there were two participants). A snowball sampling method was employed whereby interviewed lawyers recommended other child protection lawyers for interview.⁶⁵ All of the interviewees had extensive experience in child protection law. Some of the lawyers worked within organisations, such as Legal Aid Queensland, community legal centres and advocacy organisations. Others were in private practice and did child protection work on a pro bono basis or under grants of aid. We stress that the participants all represented parents or children, although three of the participants

62 See Gai Harrison and Rachel Turner, 'Being a "Culturally Competent" Social Worker: Making Sense of a Murky Concept in Practice' (2011) 41 *British Journal of Social Work* 333; Rebecca O'Reilly et al, 'Child Protection Workers: What They Do' (2011) 5(1) *International Journal of Multiple Research Approaches* 122; Jane Thomson, 'Child Protection Workers' Perceptions of Foster Carers and the Foster Care System: A Study in Queensland' (2007) 60(3) *Australian Social Work* 336; Yvonne Darlington, Judith A Feeney and Kylie Rixon, 'Child Protection Workers: Practice Challenges at the Intersection of Child Protection' (2005) 10(3) *Child and Family Social Work* 239; Judy A Gibbs, 'Maintaining Front-Line Workers in Child Protection: A Case for Refocusing Supervision' (2001) 10(5) *Child Abuse Review* 323.

63 See Asher Flynn, 'Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-Trial Process' (2010) 34 *Criminal Law Journal* 48; Russell Boyd and Anthony Hopkins, 'Cross-Examination of Child Sexual Assault Complainants: Concerns about the Application of s 41 of the *Evidence Act*' (2010) 34 *Criminal Law Journal* 149.

64 See, eg, Patrick Parkinson, Judy Cashmore and Atlanta Webster, 'The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation' (2010) 24 *Australian Journal of Family Law* 313; Catherine M Lee, Christine P M Beauregard and John Hunsley, 'Lawyers' Opinions Regarding Child Custody Mediation and Assessment Services: Implications for Psychological Practice' (1998) 29(2) *Professional Psychology: Research and Practice* 115.

65 Patrick Doreian and Katherine Woodard, 'Fixed List Versus Snowball Selection of Social Networks' (1992) 21(2) *Social Science Research* 216.

had worked for child protection departments in the past. The participants possessed a broad range of experience of child protection matters. The interviews were undertaken in Brisbane, Townsville and Cairns to ensure that both a metropolitan and regional perspective could be gathered.⁶⁶ Semi-structured interview guides were created and the same guide was used in each interview. The guide focused on facilitating an in-depth analysis of current practices and challenges associated with working as a lawyer in the child protection field, with a particular focus on their experiences within the various decision-making forums, and what they perceived lawyers had to offer at each stage of the decision-making process.⁶⁷

At the outset it is important to concede the limitations of this approach. The findings reported on here are based on accounts of lawyers who work mostly with parents within the child protection system in Queensland. It is, thus, a view of the child protection system through one set of professional lenses, and cannot be understood as a literal description of the system as a whole.⁶⁸ Given that lawyers generally work in an adversarial environment, their role is to represent their clients' interests according to their clients' instructions, and they are likely to see their clients' position in the most favourable light possible. As a result, they may employ the 'rule of optimism' in their work, excusing certain 'deviant' behaviours as cultural practices, assuming parents' 'natural love' for their children, and inappropriately minimising concerns related to child safety.⁶⁹ Regardless, the views of lawyers do represent an important account of the operation of the child protection system in Queensland. Lawyers are important actors in the child protection system and their perceived alienation suggests a lack of confidence in the system. Also, their perceptions have the potential to influence the manner in which child protection decisions are made because their approach will affect the practices of other agents within the system.

Thematic analysis of interviews revealed that the lawyers overwhelmingly lacked confidence in the decision-making processes within the child protection system in Queensland. The interviewees' particular concerns can be distilled into two key themes: denial of procedural fairness and concerns regarding evidence and proof. A contextualised discussion of these themes is undertaken below, whereby the qualitative data yielded is both presented and analysed. This is followed by a general discussion on the merits of adversarialism and problem-solving approaches in a child protection context, drawing on the suggestions put forward by the lawyers that were interviewed.

66 In fact, many of the lawyers interviewed in Cairns and Townsville regularly travelled to remote Aboriginal and Torres Strait Islander communities to assist parents and children involved in child protection matters there, so some insights in relation to practices in remote areas were also obtained.

67 Ethical approval was obtained from the Ethics Committee at the University of Queensland. Each interview ran for between 60 and 90 minutes.

68 Robert Dingwall, 'Accounts, Interviews and Observations' in Gale Miller and Robert Dingwall (eds), *Context and Method in Qualitative Research* (Sage, 1997) 51, 52, 54.

69 Robert Dingwall, John Eekelaar and Topsy Murray, *The Protection of Children: State Intervention and Family Life* (Blackwell, 1983) 82. See also Adam Tomison, 'Spotlight on Child Neglect' (Child Abuse Prevention Issues Report No 4, 1995) 7.

IV PROCEDURAL FAIRNESS IN THE MAKING OF ADMINISTRATIVE DECISIONS

The principles of natural justice or procedural fairness (used interchangeably here) have always been central to the common law and its protections against abuses of State power.⁷⁰ In *Kioa v West*, Mason J explained that it is a ‘fundamental rule of the common law doctrine of natural justice’ that ‘generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.’⁷¹ This is often referred to as ‘the hearing rule’. In addition, the principles of natural justice forbid participation in a decision by a person who is affected by ostensible or actual bias.⁷² This is often referred to as ‘the bias rule’. The dictates of the rules of procedural fairness are those ‘which are appropriate and adapted to the circumstances of the particular case’,⁷³ having regard to the intention of the legislature, and any expectations that the particular Act brings about.⁷⁴ The decision-making process as a whole, rather than just isolated ‘sub-decisions’, must be looked to in order to determine whether or not procedural fairness has occurred.⁷⁵

When considering the obligations on a decision-maker, and whether a particular decision-making forum is subject to the rules of natural justice, the courts have considered the following: the statutory framework and any evidence of Parliament’s intentions; the degree of power the forum has over individuals that come within its jurisdiction; the functions and independence of the decision-maker; the nature of the decision being made; the importance of the decision and the gravity of its consequences; and the finality of the decision including potential avenues for appeal.⁷⁶ In *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*, Kirby J also considered the degree of confidence the community could have in the forum, and whether public confidence would be shaken if procedures were seen to be unfair or biased.⁷⁷ In that case, Kirby J cited the Canadian decision of *Newfoundland Telephone Co v Board of Commissioners*

70 See especially *Cooper v Wandsworth Board of Works* (1863) 143 ER 414. See also *Ridge v Baldwin* [1964] AC 40, 64–5; *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109–110, 112–3, 118; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360. See also John McMillan and Neil Williams, ‘Administrative Law and Human Rights’ in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, 1998) 63, 82.

71 (1985) 159 CLR 550, 582. See also S A de Smith, *De Smith’s Judicial Review* (Sweet and Maxwell, 2007) 347.

72 See especially *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

73 *Kioa v West* (1985) 159 CLR 550, 585. See also *Wiseman v Borneman* [1971] AC 297, 308 (Lord Reid).

74 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 412.

75 *South Australia v O’Shea* (1987) 163 CLR 378, 389–90, 405, 410.

76 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 146, 150; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 294; *Australian National Industries Ltd v Spedley Securities (in liq)* (1992) 26 NSWLR 411, 413, 423, 427; *Gas and Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48, 59. See also Kristina Stern, ‘Procedural Fairness — Its Scope and Practical Application’ (2007) 56 *Australian Institute of Administrative Law Forum* 2.

77 (2001) 206 CLR 128, 150.

of *Public Utilities*, where Cory J said: 'All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine.'⁷⁸ Administrative decision-makers are free from many of the constraints that apply to courts, and they necessarily undertake some inquisitorial functions.⁷⁹ However, the High Court has stated that the rules of natural justice are so fundamental to legal and governance systems that it 'would require very clear legislative provisions to relieve an adjudicative statutory body from the obligation to comply with such deeply entrenched principles.'⁸⁰

A Natural Justice in Child Protection Matters

In the child protection context, very important decisions are routinely made by departmental officers. These include the initial decision made by child protection officers to remove a child judged to be at risk of harm, and those decisions (related to case planning and contact) that are made in FGMs, or equivalent ADR forums that are convened and chaired by departmental officers. It is our contention that the rules of natural justice should apply to FGMs and their equivalents in other jurisdictions, as well as to removal decisions made by departmental officers.⁸¹ Following the courts' considerations outlined above, there are at least three reasons for this: the grave consequences of the decision, the lack of legislative guidance on procedural rights and the need to maintain public confidence in the system.

1 The Gravity of the Consequences

Decisions made by departmental officers have grave consequences for children and their families.⁸² This was confirmed by the lawyers interviewed in this study, who emphasised the power that departmental officers possess, both in terms of the decisions they are empowered to make on their own, and in FGMs. One participant said:

They [child safety officers] are powerful in the eyes of the clients, because they have the power to remove children. They're not deemed powerful when they're before the courts, because the court's power overrules their particular powers, but when they are out and about and they come to your

78 Ibid 151; *Newfoundland Telephone Co v Board of Commissioners of Public Utilities* [1992] 1 SCR 623, 636.

79 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 146 (Kirby J).

80 Ibid 147. See also *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 204. See also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 422; Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103.

81 It is well established that the rules of natural justice apply to decisions made by administrative decision-makers; see generally *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In relation to FGMs, it is generally accepted that the rules of natural justice should apply in ADR contexts; see *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

82 See Crittenden and Ainsworth, above n 1.

house and say ‘we want to speak to you about this,’ and you say, ‘well, I don’t want to speak to you, get lost’, they’ll turn around and say, ‘well, if you don’t speak to us we will remove your children’ ... And that’s a continual threat that’s being put to people. They — even though a person is legally represented — they will talk with those people and tell them various things and make various promises: ‘And if you leave Johnny, we’ll give you the kids, and we’ll get a court directive that Johnny can’t see the kids.’ Now that’s really starting to act as a de facto family court.

2 Lack of Legislative Guidance on Procedural Rights

In Queensland the relevant statutory provisions generally provide little guidance regarding the procedures that should be adopted by departmental officers when making these decisions. Much of the detail is left to the department to determine, and is generally in the form of policies and procedures rather than in statutory instruments. The legislative provisions in Queensland concerning FGMs, for example, are concerned only with who may or should attend, and notice requirements.⁸³ The impression given in the legislation is that the meetings should be informal, inclusive and collaborative, with maximum family participation and with a view to reaching agreement between the parties on a plan for the child’s care and protection.⁸⁴

In this study, the participants reported that FGMs tended to be run in a manner inconsistent with these legislative purposes. Participants’ comments to this effect included:

Family group meetings, whilst in an idealistic world you could get your own clients to attend those, a lot of the feedback I’ve had is that they didn’t feel as if they were totally involved in the process of developing case plans or reviewing those case plans. They didn’t understand a lot of what was going on and they felt like they had no option but to sign off on the case plan even if they weren’t happy with it.

... very often the convenor would try to operate the meeting on the basis of the agenda that the Department have.

The department are too controlling. They will talk right over the top of them. They talk over the top of me.

The lawyers said that, in cases they had been involved in, departmental officers often set the agenda, chaired the discussion and, in many instances, imposed a pre-determined plan upon the family.

83 See *Child Protection Act 1999* (Qld) ss 51G–51YB.

84 In Queensland, see especially *ibid* ss 51G, 51J.

B Breaches of Natural Justice: Lawyers' Experiences

In the interests of protecting children, it is extremely important that public confidence in the child protection system is maintained. Where it is undermined, community members might be discouraged from making reports in instances where they suspect child abuse or neglect has occurred. Indeed, in Queensland, there is some indication that a lack of confidence in the system has led some community service providers to stop reporting cases of abuse and neglect because they believe, based on their past experiences with the department, that they are better placed than the department to assist the family.⁸⁵

In an environment such as this, where important decisions are being made by administrative officials and there is little statutory guidance for decision-makers and no legislated procedural safeguards, it is suggested that the principles of natural justice should apply.

Yet, the lawyers interviewed in this study were generally of the view that the principles of natural justice can be, and sometimes are, ignored in the making of child protection decisions. For example, many of the lawyers were concerned that their clients were not given a fair hearing in the sense that they were not meaningfully encouraged to participate in the decision-making processes. As one participant said:

I think fairness is immediately taken away if you are not able to participate in a decision that has been made about you.⁸⁶

More specifically, many of the lawyers we interviewed spoke about the difficulties their clients experienced participating in family group meetings. Overwhelmingly they expressed the view that their clients needed legal representation to participate, partly because they were so distressed and emotionally vulnerable. One participant said:

Most parents are distressed, angry and upset and can't articulate all the real important stuff. A lot of them will go to family group meetings and cry and then of course they just lose that ability. It's too close for them. It's too emotional.

The rules of procedural fairness in the context of administrative decision-making require that a person's attention be drawn to the critical factors on which the decision is likely to turn so that the person can have an opportunity to deal with them.⁸⁷ Yet many of the lawyers interviewed reported that the department did not make their current child protection concerns clear to parents, and that this limited parents' capacity to identify and address the issues in dispute. Participants made comments such as:

85 Douglas and Walsh, 'Mothers, Domestic Violence and Child Protection', above n 5, 502.

86 As to participatory approaches in child protection, see Karen Healy, 'Participation and Child Protection: The Importance of Context' (1998) 28 *British Journal of Social Work* 897.

87 *Kioa v West* (1985) 159 CLR 550, 587.

The only way to deal with these cases so they don't become protracted is to pin child safety down from the outset about what is the nature of the allegations and what is it that you think our client should be doing.

Further, the lawyers interviewed stated that parents were often actively discouraged by the department from seeking legal advice. Indeed, some of the participants maintained that even those parents who were represented were encouraged to engage in discussions with the department without consulting their lawyer. While legal representation is not essential to natural justice, it can assist in its observance, particularly in situations involving the rights and interests of vulnerable individuals who may not understand or be able to participate in the processes otherwise. The lawyers in this study remarked:

The clients will get documents that you won't get, you know, the department will go behind your back and arrange meetings with your client and talk with your client. The client may well compromise their position quite seriously in these so called 'meetings' that the department sets up without your knowledge. There's just an absolute contempt for the legal representation.

A lot of the time when the client has first come to see us and DOCS then engaged and they say, 'well, we have a solicitor, we'd like them there.' — 'Why do you need a solicitor, what have you done wrong?'

I've been told that people have been told, 'don't worry about seeing a lawyer — it'll be worse for you because it will string it out longer.'

The lawyers we interviewed also described situations of both actual and ostensible bias on the part of the FGM convenor. Participants said:

The chairperson who's always employed by the Department of Child Safety, even though they are from a different division, they still are effectively seen by the clients as part of the process.

I've had family group meetings where the person that removed the child is convening the meeting.

The importance of a convenor being neutral in the context of mediation and conciliation is well established.⁸⁸ Independence and neutrality is absolutely necessary for rigorous and fair decision-making, and to eliminate the risk of bias or the perception of bias. Perceptions are important because those impacted by decisions will find it difficult to accept a decision that they believe has been unfairly reached.⁸⁹ As one participant said regarding case planning and contact decisions:

88 *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360, 364–9. In a child protection context, see Paul Ban, 'Dialogue and Alignment in Preparing Families for Family Group Conferences' (2009) 20 *Australasian Dispute Resolution Journal* 33, 39. As to the role of convenors, see Shirley Jackson and Kate Morris, 'Family Group Conferences: User Empowerment or Family Self-Reliance?' (1999) 29 *British Journal of Social Work* 621.

89 Philip Jamieson, 'The Psychology of Procedural Fairness' (2009) 19 *Journal of Judicial Administration* 127.

I fail to see where there is procedural fairness where the department can bring an application and an order be made right there and then granting custody to the department and then the department then has a say on whether or not there is any contact [between the parent and the child].

In short, generally the lawyers in this study described child protection decision-making processes as being non-collaborative, highly adversarial and sometimes coercive in nature. They described officers of the department as having a set agenda and an expectation that their recommendations would be accepted and implemented by the court. Indeed, one participant made the following remark:

Often in family group meetings, the departmental worker will say 'when we get the order'. I mean it's inflammatory to the parent and inflammatory to me as well.⁹⁰

C Procedural Fairness: Conclusions

It is not suggested that the approach of decision-makers is unlawful. Rather the flexibility of system may have contributed to the development of a very relaxed approach to procedural fairness. However, if it is accepted that the rules of procedural fairness do apply to decisions made by child protection officers (and it is argued that they should), then it appears from the results of this study that these rules are often not being adhered to. The comments made by the lawyers interviewed suggest that the hearing rule and the bias rule are sometimes not adhered to when child protection officers make an initial decision to remove a child, and when they make determinations as part of the FGM process. This failure to comply with the rules of natural justice compromises the capacity of decision-makers to achieve the best possible outcomes for children, and it means that the fundamental rights of parents and children are being breached. It may also have serious implications for child protection departments. It may open their decisions up to legal challenge, since a person is entitled to have a decision set aside if natural justice principles have not been observed.⁹¹ This is appropriate, particularly since it has been found that in many cases where decisions are remitted because a court has held that the rules of natural justice were not initially observed, the decision-maker will subsequently arrive at a different outcome when the rules are adhered to.⁹² Further, if the rules of natural justice are regularly breached, lawyers may feel frustrated with and alienated from the system. This is important because it can impact on the nature of their advocacy, and lead to excessive adversarialism.

90 One lawyer added that the court may demonstrate bias by 'rubber stamping' the department's applications:

I've certainly struck the situation in the past with magistrates who say, 'well, I've read the department's position, I will always make this type of order.' And you go, well, that's basically the grounds to ask that the magistrate disqualify themselves on the reasonable apprehension of bias, because they're not prepared to look at the individual case.

91 *Kioa v West* (1985) 159 CLR 550, 603. For an example in the context of child protection, see *Re Katherine* [2004] NSWSC 899, and see generally *J v Lieschke* (1987) 162 CLR 447.

92 Robin Creyke and John Macmillan, 'Judicial Review Outcomes: An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82.

The rules of procedural fairness exist to ensure that the decision is made based on the best available material, so a decision-maker's observance of the rules of natural justice is critical if the best outcomes are to be achieved for children and families.

V QUALITY OF EVIDENCE IN THE CHILDREN'S COURT

Child protection matters are dealt with in a less formal manner in court than traditional civil proceedings. In Children's Courts around Australia, the rules of evidence do not bind the court, proceedings are to be conducted with as little formality and technicality as possible, and courts are permitted to inform themselves in such a manner as they see fit.⁹³ The premise behind this is clear — in order for the court to make the best decision possible to bring about protective outcomes for children, all pertinent information should be made available to the court. Yet, it must be borne in mind that while procedural rules may be relaxed, they can never be completely discarded. This has been noted by the High Court in other contexts, for example, in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*, Evatt J remarked:

Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence.' Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.⁹⁴

It is well established that regardless of any applicable rules of evidence, a tribunal must, as a matter of law, base any decisions it makes on 'rationally probative evidence'. That is, decisions should not be made based merely on matters of 'suspicion or speculation' where certain conduct may or may not have occurred.⁹⁵ Evidence must always be relevant,⁹⁶ and reliable,⁹⁷ and there is no reason in law to suggest that this is less the case in child protection matters than any other. Indeed, this seems particularly important in a child protection context because of

93 *Children and Young People Act 2008* (ACT) ss 712, 716; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93; *Care and Protection of Children Act 2009* (NT) s 93; *Child Protection Act 1999* (Qld) s 105; *Children's Protection Act 1993* (SA) s 45; *Children, Young Persons and Their Families Act 1997* (Tas) s 63; *Children, Youth and Families Act 2005* (Vic) s 215; *Children and Community Services Act 2004* (WA) ss 145–6.

94 (1933) 50 CLR 228, 256. See also *Local Government Board v Arlidge* [1915] AC 120, 132, 137, 147.

95 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 156.

96 *Casey v Repatriation Commission* (1995) 60 FCR 510. See also *Goldsmith v Sandilands* (2002) 190 ALR 370, 377; *Nicholls v The Queen* (2005) 219 CLR 196.

97 *R v Board of Visitors of Hull Prison; Ex parte St Germain* [No 2] [1979] 1 WLR 1401, 1411; *Grey v The Queen* (2001) 184 ALR 593; *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 175 ALR 209.

the degree of discretion granted to child protection officers, and the gravity of the implications of decisions made for children and families.

A Relevant and Reliable Evidence

Most of the lawyers interviewed in this study commented that the evidence being presented by child protection officers against parents in court was often dubious in nature. The lawyers said that it was common for child protection offers to 'exaggerate weak material' which was prejudicial to parents. They said that it was common for material to be admitted which was 'full of hearsay', 'full of innuendo', and 'full of opinion which can't be backed up'. Indeed, they provided many examples of situations in which child protection officers had adduced evidence which was misleading or incorrect. They said:

You will have seen affidavits that are 20 pages long that say nothing. Somebody told somebody that somebody said this about that child — possibly once happened — that sort of thing.

Virtually there are no rules of evidence, the way that they run it. We're dealing with a lot of hypotheticals. Probability is taken on someone's personal opinion or their own belief systems ... A lot of the information that's presented to court is either not relevant or is vastly exaggerated so that they can convince the magistrate to give an opinion.

We'll be at a family group meeting and we'll agree to certain things and then we go to court and they'll say, no we didn't agree to that and I was there. They lie about the child's wishes. They say that the child has told them what they want — given the child's only four. They don't provide a copy of the conversation or the questions.

If they dared present some of those documents to the Family Court, they'd want to have a ceremonial burning of the documents.

Many participants said that child protection officers relied on unsubstantiated notifications, criminal charges that have resulted in acquittals and 'histories' of alcohol or drug abuse where the person may have been clean for some time, to prove their case. Many participants made remarks along these lines:

They'll go to court and they'll have this history that could be seven or eight pages long but of the notifications, maybe only five or six of them have been confirmed ... it'll cover a period of years. It won't be, you know, all of these things happened in three or four days. It'll be over a period of years.

So it went to trial and he was acquitted. It wasn't even that it was charges dropped. But Child Safety doesn't care about that. They said, it doesn't matter — we've substantiated it anyway.

Some of these comments appear inflammatory. They might be explained by the tendency of lawyers to identify closely with their clients. It might also be speculated that lawyers generally have a preference for adversarial processes,

given the nature of their training. However, these comments are not without some support. For example, the NSW Supreme Court addressed these same issues in the case of *Re Georgia and Luke [No 2]*.⁹⁸ There, the Court stated:

The [DOCS] officer refers to a '*history of mental health issues*'. There is not the slightest evidence before this Court of a '*history of mental health issues*', whatever that vague phrase is intended to mean. Where the liberty of the subject is concerned, precise evidence justifying deprivation of liberty is required by the Court. The Court will not countenance the removal of a child from his or her parents on evidence of this type. If DOCS has information in its files which can properly be described as a '*history of mental health issues*', that information must be presented to the Court with particularity. The Court will not condone the removal of a child from his or her parents on nothing more than DOCS' assurance that it has good reason for doing so.⁹⁹

And later:

The [DOCS] officer refers to '*the history of domestic violence*' between the parents. Again, although this is a highly emotive phrase, there is no evidence of any particularity at all of any domestic violence. I repeat the remarks I have made above: children are not to be taken from their parents on the basis of vague and prejudicial 'evidence' such as this.¹⁰⁰

B The Weight of Evidence

Some of the participants we interviewed noted that magistrates will vary in the weight they ascribe to such 'evidence', and that even where a fact-finder does not weigh such 'evidence' heavily, its prejudicial effect can linger. Participants also expressed concern that parents would be unable to effectively challenge such 'evidence', even where they may have reasonable objections to it, or dispute its interpretation. One said:

If the parent says it didn't happen or doesn't accept any of the evidence, you're punching at shadows if you don't know where the material is or where it's come from or give them an ability to respond ... you don't really know what you're answering.

All the court has before them is the evidence that DOCS have. They don't always show their hand. They don't give everything to the court, they only give the court what favours their case ... So our clients are prejudiced from the beginning. DOCS won't tender the full file and present file notes of

98 [2008] NSWSC 1387 (19 December 2008).

99 Ibid [51] (emphasis added).

100 Ibid [54] (emphasis added).

what really happened or give file notes of conversations that really did occur. It's trial by ambush.¹⁰¹

The lawyers in this study were overwhelmingly of the view that it was difficult for parents to receive a 'fair trial' and they supported a strong focus on process, including stricter enforcement of the rules of evidence, to level the playing field. One of our participants said:

There's [sic] no penalties to these people. They can write whatever they like. If we as officers of the court misinform the court, there's [sic] severe penalties to us. But we go against people who have a free ticket to write and say what they want, and then we have to try to combat that.

The lawyers we interviewed believed that, at the very least, there should be a requirement that the evidence meet some threshold standard of probity. One said:

I think it's about the system saying that there is a threshold that should be met and if you don't meet the threshold, the matter gets struck out. If it gets struck out, you have to go away and prepare your material properly.

One judge has expressly supported this view in the family law context; Carmody J said 'just because the case is a family one where the dominant principle is welfare does not mean that unsatisfactory evidence can be afforded a greater weight than it can properly bear.'¹⁰²

C The Burden of Proof

Related to this is the issue of proof. In all Australian jurisdictions, legislation states that, in child protection matters, evidence must be proved on the balance of probabilities.¹⁰³ However, many of the lawyers in this study believed that a lesser standard was being applied by some magistrates in Children's Court matters. They said that, at times, some magistrates seemed to be 'rubber stamping' the department's applications for orders.¹⁰⁴ Participants said:

101 In Queensland, issues around disclosure by government departments were raised in the 2008 review of the Queensland civil and criminal justice systems. Moynihan noted there that '[t]imely disclosure minimises delay and supports the effective use of public resources', it 'fosters negotiation and reduces wasting of resources', and it also 'serves to balance the inequality of power and resources between the executive government [and its citizens]': Martin Moynihan, 'Review of the Civil and Criminal Justice System in Queensland' (Report, Queensland Government, December 2008) 86.

102 *Murphy v Murphy* [2007] FamCA 795 (29 January 2007) [240].

103 *Children and Young People Act 2008* (ACT) s 711; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 93(4)–(5); *Care and Protection of Children Act 2009* (NT) s 95; *Child Protection Act 1999* (Qld) s 105(2); *Children's Protection Act 1993* (SA) s 45(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 63(4); *Children, Youth and Families Act 2005* (Vic) s 215(1)(c); *Children and Community Services Act 2004* (WA) s 151.

104 This finding is not limited to Queensland. One recommendation of the Tasmanian Commissioner for Children in a recent inquiry was that courts seek to 'prevent the perception that statutory intervention is undertaken by the Executive Government without judicial oversight': Paul Mason, 'Inquiry into the Circumstances of a 12 Year Old Child Under the Guardianship of the Secretary' (Final Report, Commissioner for Children, July 2010) 4.

It seems that it doesn't matter what a respondent has got to say, it is purely what the department has got to say. That is even less than a balance of probabilities.

It's this 'might be at risk' that gets me.

Of course, the lawyers were not oblivious to the pressures placed on magistrates in child protection matters. They made comments including:

I can see what's in the back of the magistrate's mind — they don't want to be on the front page of the Courier Mail a couple of weeks after they've made a decision to have children returned because the department said there was a slight risk of something happening. They believe that will be their fault.

The magistrate will err on the side of caution ... The magistrate's like, well, you know, if I do this I could be putting the child at risk.

D Challenging the Evidence

Regardless of the concerns expressed by lawyers interviewed on how evidence was dealt with by decision makers, the legislation does require that a certain evidentiary standard be met before the court can consent to the removal of a child. It is imperative that this be complied with to prevent unfair and damaging outcomes both to children and to their families. The lawyers we interviewed believed that the only way to ensure that these standards are tested and affirmed is by ensuring that parents appear with advocates.

In cases where they consider the court erred in its assessment of the probity or weight of the evidence, or that the standard of proof was applied incorrectly, it may be open to lawyers to appeal the decision of the Children's Court.¹⁰⁵ However, as has been discussed, the rules of evidence do not bind the Children's Court, and the court is permitted to inform itself in such a manner as it sees fit. As a result, it may be difficult to develop a strong case for appeal based on the strength of the evidence. It will be very difficult to prove that a judicial officer placed more weight on an aspect of the evidence than was warranted, for example. Even where a lawyer does identify a strong case, he or she will require instructions from a client who may be exhausted by the processes they have already confronted and unwilling to continue. Cost is also an issue, and lawyers in many cases will find that finances or legal aid are not available. They may be unwilling to continue to act on a pro bono basis for the client.¹⁰⁶

105 In Queensland, the appellate court is the Court of Appeal; see *Child Protection Act 1999* (Qld) ss 117–21.

106 For a discussion on legal aid, pro bono and child protection matters, see Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35 *Melbourne University Law Review* 621.

VI COLLABORATION WITHOUT COMPROMISING FAIRNESS

In the context of administrative decisions (that is, decisions of child protection officers), such as the initial decision to remove a child and determinations made at FGMs, a number of participants commented that parents were being denied procedural fairness because, on a practical level, they were unable to know or answer the case being made against them, or were interacting with (potentially) biased decision-makers. With regard to the court system, participants stated that many children were being removed from their parents based on evidence that lacked probative value. Participants believed that, as a result, children were being removed from their parents, not reunified with their parents, or delayed in reunification with their parents, unnecessarily.

Much of the literature suggests that the role of child protection officers should be to work with families to bring about protective outcomes for children.¹⁰⁷ In many cases, this would involve providing practical support to families, and ensuring that they were engaged with required services.¹⁰⁸ Most importantly, it would involve getting to know the child, the parents and other important individuals in the child's life so that decisions could capitalise on the strengths of that particular family unit, and take into account the wishes and capacities of the individuals concerned. The lawyers interviewed had diverse and inconsistent views about the appropriate approach to decision-making. Some recommended greater collaboration between families and the department while others advocated for increased adversarialism.

A Greater Collaboration: Supporting Families

Some of the lawyers in this study made recommendations to this effect. They suggested that child protection authorities should 'work with families, not against them', and that the emphasis should be on supporting families to keep their children at home. This is a resource-intensive approach, and would require a wide range of services to be made available to families, including respite, welfare and practical assistance, and social and emotional support.¹⁰⁹ The lawyers we interviewed differed in their views on whether child safety departments were the appropriate body to deliver these services, however many suggested that the department should at least play a role in brokering these services. These lawyers said that the role of lawyers should be to assist in this process, supporting families in an ongoing dialogue with the department which is aimed at bringing about

107 See, eg, James Wood, 'Report of the Special Commission of Inquiry into Child Protection Services in NSW' (Report, State of NSW, November 2008), see especially Recommendation 10.1; Queensland Crime and Misconduct Commission, 'Protecting Children: An Inquiry into Abuse of Children in Foster Care' (Report, 5 January 2004); Maria Harries, Bob Lonne and Jane Thomson, 'Protecting Children and Caring for Families: Re-Thinking Ethics for Practice' (2007) 2 *Communities, Children and Families Australia* 39.

108 Walsh and Douglas, 'Legal Responses to Child Protection, Poverty and Homelessness', above n 30.

109 Ibid.

protective outcomes for children through delivery of services and support to families. They made comments including:

I think that we could all work a lot more collaboratively to make sure that people pass through the system in what is a very stressful, sensitive and difficult time, but in which hopefully there's a lot of learning which will help parents to understand how not to get involved again with Child Safety because they are fulfilling their parental duties.

[The system] needs to be changed so it's not so adversarial but rather an ongoing — I suppose — attempt to mediate and an opportunity for everybody to be able to have ongoing discussions rather than collection of evidence. I suppose the issue really is the department being far more flexible in their approach and working with the parents and their legal representatives.

On the other hand, some of the lawyers we interviewed believed that calls for this kind of approach were not realistic because it would not be possible for child protection officers to work in a supportive way with parents. Some stated that child protection officers would experience role conflict if they were directed to undertake the policing and enforcement of child protection, as well as undertaking supportive, therapeutic duties. One participant said:

The department isn't a therapeutic body. I feel that if they're going to do any constructive work with families it really should be another agency doing the work, because you can't take the kids and expect to have a good relationship with the families and work constructively with them. It's just too difficult and I think it creates a lot of fear in the family.

Many participants lacked faith in the FGM process, and argued that any culture shift would be difficult, if not impossible, to achieve within the existing framework. One lawyer said:

I've had matters where they've had three family group meetings where nothing has been achieved, and I'm just reaching a point where, really, what I need to do is cross-examine workers. What's the point of sitting around trying to sort this out? But I mean that's what the system relies on — that the parent will just give up.

Consistent with this comment, the NSW Supreme Court in *Re Georgia and Luke [No 2]*, mentioned above, stated that there seemed to be a culture of 'intransig[ence]' within the department, involving 'gross abuse of power'.¹¹⁰ The Court remarked: 'Why are the DOCS officers taking this attitude? I regret to say that I am driven to only one conclusion: an intransigent refusal to acknowledge a mistake, regardless of the consequences to the children.'¹¹¹

110 [2008] NSWSC 1387 (19 December 2008) [25], [74].

111 *Ibid* [25].

B Greater Adversarialism: Using the Courts

It was on the basis of these kinds of observations that many of the lawyers we interviewed actually advocated for a more adversarial approach to be taken in child protection matters, rather than a more collaborative, inquisitorial one. This is perhaps not surprising given that lawyers' training equips them for this approach. Nevertheless, many believed that the court, rather than ADR processes, was the most appropriate forum in which to resolve child protection matters. One said:

If you are removing kids from a family of origin there needs to be an accountable system that reviews that and oversights [sic] it. I think it should be the legal system. I think how the legal system does that can be changed and modified and adapted, but to do that, the professionals in the system need to advocate around those changes rather than complain about it being a hopeless system.

Some of the lawyers made suggestions as to how the system might be modified to enable the legal system to fulfil this role more effectively. Two of the lawyers in this study suggested that a system of case management be introduced into the Children's Court. This would mean that greater judicial control of proceedings would be taken, with a view to 'facilitat[ing] the just, quick and cheap resolution of the real issues in the dispute or proceedings'.¹¹² They said:

We need case management in this system. It's outrageous the time that the Department takes to litigate these matters and the time they're before a court. It's outrageous the amount of times they go for mention where nothing happens. It's outrageous the ability the Department has to adjourn when they should be put to proof and go to final hearing. If there is a consideration under the Act that there be a timely resolution, it's about children and young people's lives and decision-making around families. It's not around a court calendar and convenience.

VII IDEAS FOR REFORM

Two key suggestions emerge from the interviews in relation to the improvement of existing decision-making systems. As noted earlier, some lawyers suggested that a case management plan could be developed while some lawyers suggested improvements to FGMs. There are a number of models that could be drawn upon if such reforms were to be considered. These ideas are discussed below.

112 *Civil Procedure Act 2005* (NSW) s 56(1).

A Case Management in the Children's Court — How Could It Be Done?

Case management in its most basic sense has been effectively implemented in a number of civil law areas. By increasing judicial control over the manner in which proceedings are conducted, case management has the potential to help address due process and evidence concerns by ensuring that only evidence that is considered helpful by the court is raised.

In the *Civil Procedure Act 2005* (NSW), case management principles are firmly embedded and are to be used across the board.¹¹³ Under that Act, courts are instructed to eliminate unreasonable delays, by (for example) giving directions that limit the time taken by the hearing, or the number of documents tendered in evidence, and other directions aimed at facilitating the speedy determination of the real issues between the parties in civil proceedings.¹¹⁴

The 2006 amendments to the *Family Law Act 1975* (Cth) contained a number of provisions that provided for a 'less adversarial approach' to be adopted in children's cases.¹¹⁵ One version of this approach, the Children's Cases Program, was first piloted in Sydney.¹¹⁶ Under this approach, the judge takes a more controlling and directive role. By the first day of the hearing, affidavits will have been filed and the judge will have read the material. This enables the judge to discuss with the parties, on the first day of the hearing, how the case will progress and what evidence will be most valuable, and thus acceptable, to the court. Lawyers present evidence and make submissions in much the same way as usual, however judges encourage greater participation from the parties, inviting them to speak for themselves where possible. Further, the court is supported by a 'Family Consultant' who acts as an advisor to the court, and something of an expert witness, regarding the needs of the child and what would be in his or her best interest.¹¹⁷

113 See Ronald Sackville, 'The Future of Case Management in Litigation' (2009) 18 *Journal of Judicial Administration* 211.

114 *Civil Procedure Act 2005* (NSW) ss 59–63.

115 See *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

116 Two evaluations of this program were undertaken: see Rosemary Hunter, 'Evaluation of the Children's Cases Pilot Program: A Report to the Family Court of Australia' (Report, June 2006); Jennifer E McIntosh, 'The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being' (Final Report to the Family Court of Australia, Family Transitions, March 2006). See the detailed discussion of these evaluations in Hunter, 'Child-Related Proceedings under Pt VII Div 12A of the *Family Law Act*', above n 11.

117 Children's Court Clinics, established first in Victoria, undertake a similar role: psychiatrists and psychologists undertake independent assessments of children's needs and wishes and present these findings to the court so that a balanced picture is ultimately put forward: see Patricia Brown and Prue Holzer, 'The Victorian Children's Court Clinic' (2006) 14(2) *Child Abuse Prevention Newsletter* 15.

Certainly, the literature suggests that there are a number of features that are essential to successful 'problem-solving' courts.¹¹⁸ The judicial officer must be closely involved in each case. This means that, where possible, the same judicial officer should take the case from start to finish. Further, the judicial officer needs to have sufficient court time available to work closely with individuals. The presence of support people is also critical. This includes the involvement of specialist court liaison officers who have experience and knowledge of the issues being addressed by the court, and can provide specialised advice and assistance to the court.¹¹⁹ Other service providers may also attend court, so that immediate referrals to support agencies may be made. A collaborative approach is essential, whereby the judge, court liaison officer, parties, lawyers and service providers work together to create a plan that will assist the person to achieve agreed goals.¹²⁰

Children's Courts would benefit from these features. Research has shown that people are often more willing to accept a decision, even if it goes against them, if they feel they have been treated fairly and listened to.¹²¹ In child protection matters, this could be achieved by devoting more time to each case, and by encouraging parents (and children, where appropriate) to actively participate in proceedings.¹²² If an experienced and specialised court liaison officer was available to undertake an assessment with all members of the family, and make recommendations regarding the child's best interests and the support services available to assist the family, the court would not be forced to rely so heavily on the (often one-sided) assessment conducted by the child protection department. If parents could be referred to services on the spot to support them in their parenting role, a court might feel less compelled to support the department's application for removal.

118 Problem solving courts are those that deal with a particular cohort of individuals (usually defendants), or a particular legal issue; examples include Drug Courts, Domestic Violence Courts, Mental Health Courts and Special Circumstances Courts. See especially Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) ch 9; Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23 *Law and Policy* 125; Harry Blagg, 'Problem-Oriented Courts' (Research Paper, Law Reform Commission of Western Australia, March 2008).

119 The Children's Court Clinic attached to the Melbourne Children's Court provides specialist advice to the Court and support to children, thereby providing something of a court liaison role. Indeed, the Australian Law Reform Commission recommended that similar clinics be introduced in Children's Courts around Australia: Australian Law Reform Commission, *Seen and Heard*, above n 9, [13.121]–[13.122].

120 The Special Circumstances Courts in Melbourne and Brisbane, and the Neighbourhood Justice Centre in Melbourne, provide excellent models of this kind of approach, offering 'on-the-spot' service delivery to persons experiencing disadvantage who interact with the court system: see Anne Condon and Annie Marinakis, 'The Enforcement Review Program' (2003) 12 *Journal of Judicial Administration* 225; Tamara Walsh, 'The Queensland Special Circumstances Court' (2007) 16 *Journal of Judicial Administration* 223; *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic); Sarah Murray, 'Keeping It in the Neighbourhood? Neighbourhood Courts in the Australian Context' (2009) 35(1) *Monash University Law Review* 74.

121 Jamieson, above n 89.

122 Justice Peter W Young, 'Current Issues: Are Trial Courts Too Summary?' (2001) 75 *Australian Law Journal* 585.

B Improving Family Group Meetings

The description of FGMs provided by lawyers in this study suggests that FGMs are unlike most other ADR processes.¹²³ FGMs, unlike guardianship boards and mental health tribunals, are generally not chaired by neutral persons; rather the chairperson is most often an employee of the same Department that is seeking, or has obtained, a child protection order in respect of the child. Guardianship boards take an informal, collaborative approach to reaching a decision, which is very different to the adversarial environment of many FGMs. Mental health boards and tribunals are generally more adversarial in nature, but their decisions are often scrutinised by a judicial officer, unlike the plans arrived at in FGMs which are rarely subject to judicial scrutiny.

According to the lawyers interviewed in this study, the FGMs that are held in Queensland bear little resemblance to the ‘family group conferences’ upon which they were modelled. Family group conferences originated in New Zealand in the 1980s as a means of helping families in conflict to develop plans to ensure the safety and wellbeing of children.¹²⁴ Under the New Zealand model, family group conferences are facilitated by an independent person, and are held at a venue that maximises family participation.¹²⁵ The key feature of family group conferences is that they put the family at the centre of the decision-making process, based on a belief that families are able to make their own decisions to protect children if they are properly prepared and informed.¹²⁶ There are three stages to the process: the information stage where the family is informed by professionals of the results of any assessments, and what supports are on offer to the family; the ‘quiet time’ stage where the family is given an opportunity to discuss this information privately; and the final stage where everyone comes together to formulate and implement a plan.¹²⁷ The plans formulated by parents and professionals at family group conferences are intended to be an alternative to a court order, as parents are empowered to bring about their own protective outcomes for their own children.¹²⁸

Preparation is considered one of the keys to success in the New Zealand family group conferencing model. It is during this time, prior to the first formal meeting, that the convenor gets to know family members, and all parties are appraised on what the current child protection concerns are.¹²⁹ According to the lawyers

123 Note that the description of the lawyers in this study concurs with the reports of other professionals involved in child protection matters; see Heather Douglas and Tamara Walsh, ‘Mothers and the Child Protection System’ (2009) 23 *International Journal of Law, Policy and the Family* 211.

124 Peter Marsh, ‘Partnership, Child Protection and Family Group Conferences — The New Zealand Children, Young Persons and Their Families Act 1989’ (1994) 6 *Journal of Child Law* 109.

125 See Ban, above n 88, 39.

126 Leone Huntsman, ‘Family Group Conferencing in a Child Welfare Context: Literature Review’ (Research Report, NSW Department of Community Services, July, 2006).

127 See generally Ban, above n 88; Elaine Walton, Margaret McKenzie and Marie Connolly, ‘Private Family Time: The Heart of Family Group Conferencing’ (2005) 19(4) *Protecting Children* 17; Carol Lupton and Paul Nixon, *Empowering Practice? A Critical Appraisal of the Family Group Conference Approach* (Bristol, 1999).

128 See Harris, above n 59.

129 Ban, above n 88, 34.

interviewed in this study, there is very little preparation done with the family prior to a FGM in Queensland. For those who are represented, the lawyer will undertake this role, but for those who are not, no preparation may be done with them at all. One participant said:

We might do a lot of preparation prior to going into the family group meeting with encouraging the department to identify the issues prior to us attending the meeting which they don't do with a lot of clients who are going on their own even though they're meant to. So the client just turns up, no idea, no preparation, and is sort of put on the spot to try to respond.

Based on the comments of the lawyers we interviewed, changes are required to the Queensland FGM model if it is to work effectively. First, all FGMs should be convened by an independent facilitator, that is, someone neutral rather than an employee of the department. This would remove the existence, or the perception, of bias. Interestingly, some participants in this study had had some experience with FGMs that were convened by people other than the departmental officers. Due to staff shortages, on some occasions in south-east Queensland, the department will engage an external organisation to convene some FGMs.¹³⁰ These FGMs were spoken of very positively, and seemed to conform much more closely to legislative intentions, and the New Zealand model. Research conducted in Victoria has indicated that the importance of a skilled neutral party acting as a convenor cannot be underestimated. Acting in a conciliatory manner, running conferences informally and listening to parents have been found to be key indicators of conference success.¹³¹

Second, a genuine discussion needs to occur with families, instead of an adversarial approach being taken to proceedings. A fact-finding process needs to be engaged in which provides all sides with an opportunity to be heard, and which allows parents to respond to allegations made by the department regarding their parenting. This would allow for all versions of what is 'real' to be considered and respected. The facilitator should rely on external professionals, including independent social workers or psychologists, or separate representatives where possible,¹³² to make recommendations as to what is in the best interests of the child, so that the views of the department are not solely relied upon for this purpose.

Further to this, there should be some greater accountability surrounding the case plans that are ultimately drafted. Since case plans effectively represent a 'legal outcome', they should be subject to judicial scrutiny. This could be achieved simply by following the New South Wales model. In New South Wales, 'care plans' developed by agreement in the course of ADR processes may be registered with the Children's Court and the Court may make orders giving effect to the care plan where it is satisfied that it is consistent with the Act, has been freely

130 That external organisation is the Logan Youth and Family Service.

131 Sheehan, above n 9; Anne Markiewicz, 'The Pre-hearing Convenor: A Skilled Practitioner Chairing Conferences in the Children's Court of Victoria' (1996) 21(4) *Children Australia* 22.

132 Separate representatives are lawyers whose purpose is to make recommendations regarding the best interests of the child based on a process of assessment; Megan Giles, 'The Separate Representation of Children in Child Protection Proceedings' (2001) 21(1) *Proctor* 18.

entered into, and parties other than the department have received independent advice concerning its provisions.¹³³ If all case plans were registered with the Children's Court, and only implemented if these prerequisites were met, the FGM process would be made more transparent and accountable, which is critical to the protection of the fundamental rights of children and families.

VIII CONCLUSIONS

In *J v Lieschke*, Wilson J of the High Court said: 'Neglect proceedings are truly a creature of statute, neither civil nor criminal in nature. They are therefore *sui generis*.'¹³⁴

Decision-making in a child protection context does have many unique qualities. Difficult decisions must be made regarding a vulnerable group whose wishes often cannot be ascertained, but whose lives will be profoundly affected by any intervention initiated. The amount of distress caused by any intervention, or threat of intervention, is enormous, and this trauma is often ongoing regardless of the ultimate outcome of proceedings.

Despite the evidence that collaborative, and preferably out-of-court, decision-making processes are most appropriate in disputes involving children and families, the lawyers interviewed for this study consistently claimed that, in their view, informality can sometimes lead to a lack of procedural fairness. Bearing in mind the seriousness of child protection determinations, this would appear inappropriate. Yet, in the view of many lawyers interviewed in this study, children were being removed from their family unit in situations where the evidence against the parents lacked probative value.

The lawyers in this study believed that child protection officers conducted themselves in a highly adversarial manner. The excessive scrutiny placed upon child protection departments by the community, and particularly the media, makes it understandable that child protection officers might take an over-cautious approach to their work. However it must be borne in mind that the lawyers interviewed for this study generally acted for parents of children identified to be at risk. They are, therefore, likely to see their clients in the best possible light and this may impact on their perceptions of the system. Also, lawyers' primary training is in adversarial technique and some may begin with an attitude against settlement.¹³⁵ At least one participant in this study recognised that the manner in which lawyers conduct themselves also impacts on the extent to which collaboration is possible. She said:

133 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38. A similar scheme operates in the ACT, see *Children and Young People Act 2008* (ACT) ss 390–3.

134 (1987) 162 CLR 447, 451.

135 See, eg, David Luban, 'Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers' (2003) 91 *California Law Review* 209.

I think some lawyers in the way they litigate also adds to the adversarial nature ... My view is that these young children and young people are watching that and are learning from that and, from a simple point of view, if that's the framework they operate in, that's how they're going to communicate ... It's about thinking about what are the longer term implications? How do I teach or how do I demonstrate or how do I role model how I communicate?

Regardless, the risk is that if the lack of confidence in the child protection system that was expressed by lawyers interviewed for this study is not addressed in some way, lawyers are likely to resort to ever higher levels of adversarial behaviour. This would seem to be ultimately counterproductive from the perspective of the best interests of children, understood in its 'wide' sense.¹³⁶ While the changes we suggest may not lead to different outcomes in individual cases, we argue that given the gravity of the decisions made in this context a strong focus on process is important. Any successful system of decision-making in child protection matters will require lawyers, other relevant professionals, and the department, which is after all the statutory parent of many of these children, to model collegiality and collaboration, within a system that values fairness and accountability.¹³⁷ It seems that only then will the best protective outcomes for children, and supportive outcomes for families, be achievable.

136 See Kordouli, above n 7.

137 Lack of collaboration between domestic violence support workers acting for mothers of children who are subject to child protection intervention and child protection workers has been discussed elsewhere: see Douglas and Walsh, 'Mothers, Domestic Violence and Child Protection', above n 5.