REBALANCING THE SCALES

Access to justice for parents in the Tasmanian Child Safety system

TERESA HINTON

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Choice, support and hope

SOCIAL ACTION & RESEARCH CENTRE

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JULY 2020

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Any names used in this report have been changed to protect the privacy of research participants.

The research findings, conclusions and recommendations of this report are those of Anglicare and should not be attributed to any members of the Research Reference Group. Any errors in the report are the responsibility of the author alone.

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Cover illustration: Beth-Emily Gregory
Graphic design: Kelly Eijdenberg
Copy-editing: Selina Claxton

For further information contact:
Social Action and Research Centre
Anglicare Tasmania
GPO Box 1620
Hobart Tasmania 7001
Web: www.anglicare-tas.org.au

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Abbreviations

ABI	Acquired Brain Injury
ACT	Australian Capital Territory
ADR	Alternative Dispute Resolution
AVREC	Anglicare Victoria Research Ethics Committee
CAAG	Court Application Advisory Group
CALD	Culturally and Linguistically Diverse
CLC	Community Legal Centre
CPO	Child Protection Order
CPS	Child Protection System
CS	Child Safety
CSLG	Child Safety Legal Group
CSO	Community Service Organisation
CSS	Child Safety System
FASS	Family Advocacy Support Service
FGC	Family Group Conference
FIN	Family Inclusion Network
FLPAT	Family Law Practitioners Association Tasmania
FRG	Family Rights Group
FDAC	Family Drug and Alcohol Court
FDTC	Family Drug Treatment Court
HJP	Health Justice Partnership
IFAS	Independent Family Advocacy and Support Service
IFES	Intensive Family Engagement Service
LAC	Legal Aid Commission
LACT	Legal Aid Commission Tasmania
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NSW	New South Wales
OOHC	Out-of-Home Care
PFAS	Parent and Family Advocacy Service
QCAT	Queensland Civil and Administrative Tribunal
SA	South Australia
TACLS	Tasmanian Aboriginal Community Legal Centre
VLA	Victoria Legal Aid
WA	Western Australia

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Executive Summary and Recommendations

Decisions about how to meet children's best interests and whether to separate them from their family due to concerns about their safety are taken in the Children's Court. These decisions have a lifelong impact on children and families. Yet there are increasing concerns about how the legal system is able to support and respond to vulnerable families and ensure that justice is done.

This report documents the experiences of Tasmanian parents in the Court and legal processes associated with the Child Safety system (CSS). Through interviews with 36 parents and 45 lawyers experienced in representing parents in care proceedings, the research describes what it is like to cross the interface between the Child Safety and Justice systems. It explores how far parents are able to participate in decision-making processes and the ability of these processes to implement the intent of the legislation and promote family preservation and reunification. Drawing from a review of reforms being trialled in Child Safety legal systems across the world, the report makes a series of recommendations about how to improve the experiences of birth parents and their ability to preserve their family and be reunited with their children.

The key findings of the research are:

- **Demand is increasing.** Like elsewhere in Australia, the number of Tasmanian children and young people entering the out-of-home care system (OOHC) is growing. This is placing increasing demand on the Child Safety and Justice systems. Only a proportion of families involved with Child Safety cross over into the Justice system, but applications for Child Protection Orders to the Court have risen year on year, with a 27% increase since last year. This impacts on the workload of both the Child Safety and legal systems and puts pressure on the ability of the Court to deal with cases efficiently, effectively and fairly.

- **Access to legal representation is problematic.** There is an underlying public assumption that entering an adversarial legal system requires legal representation. However, parents and lawyers described shortfalls in access to legal advice at a time of family crisis when a child has been, or is about to be, removed from their care. A lack of awareness that legal advice is needed, a reluctance to seek it and/or difficulties in being granted adequate levels of Legal Aid funding commonly leave families accessing advice late in proceedings and/or attending Court unrepresented. Representing birth parents is a specialised area of the law and Tasmania has a core of highly skilled lawyers practicing in this area. However, demand on the Legal Aid funding pool directly impacts on the quality of legal advice available to parents. This has a significant impact on outcomes for families in the Child Safety jurisdiction.

- **Going to Court was commonly described as isolating, stressful and lonely.** The physical environment, the brevity of many Court appearances, discouragement from speaking directly to the Magistrate and few opportunities for support during the process or debriefing afterwards confuses and confounds parents' expectations and marginalises them from their own case. At the same time, sympathetic treatment from a Magistrate who acknowledges their circumstances and their presence in the courtroom can have a major impact on parents, encourage behaviour change and promote a sense that they have had a fair hearing and justice has been done.

- **Administrative processes, procedures and timeframes associated with making decisions in the Court erect barriers to a parent's ability to participate and to achieving the goals of the legislation – family preservation and reunification.** The late serving of Child Safety affidavits, the nature and quality of the evidence used to support them, the operation of alternative dispute resolutions and the delays endemic to care proceedings all impose additional pressures and costs on families, legal practitioners, Legal Aid funding and the Child Safety system. In addition, processes are not standardised across the state, which results in a postcode lottery and lack of consistency that impacts on both children and their families. Neither are they adapted to cultural differences or the needs of people with disability.

- **A high level of dissatisfaction amongst parents and lawyers** about how far Child Safety and the legal system are able to implement the intent of the legislation. Surviving care proceedings, whether or not children are returned to their families, has wide ranging longer-term negative impacts on families which undermine family preservation and the chances of children being reunified with their families. These impacts are underpinned by a lack of resourcing of the Child Safety system, the Justice system and the broader welfare sector, leaving parents trying to access support and treatment from services that are unable to effectively engage with them or meet their needs in a timely manner. This dissatisfaction is fuelling an appetite for change from parents, from legal professionals, from the judiciary and from community support services and a push to do things differently.

- **Across the English-speaking world Child Safety systems are dealing with similar issues and introducing reforms to improve the experiences of families and reduce the numbers entering the OOHC system.** Through changes to legislation, policy and service delivery, initiatives have focused on diverting families from legal processes, improving access to skilled legal assistance and providing wraparound support for families, including support from their peers. Most significantly, moves from adversarial legal processes to more inquisitorial and therapeutic systems, which can resolve rather than exacerbate the problems vulnerable families experience, demonstrate concrete and promising results.

- **Tasmanian parents and lawyers outlined a clear agenda for reform** which is both incremental and transformative. As well as improving Child Safety practice to divert more families away from the Justice system, they proposed earlier access to legal advice and representation as a right and a spectrum of changes to Court processes. These include more opportunities to hear the voice of parents and collaboration across the Child Safety and Justice interface to ensure a more strategic approach to supporting families to sustain family relationships and progress towards reunification. They called for specialist Magistrates, access to non-legal advocacy and peer support, improved information resources, and a problem-solving and therapeutic approach that is better adapted to addressing the complex problems that vulnerable families face. Any reforms must be underpinned by leadership, cultural change and improved resourcing.

Recommendations

IMPLEMENTING THE INTENT OF THE LEGISLATION

Recommendation 1: That the Department of Communities, the Department of Justice and the Magistrates Court collaborate to ensure a strategic approach to family preservation and reunification across the Child Safety and Justice interface.

Recommendation 2: That the Department of Communities and the Department of Justice identify who has duty of care towards parents to ensure a supportive infrastructure for those crossing the interface into the Justice system.

Recommendation 3: That the Department of Communities make further investment in pre-proceedings processes to divert families from the Justice system.

Recommendation 4: That the Tasmanian Government ensure that a right to legal representation in the Child Safety jurisdiction is embedded in the legislation and that the Legal Aid funding pool is expanded to meet this need.

Recommendation 5: That the Department of Communities, the Department of Justice and the Legal Aid Commission collaborate to increase the capacity of the legal assistance sector to support and respond to the particular needs of families in the Child Safety system.

Recommendation 6: That the Department of Communities, the Legal Aid Commission, the Department of Justice and the Magistrates Court make further investment in the ongoing professional development of their workforce in the Child Safety jurisdiction.

Recommendation 7: That the Tasmanian Government fully explore the potential for introducing a therapeutic, solution-focused court in the Child Safety jurisdiction.

PROGRESSING THE RECOMMENDATIONS

Recommendation 8: That the Tasmanian Government commission a high-level working group to promote a whole systems co-ordinated approach to addressing the needs of vulnerable families involved with the Child Safety system.

CHAPTER ONE

Introduction

One of the most significant powers exercised by Australian state and territory governments is that of removing children from their parents due to concerns about their safety. Across Australia, including Tasmania, increasing numbers of children are being removed into the out-of-home care (OOHC) system because it has been identified that they are experiencing or are at risk of neglect and abuse (AIHW 2020).

Decisions about how to meet children's best interests and whether to separate them from their family are taken in the Children's Court. These decisions have a lifelong impact on children and their families. Yet there are increasing concerns about how the legal system is able to support and respond to vulnerable families. There is a growing body of research which describes negative experiences for parents during the legal processes associated with involvement with Child Safety Services (CSS), poor outcomes in terms of family preservation and reunification and a sense that parents have been unable to access justice and justice has not been done.

This research explores the experiences of 36 parents in the Court and legal processes associated with the CSS in Tasmania. It collates their views and experiences and those of the legal professionals who are working to support them about how these experiences might be improved. A recurring theme is parents' ability to participate in decision-making about their family and the disconnect between the intent of the legislation, practice realities and the resulting experience for families who intersect with the system.

Despite the significance of the Court decisions, this is a hidden world and research about how proceedings are structured and conducted is scarce. The operations of the Children's Court are confidential and details cannot be reported in the public domain. This research provides a previously unavailable picture for policy-makers and practitioners in Tasmania about what care proceedings are like from the perspective of birth parents and their legal representatives. It demonstrates how learning from parents and legal professionals needs to be incorporated into everyday practice and policy development if systems are to improve and the best interests of children achieved.

The research aims to be solution-focused and provides a platform for debating how best to improve parents' experiences, their access to justice and the outcomes for families. It explores the interventions being used in other jurisdictions, both in Australia and elsewhere, to improve these experiences and reduce the numbers entering OOHC, and considers what kind of changes might be appropriate in the Tasmanian environment.

The research was conducted during 2019. It was guided by a research reference group with representatives from the Legal Aid Commission, the Tasmanian Aboriginal Community Legal Centre, parents, community service organisations, the Family Law Practitioners Association (FLPAT), the Department of Justice and the Department of Communities.

1.1 Background

There were a number of catalysts for this research. Previous studies about parents in the Tasmanian child protection system (Fidler 2018; Hinton 2013, 2018) identified a range of challenges they face in care proceedings and recommended a review of current Court processes. The scoping for this research also found high levels of frustration expressed by many legal practitioners, community support services and Child Safety staff who witness parents' struggles. Lawyers and Magistrates operate in the gulf between the intent of the legislation, which promotes family preservation, support and reunification, and the reality of an underfunded welfare system where support for parents is inadequate and progress towards reunification or family preservation is limited. At the same time Child Safety staff comment that entry into an adversarial legal system hinders their ability to work constructively and collaboratively with parents and to fully engage them in addressing safety concerns and promoting reunification. This has led to a consensus amongst families, support services and legal professionals that parents involved with CSS in Tasmania are not well served by Court and legal processes and that this compromises their access to justice.

The expression 'access to justice' is about the link between a person's formal right to seek justice and that person's effective access to justice according to the law (Law Council of Australia 2018). Effective access is about the capacity to understand the law, to get legal advice, assistance and representation and to use legal institutions like the courts. The concept has been extended beyond access to the formal justice system like lawyers and the courts to include access to legal information and education and non-court-based dispute resolution. It seems that for too many parents in Tasmania the factors required for effective access to justice are absent.

1.2 Aims of the research

This research reviews the interface between the Child Safety and Justice systems. It explores how far current operations are able to further the intent of the legislation to work in partnership with families to promote family preservation and restoration, what the challenges and gaps are and how this might be improved. The research:

- examines the lived experience of Court and legal processes from the perspectives of key stakeholders – parents and legal professionals;
- reviews what administrative data is routinely collected in order to quantify these issues and outcomes;
- explores what kind of mechanisms, interventions and reforms are being developed and implemented in other jurisdictions to tackle these issues and their impact; and
- makes recommendations about how to improve parent experiences in child safety legal processes in Tasmania and provide opportunities to better hear the parent's voice.

Specifically the research asks questions about the impact of current Court and legal processes on families, how far this impact prejudices the ability of the legal system to implement the intent of the legislation and how access to justice can be improved for families involved with CSS.

The research takes into account the over-representation of the Aboriginal population and parents with disability, who may require a different range of interventions and solutions. It also seeks to reflect the diversity of practice and regional differences across the state.

This work is occurring at a time of rapid change to the CSS and to the way in which the law is implemented. Renewed interest in how to transform child protection systems provides an opportunity to think seriously about how the legal system can be better tailored to meet the intentions implicit in the legislation and CSS reforms and what is required to make it 'fit for purpose'.

1.3 Research methods

The research uses a range of sources and triangulated research techniques to build a holistic picture of parents' experiences. In order to hear multiple voices, a range of participants were recruited into the research to build reflective discussion of the findings and their robustness. It involved:

- **Reviewing and synthesising existing published research, policy and practice literature** about the parent experience. This has included identifying gaps in knowledge and exploring models and interventions being used nationally and internationally to improve parent experiences and the outcomes for children. The review proceeded via internet searches and 'snowballing'[1] to identify key informants and, in particular, any evaluative material relating to new initiatives.
- **Observation of CS hearings in the Court.** The researcher attended an afternoon session at Hobart Children's Court as an observer. This allowed a deeper insight and understanding of the challenges legal professionals and parents face and the issues and themes which the research should document.
- **Collating the experiences of key stakeholders.** A mixed method approach was used to capture an in-depth understanding of experiences, perspectives and challenges, including face-to-face and telephone interviews, surveys and focus groups. In order to reflect regional diversity, attention was paid to getting a statewide perspective in recruiting participants into the research. Data was collected from:
    - **Parents.** Thirty-six parents were recruited into the research from across the state through community support services, Neighbourhood Houses[2], Child and Family Centres[3] and word of mouth (see Appendix 2). Parents participated

1 Snowballing is a sampling technique where existing research participants are used to recruit future subjects.

2 Neighbourhood Houses bring local people together to look at what opportunities or needs exist in their community and how to work together to do something about it. There are 35 Neighbourhood Houses and Community Centres across Tasmania.

3 There are 12 Child and Family Centres across Tasmania which improve the health and wellbeing, education and care of children from birth to 5 years. They support parents and enhance the accessibility of services in the local community.

through a mix of individual interviews (6) and seven focus groups (of two to seven people) across the state. Using a semi-structured interview schedule, interviews explored not only personal journeys through legal processes but also consulted parents about the kinds of changes and reforms they would like to see. The use of focus groups allowed participants to use their personal experiences to debate reform to the current system. All parents involved with the research received reimbursement for their time and any expenses they incurred, in line with Anglicare Tasmania's reimbursement policies.

- **Legal practitioners** (see Appendix 2). Information was gathered via:
  - A survey of 43 lawyers from across the state with experience of representing parents in the previous two years. The survey was designed and piloted with assistance from the Family Law Practitioners Association (FLPAT). This is a niche area of practice and the survey captured a solid sample of those doing any substantial work in the CS jurisdiction in Tasmania.
  - Face-to-face and telephone interviews with 24 lawyers practicing in this area.
  - Interviews were also conducted with:
    - the Child Safety Legal Group;
    - the Child Safety sub-committee of the Family Law Practitioners Association Tasmania;
    - the Chief Magistrate, in order to access a Court view;
    - a Child Safety Court Coordinator; and
    - two professionals involved in expert reporting and assessment for the Court.
- Exploring existing administrative data sets in order to quantify themes arising from the research. Publically available data was collated and access to additional data sought from the Legal Aid Commission, the Magistrates Court and the Aboriginal Legal Service to provide a more quantitative frame for the qualitative interview data.

A range of community support services in Tasmania are involved in supporting parents through legal processes. These experiences have been collated in previous research (Hinton 2013, 2018) and have been used as a backdrop to this research in order to understand the range of support available to parents in care proceedings.

Interviews and focus groups with parents were audio recorded and transcribed. Interviews with legal professionals were either recorded and transcribed or verbatim notes were taken. A thematic analysis of the qualitative interview data was conducted to identify the nature of the experiences, the challenges and possibilities for change and reform. Participants' own words have been used throughout the report whenever possible, but all names have been changed to protect anonymity.

The reference group met four times during the course of the work to offer advice and guidance on the conduct and progress of the research, on accessing administrative data, on analysis of the research findings and on the drafting of a final report and recommendations. Ethics approval for the involvement of parents in the research was provided by Anglicare Victoria's Research Ethics Committee (AVREC).

1.4 Limitations

In considering the research findings, a number of limitations must be acknowledged.

Firstly, and in keeping with much of the previous research about parents' experiences, this work is based on a small sample (36 parents) and qualitative rather than quantitative data. When asked, parents are more likely to talk in detail about their negative rather than their more positive experiences. This can paint an unduly black picture and make it difficult to assess the scale of the issues and problems which they face. In addition, because of its qualitative nature the research tells us little about particular sub-groups of parents, such as those who are LGBT or those with an intellectual disability or acquired brain injury (ABI), mental health problems or substance use issues. However, the robustness of information gathered from parents is validated in this study by information collected from the lawyers and community support workers working with them.

Secondly, although a better awareness of the experiences of parents is essential in thinking about the effectiveness of the system and how it might be improved, this cannot be the only measure of child protection processes, which are about a child's best interests. In any full examination of the workings of the judicial system it is paramount to hear the voices of children. There are many circumstances where children need and indeed may want to be removed from their families in order to ensure their safety and wellbeing. Yet there are also questions about how the system operates for families and its impact on longer term family relationships and the chances of reunification. Although not the subject of this study, mechanisms to hear the voices of children are central to the operation of a fair and just system. However, they have not been addressed in this research.

Thirdly, the research does not include a thorough examination of the issues from the perspective of Child Safety workers or carers in the OOHC system. Failures to keep children safe attract media attention which often puts the blame at the door of CS or the Court, whilst failing to recognise success stories when CS intervention leads to parents making the necessary changes and families staying together or being reunified. This research acknowledges the difficult work CS does, the challenging decisions they take in order to keep children safe and the lack of recognition they get when interventions are successful. At the same time carers who provide foster and kinship care and residential services for children in OOHC bring another perspective to working with parents during and after care proceedings. The significant role carers play in establishing effective partnerships with parents to promote family preservation and reunification is acknowledged but not explored in this study.

Fourthly, although the research aimed to explore what administrative databases can tell us about parents' experiences, much of this data was not available. Due to resource constraints inherent in interrogating data sets, the research draws mostly on data which is publically available through the annual reports of the Legal Aid Commission and the Magistrates Court.

Lastly, the fact that all child protection systems are facing similar issues is leading to debate across the globe about how to ameliorate these challenges and reduce numbers entering OOHC. Cross-jurisdiction comparisons can demonstrate a range of options and models, highlight what is missing and inform thinking about how to do things better. However, it is also challenging to make comparisons across systems with different orientations, assumptions, core practices and social and cultural contexts. This means caution is required in translating initiatives and interventions used elsewhere into the Tasmanian context.

CHAPTER TWO

Across the Interface: Child Safety and the Justice system

Most families who become involved with the CSS receive advice, are referred on for support services and continue to care for their children. Only a small percentage of those who are investigated and where allegations of abuse are substantiated tip over into the justice system where an Order is granted to remove their child(ren) temporarily or in the longer term. The Justice system provides a check and balance on decisions made by the CSS about the most serious cases where there is a high degree of harm and risk.

This chapter provides a framework the reader about the system and how it is intended to operate. It provides background information about the current legislative, policy and service environment in which parents find themselves when at risk of or experiencing removal of their children. It describes the interface between the CSS and Justice systems and the procedures involved when a family moves across the interface and into care proceedings. Recent reforms which have attempted to impact on this interface and improve it for those involved are also outlined, together with the current level of demand placed on the Justice system by the workings of the CSS.

The following chapters examine the qualitative data gathered from parents and legal professionals about their experiences of the system and how it actually operates.

2.1 The legislation

The *Children Young Persons and their Families Act 1997* provides the framework for Tasmania's Child Safety system and makes provisions for securing the welfare of children who are considered to be at risk of abuse or neglect. The Act sets out the legal framework and the responsibilities of Government, non-government services, the wider community and families in relation to the care and protection of children. The Act states that its Object is to maximise a child's best interests by ensuring a safe and stable environment for their upbringing. At the same time it recognises that a child's family is 'the preferred environment for care and upbringing', that family preservation and reunification must be promoted and that the best outcome for the child is to remain with their family of origin.

The 1997 Act, like its counterparts in other Australian states and territories, marked a significant conceptual shift from a 'bad parent/uncontrollable child' model to a 'family in crisis' model. This moved away from an adversarial justice approach, focusing on identifying fault and how to remedy it, to one which encourages a more therapeutic or restorative justice approach, focusing on identifying the problem and seeking solutions. A set of Principles guide how the Act is to be carried out in practice and promotes a partnership approach between Government, non-government agencies and families. With regard to the role of a child's family, the Principles state that:

- a high priority is given to supporting and assisting the family to carry out their primary responsibility for a child's care and protection, in preference to commencing proceedings;
- families are treated with respect at all times;
- removal only occurs when there is no other reasonable way to safeguard a child's wellbeing. Eventually they should be returned to reside within the family;

- contact between the child and family and community should be encouraged and supported to preserve and strengthen the relationships, whether or not the child resides with the family; and
- families have the right to be provided with information sufficient to enable them to participate fully in proceedings.

The legislation includes other Principles. In particular, the Aboriginal Placement Principle determines that as far as possible Aboriginal children are to be placed within their communities in order to preserve their cultural identity and contact with community.

The grounds for CS intervention are determined in the Act and cast in terms of the 'best interests of the child'. State intervention to protect children at risk of abuse and neglect is a particularly difficult area of the law because it involves balancing two competing interests: the best interests of the child now and into the future and protecting the family unit and the right to family life. Parents have legal rights in relation to their children only as long as they ensure their safety and wellbeing. Otherwise the State will intervene. However, they do have rights under the UN Universal Declaration of Human Rights and interference in the family can be seen as breaching those rights.

Child neglect and abuse is both a legal and a social problem. This means the law alone cannot give effect to the rights of children and families unless service systems that interact with the legal system are effective in responding to their needs. The legal and social aspects of protecting children influence each other so that stress in either system has negative consequences for the functioning of the other. For legal practitioners working in this area, this means that a narrow legal approach to justice is ineffective in terms of implementing the Principles of the Act. Knowledge of social systems and the support they provide for families is required to promote satisfactory outcomes.

Within this environment there is a growing interest in seeing families as an under-utilised resource. Some parents and other commentators have argued that the focus on the child rather than the child in the context of the family has impacted on the 'best interests' principle and the right to family, with negative outcomes for both families and children. Others would argue that the care and protection of the child should remain the sole basis for intervention by the state.

This research explores how far the intent of the legislation, as outlined in the Principles, is upheld by the system and implemented in practice.

2.2 The Children's Court

All Australian states and territories have a court-based system to determine applications brought by the CSS. Some jurisdictions have specialised Children's Courts dealing with both child protection and youth justice. Tasmania has no dedicated Children's Court and all matters arising under the Act are heard in the Children's Division of the Magistrates Court[4] by one of 12 generalist magistrates working across a range of areas in criminal and civil justice. Children's Courts are convened in Hobart, Launceston, Devonport and Burnie and there are Circuit Court sittings in a number of other regional areas.

Court-ordered child removal is the highest sanction the State can impose on parenting failure and is comparable only to the State's power to incarcerate. Removal of children is such a significant interference in family life that it requires independent judicial scrutiny and oversight. So the Children's Court stands independent of the CSS, children and parents and represents the community in determining issues which have a profound impact on children and their families. The Court determines how to ensure the safety of children, whether abuse or neglect has occurred, how to support and preserve families and whether reunification can occur. It has a role in monitoring the processes involved in CS interventions and Magistrates make decisions about a complex mix of legal, social and welfare issues in collaboration with services to solve family problems and to change behaviour.

Unlike the criminal justice system, which aims to prove guilt or innocence, the Court makes decisions about both legal and social problems on the 'balance of probabilities' and in 'the best interests of the child'. The legislation expands the Court role beyond adjudicating whether there has been abuse or neglect to enquiring into both a child's current circumstances and their future care needs. This makes the work of the Children's Court different to traditional legal proceedings, and it has been described as a 'legally protected framework for welfare investigation, assessment and promotion and the management of change' (Freeman & Hunt 1998).

The Court is closed to the public. There is little case law to guide judicial decision-making because the majority of cases are decided by consent, with few going to a contested hearing. These factors generate a sense of secrecy for some observers, with highly significant decisions being taken behind closed doors and beyond public scrutiny. At the same time it is vital to protect both parents and children in such sensitive matters by not airing them in public.

The Court operates in facilities and in systems designed primarily for the criminal law jurisdiction, with families mixing in the same buildings as those involved in criminal law matters. Attempts to mitigate this include listing matters at different times to criminal proceedings, but there is no separate building or entry for families in the CSS.

Like Children's Courts across Australia, the Court in Tasmania is seen as under-resourced, with increasing demand and workload impacting on its operations and reducing its scope to fully explore complex social problems or provide a last opportunity for parental change. This has fuelled a perception amongst some commentators that courts are failing to protect children whilst overseeing the inappropriate removal of children from their birth families; that the thresholds for removal are too low for those families challenged by neglect and poor parenting. Across Australia the Children's Court is increasingly under scrutiny to monitor what many see as unfair practice.

4 Referred to as the Children's Court in the remainder of this document.

2.3 The Child Safety system

Generally, families come to the attention of CSS through a notification from friends, family, neighbours or professionals when there are concerns about the safety or wellbeing of a child. The entry point for the statutory Child Safety system is though the Advice and Referral Service which receives notifications and undertakes initial enquiries. Those assessed as serious enough to require further investigation are referred to the Response team, who investigate the allegations of child abuse or neglect through direct contact with the child and their family and consultations with other services who know the family situation. Substantiation decisions, or whether a child has suffered harm or is at risk of harm, are usually made within a month of the start of an investigation. If substantiated the case is passed to the case management team, which specialises in working with families to address risk and to reunify children. A Child Safety worker is allocated to the case.

Working with families is guided by the Tasmanian Child Safety Practice Framework. It is based on the principles of building trusting relationships with families and caregivers and partnership working, and is relational, trauma-informed, strengths and evidence-based. A Signs of Safety[5] meeting might be held to identify the safety concerns, what is working well for families and what needs to happen to make sure the child is safe. A Family Group Conference (FGC)[6] might also be held and result in a Family Plan to address safety concerns. Work is guided by the Tasmanian Risk Framework, an evidence-based professional judgement tool to guide practitioners in assessing immediate safety and risk of future harm to a child.

If a parent is unwilling or not able to engage in responding to safety concerns and it is considered that the best interests of the child would be served by applying for an Order, the Child Safety worker and their team leader will report to the Court Application Advisory Group (CAAG). CAAG is held weekly and attended by managers and clinical practice consultants and educators[7]. It is also attended by a lawyer from the Child Safety Legal Group (CSLG). The CSLG is an independent statutory office located with the Director of Public Prosecutions and independent from the CSS. It consists of eight lawyers spread across the state who litigate any application made by CS and provide Court representation on behalf of the State. CAAG makes decisions about whether or not to proceed with applying for an Order and the type of Order to apply for.

A decision to proceed involves a formal application to the Children's Court with a supporting affidavit prepared by the Child Safety worker, giving the Department's assessment of why the child is in need of protection, the protective capacity of the family, any previous applications or Orders and referrals which have been made to support agencies.

5 Signs of Safety is a risk assessment, risk management and case planning framework designed to be used at all stages of the Child Safety process. It is currently being embedded across the CSS in Tasmania.

6 See page 24.

7 Clinical practice consultants and educators have recently been appointed to CS to take a lead role in clinical governance and promote and support high standards of practice across the CSS.

The affidavit may include independent assessment reports commissioned from experts like psychologists or psychiatrists. These reports provide information about whether a CPO is warranted and its length, parenting capacity and family functioning, mental health and substance use, intellectual and cognitive function, intergenerational trauma and the risk of family violence, and other specific issues which can affect a child's safety and wellbeing. Independent expert reports can be commissioned throughout care proceedings in order to inform the Court and the decision-making process. The matter is then listed before the Magistrate.

An initial decision that the child requires protection under an Order can lead to five outcomes:

- **Withdrawal** of an application for an Order as a family solution is found or there is a better understanding of a family's circumstances.
- A **Voluntary Care Agreement** between CS and parents which involves a transfer of guardianship or custody without going to Court. These agreements give the Secretary custody for three months when the guardian is temporarily unable to maintain adequate supervision and control over a child. They may be used, for example, when the mother is going into rehabilitation.
- A **Warrant**. CS staff may have to take immediate action to protect a child using a Warrant from the Court and an **Emergency Care Agreement**. This is used when there is a need for an urgent assessment to determine whether there has been harm and its impact. The police may provide support during the removal process. The child is placed in the custody of the Secretary for a maximum of five days. Any extension beyond that is a decision of the Court.
- An **Assessment Order**. These are generally granted initially for a period of four weeks. During this time the focus is on getting a clear picture about current and future risk and a case plan, directed towards reunification wherever possible. The assessment period allows for specialist assessments, an FGC and referrals to support services, with the development of plans to address the issues of concern. The Act allows for Assessment Orders to be extended for a further four weeks if there is ongoing risk. If an FGC has been called an extension of eight weeks is permitted. During the assessment period guardianship remains with the parent and the child may be removed or remain with the family. When a parent is unable to attend Court or a critical report has not been submitted to the Court the Magistrate can adjourn proceedings for up to 14 days. Only one adjournment is permitted in any proceedings for an Assessment Order. However, a child may be in the custody of the Secretary for up to 15 weeks or longer due to delays in communicating with relevant parties or obtaining further information and evidence.

- A **Care and Protection Order (CPO)** is made when it is decided the child needs longer term protective intervention. The child is removed to foster, kinship or residential care. In some cases the custody of the child remains with the Secretary with day-to-day care provided by foster carers and guardianship remaining with parents. In other cases the guardianship may be transferred to the Secretary with day-to-day care or custody being with a relative. The Act is flexible in order to allow the Magistrate to make an Order that best meets the needs of the child and to obtain and incorporate the wishes of the child about any placement. There are:
    - **Short-term orders** with considerable flexibility about their length in order to fit the circumstances of individual families. They are however unlikely to extend beyond 12 months. During a short-term order parental access to children is usually supervised but can move towards unsupervised access.
    - **Supervision Orders** where the child remains at home but is supervised by the CS case worker. Parents retain guardianship and parental responsibility. They have only recently been introduced and are usually for no longer than 12 months. Currently they are not widely used.
    - **Long-term orders**. These place the child under the guardianship of the Secretary until they are 18 years old with parental responsibility transferred to a person appointed by the Court. The focus is on planning for stability and permanence for the child and usually access to birth families is restricted by CS to a few times a year, although this is decided on a case-by-case basis. CS guidance suggests that 18-year orders should be considered when:
        - a child aged under 2 years has been in continuous care with carers for one year or more;
        - a child aged 2-7 years has been in continuous care for 18 months; and
        - a child aged 7+ years has been in continuous care for at least 2 years within 3 years of the date of the Order.

An Order can include conditions which must be observed by all parties, such as access arrangements or participation in family support and treatment programs.

CS considers that planning for reunification should ideally occur during the first six months of an Order and the process of assessment for reunification is considered to be continuous. Proposals to reunify must be presented to CAAG for approval, including any decisions about applications to vary an Order. CS workers are encouraged to work towards reunification with the child's immediate family, where possible, or with the extended family. A decision to reunify may also be the subject of an FGC or discussion via Care Team meetings and it may involve support during the reunification process internally from the Department or externally from the Pathway Home Service[8]. There must be an approved Case and Care Plan in place to support reunification with the family, carers and other services involved in its development. A Reunification Plan is also developed. This must be specific about the goal of reunification and the activities and timeframes associated with it, using the Reunification Readiness Assessment. This must be formally reviewed every two months.

8 Pathway Home is operated by NGOs and funded by the Department of Communities to work with CS and families to assist in the process of reunification.

2.4 Care proceedings

Child Safety proceedings are considered unique and differ to those in the criminal jurisdiction. They should be conducted in an informal manner that is not overly adversarial. Outcomes are not about winning or losing but rather about the Court making a fully informed decision in accordance with the Act and the best interests of the child. The Court is not bound by the Rules of Evidence[9] and can consider evidence on the 'balance of probabilities'. It may inform itself in whatever way it considers appropriate in order to reach a decision.

The Act stipulates timescales and the way in which cases are to be managed in care proceedings, including the duties of parties involved. The Court cannot grant a CPO unless they are satisfied that all reasonable steps have been taken to provide services to enable safety needs to be met at home and that the wishes of the parent and the child have been duly considered. Adjournments can be granted to gather more evidence, to obtain an assessment report, to enable parents to access legal advice or for parents to participate in a program or service that reduces the need for Court intervention. If parents oppose an Order the Magistrate can adjourn proceedings for a Court-ordered conciliation conference or alternative dispute resolution (ADR) to try and resolve the issues in dispute. If there is no resolution the matter can be listed for a hearing, where evidence is presented and witnesses are called and cross-examined. However, most matters in Tasmania are resolved before a hearing or shortly after it starts.

ADR is an umbrella term for processes other than a decision by the Magistrate in which an impartial third person assists those in dispute to resolve the issues between them. The focus is on collaborative working and decision-making and offering a less adversarial process for all relevant parties to identify the issues in dispute and to discuss ways forward. They provide an opportunity to hear the voices of children and their families and can result in the earlier resolution of cases and, by avoiding the need for contested Court hearings, substantial financial savings. All states and territories in Australia offer ADR during care proceedings. In Tasmania there are three ADR mechanisms conducted prior to any Court involvement to try and achieve a voluntary agreement or linked to Court processes with Court oversight of the outcome:

- **The Family Group Conference (FGC)** is an internationally recognised model developed in New Zealand which can provide the primary means for statutory decision-making. Under the Act an FGC can be requested by the family, the Secretary or the Court. A trained independent facilitator invites all considered relevant to the case to a meeting to help make decisions and plans for the safety of a child. If the child is mature enough they are also invited. If they identify as Aboriginal CS must consult with a recognised Aboriginal organisation and invite them to the FGC. An FGC can be used prior to any Court proceedings to create a 'space before the law is involved', achieve clarity about what needs to change and lead to a voluntary agreement. The FGC is often seen as delivering a 'wake-up call'

9 Rules of Evidence are the rules and legal principles that govern the proof of facts in a legal proceeding. They determine what evidence must or must not be considered.

to families who may then take the necessary steps to avoid legal proceedings. An FGC can also be called during care proceedings and is a requirement in the Act prior to any variation to a CPO. In an FGC the child can be legally represented by a Separate Representative but other parties cannot have legal representation. An FGC has four parts:

- introduction and information sharing where CSS provide a summary of the safety concerns, the strengths of the family and what needs to happen to ensure the child is safe;
- private time where the family stay together to share ideas and come up with a plan about how to support each other to meet the child's needs;
- discussion of the plan when the facilitator brings the group back together. The Family Plan is then put in writing and signed by all those attending; and
- the Family Plan must then be agreed by the Secretary if it is developed outside of legal proceedings. If the FGC is held during Court proceedings only the record of the agreement, not the substance of the discussion, is submitted to the Court. The Magistrate then sanctions the Plan and action is taken to implement it.

- A **Section 52 conference** is a Court-ordered conference between the parties held as part of care proceedings. Facilitated by the Magistrate (in the North West) or a qualified convenor employed by the Court (in the South), stakeholders and their legal representatives meet to see if they can reach an agreement about what action to take to resolve the case and avoid a full hearing. Decision-makers are required to be present and a decision is made on the same day. Again, all discussions are confidential and only the final decision is submitted to the Court and independently reviewed by the Magistrate, including parental consent to an Order. Most care proceedings will involve at least one Section 52 conference and many will involve several in order to reach an agreement.
- A **Separate Representative conference** can be convened by the Separate Representative, who is an experienced family law practitioner funded by Legal Aid to represent the child and act in the child's best interests. The conference brings all stakeholders together to identify issues and seek resolution in the interests of the child and in the context of their family and right to family life.

During all proceedings the CSS, as a representative of the State, has a duty to exercise statutory functions in accordance with 'model litigant'[10] principles. This means they must conduct any litigation in a way that is firm and fair and does not take advantage of another party's limited financial or other means. It means ensuring that:

- Court summons are served in a timely manner to all participants;

10 Model litigant principles are guidelines for how a government body ought to behave before, during and after litigation with another government body, a private company or an individual.

- sufficient, relevant and appropriate evidence is filed in support of applications in an affidavit which includes information that both does and does not support the application;
- all relevant information and all information requested is disclosed to parties;
- applications are progressed as quickly as possible to avoid unnecessary delay and include exploring opportunities for early resolution;
- proceedings are conducted in a way that assists the Court to make fully informed decisions and that is fair to other parties, especially those who are unrepresented; and
- a CSS officer with relevant case knowledge attends all Court appearances or is otherwise available.

Once Orders are made the Court's role ends and the Magistrate has no further contact with the family or knowledge of the longer-term outcome for them.

2.5 Making a complaint

Outside the legal system there are internal complaints processes within Children and Youth Services where parents can lodge a complaint or ask for a review of any decisions about care arrangements. These processes involve, first, a request for a review at service delivery level, preferably in writing. If this is not satisfactorily resolved it can be escalated to a review at Area Director or Statewide Manager level via a formal complaint. Efforts will be made to try and resolve the complaint and/or review the decision through an internal review. The outcome will be communicated via letter.

If a parent is not satisfied with the outcome of the formal complaint, a request can be made for the complaint to be referred to the Deputy Secretary, who can convene an external review by an Advisory Panel within seven working days following referral. The role of the Advisory Panel is to provide an independent review of decision-making about assessment decisions, access arrangements, placement and care and the education and health of the child. The panel cannot review Court decisions.

Complaints can also be made to the Commissioner for Children and Young People Tasmania.

Finally, any complaint or decision can be reviewed by the Tasmanian Ombudsman, who is able to investigate complaints related to the Tasmanian Government. The Ombudsman is independent of the Government and will review complaints to make sure that procedures have been followed and that the complainant has been treated fairly.

2.6 Legal Assistance

In an adversarial legal system effective access to justice usually requires assistance from a legal advisor or representative. In Tasmania government-funded support for parents and families involved in care proceedings in Tasmania is available from:

The Legal Aid Commission Tasmania. This is a statutory body operating at arm's-length from Government that delivers a range of legal services to economically and socially disadvantaged Tasmanians to enhance their access to justice (LACT 2019). The Commission provides community education legal sessions to the public, a website with information resources, a telephone advice service run by lawyers, face-to-face advice in regular clinics and duty lawyer services in the Courts. Although there is not a specialist Child Safety duty service, duty lawyers operating in the Magistrates Court in the South of the state can offer legal assistance, representation and referral on the day of a Court attendance, but are unable to provide ongoing services. The Commission provides facilities for mentoring, conferencing and ADR processes, and training and continuing education for professionals involved in care proceedings, often in partnership with the CSS, the Law Society, FLPAT and allied healthcare professionals. This includes specialist training for Separate Representatives.

> LACT supports a team of in-house lawyers providing Legal Aid funded advice and representation services. This makes it the largest statewide provider of legal representation to parents and children in the Tasmanian CSS. In addition the Commission makes policy submissions at both a state and national level.
>
> LACT also provides **grants of Legal Aid** to fund lawyers to act for both parents and children who cannot afford the services of a private lawyer to advise and represent them in care proceedings. The Federal Government sets the priorities for Legal Aid funding, the State Government sets Legal Aid funding levels, and the Commission determines eligibility for Legal Aid via a means test and a merit test (which assesses the extent and nature of any benefit from a grant of aid).

Private law firms. Of the 122 private firms in Tasmania, only a small percentage are involved in any significant CS work funded by Legal Aid grants. The majority of parents will qualify for an initial grant of Legal Aid and therefore some advice from a lawyer. However, they cannot necessarily access enough Legal Aid to support them throughout care proceedings, particularly if the case goes to a contested hearing. Most parents in the CSS are unable to afford the services of a private lawyer, but law firms can also provide assistance on a pro bono basis, (meaning for the public good) where they act for parents for no fee or at reduced rates. Pro bono work is considered when cases concern public legal issues where applicants are likely to suffer serious social injustice without legal representation and who are not eligible for a grant of Legal Aid or whose application for Legal Aid has been rejected. However, the majority of parents would not have access to pro bono representation.

- **Community Legal Centres (CLCs)** provide free general advice, referrals and signposting for those who are socially or financially disadvantaged, who cannot afford a lawyer and who may not be able to access Legal Aid funding because they cannot pass the means or merit test. This includes parents involved with the CSS. In Tasmania there are three generalist CLCs, one in each region, and they estimate that up to 10% of their work has a Child Safety element. They are unable to offer legal representation. There are also more specialist CLCs: a Women's Legal Service, the Tenants' Union of Tasmania, the Tasmanian Refugee Legal Service and the Tasmanian Aboriginal Community Legal Service (TACLS), who do offer representation services. TACLS was established in 2015 and currently operates as a branch of the Victorian Aboriginal Legal Service. They estimate that approximately 15% of their work is Child Safety related. Funding for advice and representation is accessed through the national Indigenous Legal Assistance Program rather than the local Legal Aid pool and they aim to deliver a more culturally appropriate legal service to ensure Aboriginal people get the help they need.
- **Community service organisations (CSOs)** also provide advocacy and support for parents 'by default' i.e. it is not their core business but they assist parents with financial or material support, communicating and working with CS and lawyers, providing emotional support and facilitating referrals to other services (Hinton 2018). They cannot provide legal expertise but may have legal knowledge and understanding which allow them to guide parents and perform an interpretive role for both parents and lawyers about the complexities of an individual case.

Tasmania was previously home to two organisations providing more dedicated support and advocacy for parents in Court and legal processes. These were:

- **Family Inclusion Network Tasmania (FINTAS)**. This was established in 2008 as a volunteer organisation providing advocacy and support through a core group of volunteers. FIN worked closely with legal professionals to support parents referred by LACT, CS and other service providers. It helped parents prepare for meetings and Court hearings and if possible attended them with parents. As well as providing emotional support, it linked them into services including legal assistance. Despite demand for its services, FINTAS closed in 2013 when the voluntary effort and lack of resourcing became unsustainable.
- **Parent and Family Advocacy Service (PFAS)** run by the Red Cross operated in the South of the state. It was established in 2013 to provide advocacy and support for families in the CSS and assisted with documentation, communications with CS and legal processes, including attending Court hearings with parents. It aimed to improve parent understanding of CS procedures and processes and of their rights and responsibilities, and to empower them to be able to advocate for themselves. The funding for PFAS was withdrawn in December 2018.

Those whose application for a Legal Aid grant is rejected fall into the 'justice gap'. The number of people experiencing this gap is growing every year and there is now a consensus across Australia that recent cuts to Legal Aid funding, and a systemic underfunding of the legal assistance sector more generally, has brought the system to

breaking point (Law Council of Australia 2018). Although Tasmania has not experienced cuts to Legal Aid funding, neither has it experienced any growth. This lack of funding has led to a loss of early specialist legal advice, uneven provision across the country, a negative impact on good quality decision-making and an inability to provide a safety net for vulnerable people struggling to navigate a complex system. In 2014 the Productivity Commission recommended that Legal Aid funding should be boosted by $200 million, but this has not been implemented (Productivity Commission 2014). More recently a *Legal Aid Matters* campaign was launched by the Law Council of Australia to press for more funding for Legal Aid and ensure equal access to justice for disadvantaged and vulnerable people.

A recent review of legal assistance services in Tasmania looked at their current effectiveness in addressing the legal needs of vulnerable people and whether changes to the sector are required (DoJ 2018). As well as recommending better coordination and targeting for services, the review identified self-represented litigants in CS proceedings as of particular concern. It recommended that the LACT should give greater priority to grants for unrepresented parents in the CSS.

2.7 Recent reform

In recognition of the challenges and issues parents, legal practitioners and CS face during care proceedings, a number of changes have been introduced which impact on legal processes.

THE CHILD SAFETY SYSTEM

The current redesign of the CSS aims to more effectively support families prior to reaching crisis point, reduce the numbers entering OOHC and renew a focus on keeping families together or expediting family reunification (DHHS 2016). To ensure that legal processes better reflect the direction of the redesign process, reforms have included:

- **Investment in Intensive Family Engagement Services (IFES)** to provide intensive support to those families on the cusp of legal proceedings. It is suggested that this may be leading to a fall in applications for Orders.
- A renewed interest in **promoting the use of FGCs** to engage families and divert them away from the Court system.
- The appointment of **Court Coordinators** to provide a stronger, more skilled professional nexus between CSS and the legal system. There are now coordinators in each region in the North and North West and two in the South. They support and train CS workers involved in preparing affidavits for Court Order applications and offer a liaison service for lawyers working in this area. It is anticipated that they will improve the quality and timeliness of CS information supplied to the Court and compliance with the Rules of Court. They also hope to impact on the tensions implicit in Court work where the CS objective of working constructively with families to address safety concerns can be hindered by entry into an adversarial legal process.

- Rolling out the **Signs of Safety** practice framework across the CSS to better develop a collaborative partnership with families, improving their engagement, assessing risk, promoting insight and producing an action plan to increase safety.
- **Vulnerable Unborn Babies and Infants Strategy** (DoC 2018b). This responds to the high rate of notifications and removals relating to infants under one year. It aims to strengthen collaborative and integrated service responses to identify vulnerable unborn babies and infants early and link families into the support they require via safety planning procedures, Family Meetings and the introduction of Supervision Orders that allow children to remain at home.
- **Developing a permanency framework** to achieve stable long-term care arrangements for those in OOHC and prevent 'drift' in care (DoC 2018a). The framework has the potential to affect the work of the Court by imposing stricter timeframes on creating permanent arrangements for children, and the time available to families to addressing safety concerns and seeking reunification. This is a concern in an environment characterised by a lack of support services to assist parents with improving their chances of reunification and family preservation.

THE LEGAL SYSTEM

- **Amendments to the Act.** In 2013 amendments were introduced to provide more flexibility in the length of CPOs available to the Court, including a greater use of Supervision Orders (implemented in 2018) to allow a child to remain in the family home by ensuring there are opportunities to deal with safety issues. These amendments enable Magistrates to more accurately assess and respond to individual cases and give them the ability to instigate more realistic timeframes for parents to make the necessary changes required to address safety concerns that are better tailored to their individual circumstances. The legislation was also amended to ensure that the Rules of Court which govern the procedures and conduct of the Court are implemented. This has focused on more pro-active Court case management of individual cases to improve the efficiency and timeliness of processes and decisions.
- **The Family Law Practitioners Association Tasmania (FLPAT)** provides a voice for family lawyers in the state and works to ensure better practice. In recognition of the problems faced by lawyers representing parents in the CSS, FLPAT has established a Child Safety sub-committee. The committee intends to raise the profile of CS work and offer training and professional development to its membership practicing in this area.
- **TACLS** is currently working with the Department to establish a system whereby they are automatically notified by CS about Aboriginal families facing involuntary child removal.

- **Interface with the Family Court**[11]. There is a growing interest in improving the interface between the Family Court and the Children's Court. Numerous enquiries have sought to address the fragmentation this causes for families involved in both systems. The Magellan program[12] was developed to deal with Family Court cases involving serious allegations of physical and sexual child abuse. It has information sharing procedures with the CSS system and rigorous judicial management, including the imposition of strict timeframes. The Court is able to order expert investigations and assessments from the CSS and make appropriate interim orders to protect children until the matter comes to trial. A committee has been convened by the Family Law Court, the Family/Federal Circuit Court and the CSS to bring together key stakeholders, including the police and the LACT, to discuss the interface between the systems and improve it.

2.8 Demand on the Justice system

As elsewhere in Australia, the number of Tasmanian children and young people in OOHC continues to increase. Over the five years from 2014/2015 to 2018/2019, numbers increased by almost one-third (31%). By September 2019 there were 1,326 children in the OOHC system (AIHW 2020; DoC 2020). Compared to other Australian jurisdictions, numbers are higher in Tasmania as a proportion of the population, third only to South Australia and the Northern Territory. Those in OOHC now represent 9.8 per 1,000 population, compared to the national rate of 8.0 per 1,000 (AIHW 2020).

The rate at which Aboriginal children enter the OOHC system is much higher than the rate for non-indigenous children. Nationally the rate of entry for Aboriginal children is eleven times that for non-Indigenous children. In Tasmania the rate of entry to OOHC is three times the rate for non-Indigenous children (AIHW 2020).

Figures are not available for the percentage of families involved with the CSS who have concerns of harm and risk investigated, substantiated and who cross the interface into the Justice system. However, emotional abuse is the most common reason for substantiating an investigation and accounts for almost half (46%) of substantiated cases. This is followed by neglect, accounting for 30%, with lower rates for physical abuse (16%) and sexual abuse (18%). Between them emotional abuse and neglect account for three-quarters of those cases where a substantiation may lead to application for an Order and entry into the OOHC system. Some Orders will relate to children from the same family and the same child may have multiple Orders during the course of a year, so it is difficult to calculate the number of families these figures represent (AIHW 2020). However, they do show that increasing numbers of families involved with CS are entering the Justice system for issues relating to emotional abuse and neglect, which are commonly linked to poverty and disadvantage.

11 The Federal Family Court deals primarily with the financial and child care and support arrangements for separating families.

12 Established in 2003, the Magellan program deals with Family Court cases involving serious allegations of physical and sexual child abuse. It provides a fast-track program based on an interagency collaborative model of case management to respond to these cases and provide quicker resolution.

Data from the Magistrates Court shows that 983 'lodgements' or applications were made to the Court for Orders during 2018-19 (Magistrates Court 2019). In terms of the overall work of the Magistrates Court, applications for CS Orders represents just 3% of total lodgements, which covers adult and youth criminal justice, civil claims, Family Violence Order applications and the Coroners Court. However, CS cases tend to be longer and more complex than others and, alongside those in the Youth Justice Court, require more attendances to resolve a matter. As would be expected from rising numbers of children entering OOHC, the data shows a steady increase of 49% over the past five years in the number of applications lodged by the CSS. In just the last year there has been a 16% increase in lodgements, or an extra 135 applications, imposing an additional workload on both the Court and the CSS.

In terms of the type of Order lodged, there were significant increases in applications for Assessment Orders and CPOs, alongside a marked decline in applications to revoke a CPO. There were:

- 256 applications for an Assessment Order, a 27% increase on the previous year;
- 393 applications for a Child Protection Order (CPO), a 26% increase on the previous year;
- 211 applications to extend or vary a CPO, a 7.1% increase on the previous year;
- 13 applications to revoke a CPO, a 28% decrease on previous years; and
- 110 'other' applications for a CPO under the Act, for example applications for a Warrant or Emergency Care Agreement to take a child to place of safety.

Accessing quantitative information about the processing of cases through the Court is difficult. Without manually scanning individual Court case files, data was not available on the number of attendances in the CS jurisdiction with no legal representation, how many families are represented throughout proceedings or the number of adjournments and the reasons for them. It was also difficult to extract information about the number of Section 52 conferences ordered by the Court and the number of contested hearings. It is suggested that at any one time 15 to 20 contested hearings are being prepared by the CSS. However, few go to a full hearing and parents will either drop out before the hearing begins or shortly after it starts, with very few going through to finalisation.

A national framework of performance indicators assesses the performance of Magistrates Courts and provides some information about the effectiveness and efficiency of Court processes. These indicators show growing delays in processing cases as demand increases. The Backlog Indicator (a measure of effectiveness in relation to timeliness and delay) shows a 27% increase in cases pending completion on the previous year. Backlog is not necessarily within the control of the Court. It can be affected by factors other than Court efficiency in processing cases, for example a party not being ready to proceed. However, the Clearance Rate (an efficiency measure of processing the inflow of cases through the Court) also shows an increase in the pending caseload of the Court.

At the same time there has been a gradual decrease over a five-year period in the Attendance Indicator, or the average number of Court attendances required in order to resolve a matter. It currently stands at 4.7 attendances for care proceedings, decreasing from 5.4 in 2014-15. Fewer attendances may suggest more effective processes, for example through greater use of ADR. Yet attendances will also increase with more intensive Court case management, a direction which many participants in this research supported.

Data available about applications for Legal Aid funding can also assist in quantifying what is happening to families in the Justice system. The approval rate for CS applications under the Act is approaching 90% (LACT 2018). However, these figures do not show what proportion of these grants were for Separate Representatives for children as opposed to legal assistance for parents. A snapshot picture over a six-month period in 2017 indicated that over half (roughly 61% of applications) were to parents and grandparents, and it is suggested that most parents will receive Legal Aid at least for initial advice, if not for representation throughout the course of proceedings. The latest annual report shows a 15% increase in Legal Aid grants for CS matters (LACT 2019).

What these figures indicate is that demand on both the CSS and the Justice system in the CS jurisdiction is rising year on year. The number of CS lodgements in Court and applications for Legal Aid are increasing while the ability of the Court to process cases in a timely manner is decreasing. This view was confirmed by the Court which is seeing a steady increase in their workload.

CHAPTER THREE

Access to Legal Advice and Representation: Experiences of parents and lawyers

This chapter explores the experiences of 36 parents in accessing legal advice and representation and of the lawyers who provide it. It looks at pathways to getting legal advice and Legal Aid funding, the experience of appearing in Court, what it means to represent parents and what a quality legal service looks like. Lastly it describes what it is like to be unrepresented and the impact of this both on parents and on the Court system.

3.1 The challenges faced by legal practitioners

What kind of challenges do lawyers face in representing parents? Those responding to the survey were asked about what was working well in the current system for parents and about the challenges. They commented favourably on a number of aspects of the legislation, such as the presumption of reunification, and on the impressive work of some individuals and agencies in supporting families to tackle the issues that had brought them into the system. They were also complimentary about the ADRs embedded in legal processes and the opportunity this gave parents to express their views. However, overall they identified a 'broken system'. As one lawyer said:

> My immediate gut reaction is 'almost nothing' [is working well]. I have heard that more money has been put into providing services to avoid Child Safety taking action with a parent, the parents on the cusp. I cannot comment broadly but the fewer parents involved in the legal system the better. The system is clearly broken and once involved it's a mirrored maze to get out. (lawyer)

Lawyers reported encountering a range of challenges in advising and representing parents. These are listed in Table 1. In order to get a sense of how prevalent the challenges are, respondents to the survey were asked how far they could be applied to cases on their caseload in the previous two years – all cases, the majority of cases, the minority, rarely or not at all. The nature of these challenges will be examined in more detail in this and following chapters. However, what the survey and one-on-one interviews with lawyers demonstrate is a striking consensus amongst legal practitioners about the difficulties they encounter in representing parents and their prevalence. Their views about the system closely mirror those described by parents.

Table 1: Representing parents: challenges encountered by lawyers 2017-2019

Type of Challenge	Lawyers experiencing challenge in 'All' or 'Majority' of parent clients in last two years (n=37) %
Negotiating access/keeping the Department accountable for access arrangements	89
Availability of supervision services for access visits	86
Duration of proceedings	72
Non-compliance with the Rules of Court	72
Lack of access to support and therapeutic services	72
Inadequate levels of Legal Aid funding	67
The evidence used to make decisions	64
Late access to legal advice	62
Commissioning and use of expert reporting	58
Managing the gap between the role of the lawyer and parent expectations	54
Difficulties engaging with parents	41
Incapacity of parents to provide instructions	27
Working with intellectual disability	27
Cultural considerations	21
Interface with the Family Court	17
Own levels of skills and experience	12

In addition, working alongside and communicating with the CSS was identified as a further key challenge by both survey respondents and those lawyers involved in individual interviews.

3.2 Pathways to legal advice and representation

In an adversarial legal system access to good quality legal advice and representation is considered essential in order to protect the rights of parties and ensure proceedings are properly conducted. The Court relies on parties to present the main facts and arguments of the case and this can usually only occur effectively if the parent is properly represented. The consensus view is that representation cuts the time and costs incurred during Court proceedings and Magistrates strongly prefer parents to be represented. However, parents were not always able to access help from a lawyer or access it at an early enough stage in proceedings. They described a multitude of pathways to getting legal help.

A parent's first contact with the Justice system is usually in relation to an application by CSS for a Warrant and Emergency Care Agreement, an Assessment Order or a Child Protection Order (CPO) and a summons to Court. This may be after a child has been removed or when the family is threatened by removal. Typically, in our sample, parents described removal as occurring with little previous contact with the CSS on a five-day Emergency Care Agreement. A number were told at the time of removal that this would give them some respite from the challenges they were dealing with and a breathing space to sort themselves out:

> At the time I couldn't read. They wanted me to sign a form. They told me it was for five days because of the family violence to help me get settled back in and stuff. So, under the pretension that this would be great and keep my kids really safe I signed it. I was very upset that they were taking them at all and very scared as I was a welfare child myself. But at the same time I thought it's five days, they are going to come home in five days. Then I went to my mailbox and I found a summons to appear in Court to fight for my kids. I just froze. I was told over the phone and then served the next day. When I asked do I get to see the boys they said not until after Court. They said they were going to take a 12-month Order and would keep the boys. That's when I went downhill. I went and got alcohol and started drinking a lot. That's why it took me so long to get my kids back because the depression kicked in and because they were the only things in my life it was worth being around for. They were my everything. (parent)

Previous research has documented what happens to families when children are removed and the 'collateral consequences' of child removal (Broadhurst & Mason 2017; Fidler 2018; Hinton 2013, 2018; Ross et al. 2017). The stress, grief and trauma can be compounded by steep losses in income, an escalation of coping mechanisms like drug and alcohol use and an exacerbation and deterioration in already existing problems such as mental health, domestic violence and substance use. Four parents in our sample were homeless at the time of removal, with their housing situation being a major factor in the decision to apply for an Order. Several described how a request for help from CS, for example for a few days' respite to help them through a crisis, had led to an application for an Assessment Order and the children not being returned. This was especially traumatic when a child was removed at birth, and led to a sense of being deceived by the system which had removed their children even though they were asking for help.

> All of a sudden the kids were gone with no explanation. They are not willing to participate in a discussion straight away with the parent. They just want the children out of the scene with parents upset, stressed out. What can you do? It's like your world has been taken off you pretty much and when you're in a vulnerable state like that it's very hard to think what to do next. You are in a state of trauma and breakdown and it's really hard to go from there to what do I do next. (parent)

In some instances informal agreements had been made that the children would be removed into kinship care and it was initially resolved out of Court. Some parents experienced a lengthy period of time between removal and the Court summons, and one mother said: 'It was kind of like they were kidnapped. That is what it honestly felt like. We didn't have any information about what was happening, what we did wrong.' However, whatever the circumstances, parents described both the practical challenges and their emotional state post-removal. As one parent said, 'once your kids are gone your world spirals into chaos.'

> They take your kids and then just leave you to your own devices. Honestly, I was that suicidal it wasn't funny and I can see why people do kill themselves when they take the kids. The way the workers talk and stuff, they just terrify you and they don't give you much hope. It's all about preparing this case to get that Order. They just tear you down to bits. I was that depressed. I just could not cope. I was just a big mess. (parent)

It is at this point of crisis, and sometimes within hours or days of giving birth, that parents become involved in the legal system and seek access to legal advice.

There were two main pathways to legal advice. Firstly, there were those who had no prior experience of the legal system and certainly no experience of care proceedings. They commented on a distinct lack of information about how the system worked or how they might engage with it as a parent. This lack of basic information immediately put them at a disadvantage. This was compounded by what they described as a failure on the part of CS to advise them to seek legal help. Although advising parents to seek legal advice and referring them to the LACT is considered part of standard CS practice, parents reported inconsistency in whether this occurred and at what stage of the proceedings. While some had been advised to get a lawyer, three parents reported that their CS worker had told them it was not necessary to have legal help for the initial stages of care proceedings. In one case a mother had been advised not to get legal advice because 'they [CS] wanted to keep it in-house'.

> I went to Court with no legal advice. Child Safety might have advised me to get legal advice but at the time I was pregnant and everything was a blur. Child Safety did advise me to get legal help after a while. I was doing it on my own to start with. The caseworker, he said Court is going to be this date and you are going to need a lawyer. (parent)

In order obtain legal help, parents first need to know that they are in a situation which requires legal advice. A minority of those who had no previous contact with the legal system said they did not realise they might need a lawyer and certainly did not know how they might find one. With no prior experience of Court or care proceedings and no existing relationship with a lawyer, it was not unusual to seek help some time after proceedings had begun:

> They didn't tell me to go to a lawyer. To be completely honest I didn't understand very much. I wasn't as bright as I am now, I couldn't read. I was like what do I do, I don't know what to do in Court. I didn't even know what Court even is. I couldn't read any documents, I had no family support. It was just me and my kids. I didn't even know what a lawyer was properly. I had no idea. I didn't even know I needed a lawyer. (parent)

Some had gone straight to the LACT, who had either taken on the case or referred them to a private law firm doing Legal Aid funded work. Others had been advised by support services they were already in contact with or other family members or friends in similar circumstances who recommended particular lawyers or advised them which law firms to approach. One parent said, 'It was my auntie who got the lawyer. I don't know how she did it.' But there were also those who said that, although they knew they should seek assistance from a lawyer, they were too depressed, anxious or distressed to take the necessary steps. One parent said, 'When they first took her I suffer from depression. I didn't want to leave the house so I never got a lawyer.' Parents also described their fear of involving lawyers and a concern that contesting the actions of CS might prejudice their case, affect the working relationship they had developed with the CS worker or affect the kind of access they had to their children:

> Child protection recommended I get a lawyer. I was afraid. I thought this is getting serious. Up until that point I was communicating with them very well, I was negotiating with them. But the report [from a psychologist] turned everything upside down. (parent)

> I didn't want to go for a lawyer because then I might lose the kids for good. I was scared. I didn't want the visits to stop and I was scared if I fought them now that they might stop visits and stuff like that. Child Safety are very powerful. If you are fighting them for your children you feel like they can stop your visits and stop you having your children. (parent)

The second pathway to legal advice was through a parent's previous experience with the legal system, either with the Family Court or the criminal justice system. This meant they had some understanding about how to get legal help, or they returned initially to a lawyer who they had worked with in the past:

> We weren't advised to get legal advice but I had already been in the system before so I already knew. My partner had, in her younger days, a couple of drink driving charges, stealing, so she had a lawyer who actually cared for her in the past. She didn't even want the money to help us. We were fortunate in that area. (parent)

However, finding a lawyer willing to take on a case was not necessarily straightforward. Some described a lengthy search for a lawyer prepared to work in the CS area and a race against time to get advice prior to attending Court for an interim Order. One parent said, 'The minute I said Child Safety the lawyer just treated me like crap. They treated me like a criminal.'

> I went to a whole bunch of lawyers down Devonport and Burnie. I only had about a week to find a lawyer. I was calling every lawyer place. A lot of them said we don't do family related cases. I called a couple of Launceston ones but they wouldn't travel to Burnie for the Court. Either they didn't do family matters or didn't travel. They gave me a date for Court and I thought what do I do now? (parent)

Women in prison can face particular difficulties getting legal advice and little help from the CSS in negotiating their legal situation:

> Many girls are unable to access legal help from jail. If your kids got taken the night you got locked up there is no lawyer for you regarding the kids. The kids get a lawyer and representation but you get shit. As a parent in jail the legal system isn't available to you. Child protection give no help to keep you and your child together. It's what they're all about, keeping the family together, but they don't say look we've got this team of legal advice or here's an office number you can ring and someone in there will give you contact with lawyers. (parent)

3.3 Access to Legal Aid funding

Legal help is very expensive and few parents can afford to hire a lawyer. This means that most legal assistance for parents is funded by Legal Aid. Once parents found a lawyer, many encountered an upfront fee of $60 to cover the administrative costs involved in an application for Legal Aid. Although this fee may be waived for some parents, combined with the loss of income associated with child removal and the travel and transport costs inherent in trying to find a lawyer, paying the fee could be a challenge:

> I had to pay an upfront fee of $60. It was something that I had to do so I just found the money. Looking back now I couldn't afford it. When you're on Newstart paying the $60 is difficult. But I did because I knew I had to. It wasn't like something you could put behind you and pretend like it's not happening. You have to go and do it, otherwise if you don't show up to Court they will use that against you and they will make a decision without you and I can't have that happening. You really have no choice. (parent)

Eligibility for Legal Aid is determined by the LACT grants office and requires passing an income and assets test, a merits test (whether the matter has merit or a reasonable chance of success in Court) and fitting into a priority client list as defined by the Commonwealth. Applications are made through the lawyer with funding being granted in 'lumps' or to

cover the next step in the process. At least initially, most parents involved with CS will pass the tests and have access to varying amounts of Legal Aid to cover advice and representation in Court during initial care proceedings and/or a Section 52 conference.

As lawyers described, the bulk of work with parents is funded by Legal Aid (over 80% of cases in our survey). However the limited Legal Aid pool in Tasmania means that there is often inadequate funding for representation throughout proceedings and/or if a contested case proceeds to a hearing.

> Families are facing the loss of a child. There should be funding available to contest an Order, provide advice and understanding and representation and support, but there isn't. It's a terrible system. Families in this sector, there are literacy issues, there are drug problems, there is intergenerational poverty, all of those factors that contribute to making this experience what it is. They don't have a voice, they feel powerless, and Legal Aid [funding] is limited by access to a pool which is not enough. Families can get free assistance and advice through the clinic and advice line but there is no ongoing comprehensive legal assistance and representation. A grant of aid may go to preparing documents or fund conciliation but no further, and they are then on their own. It adds to the struggle. People don't turn up to Court or Orders are made in their absence. The fallout from that is quite significant and it defies any sense of natural justice. It is stupefyingly complex for lawyers let alone unrepresented parents. Only about half of the parents get Legal Aid and the rest are obliged to represent themselves. (lawyer)

Two-thirds (67%) of lawyers responding to the survey stated that inadequate levels of Legal Aid were a major challenge in the majority of their cases with parents over the past two years. It meant that some matters which should be litigated (i.e. argued in Court) were not due to a lack of funding for time in Court. For example, Legal Aid might cover two or three Section 52 conferences, but when there was no resolution the parent would be forced to self-represent at a contested hearing.

Lawyers commented on the application of the merit test and the extent to which this meant the pre-judging of cases by grants officers rather than the judiciary. When applications are rejected the applicant can ask for a review. Although the research was unable to access figures about parents' use of the review process, questions can be raised about their understanding of the process, how far they used it and the impact of waiting what can be a period of weeks for the review to conclude.

> It's a hard test [the assets test]. You may be working but you're certainly not well off, you are working poor. Casual workers, seasonal workers who technically may not have a health care card but who fail income tests for some minor asset like a vehicle, and you expect them to sell it to pay for legal practitioners. The merit test is the bigger issue. You have those that qualify on assets and income but because there is such a pull on the resources of Legal Aid [funding] they just have to allocate resources to the worst of the worst. Others who would have traditionally qualified are missing out. I am sure not as many people seek a review as should do because of literacy, numeracy, circumstances and time, and they only have a short time frame to ask for a review. (lawyer)

Lawyers commented that the situation was getting worse and the level of grant aid has not kept pace with the costs. If successful, a Legal Aid grant provides fixed fees for lawyers at an hourly rate. These rates operated as a financial disincentive for lawyers in private law firms who had to meet budgetary constraints imposed by the firm. $70 is payable for a mention (or appearance) in Court. When adding up travel costs and waiting times to appear before the Magistrate it made the work unprofitable and hard to achieve a reasonable return. This reduced the pool of people prepared to do the work, operated as a barrier for experienced lawyers and contributed towards a perceived lack of regard for the complexity of the work. This has led to a perception among some lawyers that CS work is a training opportunity for new and inexperienced lawyers:

> The representation they get is invariably through Legal Aid [funding] because they can't fund an independent [or private] lawyer. Some of those lawyers are often early in their career, so they are not necessarily very experienced. There is a major deficit in terms of the knowledge base from which the lawyers work. Many of them simply have a law degree and function within a fairly narrow perspective. They don't necessarily have any knowledge about child development or family dynamics, which I think is a requirement if you are going to function within this arena. Because they get poorly paid, parents often complain about how little time a lawyer will devote to their case. They get very little time with the lawyer so they don't necessarily feel they are getting good representation. So there is an issue about the remuneration of lawyers which inhibits getting good representation. (lawyer)

> In the past an initial grant of $1,000 would cover initial investigations, a Court appearance, affidavits and liaising with the Child Safety Legal Group. Now that initial grant has been reduced to $325 which doesn't necessarily cover any appeal. A mention is when you're going before the Magistrate. It may the first or second appearance and you're asking for a Section 52 conference, or you're telling the Magistrate that you are getting a report. Often because the Court lists are running late and there's lots going on you're not there for half an hour, you're there for an hour and a half or two hours. You can wait from 3 to 5pm for a mention which then takes three minutes. There are multiple hours of a day that I can't bill for and I have to account to my superiors for what I was doing. It can be difficult to convince firm partners of the value of meeting the cost and there is no unit code for 'waiting for the Magistrate'. It can be very frustrating going down to Court on no money whatsoever. (lawyer)

Having the case represented by an inexperienced junior practitioner is a significant issue for parents, impacting on their chances of success with a Legal Aid application and on the final outcome of proceedings. One lawyer said:

> I fell into Child Safety as a junior. You tend to get given the files if you're doing family law. I just found it quite bizarre that it's an area that is so serious and has such serious ramifications and it is handed to the junior lawyer. That's how you learn, but

> it's an area I had received barely any training on. We have professional development coming up on it but it's very rare to have professional development in this. I feel like it's been an area which has been neglected. (lawyer)

There were a small number in our sample who did not have access to a grant of Legal Aid and were faced with large bills to get legal advice and representation. Either they were in employment which excluded them through the assets test, or they considered that they would get better advice and support if they could pay for a lawyer. They described borrowing money, going on a payment plan or just 'going without' to cover the costs.

> I didn't have Legal Aid [funding]. I paid for a lawyer. I was angry, I thought I'm not going to Legal Aid. I just went to a lawyer. She was out on her own. She didn't charge me in the end. She charged the first visit and then after that she didn't charge me. (parent)

In some cases where Legal Aid had been refused, the lawyer acted for them on a pro bono basis or on the understanding that they would pay by instalments when their financial circumstances improved. Among survey respondents, 7% of caseloads had been represented on a pro bono basis either at no cost or at dramatically reduced rates.

Hiring a private lawyer was something that a number of parents in the research aspired to, and lawyers identified advantages and disadvantages for parents. As they commented, on the one hand it was likely to mean being represented by a lawyer with less experience in the area and without the same collegial relationships with other professionals which help to progress a case. On the other hand, it could mean additional time to explore all avenues and to thoroughly test and challenge the evidence presented by CS, rather than operating under the restrictions imposed by Legal Aid funded work.

3.4 Late access to legal advice

The speed with which many removals occur and the diverse pathways into accessing legal advice meant that, although many parents made contact with a lawyer shortly before the initial or early hearings, it was not unusual to be accessing help on the day of proceedings or after they began. This meant that they either attended Court with no legal representation or met their lawyer for the first time in Court and immediately prior to a Court hearing. This left little opportunity to establish a relationship, identify the issues, apply for Legal Aid, understand what is likely to happen and give instructions. If a parent was dissatisfied with the lawyer, it was difficult to change lawyers, especially if a Legal Aid application had already been made:

> First off I had a lady. She was hopeless. It was my first ever Court appearance. She was standing at the front of the Court and talking about what she was doing at the weekend, what she was going to wear out and what she would have to drink. I was like, well my children are obviously very important to you. Somebody told me about a brilliant lawyer and I rang. She said unfortunately once the Legal Aid [funding] is

> approved it's very hard to get it switched from one lawyer to another. If you want to change lawyers you will lose your Legal Aid. I had to write a letter to the Commissioner, which I did, outlining what my issues were. They denied it and Child Safety got their 12-month Order. That Legal Aid finished and I went to the other lawyer. (parent)

Amongst lawyers who responded to the survey, just under two-thirds (62%) highlighted late access to legal advice as a key challenge in the majority of their cases.[13] This led to difficulties for lawyers in matching the work needed to take instructions and the time available. It meant they frequently started to act for parents at short notice and after proceedings had begun, with instructions being taken at Court. Although this overcame some of the difficulties of communicating with clients who might lack stable accommodation, reliable phones or literacy skills, it also meant they had to act for clients with very little knowledge of the case or the parents' wishes.

> A few of my clients don't realise that they could have legal representation at the beginning or that they can access advice prior to the children being under Orders. The Child Safety workers may have a relationship with them and give them advice about the process, but it's not until the children are under Orders that they actually come and ask us for legal advice on the matter. Even if they've got one child under an Order and they fall pregnant with their second child, it's not until after the child is born that I am notified that Child Safety are making an application. So we are not there from the very beginning. (lawyer)

> When families get involved with Child Safety they don't recognise it as a legal issue so they don't seek advice. They are also not advised or referred by Child Safety, who do not actively encourage seeking legal advice. You cannot rely on clients seeking assistance as their world is imploding, whereas it is to everyone's benefit – parents, Child Safety, the legal system – to have legal representation as soon as possible. But it gets to them too late when a child has been removed and it's a done deal, and there is little we can do to change or challenge it. If a client doesn't know their rights it delays the system and they are hostile, frightened and alienated. If a lawyer was present they would realise they were in a legal situation and the seriousness of it. It can help smooth the path and promote engagement. (lawyer)

As an evaluation of Tasmania's legal assistance sector found, late access to legal advice is not an issue unique to those in the CSS (DoJ 2018). Despite many entry points into the sector, a large percentage of the Tasmanian population does not automatically seek advice when faced by a legal problem and may not know where to go in order to get help. Not getting any legal advice until late in the day means attending Court without any legal help to contest an Order, which can prejudice a parent's case and set its direction into the future.

13 See Table 1, page 37

3.5 Going to Court

On average parents attend Court four or five times to finalise a matter (Magistrates Court 2019). Some of those in our sample reported many appearances in Court, up to 15 times in some cases. Parents were asked about their experiences of going to Court, how they had prepared for it, any practical difficulties in getting there, their views about the Court environment and their understanding of their own rights.

Although some have the chance to read the CS affidavit beforehand and digest the contents and list of allegations, this does not apply to everyone. Either documents are filed late or, as one parent said simply, 'I couldn't read'. Some parents meet their lawyer beforehand and have the time to consider affidavits:

> It was a bit daunting. I am glad I had a lawyer because you can represent yourself, but I don't like speaking. I feel really intimidated. So it was good to have the lawyer because she spoke for me about everything. She wanted to meet with me before Court in her office. We had the affidavit from Child Safety. She said that they like throwing stuff into affidavits to make them look good. I was confused and thinking why would they do that? But she said that's what they do. I went in, sat down and listened to everything that the judge had to say and the affidavit. Some of the things made me look bad, it was like I wasn't allowed to have a say to the judge. (parent)

Others had not, and it was only when they attended Court that they became aware of the allegations against them. Magistrates will do their utmost to ensure unrepresented parents, and especially those with literacy issues, are aware of what is happening. This can mean a full reading of the affidavit in Court:

> Going to Court was terrifying. It made me feel like I had to spill everything out to the judge. After they read out all that stuff about you, you feel you want to answer everything right there, right now and tell the judge so he can decide and make a decision. You are really angry and frustrated. It's scary because you're talking about your life. (parent)

Whether they had previously experienced proceedings in the Family or Criminal Court or not, all parents described going to Court as frightening, confusing and isolating. The environment was described as alienating. There can be long anxious waits of over two hours before being called. Court rooms are usually in a traditional style with parents separated from lawyers and sitting at the back. The conversation takes place between the Magistrate and the legal representatives in subdued voices, with lawyers having their backs to parents as they talk to the Magistrate. Discussions are often of a technical nature and use legal terms which parents do not understand. Many parents who participated in the research commented on their inability to hear what the Magistrate and lawyers were saying. Thus the parent becomes an observer rather than a participant in their own case and only marginally involved. The challenges of the environment can be exacerbated when they involve negative encounters with other family members or with abusive ex-partners in the Courtroom.

> I can't really remember a lot of it. My mind tried to block it all out because it was that traumatising. When you're going through something traumatic at the time and you don't handle it too well, your memory doesn't work that well either. I felt helpless and powerless. It's really overwhelming, alone and humiliating and confusing. I didn't understand what was happening. As soon as child protection is in your life the rest of the world has already viewed you as scum. Straight up it's what's your name, to see if they've heard it before. That's how I felt. (parent)

> It's hard to describe what that first Court appearance was like, because for me I felt nothing, so there's no way for me to describe how it felt for me. I didn't know whether to be upset or angry. I was just numb, I had no feelings at all for it. I didn't know what to think or how to feel because of my mental health, because of my anxiety, my depression. I got so used to it as a child being taken in and out of the Court. It became such a big part of my life, it was just normal. Having to do all that is normal. (parent)

For so many of the parents in our sample, attending Court did not match their expectations. Although many anticipated that they would be able to speak to the Magistrate, it is expected that those who are represented do not engage directly with the Magistrate. They will generally be dissuaded from this by their lawyer, usually from fear of what they might say or how they might prejudice their case. Whether a parent is directly addressed by the Magistrate is a matter of individual style. Some parents described being acknowledged by the Magistrate, but more often they were ignored and not addressed directly. This served to reinforce their sense of powerlessness, the disrespect they detected and being treated 'like scum'. This was exacerbated by the timing of proceedings, and they consistently expressed surprise about the lack of any opportunity to speak and how quick the proceedings were for something which, to them, was so important.

> After the removal I was in Court the next week. I actually went into it thinking I'd be able to talk to the judge. I knew my lawyer was going to speak for me, but at the same time I felt she wasn't getting it across that this person they had commissioned to do this report was inaccurate. I thought I could go in there and say to the judge, can we get them to forget about this report because I have this one and that one. It was strange, it was so quick. I was walking out thinking I didn't get a chance to say excuse me. It was only a matter of minutes. All I could say is who I was and that I was the mother. It was very brief. (parent)

> The times I did try to stand up and speak to the judge, they wouldn't listen to me. If parents actually stood up and had a chance to have a voice and were given a chance to be listened to, then it would mean more than what your lawyer has to say. Although I loved my lawyer, I feel like I could have spoken up, but we're not allowed to. I was trying to show I've got this and this and they were like no, let your lawyer speak. Sometimes your lawyers can't put it across the way you can, you are not really given a chance in Court. I value being listened to but I've never been listened to. It's always let your lawyer talk. But how can a lawyer express what's going on? (parent)

The absence of any support after Court hearings or the ability to debrief was especially difficult:

> When these Orders are granted, and the trauma you face when you are having a child taken from you is horrendous, and then you are told to get up and go. You don't have time to think, you don't have time to be sad, you have all these emotions. The pain is indescribable and you are supposed to just keep on going with no direction, no help. It's like a truck has hit you, inside and out, but you're supposed to walk out. Child protection walks out, the judge walks out, but they don't realise the impact it's having. When you hear 18 years it feels like it's the end. I was never told I could contest that. My lawyer didn't even tell me that. It was just 18 years and see you later. (parent)

Attendance at Court is seen as a way of demonstrating commitment to a child(ren), and when parents do not turn up cases are adjourned or Orders made in their absence. From the Court's perspective non-attendance is a black mark against a parent. But, as parents pointed out, there can be a range of practical reasons for non-attendance – the cost of transport, not being informed of the time, being unable to cope. Disengaging from Court processes did not necessarily mean they did not want to have a role in their child's life, although that is how it can be perceived.

> I've had Court where no one has even contacted me. My lawyer didn't tell me I had Court. I was out of the loop and the next day child protection contacted me and said a 12-month Order had been made because I wasn't present, so it looked like we had no interest. I know plenty who haven't turned up. They've lost it anyway. If you ask that person at the time, it's not that they've lost faith, it's because it's been ripped completely out of them. (parent)

Cost of travel to attend numerous hearings, many of which end in adjournments, could be a big barrier to attendance. Some had help with the cost of travel to Court, to services and for access visits. However, one parent found accepting this help was used against her in Court, which made her unwilling to accept it again in the future:

> Most of the time if I know I've got Court coming up I'll try and save it in the bank. A couple of times I had to go to St Vincent de Paul to get fuel assistance. They know my situation and know what's going on. I don't like doing it because I hate asking for help. My Child Safety worker said we'll reimburse you for fuel. But then it came up in a conference that they helped me with petrol. In the affidavit it had that they had assisted me with financial assistance. They were trying to say she can't fork out to see her daughter, how is she going to afford it if we give her back to her. They made it seem like a bad thing that I'd been reimbursed for petrol. So I don't take the offers of their petrol no more. I am not going to do it if it's going to be used against me. (parent)

3.6 The task of representation

Those who had been able to access Legal Aid funding and support from a lawyer had a lot to say about that support, its nature and its impact. Most parents considered that legal representation was vital in order to be able to navigate complex processes at a time of crisis in their lives, but there was considerable variation in how satisfied they were with the support they received.

At one end of the spectrum, for some parents representation was a personalised service tailored to individual circumstances. Parents welcomed having the process and their rights explained, giving instructions, advice about direction, and assistance with negotiating Orders and access arrangements, as well as opportunities to demonstrate positive change in their lives. They were also receiving emotional and other support from their lawyers, including help with accessing support and therapeutic programs outside the CSS. They described their lawyer as accessible, experienced and supportive, and especially valued continuity when the same person was able to represent them throughout proceedings.

When asked what makes for a good lawyer, parents described someone who believes in them, listens to them and actually wants to help them. Several commented that it helped if the lawyer was a parent themself and had an understanding of what a parent goes through:

> Legal representation helped because I felt I had someone in my corner. It is daunting. There is the judge and a table with people there saying section this number and that number and under this Act we've applied for this. I didn't know what any of it means. I am trying to understand and at the same time deal with my grief and speak for myself and I couldn't do all those things at once. It has to be the right person. You can access good people. You need an experienced lawyer. This lawyer always explains everything. In a ten minute conversation I got more said and done than I ever did in the last two years with the other lawyer. (parent)

When asked whether they wanted the opportunity to speak for themselves in Court, many said they found it too intimidating and had left it to their lawyer. As one parent said, 'I would not be able to stand up and say something in front of a judge'. It was their lawyer who gave them a sense that their voice had been heard by the Court and their circumstances recognised and understood.

However, parents also described getting a 'good lawyer' experienced in CS work as the luck of the draw. Although continuity was highly valued, in practice it could be hard to achieve. Sometimes lawyers were not able to attend every hearing or Legal Aid funding expired, meaning parents could no longer access representation. Parents could experience a changing array of different lawyers who were not necessarily familiar with this area of law or with their case. Reflecting the practice of CS cases being conducted

by junior practitioners, they described some lawyers working with a grant of Legal Aid as 'lower level', inexperienced, ineffective or 'not caring':

> I couldn't have a lawyer for the whole thing. It's different people and there is no consistency. For the most part they were okay, but the child protection lawyer wasn't listening to mine. One lawyer in particular was relatively young. He walked into the courtroom and had social moments with the opposition. They were chatting about light-hearted stuff. I'm thinking I've got something heavy here, this is inconsiderate, talking among themselves like it's a normal day. But mostly they wanted to help me. They were trying but it wasn't being taken on board. They tend to focus on the paperwork and all these fancy big terms and they need to focus not just on what's happening but everything that pertains to it. (parent)

> The lawyer was useless. He didn't explain anything to me properly. I didn't have a phone back then so we were meeting before Court. There was no time to really talk about what had happened that week or what I had done. He just said do you agree and I said well I have to don't I? He didn't tell me that I didn't have to agree. They need to meet you long before Court so they have time to take in your evidence and statements and to understand your emotions, and of course you will be depressed and anxious going into Court. (parent)

Of particular concern was what they saw as the unprofessional conduct of some lawyers, or their perception of a clubby atmosphere between lawyers working for opposing parties. This is a niche area of practice with a core group of lawyers handling the majority of cases. As one lawyer remarked, there is a collegial atmosphere when parties meet regularly at Court and productive working relationships have developed over a period of years. Certainly parents were critical of this world, where jokes and anecdotes were swapped between lawyers acting for them and lawyers acting for CS:

> This is Tasmania. There are dual relationships especially within legal and child protection circles and the Department of Education. One person works here and there, they remember this family. There needs to be more concentration on being professional, so when these legal things happen save that chitter chatter for after work. Don't do it in front of the clients. That is the biggest thing and a lot of parents talk about that. It's horrible. You feel your rights are not being respected. It's just not appropriate. That is a big problem and there needs to be more awareness. (parent)

A couple of parents had decided they would access a lawyer privately and pay for them in the belief that this was necessary in order to get quality legal representation and a better outcome.

> I worked and saved nearly ten grand to get a good lawyer. In my mind that's all I thought, the only way to get my children back is to get a good lawyer. Legal Aid

> weren't going to grant me anything. She was from a private firm and I told her my story and I think her heart opened up and she really fought for me. At the moment I've paid nothing, but now I've got my mum's inheritance they will send me a bill. She is just going to let me pay it off 12 bucks a fortnight. For the first time in my life I have a lawyer who actually cares and it made the hugest difference. She listened to me, I felt like I had a voice. (parent)

Lawyers discussed the key elements of what providing a good service to parents looks like and the qualities, skills and experience required to work effectively in the Child Safety jurisdiction. Given that many survey respondents were specializing in CS work, it was not surprising that only 11% identified their own levels of skill and experience as an issue in their caseloads (see Table 1). For lawyers the task of representation required:

- helping parents to understand the process and what they need to do – for example engaging and cooperating with CS and any access arrangements and working in the best interests of the child;
- high level communication and mediation skills, including the ability to paint a realistic picture of a parent's position whilst avoiding giving false hope, and the ability to work with a range of people (those with intellectual disability, with trauma, with mental health issues and those whose literacy skills are compromised);
- acquiring a thorough knowledge of the family circumstances, documents and evidence;
- providing holistic support by signposting to support and therapeutic services, encouraging the motivation to change behaviours, and giving advice about self-care; and
- securing the best outcome whilst paying attention to the best interests of the child; for example the case for the least possible intervention in the family by providing opportunities to demonstrate behavior change, assisting parents to accept the outcome.

Lawyers varied in what they were prepared to do for their client, depending on their own style and the kind of relationship they had developed with individual families. However, significant gaps in post-removal support for parents meant that not only were lawyers providing formal legal representation and advice, but they were also often acting as signposts to relevant support services and even providing advice about lifestyle, self-care and parenting. This meant acquiring a familiarity with the community resources available for treatment and support and referring their clients to them, a role for which they had not been trained. They could be involved in arranging transport to the Court, debriefing after Court attendance, providing emotional support and listening to parents' concerns. In the absence of other support mechanisms this personalised service was highly valued by the parents, but it was also demanding and time-consuming work. Lack of access to appropriate services and supports for the majority of families they were working with was identified as a factor by almost three-quarters (72%) of survey respondents.

> It's a perpetual challenge for lawyers acting for parents trying to keep a hold of what other services there are, because often they are the key to resolving things for the parents. This is often my number one challenge. Very few cases don't need wraparound social support and a lack of services can cause a real difficulty working with parents. You've got a parent who was reliant solely on parenting payments who then has a child removed who then has a housing issue and then there is a lack of housing support. Without money you can't solve the housing issue and because of the housing issue the mental health issue perpetuates, the violence issue perpetuates. Unless that situation improves, no matter what other supports you access there is no safe home for you and your children. As a legal representative this situation is completely out of your control. Lawyers are not social workers and the client must engage with services. We try to inform each other about services that are available. It is incumbent on the lawyers to do that work and stay up to date so we are then passing that information to parents. (lawyer)

> There is no way that Legal Aid [funding] would cover what is required for each individual case. I am talking about phone calls on the weekends, 24 hours a day, public holidays, constant text messages. For example, I have a client, it's a very complicated case. She has a number of NGOs who are working with her. She is very well supported, more than any of the other clients I act for, and rightly so. But that doesn't stop me getting constant messages about her not having proper contact with her children. I have constant stress from all the fallout of her not being able to contact Child Safety. (lawyer)

When lawyers were asked what they would identify as the key qualities required to effectively work with parents, they identified empathy and a non-judgmental and compassionate approach, patience to be able to withstand the current inefficiencies of the Court, and an understanding of parents' circumstances. Also required is a thorough knowledge of the legislation, Child Safety and the support and therapeutic services available to parents. They identified this jurisdiction as 'one of the most important and difficult areas of the law'. Courage, persistence, resilience and the ability to be proactive and assertive and to take on CS and the State and hold them to account were also considered critical.

> An enormous amount of tact and patience both in dealing with parents and with Child Safety Services. Diligence and organisation in chasing Child Safety and the knowledge and ability to act quickly. The courage and ability to push back against Child Safety when the Department is not acting correctly with respect to procedure prior to Court, for example not providing sufficient information to parents to allow for them to be properly advised. The ability to negotiate in order to enable an outcome which Child Safety and the parents can live with. (lawyer)

They also described how the work could take its toll, with heavy workloads sustained by a deep interest and commitment. They described high levels of motivation due to the intrinsic and intellectual challenges and a strong belief in the rights of the parent and their desperate need for assistance in their engagement with the CSS. As one respondent carrying a heavy CS caseload said:

> It's very stressful work. It's stressful for the litigants, for the lawyers. It's challenging work and the most traumatic hearings you can imagine. But I feel like there is something I can commit to, I can give. I wouldn't do it if I felt I couldn't help. It's overwhelming for everyone involved. You have to compartmentalise. I want to keep doing the work. I'm a criminal lawyer and that is my major work. But these two work in well together, and other practitioners are in a similar position where it's useful to have the knowledge in all the different jurisdictions, especially criminal, because the cohort is similar. I want to keep working in this area because improvements need to be made. (lawyer)

Being able to provide a good quality legal service was compromised, however, by the legal capability of the parents they were working with, the expectations they had of how lawyers could assist them and difficulties in engaging with parents to progress their case.

Common law presumes that individuals have an implicit capacity to make legal decisions, including commencing or defending legal proceedings. The authority of a lawyer to represent them depends on the client having the capacity to instruct them. The standard of capacity required to participate in legal proceedings is the same as that required to enter into a legal transaction – capacity to understand there is a problem, to seek legal advice, to give clear instructions and to understand and act on the advice given. Normally representation involves lawyers taking instruction with the client choosing the destination and the lawyer the route. However, at least a quarter of survey respondents (27%) felt that their clients had difficulties in providing instructions. In addition 41% of respondents pointed to difficulties in engaging with parents and that managing the gap between the role of the lawyer and parent expectations of that role was an issue for over half (54%) of respondents in all or the majority of their cases. These issues were exacerbated by intellectual disability and mental health issues. Lawyers stated that intellectual disability was a factor in a quarter (24%) of their cases. Together with late access to legal advice, limited Legal Aid funding and heavy caseloads the ability of parents to proactively participate and engage with their lawyer and for lawyers to provide good quality representation could be severely compromised. A first meeting can involve unwelcome advice – for example being advised to consent to an Order in the best interests of the child. This is not what a parent necessarily wants or expects to hear:

> The challenge of getting your client to understand that their responses and the way that they interact with Child Safety will affect the way that Child Safety interacts with them. If they are angry Child Safety will stop the meetings or say we are communicating with you only in writing, which for someone who has literacy problems is obviously entirely unworkable and it only makes them more angry. Of course we are dealing with volatile human beings and it's easy for us to say calm

> down. Again it comes down to that person probably needs adequate mental health support or support from an advocacy worker to manage that situation. A lot of people have heightened behaviours which the Department see in a very bad light. Child Safety is saying you are too angry, too volatile for us to meet with you, and their lawyer is trying to convince them just be nice to them. You can feel you're at a bit of a road block. (lawyer)

There are of course protections for parents: for example, they should be supported to participate in decision-making processes and the Court may adjourn to allow for them to seek legal representation. But this does not address the specific issue of participation when capacity is lacking. Where there are doubts about this, the lawyer's duty is to place the Court on notice to consider this and to undertake a capacity assessment to ascertain their ability to give instructions. This may result in a referral to the Guardianship Board[14]. More generally lawyers were concerned about their ability to convey information which parents could understand and/or accept.

> I had a client who had a frontal lobe injury and every time he met with Child Safety he used the F word. They wouldn't speak to him because they didn't understand that it wasn't really him as a human being, it was injury that was contributing to his behaviours. He couldn't regulate, he got angry and raised his voice. The lawyers can help by raising awareness of a client's shortcomings and it's the lawyer's responsibility to ensure that their client is getting the correct messages and vice versa. The lawyer needs to make sure that the client understands, but it's really difficult for anyone to understand what the level of understanding of clients is. (lawyer)

> At the point when you remove a child you are creating a crisis for the client, for that family. When people are in crisis they generally don't listen to what you're saying. You have to deal with the crisis before you can look at other matters. We create a crisis, we know people are not going to listen at this point, so there's no point giving them information. You need to take a step back, do the immediate things that need to happen to keep the child safe, and then have the conversation with parents about what needs to happen. But this doesn't happen. There seems to be an assumption that once parents are in the system things will happen by consensus, but this is not always the case. The parents obviously have the right to oppose and not agree to Orders being made. But parents are so disempowered they just accept it and don't fight. These clients are disempowered and they haven't been given critical information about what they can do, what their rights are and how they can get help. (lawyer)

14 The Guardianship and Administration Board is an independent statutory body with the authority to appoint guardians to make important decisions affecting the lives of people with decision-making disabilities.

One of the key tasks of representation is to give good advice about whether a parent should or should not consent to an Order. Lawyers have to negotiate a delicate balance between easily influenced clients who will just agree with any advice given to them and following unrealistic instructions which most commonly relate to contesting an interim or final CPO. They may be advised to consent to final orders and return later to try and vary or revoke the Order. In practice there are very few successful applications to revoke an Order – just 13 in 2018-19 – and numbers are decreasing (Magistrates Court 2019).

> Once in the legal system there is a huge power imbalance and pressure to agree to Orders. Maybe they are bribed with false expectations for reunification within six to twelve months, but with resources unavailable for this to happen. We have parents who are agreeing to Orders to get them out of the system. To use a Criminal Court example, pleading guilty for the sake of it to get it dealt with. They think the children will be returned back to them if they're seen to be cooperating. In this situation parents are agreeing to Orders which really if push comes to shove challenge the thrust of the Department towards reunification. The Department might get a 12-month CPO and once that Order is put in place all momentum is stopped and the parents are left to try and deal with the Department as far as accessing and communicating with their children is concerned. At the end of the day the Department has their Order and that's all they wanted. The parents have been left on the side of the road. (lawyer)

> There is a high rate of consent. It's not forced but there are lots of contributing factors going into it and lack of Legal Aid [funding] is probably one. None of my cases have gone to a hearing. They have all settled. If a client opposes an Order it always goes to a Section 52. Often there is more than one, up to five, but a lot of the time you can't progress it because the Separate Representative hasn't been appointed or we are waiting on an assessment. If you can't reach a resolution, so basically if your clients don't agree to consent, it goes to a hearing. Legal Aid often don't fund hearings and a lot of the time it's already been six, eight, twelve months and you're still at a hearing with another six or twelve months to go. For the client it's often I have already dragged it out this long and I haven't got what I wanted, I'm going to have to wait even longer to get the Order. The Magistrate might make the Order so then I've just consented to a 20, 30-month Order by the time it all adds up. A lot of people, they get tired, constantly coming to Court. A lot of them have to travel so far. Once they consent, and if you've got really good notation, providing every eight weeks for a care team meeting for example, they come to the table a bit more enthusiastically. A high rate of consent is definitely of concern, and for a lot of people that final Court mention is so sad for them because it's the finalisation of something they don't necessarily want. (lawyer)

Settlement by consent means that the parent agrees to an Order and that consent is then approved by the Magistrate. In Tasmania, where most issues are resolved by consent and there are few contested hearings, questions have been raised by both parents and legal professionals about how far parents are getting good quality legal representation.

3.7 Being unrepresented

Comprehensive data on the number of Court attendances where parents are unrepresented is not available. However, not seeking legal advice or difficulties in accessing Legal Aid funding, or enough Legal Aid, meant that most of the parents in our sample had at some stage attended Court alone, unrepresented. Only one-third of the sample had always been represented throughout care proceedings. Less than satisfactory experiences with lawyers had led some parents to a growing distrust of lawyers, Magistrates and the legal system more generally and an ambivalence about having legal representation. Some parents in our sample had positively chosen self-representation as a way of ensuring their own voice was being heard by the Magistrate rather than it being mediated by lawyers:

> My lawyer was great, but she was like do this because you won't win. After the 18-year Order was granted I just felt like she didn't try. She would tell me to just listen and say yes because they are going to get it anyway. After that I stopped trusting lawyers. So it wasn't just child protection I didn't trust anymore, it was the legal system too. Not because we lost but just because I know that I could have stood up and I could have fought them better. (parent)

Attending Court unrepresented could be an intimidating experience and parents can become agitated and frustrated as a result of not being able to advocate their case or understand what the Magistrate is telling them. This can mean cases take longer to resolve.

> I feel like the judge was rude to me. He was like why don't you have legal advice? I said what is legal advice? I didn't even know what legal advice was. I was sent to someone that was in Court to talk to about it. In their opinion my house was a mess. I didn't know how to dust or clean the windows. Their impression was the kids didn't have beds to sleep in but they never let me explain any of that to them, they just wouldn't have it. In the Court they told me to come up and that was really scary. There was this big scary man up there. It was like do you agree and I said yes, you're petrifying. My understanding was they would have my kids for 12 months and I would get them back. I had no idea what I was doing. I tried to say what I wanted but it was like my voice wasn't being heard, so I just went along with it after that. (parent)

Commonly, most parents lack the skills and knowledge required to present their case effectively. They may not appreciate the consequences of an Order or understand the meaning of legal terms, or they may concentrate on their own issues and needs and not those of the child. They do not understand the evidence requirements or the procedures, processes and paperwork and how to make their own submission.

> I felt really intimidated. I had so many people up against me too. There was child protection there, two former partners, their new partners, kinship carers and just me. All the focus was on me. I ended up one time, and I don't know what the judge thought of me, but I was laughing and crying at the same time. It was an emotional

> thing and I looked at the judge and I thought he's going to think I'm as mad as a hatter with all the focus on my mental health. It just felt so surreal, so I found it laughable. I was so distraught and I didn't know how to physically react to the situation. I didn't understand what these affidavits I was being handed were, these big thick books from child protection, and I didn't have time to read through them. They were handed to me the day before and I'm due to be there the next morning at 10 am. I would read through them and then feel like I couldn't go to Court. I just felt like there is no point my going if the judge is going to read this. So then it looked like I'm struggling mentally and not cooperating or coping and then I am in Court laughing and crying at the same time. I felt like it was orchestrated to be that way. (parent)

In situations where a parent is unrepresented, the Court will usually do their utmost to encourage a parent to get legal representation and will adjourn the hearing and recommend they seek legal advice. As one woman said, 'it was pretty much the Court who told me to get a lawyer':

> I didn't have legal advice at the start. I didn't think I needed to. The first three Court dates when they were trying to grant the Order, the one year and the 18 years, I didn't have a lawyer. They rescheduled it and said we recommend that you seek legal advice. I would go to Court and say I don't have a lawyer, so the judge said I'm not going to grant these Orders unless you have a lawyer. They just kept on adjourning it. Child protection were trying to push it through without me having a lawyer present. I got Legal Aid finally after quite a few adjournments. (parent)

However, the limited state of the Legal Aid pool in Tasmania means that many will end up self-representing. From the Magistrate's perspective, an unrepresented litigant required high-level communication skills and the ability to create a courtroom atmosphere which enables a parent to participate fully in proceedings. This meant paying attention to the language being used, inviting the parent to the Bar and in some cases reading a lengthy affidavit out loud to ensure the parent fully understands the allegations:

> Your ability to communicate with everyone in the courtroom is key and the ability to ensure that people are being heard as far as their position is concerned. Whilst you can't step down and represent the person, you've got to make sure that they've got the opportunity to put their case and that can be very challenging and time-consuming, especially if it's a contested matter. So you do need patience. You need to be able to take it one step at a time and go through where the issues are. Communication skills are very, very high. You do have to keep in mind you can be saying one thing and thinking that you're conveying a particular position or message and it's not being heard like that at all. They're hearing something else, bearing in mind they are heightened. Here is the Department saying you're not capable or your children are at risk in your care. That's challenging. (Court view)

Yet not having representation was not always described as a negative experience. One parent related how she had successfully represented herself and how this had boosted her confidence and provided some healing from past experiences:

> I went to Court and showed them the evidence of what I'd done as a parent to get him back. I showed them all my certificates. I was doing 'Dealing with the law' so I knew a bit about the law and I knew this time around what to do and say in Court hearings. I represented myself, I had no lawyer. I made the welfare look from high to like a grain of salt. They were shocked. They thought they were going to take him off me for good, but I proved them wrong. They were applying for 12 months but when the hammer went down the judge said this lady, from her previous record, from her drug and alcohol abuse, sympathy for deaths in her family and dealing with cancer, the way welfare has treated her is appalling. She has proved them wrong and from this day I find that he will be returned to her when she finds a suitable house for her child. (parent)

But overall, for those without representation care proceedings can be lengthier, more stressful and result in a less favourable outcome, one of the most negative potential outcomes being consenting to Orders they do not agree with.

> Self-representation is extremely difficult to do, because you end up being cross examined by a lawyer for the Department and being cross-examined is not fun, it's extremely difficult. People who self-represent don't understand Court procedures, they have to write affidavits because that is the only way you can get material admitted. They are not good at this or responding to being cross-examined by a barrister in the context of a hearing. So self-representing you are putting yourself in a disadvantaged position. (lawyer)

3.8 In summary

Parents and lawyers report a diversity of experiences in accessing legal assistance. Common factors include:

- Attempting to access legal help at a time of family crisis and emotional upheaval with, for some parents, confusion about whether involvement with CS warrants access to legal advice or even what 'legal advice' means. Some parents also expressed an unwillingness to get involved with lawyers due to difficult experiences in the past, not wanting their voice mediated by legal professionals or fear that seeking help will prejudice their case with CS.
- A lack of direction from CS about the need for legal advice and how to find it. Although standard CS practice includes referring families for legal advice, it appears this does not always occur, or families in crisis may not absorb this information.
- Difficulties in finding a lawyer who will take on CS cases and problems for some in passing the asset test and merit test to access Legal Aid funding. This may be compounded by a lack of knowledge of or uptake of review processes if applications are refused. It results in few being able to access representation throughout care proceedings.
- Late access to legal advice resulting in attending initial Court hearings unrepresented and/or giving instructions at the Court immediately prior to a hearing. This impacts directly on the ability to prepare the case, build a relationship with the lawyer and on the initial direction the case takes.
- Magistrates acting to promote legal representation by adjourning cases in order for parents to seek legal help. This can further delay Court proceedings, increase Court costs and compound the stresses imposed on families by delay and long drawn out processes.
- Low hourly fees for Legal Aid work, can meaning representation by private legal practitioners who are junior and inexperienced. There may also be a lack of consistency in representation, with at various times different lawyers not necessarily familiar with the case providing representation and advice. Both these issues can impact directly on the quality of legal advice available to parents.
- Challenges for lawyers in working with parents with low levels of legal capability, difficulties in engaging and giving instruction and a gap between the lawyer's perceived role and parent expectations.
- A Court environment commonly described as isolating, stressful and lonely. The physical environment, the brevity of many Court appearances and discouragement from speaking directly to the Magistrate confuses and confounds parent expectations, further marginalising them from their own case. These issues are especially daunting when a parent appears unrepresented.
- A core of skilled and experienced lawyers in the state committed to working in this area and a high rate of consensus between parents and lawyers about what good representation entails. This includes a 'caring' approach, empathy and understanding and, in the absence of other support for parents post-removal of their children, the provision of more holistic support and help in accessing therapeutic and other services.

CHAPTER FOUR

Making Decisions: Experiences of parents and lawyers

Care proceedings have been described as a process rather than an event. They are rarely finalised quickly at a first or second mention in Court. On average they last for approximately one year, from lodgement of an application for a care Order to finalisation, and involve four or more Court appearances. In some circumstances proceedings can be spread over a period of years, progressing through a series of interim Orders before any kind of long-term arrangement is made.

Proceedings are not just disputes between parents and CS about the care of a child. They have been described as 'Court supervised, multi-party enquiries into the child's current circumstances and future care needs' (Pearce et al. 2011). The Court has the power to determine the type of Order granted, where the child is placed and the nature of access arrangements, between parent and child in the 'best interests of the child'. CS must prove to the Court that intervention is justified under the terms of the legislation by gathering and providing evidence about family functioning and showing that the child is suffering or likely to suffer significant harm in the care of the parent. In its efforts to support allegations of risk the CSS may commission reports from experts. The Court proceeds through testing the evidence and using conciliation processes or ADRs outside the Court system to try to bring parties together to get clarity about the issues in dispute and to resolve the matter by agreement or consent.

During this time children may be subject to interim Orders and placed in OOHC. Parents have the opportunity to respond to allegations of risk, and the system assumes they are represented so that they can challenge evidence and Orders. They are also given opportunities to address safety concerns and parenting capacity and may be required to complete treatment programs or access services to deal with issues like mental health, substance use or family violence and to demonstrate change. Meanwhile there are negotiations about where the child is placed and the kind of access a parent will have to their child.

Parents and lawyers were asked for their views about decision-making processes during care proceedings and their level of confidence in them.

4.1 Processes, procedures and timeliness

As one senior lawyer said, 'time and time frames are a real issue in the Child Safety jurisdiction'. The time it takes to process cases and get an outcome in the best interests of the child can have a major impact on families and children, on procedural fairness and on outcomes, particularly in terms of the chances of reunification.

The duration of proceedings was identified by 72% of lawyers in the survey as a major challenge in all or the majority of their cases over the past two years. Parents expressed frustration about the impact of prolonged procedures, delays and adjournments, which exerted serious pressure and stress on the family, as well as on achieving stability and permanency for the children involved. Delays undermined mental health and threatened access to legal representation as Legal Aid funding expired. There is the suggestion that delays could mean parents agreeing to Orders rather than contesting them just to finalise the situation.

One parent described care proceedings as a 'roller coaster ride', where the dynamic nature of family life combined with a constantly changing array of CS workers could alter the direction of a case, throughout proceedings adding to the family's stress and confusion. Meanwhile the costs for the Court and legal practitioners escalate. Although some timelines are specified in the legislation, delays are routine throughout care proceedings and there is a tendency for lawyers, CS workers and Magistrates to blame each other.

> It sets the children back because the system is so slow. All these months have happened and the trauma of the children depending on their age. My five year old has a few issues and anxiety. If you miss one Court they push it back for as long as they can unless your lawyer is saying something. That means it will take a few months for it to move any further and it delays the whole process. That means a lot of pressure and stress. You don't want to have to drag your kids to Court. It's not a good place for them to be. (parent)

> When they do 12-month orders they don't go by when the kids were taken, they go by the last Court date. Once it was adjourned because they wanted the kids to have their own lawyer. Things kept coming up and they keep adjourning it. The result finally was a 12-month Order. We were going to fight it but we decided it would be quicker just to do what they want than fighting it. It could have gone on for ages. (parent)

Administrative data cannot give an accurate picture of the reasons for delay, but research participants pointed to:

- CS applications for Orders where the case has not been thoroughly formulated, for example emergency removals resulting in unplanned care proceedings;
- a routine failure by the CS to operate as 'model litigants' and comply with the Rules of Court[15];
- unrepresented parents requiring additional Court time to unpack the issues involved;
- repeated adjournments because a party is not ready with documentation or does not have legal representation, for an ADR to be convened or for an expert assessment to be received;
- an unwillingness among CS staff to share information or communicate with parents and their lawyers;
- a lack of accountability within CS for meeting its obligations, for example not meeting the deadline for a home safety check or providing the required number of beds for reunification to occur. These issues can lead directly to the extension of an Order; and

15 The Rules of Court are the rules of procedure for managing care proceedings through the Court to ensure fairness and timeliness.

- sympathy for parents and a tendency to delay decision-making to give parents a fair hearing and an opportunity to make necessary changes.

Delays can work both for and against parents, and survey respondents considered that it is common among lawyers and the judiciary to give parents every opportunity to prove themselves and demonstrate that they are able to care effectively. In some quarters fighting care applications is also viewed as therapeutic for parents even at the cost of delaying decisions for children. These factors have operated against setting rigid timeframes for procedures, which is seen as counter-productive.

> Sometimes the extra time can help your client and be a blessing. They go to one more appointment, you get to get an update from a counsellor. But a lot of the time you get adjournments because the Separate Representative hasn't made their inquiries, we are still waiting on a report, the terms of reference haven't been finalised. There are so many different things that can push the time out. This is very tricky if you've got time limits that you need to address. Sometimes there are so many parties involved. You may have both parties represented, you have Child Safety, the Sep Rep, one or two grandparents, a kinship carer. You are coordinating so many people and that can also push it out. (lawyer)

Of particular concern for lawyers was the routine failure of CS to operate as a 'model litigant' and comply with the Rules of Court. Lack of compliance with timelines was a challenge identified by 72% of survey respondents in all or the majority of their cases over the past two years. Although CS are required to serve an affidavit which sets out the safety concerns and justifies intervention in the family at least two days prior to Court attendance, most are served late and often not until the day of the Court hearing. The last minute serving of affidavits gives little time for parents to access legal help, digest the information, issue instructions, prepare for Court or make a case for Legal Aid funding.

> It is common for Child Safety to serve Court documents late, the day before Court or on the day of Court. I have found late serving to be particularly bad in cases where the parties have had intellectual disabilities. For example Child Safety have served the parties less than an hour before Court, which has resulted in the parties nearly not being represented for Court. They provide information late and it can be deficient, which affects the ability to properly advise parents who are under enough stress already. (lawyer)

The inability of CS to meet timelines is underwritten by under-funding. Whilst parents, and at times their lawyers, might perceive it as a tactic, CS attribute late delivery to under-resourcing of the system with high workloads, large numbers of unallocated cases and high worker turnover. They also report practical problems in serving documents, for example due to not being able to find families in insecure accommodation or literacy issues where families are unable to understand or process the documents. Others attribute some of these difficulties to poor professional development and training for CS workers and to a shortage of lawyers working on cases for the CSS. Lawyers commented that CS

consistently took offence at efforts to make them comply with the basic legal principles of procedural fairness and a fair and transparent process or provide and share relevant information in a timely manner.

> Failure to comply with the Rules of Court is a huge problem. Clients get information the day before and are told they can respond, but they don't even have the time to digest the information, let alone come up with a response. Child Safety are constantly breaking the rules. (lawyer)

A failure on the part of CS to communicate and share information introduced further delays, with lawyers forced to subpoena information to gain access to relevant Department material. Calls to CS went unanswered, processes were not explained to parents and written information such as reunification plans was never provided. For example, being asked to address 'your mental health' or 'keep up engagement with services and demonstrate safety around access visits' lacked clarity both about how this was to occur and how to demonstrate that these expectations are being met. Lawyers and parents struggled to hold CS to account for the things they said they would do. These difficulties in communication were felt to demonstrate 'the paranoia of the agency'.

> The Child Safety system is very closed. They won't provide information, won't negotiate. They fail to recommend what courses a parent should do to assist in having their child reunified into their care. There is also no assistance in helping parents access those courses. Response times can be dreadful and they won't respond to just trying to update information or get the Department's position on reunification. Lawyers are not permitted to speak to Child Safety workers to get more information and the facts of the case but can only communicate through written materials. Requests are just ignored. If they ignore us what are they doing to the parent? Requests for information are often met with no response and the need to subpoena for this type of information. They are incredibly adversarial. A greater transparency, access to information and general helpfulness by Child Safety would greatly assist. (lawyer)

Both lawyers and parents saw the turnover among CS workers as a particular issue. It provided no continuity or relationship of trust for the parent to engage with and meant that legal processes were often handled by junior and inexperienced CS staff.

> They are very short-lived because they don't feel right for the job or up for the task. Or there are those that are really good but because they are so good everything gets pushed on them and they burn out and leave. The Department changes its personnel an awful lot and when we have damaged parents, damaged children, working with someone who yet again is new, it perpetuates problems. Someone might assess this person is a danger for access and the next person to come along wouldn't have the same prejudices. So we have inexperienced staff with fairly inexperienced team

> leaders. It's a bit like the blind leading the blind. They try and muddle through and do the best they can. Sometimes they get it right but sometimes they get it wrong, particularly around reunification. The legal matters do put a lot of pressure on them, doing the affidavits, getting ready for Court, worrying about being a witness. (lawyers)

One of the most significant impacts of the duration of cases, delay and difficulties in communication with CS was on prospects for reunification. Both parents and lawyers pointed to failures on the part of CS to support progress towards reunification by promoting access to services and contact between parent and child during interim Orders. Long drawn out care proceedings and a lack of good legal representation stalled or even halted reunification processes and lengthened stays in OOHC. Being told that reunification could not occur because there had been a failure to maintain regular access due to routine CS cancellations of access visits, or a failure to develop a bond or attachment because a parent was not given the opportunity, was described by one lawyer as 'the cruellest outcome'.

> If the plan is to reunify a child with their parents shouldn't parents know exactly what the plan is for that, that's the case and care plan? You will hear Child Safety workers say our plan is to reunify, but using the affidavit material and really listening to what they are saying no way they're planning on reunifying and yet they will make all the right noises. I am thinking don't string this parent on for one, two, three years thinking that their child is coming home when you know that's not going to happen. If Child Safety have the opportunity to do nothing they will take it every single time, which puts parents at a disadvantage. This is not a resourcing issue, it's cultural, an expectation that parents are the problem and they need to go and fix it. I think it's the responsibility of the Secretary to provide those parents with as much assistance as possible. But basically there is no support from Child Safety to say this is what needs to happen and this is how we will walk alongside you to help you make this happen. (lawyer)

> As he's grown up and he's been with the foster carer since he was born he's become so attached to her and her husband and her family that he refuses to have access visits with me. In the last couple of years I've been in and out of prison and he hasn't had much to do with me. He's been for one visit since I've been out and he told me then you didn't want me when I was born, that's why I live with mummy Sally. For the last couple of years he refuses to come to access visits. I think the cancellation of my visits for twelve months when he was a baby had a big part to do with that. I didn't get the chance to build that bond with him, so he became so attached to the foster carer that he refuses to come and see me now. He is now on an 18-year order. (parent)

> It is very difficult for families when they get a timeline and then go to Court and Orders are extended because things that were supposed to be done haven't been done. This happens in reunification and it is the cruelest thing, for example people not signing documents when they should do or a worker changes and something is not signed off. Precious time with your child is lost despite you doing everything you

> are told, and the children are expecting it too and asking why don't you want us back. It is very inhumane. At the same time mum knows if she has an outburst it might go back a few steps because she is told she can't handle having the children back as she is breaking down emotionally. (lawyer)

The high turnover among CS workers can have a strong influence on decision-making in the Court. Continual changes to case workers meant a lack of consistency about how an individual family was perceived and the kind of intervention strategies being used. Parents described how a change of worker had brought their progress towards reunification to a halt, or imposed a range of new conditions that parents had to meet. It could leave families without an allocated case worker for months, which meant problems dealing with paperwork and progressing cases in a timely manner.

> Some of the people I've known in child protection, the workers, are hopeless. They are not arranging visits, doing the paperwork, getting it in. The workers are forming opinions against the parents and sometimes it just seems so unfair. These people love their kids and the reasons they've taken the kids, it doesn't seem a reason to keep them forever. They said because I worked with them, I was cooperative. I think they said teachable, that I was open to change. I think I was lucky in a sense because they were nice to me. Not all of them. I had one worker and she was very young and everything I did she yelled at me. If you don't control your children I am going to take them out of here and end this visit. Anyone who knew kids, they were just being kids. I had one good worker and she was a real support to me. The one who supervised visits was really great. Some of my friends just wait months and months and months for the workers to do their reports so they can move on to the next stage. It seems really unfair. (parent)

One lawyer described the impact this had on families and how endemic delay was to care proceedings:

> Once you are in the Child Safety system it's very hard to get out. Legal advice might not kick in until the second or third Court appearance, by which time a few months have passed on an interim Order which is never backdated. Eighteen months through a 24-month Order, mum makes a suicide attempt and the Order is extended for 12 months. The Child Safety worker and/or the team changes and they don't like family. They don't answer the phone, they find new concerns. At the end of the third Order they go for 18 years not on basis of risk but because the child has now spent too long with the carer. A 12-month order seems a long time until you have to meet the conditions and address the issues, for example 'improved mental health' but to what standard, how do you prove it? There is no clarity about how long the race is, how far apart the hurdles are, and if you get knocked back another hurdle is put up or you go back to the beginning. We do negotiate conditions on Orders for clients, but Child Safety almost never agree to an Order which binds the Secretary to do anything beyond what they are already prepared to do. The scope in the Act is very broad with

> Orders and the powers of the Court are extraordinary. Parents can satisfy the Court that it's in the best interests of a child to revoke an Order, demonstrate change in their circumstances and ask for a review. But this is rarely done and usually done via an agreement to a notation. (lawyer)

These issues are of course fueled by the under-resourcing of the broader welfare sector and the range of supports provided by community service organisations. Access to these services can be beset with long waiting lists, gaps in provision and a diversity of services across the State, many of which may be delivered in a way which is inappropriate in meeting parents' needs (see Hinton 2018).

> Your client gets a list of what they have to do and they have to go to four or five different places. They can't remember all the names or where to go, what days and transport getting there. There are so many different barriers, so many practical barriers. This is just part and parcel of everything, the wait to get into your parenting course and often you're looking at a huge wait. You get a mental health care plan, when is your first psychologist appointment? Two months away, but we have another Section 52 conference in three weeks so nothing is going to be progressed. Sometimes it's a long time until things start to fall into place. Then that's really upsetting, because you can see they are on the right track, but they've run out of time. There are so many stakeholders involved – housing, health, education, police, church-based NGOS, government and a three-year election cycle – when what you need is a holistic multi-agency approach on a ten to twelve month time frame with small goals along the way to plug the leaks. (lawyer)

There have been calls for more active case management by the Court in order to better streamline processes and ensure better compliance with timelines and the implementation of procedures according to the Act. Court case management involves an understanding of the substantive issues of a case, the oversight of procedures and ensuring procedural compliance, determining the activities that should occur and when and ordering conferencing at critical points. The Court might inquire into what steps have been taken to support the family and divert them from legal processes. They might also be critical of the failure to comply with the Rules of Court, poorly prepared evidence and the late filing of documents all of which lead to delay.

> The Court could do more to assist parents. They are not firm enough with Child Safety as to what they need to provide to parents. For example the Magistrate has it within their power to specify access times. However this is often not done and Child Safety pushes back against being pinned to anything specific. This provides the Department with too much power. (lawyer)

The Court considered that there was a role for more active case management and holding parties to account rather than letting cases drift. For example, a request for

an adjournment by a party, rather than leading to the request being granted, should result in unpicking the issues involved and leading to Court direction on the matter. But more proactive case management could be difficult to achieve in practical terms, given pressures on Court time and challenges in imposing sanctions if parties do not comply with procedure and timelines:

> Often the Court will make directions that Child Safety need to file the material in support of their application by such a date and they just don't. They file late so the defense needs more time to consider the material and the matter keeps getting adjourned and that's very frustrating. That's the challenge. Say they don't, do you then say well you can't rely on that evidence then if you don't file it in time. But is that going to be to the detriment of the child? What does a sanction look like? (Court view)

Another factor relevant to more intensive Court case management is judicial continuity. The Court will try to ensure that the same Magistrate works with the same file wherever possible. This reduces Court time and duplication as only one person has to acquire the facts of the case and the best way to proceed.

Certainly, unlike a number of other states and territories, lawyers and the judiciary did not feel that stricter timelines were necessarily the answer. Imposing timelines to achieve permanency for children assumes the existence of a 'perfect system' whilst ignoring those factors, including under-resourcing, which generate delays beyond the control of parents and their lawyers. Some even saw merit in longer procedures which provided opportunities for the development of more positive working relationships between the family, the lawyers, the Court and support services. These relationships could operate as a catalyst for change for parents over the course of proceedings.

4.2 Assessing and testing the evidence

Evidence is usually presented to the Court in the form of an affidavit. This is a formal written statement of facts that supports CS applications for Orders. Affidavits are generally compiled by the CS worker who has had initial contact with the family. They should not include opinions unless they are from an 'expert' and they should avoid hearsay evidence or information received from others rather than personal knowledge. There are exceptions to this, and if hearsay evidence is being used decisions must be made about whether it is admissible in Court.

Parents' key critique of Court procedures was about the nature of the evidence presented to the Court and their or their lawyers' ability to challenge and contest that evidence. Alongside the late serving of affidavits, the kind of evidence used to demonstrate risk was one of the most contentious issues for parents.

A parent's argument is likely to be that either CS are wrong in their assessment or that circumstances or CS interventions, including a CPO, has changed their attitude, that they

accept the safety concerns and are now prepared to cooperate with CS to address them and change their behaviour. From the parents' perspective the ability to test and challenge the evidence presented by CS is key to achieving a fair and just outcome. However, they were highly critical of the quality of the evidence. They reported factual inaccuracies, the use of hearsay evidence, words and behaviour that had been misinterpreted or taken out of context and exaggeration or even fabrication which the parent felt unable to challenge. They described CS as 'twisting what you say', using expressions of distress about removal of children against them and 'tricking you into giving information' which is then used to ensure that applications for Orders are successful. They felt the Court was over-reliant on reports from CS and it 'fitted them up', and too often gave the Court a distorted picture of their lives that emphasised faults and gave little opportunity to report positive change. It often came down to a 'she says, he says' situation, or parents might be accused of not being committed to their child because they had failed to respond to a text or attend an access visit with no opportunity to explain that they had no money for transport or no credit for their phone.

> It was my birthday when they took my kids. I was having a couple of beers. They put down that I was as drunk as. I only had a six pack for my birthday. They turned up and said I was pissed so they took them. We had done food shopping the day before and they reckoned there was no food in the cupboards. (parent)

> They reckoned that my son hit my daughter across the head with a cricket bat. We don't even own a cricket bat. They reckoned I was selling my son's Ritalin around the place. I never had his Ritalin. The school held his tablets. The people around where I was living at the time, they threw shit on me. I read the evidence and some of it is false, not real, it didn't happen. It was like someone made it up to cause trouble. You've got stuff you do after losing a child and they use that against you in the report as well. Of course you're going to act out, your child has been taken. When they read out all that bullshit it was upsetting because I knew most of it wasn't true. (parent)

Reading the affidavit and a long list of allegations, most often provided by the CS worker who had been working with the family, was described as shocking by many parents and a betrayal of the working relationship they had developed with particular CS workers:

> You think you can talk to the workers quite openly and have a conversation but all the time it is being used legally because it shows up in the affidavits. As a parent you are just trying to work with them because you are told that is what you have to do. You work together and promote all that positive stuff and then it just comes back to bite you when you go to Court. I was just innocently working with this person for the kids. You feel they are lying to you and it doesn't feel honest. That is confusing, that part of it. I didn't like the workers I had but after the way the Courts were and they were sitting there… (parent)

> They play being your friend while they gather more evidence. You go in there and spill your guts about doing right and they are extracting stuff out that they can use against you. Basically when a child protection worker comes into your life their job

> is like prosecutor, so they are gathering all the evidence against you. They seem to have double standards and it depends on the worker you get, what they'll pick on you about. There was nothing positive being presented and there was plenty about me that was positive. It was all just so negative and so nit-picky. (parent)

This situation was exacerbated by the use of hearsay evidence by CS from neighbours and family members. Many described dealing with false accusations made by partners or kinship carers bearing a grudge. They expressed surprise that this kind of unproven evidence was able to be used in the Court:

> It only takes one phone call from someone to say they are doing this and bang, they remove them. I have a cousin who hates me, a sister who was always on the wrong side of me. So from the beginning where I did do things wrong I was always judged by the judges. They made me look like I was terrible. The Court granted with nothing, just my past. They didn't even know what was going on. (parent)

> They go into Court with the evidence which is all hearsay and the judge makes a decision on just that. He has to take their recommendations. They can accuse you of all this stuff but where is the evidence? Why haven't the police come in and done interviews? There's nothing. There is no actual evidence, no witnesses. It's their word. Where is the proof? They don't examine the evidence. The Court believe everything that Child Safety put on file. My children were removed because of a false allegation. I have since learnt that parents do this to each other, make these wild accusations. The Magistrate said are you telling me how to do my job? I was like no, but yes. I just want you to hear my concerns. I want someone to hear my concerns, but no one was listening. (parent)

Especially challenging for parents was when information about past behaviours or history was used as evidence against them in current care proceedings without taking into account any change in their circumstances. They felt they were tainted by the shadow of the past or their families' past and they would never get a fair hearing because of that. They were particularly frustrated when evidence of past trauma in their own lives was used to suggest that they were incapable of being adequate parents. Assumptions were made that history would repeat itself and that they were likely to harm their own children. Some also commented on being tainted by the postcode and the area in which they lived.

> I was always a drug dealer to people. When does someone give you a chance? At the end of the day I am always going to be a drug dealer to the judge. Your past is always there. They just make you feel like a bad person. Do they look at the records of the person? I wonder that. Because they've seen you in the Court before they probably think are they still doing that stuff? Would that make a difference? (parent)

> If they fully understood my circumstances they would have understood that any person who had the upbringing that I had, the Court should understand that any

> person who has been put through all of that wouldn't do that to their children whether they had mental health issues or not. (parent)

> They say I have mental health issues because my baby passed away. Just because I don't talk about it doesn't mean I'm unstable. There was a complaint made that apparently I was smelly and dirty, I hadn't brushed my hair and didn't have pride in my appearance. And because my ex-partner has tattoos on his face they discriminate against him because he's got a criminal record and tattoos. They do judge because of your past and by our looks. I think they treat people as guilty and it's up to people to try and prove their innocence. The judge just goes along with whatever Child Safety put in their face. (parent)

Overall parents expressed concerns about the low level of proof required for something as fundamental as keeping their children. They considered that they were 'guilty until proven innocent', that the onus of proof lay with the parent, that the Court did not fully understand their circumstances and that routinely the Magistrate would just agree with any evidence and recommendations that CS put forward. They described a system weighted against them with 'selective evidence' that they had little or no opportunity to challenge. This was a dehumanising experience which undermined their ability to cope with the proceedings and their faith in the Justice system. They compared the Children's Court unfavourably with the testing of evidence which occurs in the Criminal Court:

> People who do something wrong get a voice but we don't. The evidence is usually based on true facts whereas we are judged in the exact same way by things that are not true. There is no respect for us because we are judged like we've done a crime, like we are criminals. I'd never gone through the affidavits, it's too traumatising, because you can't defend yourself. But I finally did. I went through it all and all of it was wrong, none of it made sense. They had just taken these little bits of little issues which I'll admit to and they thought it would be easy because I've always just let it happen. That is what my biggest mistake is, not fighting. They made me live in the past. Every single affidavit that they took to that Court was based on old evidence. They had nothing new, nothing, and in an affidavit there is nothing positive. (parent)

Given such high rates of dissatisfaction with the quality of the evidence used by CS and the fact that it could provide lasting evidence of parenting incapacity and failure which is then held in Court files forever, parents were asked whether they or their lawyers had contested the evidence. There were those who said they were too scared to contest. They felt pressured to consent to Orders even when they did not really understand what was happening or how these decisions were being made. They feared that pursuing a complaint would mean that their situation deteriorated and that it might delay any reunification process or impact on access arrangements. Their reluctance to take action meant that they felt tricked into signing their children away:

> I didn't want to go for a lawyer because then I might lose the kids for good. I didn't want the visits to stop and I was scared if I fought them now that they might stop

> visits. We signed off on the one year Order. They just told us to go to Court just to sign this order. Not once did they say we needed legal advice. In their voices it was more like a threat that if we didn't do this Order they would take our kids for weeks and keep on going for the Orders if we don't sign. It's like they tricked me into that Order. I had no idea what the Order was about. You feel intimidated and welfare turn around and say if you don't agree it will take longer and we will have them for longer. You feel like you have to agree so you'll get your kids home quicker. They say things like that especially when you're young, and I was quite young. You should have a lawyer with you if they are going to make you sign papers, to read the paper and make sure you understand. They leave you to your own devices. (parent)

Many in our sample were, at least initially, critical of the perceived reluctance on the part of their lawyer to challenge the evidence being presented. For parents who expected a 'fair hearing', not testing and challenging the evidence and being advised to consent was often seen as further proof of an unfair system.

> We decided not to fight and that it was quicker to just do what they wanted. The lawyer said if we were going to fight it would take too long. Looking through the records of the Court cases, it was too backed up and would take too long to fight. But any lawyer is meant to be fighting on behalf of the parent rather than telling them to agree. I don't feel like mine ever did [contest the evidence]. It was just like do you agree? I have to, don't I? I didn't see that I had another option. I found they were useless in the end. They didn't contest anything and just said I agreed. They said if you don't agree to it will take longer. They will stop your visits. (parent)

Lawyers did identify the nature of the evidence used to make decisions as a key challenge in their work with parents. Amongst survey respondents two-thirds (64%) stated that it was a major issue in all or a majority of their cases over the past two years.

In a criminal case the burden of proof is 'beyond reasonable doubt'. In a civil or child safety case it is about the 'balance of probabilities'. Lawyers consistently expressed concerns about the Department's ability to present material sufficiently supported by relevant evidence. Like parents, they commented on errors and incorrect details in affidavits, the use of innuendo and rumour and a lack of evidence for key assertions or to justify the length of an Order. There was often insufficient information about a parent's situation or the involvement of other agencies. The information in affidavits was described as repetitive or using outdated material or old allegations and frequently lacked any account of the positive progress a parent had made or their commitment to addressing safety concerns. Many of these shortcomings were attributed to a lack of experience on behalf of CS workers.

This presents lawyers with a dilemma. The Court does not exist to rubber stamp CS proposals. This means that lawyers must be prepared to pursue a client's case by

requesting further assessment, testing the evidence and challenging any plans for contact arrangements. But as lawyers indicated, when there is substantial and irrefutable evidence of significant harm and risk it is unusual to spend much time contesting the evidence. Challenging weighty affidavits on a Legal Aid budget is often not feasible. Further investigation and testing the evidence can be a long process and lawyers would not routinely write an affidavit in response to defend the parent. The Department will present an extensive history of what happened before they applied for an Order, what interventions they have made and how they have not been successful. It becomes impossible to prove that those things did not happen or challenge the presence of risk.

> There are times when the facts should be challenged. The false allegations I used to find were horrendous and what was worse, some of the workers were immovable on it despite the evidence. They do tend to fixate on things because perhaps it's a criticism they are not prepared to wear. But the challenge is telling your client yes, you may be fixated on this one incident or the nine incidents which didn't happen, but that's not going to make a difference at the end of the day. They still have enough evidence of risk, so we need to focus our energies on access and not contest the evidence. You have to cut a deal because the Department has the upper hand. (lawyer)

Like parents, they were particularly concerned when a parent's background and childhood was used as evidence to suggest they are not capable of parenting their own child.

> One thing that really frustrates me is when the parents have themselves been subject to an Order in their youth, and that is used as a justification as to why the parent can't parent their own children. It's used against them to say they don't have the capacity because they haven't ever experienced a normal parenting relationship. That is completely unfair. If they haven't experienced that as children, that's not their fault, that's the fault of the Department if they were under Orders. It's there in the affidavit material more often than not and I think it's a ridiculous argument to make. It's not their fault if the Secretary wasn't being an appropriate guardian. (lawyer)

This was especially fraught when the parent had experienced previous removals and this was used to justify the removal of a subsequent newborn or infant. Past removal became a non-erasable Court record which reappeared with each new baby and was used as evidence of parenting incapacity without necessarily taking into account changes to a parent's circumstances. Tarred by the brush of previous removal, parents were also less likely to pass the merit test in order to access Legal Aid funding. One lawyer described newborn removals as 'a disgraceful and wicked practice':

> I act for a lot of clients who themselves have been in state care and are now having babies or are having third or fourth children continue to be taken from them. What should have been happening with a first or second baby is not. I am not saying they are written off, but it feels like that. There is some hope given to them with the subsequent pregnancy and then there is no work being done with them by the

> Department or not enough therapeutic supports by the workers allocated to them to prevent further removal. The taking of babies from hospital at a time when mothers should be able to be part of the breastfeeding, early bonding, but they go straight to Court. The way that's done needs to change immediately. Any of the principles around the bonding of that baby with the mother, that's been taken away. They may increase the access time, and obviously involve kinship care and extended family if possible rather than taking the child into foster care. Yes, the risk is there but high risk is being created to both baby and mother and extended family when babies are taken like that. There has to be a better way of doing that. (lawyer)

It is indeed uncommon to fully contest CS allegations of risk when there is substantial evidence of significant harm. The majority of care proceedings and grounds for intervention are about persistent neglect and/or emotional abuse rather than physical or sexual abuse. These risks involve sub-standard or dirty housing, housing instability, an unwashed child, an inadequate diet, a poor vaccination record or a failure to thrive, alongside substance use or family violence (Fidler 2018). How risk is interpreted is left to the Magistrate's discretion, but as lawyers pointed out, a key factor in assessing evidence is the Department's and the Court's approach to risk driven by fear of child deaths and media attention on the workings of the CSS. If a child is severely harmed it is CS and the Magistrate who are blamed, not the parent. But predicting risk of harm and how it can be managed is complicated. Risk has been described as 'sitting like a fog creating a persistent anxiety about what is around the corner…. It shrouds understanding and attempts to avoid and control it leave little scope for change, promote an overreliance on procedure and process and result in a failure to be creative about reaching possible solutions' (Smeeton 2018).

> The Department is risk averse and they are not willing to go there. They are not even willing to shift on things like moving from supervised to unsupervised access. It is very risk averse. The Department will fight on risk and they will win maybe eighty percent of the time on that. But they often need the evidence tested to be able to justify them not giving the client any access to their child. You are better off trying to challenge their justification for no time with their child in front of a Magistrate rather than risk. (lawyer)

Most cases are settled by consent but parents' accounts of their experiences suggest that although parents are not contesting the evidence and an application for an Order they are not really consenting either. Parents welcomed those instances when their lawyers had contested evidence, asked for proof and pursued their case by requesting further assessments or challenging allegations. They also pointed out the difficulties their lawyers had faced in what they considered to be obstruction from CS, especially with regards to the sharing of information and communication to clarify key issues with the evidence:

> We were with her 110 percent and explained every single detail that had been said against us. The worst thing was what our lawyer found very upsetting is that they can work along with us and then bang we're going to put you back a couple of months because we've got a new worker. The lawyer had to keep fighting about going back to square one. Our lawyer even wanted to sue them because of it. For a simple email or any information from us or the children, the lawyers would have to go there personally because they wouldn't give them a call back, they wouldn't send them an email. She is trying but Child Safety keep changing their minds with everything. (parent)

But although lawyers might support a parent's right to fight and 'have their day in Court', they may also hope to spare parents with no chance of winning the traumatic experience of a contested Court hearing. This can mean not spending time contesting evidence of risk but advising parents to consent to Orders and focusing on solutions to get as much access as they can for the parent to their child:

> You can challenge the risk, but how do you challenge the risk when the evidence is usually pretty overwhelming. The bar isn't very high. If you have three witnesses to drug paraphernalia on the floor, kids running around, dirty nappies everywhere and there was shouting and screaming last night and it's over, it's over for risk. It's a done deal. But it definitely isn't over for should these children be on a long-term Order, or should these children not be seeing their parents, that's the fight. The focus of these cases is always on the wrong thing. The focus of everyone, including the Department, is on risk when ninety-nine percent of these matters have everything to do with what access the parents have to their children. The parents will always argue about it. My greatest frustration is lawyers need to get better at explaining to their clients that the main game is not whether you took drugs five times a day, it's about getting you the best amount of time with your kids because this Order is very likely to be made. It's about how long it's going to be for and what the access is. We are all so focused on process and risk that no one actually thinks about how do we solve this? We need a recalibration of focus. (lawyer)

Nevertheless, not testing the evidence is not only distressing for parents but also means that it becomes part of the Court file as an unchallenged record which is then accepted as fact. This led some lawyers to argue that making a parent's objections to the evidence clear and challenging it in Court was crucial for the Magistrate's understanding of the case, and also for parents to feel that they are being effectively represented in proceedings:

> You can stand up at the beginning and say my client objects to these points in the affidavit. A lawyer that has good insight into their client and can see that those things are either exaggerated or false takes good instructions at the beginning to be able to get that out at the interim stage, rather than letting it go on for months and months and to articulate that at the conciliation phase. If you don't challenge the evidence it's there for ever. One of the ways to do that is to counter the early paperwork that's been put in, the affidavit with the application. The Department will then have to

> either amend their affidavit or continue their stance that it is true, but at least the parent is able to have something in writing. Otherwise the Magistrate is unaware, it's not on the file. It's important at an early stage for the parent to have their concerns addressed about what they say is false material. How can they have a voice if it's not seen by the Magistrate and if the Magistrate has only one thing to look at from the Department? Then the person can feel confident that you are fighting for them in a way that they believe is real. (lawyer)

Contesting evidence at an early stage in proceedings was seen by some lawyers as crucial for good representation that ensured the parent had a voice in proceedings.

4.3 Expert reporting

One form of evidence used to improve decision-making by the Court is the commissioning of independent assessments of individual and family functioning from professionals like psychologists and psychiatrists. Magistrates are generalists and dependent upon the evidence presented to them to reach decisions about how to ensure a child is safe, where they will live, for how long and the level of contact they have with their birth family. This may require professional assessments of family circumstances and functioning, parenting capacity, child development, attachment and bonding and other factors relevant to making decisions in the best interests of children. Experts may provide a commentary on the benefits of different interventions and referrals for support, a prediction of risk, the benefits of different placement options and a synopsis of current research about the impact of neglect and abuse on children, risk, permanency and contact. In theory this means that CS and Court judgements about parenting capacity and a child's needs are professionally scrutinised.

Most assessment reports are commissioned by the Department or by the Court from a small group of experts they use regularly. The Department will usually specify the terms of reference. This stipulates what areas are to be explored, what information the expert will have access to, who they are allowed to speak with and the timeframe for reporting. The initial stages of proceedings may involve parents undergoing assessments before any decisions are made about Orders, placement or contact arrangements. There is no quantitative data available about the number and type of expert reports tendered to Court, but seeking assessments can mean delays to proceedings whilst the Court waits for an expert report to be submitted.

Parents were asked for their views about assessments and how far they felt they contributed to a good or a fair outcome. For some, expert reporting had worked well and had supported their wish for reunification or a change in the direction of their case:

> We did our psychiatric assessment. Child Safety were trying to say that domestic violence was impacting on the children. But we done the assessment and there is nothing to say that it's impacted on them because it wasn't done around them. They read it out and it was a shock and in my favour because domestic violence had not affected my children. The case got thrown out. (parent)

But others said that they did not necessarily trust the experts who had been chosen to do the assessment or their independence, that they had got it wrong or it was inaccurate or misleading or that they were concerned about too much reliance on the use of expert opinion in the Court. The fact that they were frequently undertaken at a time of high stress and crisis meant the parent had presented poorly which affected their accuracy. They questioned the extent to which the assessment was based on Department files and the artificial circumstances surrounding observation during access visits, which could become an integral part of the reporting. For some it was the first time they had encountered a mental health professional or been asked about the issues affecting their lives or past trauma. They had confided highly personal information freely with the understanding that it was confidential. They were then horrified to find the details of their lives being read out in Court:

> She [the family assessor] had an hour appointment with me and saw the children all separately and former partners as well. I was surprised. It was a short amount of time and a report about that big. I just felt she had got a lot of information off the internet about what this and that means. There were so many things that were wrong. I picked it apart. The view that my eldest son had a father relationship with my former partner who is not his father. From that they recommended that my son live with him and he hated it. It was a horrible time for him. Years later they finally listened to him. They did not have a bond but she decided that they did. I got the assessment before my lawyer. It took me some time to read through it because it was so big. My lawyer said I want you to get a highlighter pen, go through it all, highlight what you think is not accurate and number each highlighted point. I stayed up late through the night to go through it. At the same time I'm thinking I'm about to lose my house so I knew I had to sort things out quickly as best I could because I was losing my home. (parent)

> When I had my three kids taken off me I was so angry. I was swearing and cursing, give me back my fucking kids. She [the psychologist] said how do you feel? I said I feel like a mother dog getting their puppies taken off them. And that's what they wrote down. Sharon feels like a mother dog with her babies taken off her. I thought what? I thought that's what I just said and you tell the whole world. (parent)

A number of lawyers raised concerns about the Court's increasing reliance on expert views. Well over half of survey respondents (58%) stated that the way in which reports are commissioned and interpreted was an issue in all or the majority of their cases. Some stated that 'experts' had become 'gods of the system' and raised concerns about the availability and quality of assessments, their capacity to address cultural differences and the ability of Magistrates to fully appraise them. There is often little involvement from lawyers, parents and other stakeholders in defining the terms of reference for reporting and currently no training or accreditation about how professionals provide expert evidence, beyond guidance from their own professional bodies:

> Often the terms of reference are circulated around, which is good, but then it depends on who is involved. If the lawyer is involved they can help the parents with it, but lawyers don't have expertise in complex psychology, sociology, social work. What happens in these cases is that everyone relies on reports from psychologists who

> become the guru. There are certain firms of psychologists who do these reports and make a lot of money out of them. I think the report exercise itself is farcical. They get people in, interview them and then make judgements about them. It's really frustrating that there is not a panel of experts that are used in these matters. The Department seem to pick and choose the experts they think will give them the right answer and there is an expectation that the Department's view will be the prevailing one. (lawyer)

> Expert reports are taken as black and white, which is a very dangerous thing, and the Court can rely on them too heavily. Sometimes the frustration a parent expresses can present them as being more of what the report says than they really are. Removing a child from a family is an abnormal event and the way parents respond emotionally, that's normal, they are besides themselves. But this is not understood as a normal response and it's a one-off assessment, done quickly and depending on the state of mind of the person on that day. Obviously there is some denial there for a parents about events but they are also aware that people are talking about them, assessing them, it's humiliating. They sit in Court hearing about their mental health without being allowed to speak. A negative assessment is an awful journey. (lawyer)

Experts themselves commented on the commissioning process. They had encountered episodes where CS held back information which might enable a full assessment of risk and it was rare to receive a whole CS file. They tried to also offer hope and a way forward for parents with recommendations about treatment and support, and identify strengths. It was not uncommon for reports to disagree with CS risk assessments. As one expert said:

> Child Safety choose what we see and this creates difficulties with the transparency of information. We always get the Child Safety affidavit, but much of this is hearsay and the Child Safety worker's opinion. A more comprehensive, balanced assessment requires information about criminal records. This is very helpful. Also drug screen analyses for levels and which is longitudinal. It is useful to have the full Child Safety record and exactly what concerns have been raised by whom, over what period, the involvement of other children, multiple records, notes from supervisors and changes over the years in order to try to get the full picture. Then we can do a better job for the parent and recognise the changes in their lives. We also like to have family violence records from the police with details about what happened during particular incidents and information about other partners. A cross-sectional assessment undertaken within one hour is limited without the above. (expert)

Parents and their legal advisors can also commission their own independent professional reports. However, this is expensive and uncommon. The national rate payable for reporting is $260 per hour and assessments can range from ten to forty hours' work, or several thousand dollars. Parents are unlikely to receive Legal Aid funding to cover the cost, and if they do manage to commission a report they commented that it is unlikely to carry the same weight as those commissioned by the Department. Such experts can be seen as biased in the parents' favour and not necessarily in the child's best interests.

4.4 Alternative Dispute Resolution mechanisms (ADR)

The other tool available to the Court to assist in making decisions is ADR, which promote resolution by voluntary agreement and a collaborative approach where parties work together to achieve a solution. There are three types of ADR in use in Tasmania – family group conferencing, used both prior to and during Court proceedings, Section 52 conferences ordered by the Court and conferences called by Separate Representatives to discuss avenues for moving forwards with a case. These processes go some way towards moving from an adversarial process to a more inquisitorial one where matters can be resolved non-adversarially, Court time can be reduced and families can actively engage in the process and have their voices heard.

An FGC is usually arranged by CSS but can be requested by two family members. Although the child can have their own lawyer or 'Separate Representative' present and acting on instruction or in their 'best interests', a push to move away from an adversarial approach means that legal representation for parents in an FGC is not permitted. Given that they are promoted as a tool to reduce the number of cases progressing to Court, it was interesting to note that a number of parents in our sample had no knowledge of them, had never experienced one and were certainly unaware that they could have requested one. There was a mixed response from those who had. Their experiences were highly individualised and appeared to depend on the training and skill of facilitators, cultural appropriateness and the level of participation achieved by parents and by children. Some had found them useful, particularly when making decisions about access arrangements or reunification or how to manage a crisis situation; for example due to a parent being ill.

> We had a family conference and we had it where I feel comfortable. The facilitator was good and with child protection now I ask for her. We had this big ball [in the centre of the table] where things were wrote out, like if I needed time out what would happen with the kids. (parent)

Others questioned their usefulness and validity. A key concern was CS compliance with decisions made at an FGC. There are times when they do not involve the CS worker most involved with the case and/or CS staff with the power to make decisions. This meant that some parents expressed little confidence that CS would follow through on the outcomes of the FGC, leaving no alternative but to have their concerns heard through the Court process. For others family dynamics meant this was a situation fraught with difficulty and confrontation. As one parent said, 'we don't get along. If they want to put us all in a room there are going to be some fireworks.' Many parents emphasised the need for support in this situation, particularly given the lack of any legal advocacy:

> They are useless. I couldn't sit through one, I broke down and had to walk out. When you're all sitting in the room, you have some family members there and I don't talk to all mine, which makes it hard. You have to sit there and listen and they say this will happen, but nothing ever happens. There is no outcome really. I just felt they never

> bothered with me. We are going to do this and that, we are going to get you a family support worker, but nothing ever happened still to this day. At the end of the day they don't do anything they say. They are supposed to keep you informed about what's happening but you are lucky to hear from them. Nothing ever got sorted out in them. Nothing could ever be agreed to in them. (parent)

> I was told I could request one and that I would need two family members to put in the request. My eldest son wanted it, he felt unheard over the years, and so did I, but they wouldn't. They said we are not even looking at that. It's a good idea, more FGCs, but it would only work well if it was well supported. With child protection families there can be so many dynamics going on, so a parent would need to be supported because they can be quite confronting. You are dealing with partners and grandparents. If they can't have a lawyer there then they need someone who is in their corner. It's very confrontational. (parent)

Lawyers certainly supported the promotion of pre-proceedings intervention to divert families from the Court system, including a greater use of FGCs. They also considered that the Department should have to demonstrate prior ADR use to the Court before any application for a CPO is made, except in extreme circumstances of high risk.

> I would like to see fewer cases make it to Court and more pre-Court intervention. An FGC when done well is an amazing thing. It can be used as early intervention or be part of the Court process. To be able to sit down with a family and say this is what we're worried about. We don't want to remove your child so let's be creative in terms of these are the worries, these are the things that need to be addressed, how do we do that in a way that will keep your child safe at home. A lot of time is given to the family to think about how they could address the concerns. It's about hearing their voice. It is really a planning tool and it gives the family a chance to get it right from the beginning. Once you're in the legal arena there is little room for this. Without lawyers present it is a much more holistic and friendly environment and they could be used a lot more than they are. (lawyer)

However, both parents and their lawyers were concerned about instances where families participating in FGCs had felt under pressure to settle. The absence of any legal representation biased the parents' situation and could lead to important decisions being made outside legal processes and without any external scrutiny, for example agreeing to unreasonable Orders or conditions. In some instances lawyers considered that, rather than promoting the engagement of parents in decision-making, these forums were being used as opportunities to assemble further evidence of risk. This led some lawyers to advocate for a legally-assisted model of FGC. This would require Legal Aid funding for lawyers to participate and a move for lawyers to focus on collaboration skills rather than litigation:

> Families need to understand what it's about. Although an FGC is not compulsory I think they feel like it is. Families don't look at it from a positive, they look at it from

> a negative or an opportunity for all these professionals to tell them what a terrible parent they are. It comes back to that power imbalance. There is provision for families to drive an FGC and I would be interested to see how often families do. Certainly in the north FGCs are very rarely instigated by the family. You just need two family members and to notify your Child Safety worker. I don't know if that is well-known or used. On a few occasions I've gone to Court and my client has told me they oppose the Order. I mention that to the Child Safety lawyer and they say but at the FGC they consented. I understand they are quite beneficial but when done badly it effectively destroys the relationship between everyone involved and pressures parents to consent to Orders or other arrangements. I've given clients very clear advice saying if there is a discussion about Orders then that is not appropriate for the conference. There is probably some work to do about clarifying the role of the FGC. (lawyer)

Unlike FGCs, Section 52 conferences are ordered by the Court (under Section 52 of the Act) during proceedings to clarify what matters are in dispute and to try and resolve them. They are presided over by a Magistrate, an officer of the Court or a conciliator nominated by the Magistrate and include the legal representatives of the parties. They are often the first time that all parties have been involved in a round table discussion, including CS staff, family, former partners and the facilitator. If no agreement is reached then the case returns to the Court for a hearing or a further Section 52 is ordered.

Again, some parents described them as useful and had valued the opportunity to be included in discussions. Others described them as 'useless and a waste of time'. They described stressful situations which were intimidating due to the dominance of professional voices, where cultural differences in communication norms were not adequately understood. Uncompromising CS staff and dealing with the strong emotions these issues could elicit meant that parents found themselves agreeing to Orders and then regretting it. Again, as with FGC, parents were critical of situations where, although agreement had been reached, it was not implemented, such as moving from supervised to unsupervised visits, having more access time or starting a reunification process:

> They were hopeless, absolutely useless. We have no authority, nothing. You can only speak through your lawyer. The second one here they told us to leave the room because I started to get a bit irate. The thing is you have to be an emotionless puppet to keep them happy. We had everyone around the table but Child Safety couldn't come up with anything. They couldn't compromise with anything. I was just told it was going to hearing. You can't legally come upon agreement in them. I have not come across one person yet that has said they have come to an agreement with child protection in a Section 52 conference, not one person. (parent)

> I was involved in lots of them. The reason I found them in no way useful is the fact that you don't really get anywhere with them. They came to nothing, there was no agreement. Asking me where do you think the best place for your children to be in the future is, and then laughing at me. That is the most unprofessional thing I have ever, ever seen. They just try to make it look like they get somewhere, to make it look like

> we've done a Section 52 so we can all sit down and have our say. But most of the time when you say something child protection will ask you a question and when you give them an answer then they use that against you. It's like a slide and you're sliding down. They don't get anywhere because they are not going to change their mind even when the child representative is on your side for the best interests of the child. (parent)

Lawyers also commented on the current operation of Section 52 conferencing. Some saw them as important forums for ensuring the voice of the parent was heard and were consistently complementary about them. They were also supported by the Court as increasing the likelihood of resolution through conversations between the parties rather than an agreement imposed by the Magistrate:

> At the end of the day risk will be conceded, so it's about being heard somewhere in this process. There has to be some point in this process where parents get to have a voice and Section 52s are a very useful tool. You have that independent person, the mediator or Magistrate, who is able to give a little bit of direction to try and assist the parties to come to a resolution, for advocates to say well actually our client has been to this and this appointment and he's doing this course and this is how it feels when the Department doesn't return their ten calls. If it's not going to run to hearing then this is the only chance for this to happen. They work well with a lawyer who is up to date on the case. But I think we have probably lost a bit of direction with it. I think it would actually improve that experience for the parents if it was them with the added voice of a Magistrate building a bit more authority in the room to say yes we have heard that. (lawyer)

However, like FGC, there was criticism about a failure to ensure adherence to any outcomes or agreements. In some instances this was seen as reflecting a lack of skill among facilitators.

> In Section 52s Child Safety can't sign off on agreements as staff with decision-making powers are not present. The client is in a heightened state and is being asked to conciliate. When it's an unallocated case you get people coming along because morally they should show the client we know you're in the system. But they don't have any actual instructions and don't necessarily get crucial documents before the meeting. So you sit there with a conference and in the end nothing is resolved. (lawyer)

Section 52 conferences operate differently in different parts of the state. In the South, due to heavy workloads, the Court appoints a Court official to facilitate the conference. When a resolution is not reached the Magistrate can order a further conference or indicate how they think the case will progress if it goes to a contested hearing. In the North West Magistrates themselves are involved in proactively running the conference. Anecdotal information suggests this might be more effective, with parents and lawyers feeling they are more robust mechanisms, that they are being heard and that there are concrete outcomes.

Lastly, parents commented on the powerful role Separate Representatives play. Separate Representatives are funded by Legal Aid to advocate for the best interests of the child. As well as giving voice to the child(ren), they are able to recommend specialist assessments, influence the direction of a case and the supports available to parents and convene a Separate Representative conference to identify issues in dispute and seek resolution. They can hold the Department to account by asking for the reunification plan and whether parents have been offered support. They can be involved in the terms of any Order or in reviewing the child's care and access arrangements. For some parents the presence of Separate Representatives had worked in their favour, for example by supporting less punitive responses to the issues parents had in order to meet the best interests of the child.

> The Sep[arate] Rep[resentative] will call a conference often at their office or the Child Safety office where people can discuss what's happening and whether there is an agreement or otherwise for the Orders being made. Having that more informal discussion where people can still put their views across is probably one of the best things that can be done. It allows parents to participate with the support and guidance of their legal counsel in maybe ways not considered in an FGC or Section 52. They are used sometimes when you have had one or two Section 52s, you have worked out what you're going to do, like if you're going to get an assessment done, and then there might not be a point to come back to another Section 52 until you've got the assessment. You get the assessment, tee up a Sep Rep conference and all go down and talk about it. (lawyer)

Of course, the Separate Representative can also confirm the views and outcomes desired by CS. In these cases parents and their lawyers may feel they are 'fighting multiple layers' with little chance of having their voice heard. Parents described instances where the Separate Representative had adopted a negative view of the family and where their presence prejudiced their case and acted as an obstacle to reunification:

> The Separate Rep for my daughter, from the start she has always seemed to favour the father. That's how I feel about it. I am doing the right thing and they are favouring the wrong people. I am doing everything child protection asked me. You have him declining drug tests but she is still oh no it all needs to be proven that he has done this. (parent)

A number of parents commented that they wanted to see their child being given more of a voice. Under the legislation children can be provided with an opportunity to speak directly with the Magistrate, supported by the Separate Representative. Parents, despite expressing concerns about the kind of evidence given by children and the potential for coaching a child so that their views matched those of the Department, wanted to see more children being given this opportunity to present their opinion.

> If a child wants to talk to a Magistrate about an Order about them they are not being listened to. I came across this with my oldest one aged 14. They should be able to talk to them. They are doing it in the Family Court but not child protection kids. They are

> not being spoken to. Can't the judge ask the child what they want, either through a lawyer or what not? But get a child up on the stand. (parent)

Some lawyers made a case for wanting to see a bigger role for Separate Representatives within the system. This might include mechanisms to ensure better consistency in the role so that appointments last for the entire duration of care proceedings and of Orders.

4.5 The Magistrate

There are 12 Magistrates working in the Child Safety jurisdiction in Tasmania. The Magistrate hears cases, listens to the evidence and makes decisions. The way in which the Court operates, the extent to which parents are directly addressed in proceedings and how proactively cases are managed through the Court is dependent on the individual style of Magistrate. Parents were asked for their views about Magistrates and their confidence in their role as the ultimate decision-makers in care proceedings.

Parents were very aware that the individual Magistrate who presided over their case could make a difference to the outcome. Communications between parents caught in the CSS system often conveyed a consensus about which Magistrates were fair in their judgements and which were not. They were particularly appreciative when there was judicial continuity with the same Magistrate throughout proceedings, when they felt listened to and when they considered that the Magistrate knew and understood the facts of their case and was empathetic to their circumstances:

> When I went back to Court it was a relief to have the same judge. He let me have a say in the matter and had my files. He said have you got a lawyer and I said no I'm representing myself. He was so proud of me. He stood there and he said in Court where everybody could hear, he said I wish there were more young ladies like this that have proved themselves and fight for their kids. I am not having an 18-year or 12-year order on this child. That child gets returned tomorrow and bang it was sorted and signed and delivered. (parent)

> One was really good. She was lovely. She acknowledged me as a mother and that is what I needed. I had just given birth and was dragged over the road to the Court. They needed to put a five-day order while I stayed at the hospital. She was very good. Even child protection said it's unfortunate that we don't have a place for new mums to stay with their babies anymore. She was alright and understanding how stressful it all is. (parent)

Parents described how being given a chance by a Magistrate who recognised the pressures they were under and that circumstances were not necessarily under their control had a major impact on encouraging behaviour change and boosting their confidence in being able to deal with the situation and with parenting:

> He said I think I am going to give her a second chance. She's cleaned her mess up and hasn't made any more mistakes. He said I am very proud. I felt I was treated like a normal human being should be treated. From that day on I felt proud, privileged that

> I stood there and knew that I did something right. Not everyone who is there is going to be there because they have treated their children badly. Some of them are there for things outside their control like mental health issues. It requires understanding. (parent)

> You can tell when a Magistrate is just going through their day and treating a case of child protection just like any other legal case. But you can also tell when they are truly listening to you and they look into your eyes and they say okay we are going to give you more time and you're doing a good job. (parent)

The other side of the coin was when parents described feeling negatively judged by the Magistrate right from the beginning of proceedings. Those with a criminal history also questioned whether this presented a conflict of interest for the Magistrate and that they would be more harshly judged because of it:

> From the first day I walked into that courtroom I knew he was going to condemn me. The look I got when I stood up. I felt he had already made up his mind. He commented on the length of the Court case and the number of adjournments. I never asked for an adjournment once. I felt it was a kangaroo court. The first judge looked at me like I was the scum of the earth, the scourge of society. It was terrible. It's terrible for your confidence. It's terrible to be looked at like that. He was so angry and that scared me. (parent)

> The one I'm going up in front of now is the one who dealt with my criminal charges and sentenced me to prison. That is a conflict of interest. That is going to impact his decision. It would impact any judge's decisions when they send a parent to jail and are also dealing with child protection matters. That's how I see it. I don't think that judge should have been given my child protection files knowing he was going to be sentencing me. The same Magistrates that take your children are the same that deal with criminal stuff. If you've got a criminal history you've had it. (parent)

A number of parents remarked that is was a CS Court, not a Magistrates' Court. They questioned how far the Magistrate was able to be a neutral arbiter between CS and the family and how far they were able to make an objective decision based on the evidence in front of them, especially when they had never spoken directly to the family.

> The problem isn't Court. The problem is welfare. The judge only goes off the facts which welfare put in their face. She doesn't ask us for facts or ask about our side of the story. The lawyers talk to the judge. We can't go up there and say look this is what happened, this is my side of the story. It's the lawyers that do that. Child protection is a law unto themselves and what they say goes. How is a Legal Aid [funded] lawyer going to fight for that mingy bit of money? It's not a legal system, it's for Child Safety more than legal. You can't win against the Court system and there is not a chance that you can be heard. (parent)

> One Magistrate didn't seem to want to be there. I had him again when they took Orders off three of my boys placed with their father. He did make the comment oh good let's get it out of my Court. It was just dump and run. It felt like an inconvenience and there were other matters they had to sort. They would come in after lunch and look flustered. What about sibling access, all the boys were in different places? But it was just a complete cut off and there was nothing I could do. I couldn't talk to him. It felt like child protection were running the courtroom. They get what they want and off you go. How do I stand up and say this is me? (parent)

> Who makes the rules, Child Safety or is it the judge? Sometimes it was like the judge was on my side but still Child Safety said something different. At the hearing the judge went through everything. The thing that annoyed me was they had stuff in the affidavit from the first time they were taken so it made it look like nothing had improved. I am not sure if the judge went on the past or not, it was confusing. The judge looked at all the paperwork and wanted a meeting with the kids. They said to him can we come home tomorrow. He said he wants to give the kids what they want and get them home as soon as possible. When I was with Child Safety later on they said no it doesn't work that way. I was hopeful when the judge said that. Child Safety wasn't on board with that but I thought the judge should have the last word. So I don't really know how the system works. I got confused about who actually made the rules. (parent)

Several parents expressed confusion about how far the Magistrate was on top of the details of their case. When asked during the course of the research what questions they might like to ask a Magistrate if they had a chance, the most common was how was it possible for the Magistrate to effectively digest all the evidence involved in the case in order to make a fair decision.

For the Magistrate, assessing the amount of risk is based on what is in the best interests of the child on the 'balance of probabilities'. Once risk and level of risk is established the question becomes what is an appropriate Order and access arrangements in these circumstances. There might be actions which can be taken to minimise risk and preserve the family, but ultimately it is a judgement about whether the level of risk can be managed within the family or whether it requires short- or long-term separation of the child from the family.

4.6 Negotiating access

Once Orders are in place the contact that parents have with their children and its nature, location and frequency become key concerns and can generate high levels of stress and frustration. Negotiating contact involves seeking agreement between parents and professionals who may have conflicting perspectives about the welfare of the child and how to best meet their needs. It can be supervised or unsupervised and be held in a range of locations, from the parent's home to the premises of community support and health organisations, contact centres or CS offices.

Court Orders can include broad contact conditions like 'regular contact' but leave the details of precise times, length and conditions of contact and whether it is supervised or not and by whom to be negotiated. Contact arrangements and complying with them are highly significant for parents. They can strengthen or weaken the parent's case or the goal of reunification by presenting opportunities to demonstrate commitment to the child and the quality of the relationship with them, as well as parenting capacity. Contact notes and observations during supervised visits provide an indication of interactions and possibly the issues which can be used to challenge a Child Safety worker's judgement about risk factors. This means that securing contact which works well for everyone is an important goal for lawyers and for parents.

These arrangements provide opportunities for lawyers to achieve an improvement in outcomes for parents. Lawyers might not be contesting the evidence of risk submitted by CS, but they could achieve better levels and conditions of access. This can be important in gaining the engagement and trust of parents, and negotiating access and monitoring its delivery became a significant part of their representative role. The majority of survey respondents (89%) identified negotiating access and ensuring that it is adhered to as the most common challenge they faced in working with parents and that it applied to the majority of their caseload.

Parents are often critical of placement decisions made by the Court and access arrangements which accompanied them. Kinship placement was especially fraught, for example when a child was placed with relatives of a violent ex-partner. They expressed many concerns about the environments where their children had been placed and the parenting capacity of the carers they were with:

> They put my kids all together and listened to everything my partner was telling them. I stopped doing everything. I stopped using, smoking dope, I even gave up smoking cigarettes. I have never really been a drinker. He was using flat out and he was allowed to have contact visits for a few hours at a time. He's driving around my little girl in a car which is not registered, he is unlicensed. I don't have any access to my own kids because of stuff he's been saying and he's putting my kids at risk. They remove your child for being in a domestic violence relationships but they will give him full access. They make the decision and you are sitting in the corner thinking no, no. (parent)

They also reported numerous occasions where they had difficulty holding CS to account for access arrangements. This was a painful experience for parents, for children and for the extended family. Under-resourcing of the Department and a shortage of placement options means difficulties in resourcing access visits, paying for transport and recruiting supervision services. Both parents and lawyers commented on a shortage of supervisors and support workers which resulted in frequent cancellation of visits, often at the last minute, and reductions in the frequency of visits. Requests for access for special occasions like birthdays or Christmas were ignored or rejected. They reported times when arrangements were used as bargaining chips, for example delaying access until a parent had found stable accommodation or was accessing treatment or services:

> We did have her every weekend, Friday to Sunday. We done that for six months. Then all of a sudden welfare just stopped it. She went really sad, she got a stutter.

> Now I see her once a week if they have made the time to be there. Mum and dad and the other two kids don't even see her, their sister. They are just hopeless. Mum and dad love that little girl but they just shut them out of her life. What have they done wrong? I have her once a week when they can be bothered. They are busy doing other stuff so they just cancel the visit. (parent)

> I got a new caseworker and the new caseworker stopped my visits for 12 months. She turned around and said in Court that I had been cancelling my visits and that's why they cancelled them. I had cancelled two or three visits, yes, due to not being able to get there. The Magistrate turned around and said well your visits have been cancelled for 12 months, why have they done it? My lawyer tried to argue about my visits being cancelled but the Magistrate I had didn't really want to hear it. He was more on the child protection side. I was so angry over it and argued and fought for visits for so long, they were put back on. (parent)

Parents described being in a double bind when meeting a condition to get treatment for mental health issues or substance use also resulted in a loss of access. In one case when the mother took up treatment for her mental health issues, this was used to justify cancelling her access because she was considered to be too unwell.

> It's actually in the Order that they review things every three months and they weren't doing that. I had some things factored into some Orders like access but child protection didn't stick to it and I didn't think there was anything I could do. I've since found out you can take these matters to Court but it's hard to do on your own. The worker said to me we are not doing that because with children on 18-year orders you only get to see them once every three months, that's just what we do. I have my Order and it's different but I couldn't challenge it. I couldn't seem to challenge the evidence. I had people writing letters and reports. Mental health even waived a fee. It's about $1,000 for these psychiatrist reports. Legally I couldn't go back to the judge and say look I've got this now and they are not sticking to this part of the Order with access. I couldn't get Legal Aid. They are taking access away because they are saying I am unwell and they want me to get treatment, so I did. Meanwhile they took away my access because I had presented to a psych ward and finally got the medication I needed. They even went as far as to say to community mental health we don't believe she is well, we think you're lying for her. They knocked my access right back. (parent)

> There were a couple of times my visits were stopped before Court. They tried to use the excuse that I was too stressed at those times to be with the kids. You are holding your kids and of course you're going to cry not just with sadness but with happiness and then it's time to go. My child protection worker I have now, he tries to bribe me. If you agree to this we will get this happening for you. I had asked about unsupervised visits. If you agree to this 24-month Order we will look into doing unsupervised visits for you. (parent)

Under the terms of the Act, the Court is able to grant a Contact Order specifying access arrangements and conditions. However, detailed Contact Orders are rarely used in Tasmania. Instead Magistrates and CS prefer 'notations' attached to Orders. A notation formally places the details of access arrangements on the Court record but is not legally binding. It means that breaching a notation cannot be held to have contravened a Court Order, for example a failure by CS to facilitate a supervised access visit due to a lack of supervisors or support workers.

Access arrangements are set in accordance with the Department's budget, not the needs of the child or the family. For lawyers the availability or otherwise of supervision services in order to facilitate access was a challenge in 86% of their caseload.

> Contact with children is always an issue and the Department and Courts are unwilling to make access orders which define the access that families have. This makes it impossible to hold the Department to account to anything and they often do not comply with notations in Orders made by consent, which leads to a lack of trust. Supervision services are inadequate to facilitate meaningful relationships between parents and children. Parents are expected to sign agreements but there is nothing they can do if the visit doesn't go ahead due to lack of resources. They can go weeks without seeing their children. Supervised contact is the default position of Child Safety, but in many cases it's not warranted and can drag out for years with Child Safety not willing to move in realistic timeframes or not prepared to provide any timeframes at all for parents to work towards. Parents are just given vague responses like 'parent needs to build trust', which has no meaning and doesn't assist the parent in addressing their issues. (lawyer)

> Parents perceive a lack of fairness in how their actions are regarded. If they cancel access visits close to the time it is due to occur it is a black mark, whereas the Department doing so is not treated as significant, there is no make-up time. There is an either/or situation. Either the family comes good and the child is reunified or they don't and the plan is for the child to have little interaction with their parents. The best interests of the child require that the parents have involvement up to the level of their ability and willingness to do so safely. But it is not clear that an objective assessment of what is in the best interests of the child, given the circumstances, is done in each case. All I want is for Child Safety to be clear and do what they say they will do. Promises feel empty. You have to chase them to achieve anything. (lawyer)

One mother described the particular difficulties she had when trying to negotiate access arrangements from prison:

> In the jail I was trying to get access to my son from his dad. He has a disability and he might be 18 in his body but he actually functions like a 12 year old. I was trying to contact him because he thought I had murdered someone, that's what they told him. I actually needed him to know that I was in for driving without a license. I rang child

> protection and they said he's not on our caseload. I said I need to be able to see him. She said that's not our job. You can't just go to the phone and ring child protection. I had to put in a request to the reintegration unit and for the reintegration unit to send it off to child protection, child protection to allocate five minutes to ring me and then for the prison to approve the phone call. So it took about a month for me to get that phone call. I get there and she says have you received my letter yet, I sent it out yesterday. Sweetheart I ain't going to get that for the next ten days by the time it goes through the security unit. She said I will ring you back and I'm like no, don't go, I need to know what my rights are. She said they are all legal questions. I can't answer them. I said tell me who can and she said I can't give you legal advice. (parent)

Commitment to preserving and/or reunifying the family is judged by regular attendance at access visits and the quality of the interactions between parent and child at these visits. Yet there are a number of obstacles to achieving suitable and achievable access arrangements. Limited time for access visits can weaken family relationships and make it increasingly difficult to sustain or develop a parent/child bond, particularly in the face of numerous cancellations of supervised access arrangements. At the same time parents have limited ability to hold CS to account for a failure to facilitate access visits.

With access arrangements often key to demonstrating attachment between parent and child, attachment theory has become a very influential concept in CS practice, driving risk assessment and decisions about the early removal of babies and infants from their families (McLean 2016). Being given the opportunity to form a bond and attachment becomes a major issue for parents and lawyers representing those facing removal of a newborn. Here a failure to allow time for bonding becomes a self-fulfilling prophecy and removal becomes inevitable:

> Early removals of little babies, the parents might only be getting a couple of hours a week. It's not enough and they create a bond with their carer. In twelve months' time when it comes to reunification, the Department has the audacity to run an argument that says we can't give this baby back to its parents because its bond is with its carer and the effect of breaking the bond would be detrimental to the child. You have parents who've done what they need to do, whether that's leave the family violence relationship, get off the drugs, and have showed up for every single contact that's been scheduled. Nothing about that bond creation was their fault, absolutely nothing. Sometimes the removal of the child wasn't their fault, it was removed because older children were removed. So when they later had a child it was subject to an automatic notification to the Department who then removed the child just to be sure. Most cases begin as a four-week Assessment Order with evidence to a low standard, for example a previous failure to protect from family violence. This despite the fact that circumstances have now changed and there is a different father. Combined with an unsympathetic Child Safety worker and a parent who is not cooperating with a request from Child Safety, a missed appointment can mean agreement to an Order. (lawyer)

> The children suffer from being separated from their parents and particularly if they are three or four, that is a real issue for them. But at any age they are only seeing their parents a couple of hours a week and they start becoming attached to the foster parents. It's a real issue and it just breaks up families. If they take the kids parents should be presented with every opportunity to have them returned or maintain a relationship with them. If parents can demonstrate an improvement then access time should improve. This doesn't happen. The Department will set access in accordance with their budget, not the needs of the family. Moving away from having any access is a self-fulfilling prophecy. It's a domino effect with the bond, attachment. They get more isolated from their children without that access. If you can fight that and can show you have had the time with your child, prove the bond is there, we can build on this and move further towards reunification within the life of an Order. That's what a lot of us working in the area are looking at. (lawyer)

Lawyers talked at length about cases where access was impacted by resourcing and where there were difficulties holding the Department to account for arrangements. They found that reunification plans often gave parents few expectations of what might be achieved if they did the right thing and there was no real plan or strategy for progressing the case with measurable objectives, for example specifying behaviours that would result in an increase in their access:

> The main issue for parents and lawyers is we can't trust the Department to do what they say they'll do. The Department will refuse almost point blank for there to be Contact Orders, but they want contact notations. They want an Order which says contact will be arranged by the Department at their discretion and a notation to say that if the mother jumps through a hundred hoops or the father does all these courses they might allow contact to happen at such and such a time in such and such a place. But that never happens. What always happens is that contact turns out to be two hours a week at the Department's premises, in what they call the fish bowl. It's really difficult for parents to get proper contact with their children and maintain the relationship. Myself and other lawyers won't accept just notations these days. We ask for actual Orders. But even when the Orders are made the Department often comes back and says we just can't do it, we can't arrange for this Order because we don't have the resources. So it just doesn't happen. With access it can be easier to say no due to resourcing rather than actual risk. (lawyer)

A significant part of the representation task then became negotiating for improved access arrangements and holding the Department to account for these arrangements.

> With a 12-month Order we would hope to see movement towards reunification with measurable outcomes. Responsible representation would ascertain the plan, define measureable objectives and then what in the system can promote the child being

> cared for by their parents. But often we see no action and no support for parents to initiate action and change. So we have spent 12 months in a holding pattern. Unless legal representation can keep the Department accountable often nothing happens. I would like to know what resources are being planned or suggested for the follow-up of those families issued with a 12-month CPO or an 18-year order. Often once that Order is in place, reunification is just lip service and parents feel they are washed out of the back end of this system and left to fend for themselves. I would like to clarify whether or not they really have an intention to facilitate reunification or greater time between a child and biological parents. (lawyer)

As lawyers emphasised, the predominant and narrow focus on the child and their best interests can mean minimal attention being paid to the fact that those interests often incorporate the interests of the family and their preservation as a unit. An emphasis on removal as the solution to family problems failed to recognise that strong, entrenched family ties and supporting them were integral to a child's best interests.

4.7 Cultural considerations

Both parents and lawyers commented on a lack of attention being given to cultural considerations by the CSS and by the Court. One-fifth of the lawyers (21%) who responded to the survey identified cultural considerations as an issue in all or the majority of their cases.

TACLS provides legal assistance and representation to those who identify as Aboriginal. It draws on the Indigenous Legal Assistance Program to access funding for supporting Aboriginal parents through care proceedings. This removes these parents from the constraints imposed by the state-funded Legal Aid pool. More flexible funding rules enable legal advice and assistance to be provided earlier and to continue through to a final hearing. This arguably gives Aboriginal families better access to legal representation than non-Aboriginal families.

However, despite an upward trend in the over-representation of Aboriginal children in the OOHC system, lawyers commented that the access Aboriginal families have to justice can be compromised by a lack of cultural competency in processes and procedures. The Act stipulates the Aboriginal Placement Principle, where children must be placed within the Aboriginal community wherever possible and/or be provided with opportunities to retain those links with the community. Families engaging with legal processes must also have the support of an Aboriginal organisation. One lawyer commented that these processes were 'a tick box exercise at times rather than considering the cultural needs of the children and their cultural rights'.

They pointed to a number of issues operating as barriers to sustaining links with community and culture and participating in cultural experiences. The Aboriginal Placement Principle is difficult to adhere to, with a shortage of Aboriginal families available to foster and a common unwillingness to explore possibilities within the extended family or speed up assessments of kinship placements. This results in the placement of children in non-Aboriginal families. In addition, Aboriginal parents are not necessarily those who have had care of the children or been involved in the reason for their removal, yet the Court system does not accommodate the extended family, the grandparents, aunts and uncles who should be party to the proceedings.

> Across Tasmania there are different levels at which the Department, both their legal team and the case workers, will engage with different Aboriginal organisations. The legislation requires Child Safety to seek approval from an Aboriginal group, but they will quite often go to the wrong one. A group that has nothing to do with the client is told to make the decision about what's appropriate for our client's child. That doesn't work and it also tends to further isolate the family from the process, because culture is not the same between different groups. They feel more isolated by the white man telling them what their culture is. When there is good uptake, they engage well and use the services. Those families tend to have much better results, particularly in regards to contact, because they'll allow the organisation to facilitate the contact, and the organisation has the resources to do that. But in some areas they will automatically acknowledge only one Aboriginal organisation. If your client is a member of a different group you're out of luck, they just won't do it. It is a particularly silly problem to have when the Department and their lawyers are told that this is the group they engage in, not this one. It could easily be fixed at very little cost to just make it work a little bit better. (lawyer)

The research did not allow for a full exploration of cultural issues, but it is apparent that different CALD communities may experience particular issues, both of gender and of culture:

> With the Sudanese community there is a difficulty in engaging with the mothers because of how the mothers are allowed to engage with males. With the father of the children the mother is unable to engage with Child Safety because of restrictions on her speaking because of her partner or ex-partner. Or when the Child Safety worker is male she can't counteract anything they say, she's required to agree with them. They can have difficulty dealing with people of a different gender but also with authority figures. The Court system doesn't know how to deal with that. So a family who would otherwise be perfectly fine and able to do what needs to be done, shut down when engaging with the system and it means that information can't get across. It makes it much harder for them. (lawyer)

4.8 The interface with other legal processes

Families with complex issues, including child abuse and neglect, can be involved in a number of jurisdictions at the same time – the Children's Court, the Family Court, the Criminal Court, and the Criminal and General Division of the Magistrates Court where Family Violence Orders are granted. The consequences of this are multiple and predominantly negative as families experience different proceedings which can overlap, assessments, conferences and negotiations which are duplicated and access to legal representation being compromised by this duplication, with the same issues being aired across different Courts while costs escalate. Orders can be inconsistent and there is increased stress on families as they repeatedly tell their story.

Sixteen percent of survey respondents identified the interface with the Family Court and practice and procedural differences between the Courts as a challenge in all or the majority of their cases involving parents. Both systems are similar in their emphasis on informality and relaxing the rules of evidence and both operate in the best interests of the child, but the Family Court is a 'Court of Record' where reasons for the decisions made are transparent and more reliant on case law. The parent themselves can also initiate Parenting Orders or the access arrangements which apply to the non-resident parent. In the Children's Court parents can apply to vary, revoke, suspend or end a CPO. There is a different model of representation for children which is funded in a different way.

> They go from being your criminal law clients to your Child Safety clients and then your family law clients. They are very much the same cohort. There are similarities and risk factors which are often the same, drugs, family violence and so on, but it's also a little bit different because of the gravity of the situation. The Family Court has advantages. It is tapped into services better, parents have more ownership. There are on-site services and mediation and the ability to link families to non-legal needs. It is not the state against the parent. There is the opportunity to move away from coercive Orders and the stigmatisation involved. There is a different approach to access arrangements. Judges have broad skill sets and the ability to deal with all types of family matters whilst understanding a best interest approach and thresholds for intervention. (lawyer)

This interface has been the subject of numerous enquiries to foster better alignment between the Courts. Some lawyers saw a clear benefit in enabling Children's Courts to make parenting orders and, given their expertise in dealing with children, for the Family Court taking on a limited jurisdiction to deal with CS.

The response to family violence in the CSS focuses on making Orders to ensure the safety of victims by limiting or preventing contact with the perpetrator. This has been described as a 'blunt instrument' which only secures immediate safety. They are not nuanced and do not necessarily involve exploring children's wishes and ongoing assessments of the protective capacities of parents and of perpetrators. Lawyers supporting parents involved with CS where there are family violence issues can face particular challenges:

> Parents have asked Child Safety for help due to having an abusive partner. The parent has recognised that it's not safe for the children to be in that environment. Rather than Child Safety assisting parents to get the help they need, they have removed children and then criticised parents for all the risk factors involved, despite the parent already recognising the risk factors and wanting assistance in how to address those issues. Child Safety have not been focused on the solution but rather the problem. That's almost double punishment for victims of family violence, mostly mothers. Child Safety say you can't protect your children from family violence so we are going to take your children. Is that not the lowest moment? (lawyer)

There have been significant policy shifts to lessen the victimisation of women in the context of CS interventions. These acknowledge the compromised position of mothers as the protective parent. But there is a still a disconnect between policy, legislative intent and practice when, despite a restraining order, contact is maintained between the child and the perpetrator or the mother is prevented from participating in a pre-hearing conference due to the presence of a violent ex-partner. A number of parents in our sample described these difficulties.

Framed as a problem-solving approach, dealing with family violence issues in the Magistrates Court uses more collaborative or integrated service approaches in recognition of the multi-dimensional nature of the problem and draws together justice and support. The LACT Safe at Home section provides legal information, advice, support or representation for adult or child victims of family violence. Most recently the Family Advocacy and Support Service (FASS) has been implemented across Australia to provide short-term legal and social support to victims of domestic violence in the Family Law system during legal proceedings. FASS can also assist parents with CS issues if they are transitioning from one system to another and if resources are available.

Many would like to see a one-Court principle to address the jurisdictional overlap for families through information-sharing initiatives and collaboration, a national database of Orders, co-location of Courts and joint training initiatives.

4.9 Regional differences and consistency

Both legal practitioners and parents commented on a marked inconsistency across the state in how processes and procedures operated and decisions are made. There are differences between different CS offices in how parents are dealt with, the type of applications they make for Orders, the style of prosecutors and in the levels of

collaboration between the legal system and the CSS. There are differences in the access parents have to support and therapeutic services and to supervision services for access visits. Although Magistrates are operating within the same legislative framework, they are independent judicial officers and proceedings will be conducted differently dependent on individual style. There will be different approaches to seeking the participation of parents; some will be more interventionist and some more therapeutic than others.

> There's an inconsistency between what Child Safety do with one family compared to what they do with another. Some parents get a lot more Legal Aid [funding] than others. With cannabis in some cases you can't have your children until you have not smoked for x amount of time. In others they can continue to smoke cannabis in the house and it is not an issue. It's quite hard to judge at times what's going to be an issue and how to overcome it when there's no consistency. As people move around the state there is a different approach in different divisions. I work from Campbell Town up and in Burnie, Devonport and Launceston. Even between those three jurisdictions the processes change and the likelihood of reunification definitely changes. (lawyer)

> The regional differences are insane and that is another challenge. The lack of transport infrastructure is a key issue. Parents are unable to travel to courses, to counselling, to access visits. They have no money for transport, which is then used as a black mark against them. We are almost on different planets down here compared to the North West. The South are more collaborative with fewer matters going to a full hearing. Hobart is the biggest registry and the better resourced. If we can create a new relationship and a different dynamic down here then we can go and sell that to the rest of Tasmania. (lawyer)

Lawyers described some key differences in how FGC was used across the state as an early intervention tool, and similarly with Section 52 conferences, where in the North West they are presided over by the Magistrate rather than a Court-appointed facilitator. This is seen to improve rates of resolution. One lawyer described how notations[16] are used in different regions and the impact this has on the family both in the short-term and into the future.

> In Launceston we hand to the Magistrate the Orders that parties have agreed. Attached to these Orders are ten notations so the Court understands why the parents are doing this and what they are doing (i.e. accepting removal) and what the Department is expected to do in relation to those parents. The Magistrate commends the parent for what is a very hard decision, thanks them and makes the Orders and it's on the Court file. You'd go to Hobart and do the exact same thing, and get no,

16 Notations are not Orders made by the Court but a statement of the wishes and intentions of the parties attached to an Order. They are an aid to the court to properly interpret the Order but are not legally binding.

> we're not putting notations on the Court file, it's not a consent jurisdiction. The Orders will be made but there'll be no other comments. So then in three years' time you come back and say those Orders weren't opposed because this is the understanding of what is going to happen. The Court will say where is that on the file? The Orders are identical but one is really positive and one is not. That in itself is such a big discrepancy for a two and a half hour drive Launceston to Hobart. It makes such a big difference. Kids grow up and they get a copy of their Order and they see in black and white it was not opposed by the parent and don't understand why their parents didn't oppose those Orders. It makes a big difference to families and it makes a huge difference to young adults who are trying to find out what happened. (lawyer)

Given the seriousness of the decisions being made, it is difficult to justify this lack of consistency across the state. All processes are based on the same legislation. It should not be the case that a parent experiencing proceedings in one region should get a different outcome to a parent in another region. Or, as some parents who had moved between regions said, different outcomes for the same child depending on where they were currently living.

> The child protection services in Launceston came and did a safety check and said we are going to release your son into your care. But when he was born the child protection office in Hobart rang the hospital and said do not let her have that baby. If I had had my son in Hobart they would have taken him. Because I had him in Launceston they didn't take him and he left the hospital in my care. (parent)

4.10 In summary

The way in which decision-making processes currently operate has a significant impact on the ability of parents to participate and their sense of whether they have been treated fairly and had access to justice. Alongside shortfalls in access to quality legal assistance, the barriers include:

- The late serving of affidavits, giving little time to digest allegations of risk, prepare a case or give instructions to a lawyer.
- The nature and quality of the evidence used to support CS applications, which is often described by both parents and lawyers as factually inaccurate, misinterpreted, taken out of context, exaggerated or even fabricated. The constraints of a Legal Aid budget can allow little time for investigation and testing of the evidence or the commissioning of expert reports to challenge those provided by the CSS.
- The operation of ADR and their ability to provide parents with a voice during care proceedings being highly dependent on the skills of the facilitator and whether decision-makers being accountable for implementing the outcomes. Parents report pressure to consent to Orders during ADR processes.

- Under-resourcing, which creates difficulties for parents in complying with the conditions attached to Orders and gaining access to support and therapeutic programs, and for the CSS in facilitating access arrangements and the steps required to achieve reunification. This impacts on a family's chances of achieving both family preservation and reunification.
- Numerous delays in care proceedings which lengthen their duration, increase stresses on the family, and lower the chances of reunification when they clash with the developmental needs of the child.
- Processes and procedures which do not adapt easily to cultural differences or the needs of people with disability.
- Diversity in the way care proceedings operate across the State – in the style of different Magistrates and the way ADR operates, in the approach of CS offices and of legal practitioners, in the access parents have to support services and in levels of collaboration between the CS and the legal system. This diversity supports a system where outcomes for parents can depend on where they live rather than their or their families' circumstances.

It has been argued that decisions about families and children proceed in two separate ways. There is the legal process where applications for Orders are made to the Court, allegations of risk and harm are explored, parents are typically ordered to connect with services and treatment programs to change their behaviour and the Magistrate makes a final decision about the child's future. In theory parents have legal representation during these processes to assist them. However, there are also administrative processes running alongside Court procedures where parents attend meetings with CS workers, develop plans to keep children safe and clarify reunification plans. These processes are arguably more important and often begin before the Justice system is involved, but operate without any advocacy or representation for parents. This makes a strong case for access to both legal representation and non-legal advocacy throughout families' dealings with the CS and with the Justice system.

CHAPTER FIVE

Outcomes: Experiences of parents and lawyers

Care proceedings result in a range of outcomes short- or long-term Orders determining where a child is placed and for how long and the kind of access parents will have, including whether and when reunification can occur. Parents were asked for their views about the outcomes of care proceedings and what kind of impact they have had on their lives more generally and the lives of their children and wider family.

Parents were shown the Principles of the Act relating to the role and participation of families in promoting the safety of children. Together with lawyers, they were asked how far the current legal system had been able to implement the intent of the legislation and the extent of any shortfalls.

5.1 Impact on health: emotional, mental and physical

Although a basic tenet of both the Justice system and CS is to 'do no harm', surviving care proceedings and living with the results can impose a severe cost on the health of families. Many parents described a lack of recognition of the meaning of final hearings for them. This is reflected in few opportunities for debriefing or support after a final Order is made:

> I stood there in Court and I felt embarrassed looking at the welfare people smiling happy. I was a frozen bit of ice. My heart dropped and I just walked out of that Court slowly as. I was alone. I caught the bus, went home, sat there, had a coffee, staring at the four walls. (parent)

> I went to Court with my head held high. Finally this will be over and all my kids are going to come back to my care. No, the judge granted them 18 years. I walked out of there the biggest mess I've ever been in my life, the hardest day of my life. They said he'd been in his placement too long to be taken from there, that it wouldn't be good for him. The Court didn't realise the impact when you've worked so hard and you're doing so well. I can't understand it. So many are taken and then the excuse is they have been in care too long. I said why can you rip a child away from me but he's been in his placement for too long. That is a lose-lose situation and I can't understand how the legal system works if that is the case. (parent)

Although they might be aware of the challenges inherent in making decisions about whether to remove a child and the risks involved, parents also described how difficult it was to come to terms with the decisions made, especially when they did not feel they were the result of a fair and just process.

> With that pro bono lawyer I felt like it was let's just get an Order done so it's done and dusted and you can just get on with your life. He literally did say that after the Order was made, now you can get on with your life. Am I at the end of this battle, is that it? I want to keep fighting. It didn't feel right. Because it was adjourned so many times, because they were doing this and that and getting reports, when it finally got to the point where they put an 18-year order on, let's just get it done. I didn't like that. It

> didn't sit right with me. From what I'd heard once they get those Orders then that's it, it's very hard to get your children back. At no point did I have any chance to speak up for myself. I wanted to talk to the judge and say you're not listening. (parent)

> I don't know what to think. In some ways I get where the Courts and child protection are coming from with their views of me personally. I understand, with my mental health, I get that they're worried. Because of the upbringing I had they are worried I am going to do that to my children. But then in saying that, they must also get my point of view which is I have never had a chance to look after any of my children. They have been taken straight from hospital within an hour of being born. Even some of the Magistrates have sat back and said she hasn't been given a chance, but in the end they make the Orders. I don't think it was fair at all not to be given the chance to raise any of my children. I don't wish that upon anyone. Child protection say I can't look after my kids but yet I haven't been given the chance to show I can. (parent)

Some parents described a slow acceptance of the decisions, whether or not they agreed with them:

> I'm stronger now. I put myself in my kids' shoes. I can't say it didn't hurt, but it hurt for them, not hurt for me. And I went what have I done to my kids? That was the hardest part. It started to make me stronger because I cried and I hurt and I accepted. I had to get this trauma and I had to face it and that's what I did when I was in prison, and it made me stronger. You have to deal with the wrong things you've done, and you have to deal with the fact that child protection were wrong too, and you have to deal with the fact that you did this to your children. (parent)

> There is no reason not to agree to the Order other than me wanting him back. His happiness comes before mine and he is happy where he is. I agreed to the 18-year order and it was finalised in Court. I know he will never come home, he will always stay with Gemma. I've met Gemma once and she won't meet me again. I do understand that. (parent).

However, whatever their views about the final decision, they described a big impact on both their physical and mental health and the health of their immediate family. They talked about the ongoing grief and pain of separation, the anger, anxiety and depression. They described sleeping all day or not being able to sleep at all, escalating use of drugs and alcohol, and suicidal thoughts. Some had found it so difficult to cope with the separation that they no longer attended access visits because they found it too painful.

> I got told don't be so negative. I said how am I supposed not to feel so negative in this situation? I have a very bad anxiety over the whole thing, mentally, physically and emotionally. It's just a train wreck. They chuck it on you and say this is the way it's going to be, tough shit, get on with it. (parent)

> The impact has actually been a massive reason why I haven't been able to get back up and keep going. You're trying to go up to a judge and have a voice and you are shut down. I have pleaded with judges and they say don't talk to me or I will throw you out. That hurts even more because you go to a judge, someone who is supposed to judge what is right, do what's right, and you don't get a voice. I feel I've been treated just like someone who has done a crime and is being punished for it. The kids came and visited me and I couldn't handle it. They cried nearly every day. I thought I can't do this with depression and I am not going to get you back, so I'm going to give up. I just stopped going to the visits, started drinking just trying to fill this void. After that there were times when I'd call up and try to reorganise it. I always wanted to see them, but I was just broken, so I just drank and drank and drank, every single day for seven months straight. I think about my kids every day, so I have to block it out or I'd die. They just kept kicking me down and whenever I did something it was never good enough, so I was never praised. It was unbearable. My brain did this thing where as soon as it would come to my children it would go past like it tried to protect me. So with affidavits it was like I can't do that, I can't deal with that. (parent)

> Some people go through it all and they just break. Removal is the solution because it's the cheapest. People take their lives because they've had everything taken away. They take them away because of your mental health or whatever and put them in someone else's care. They are mortified and feel it's their fault this has happened, they get worse. And then they say we knew that was going to happen. Well it only happened because you took their children away. (parent)

They talked about their children calling the carers mum and dad and carers spoiling their children with possessions and treats which they could not afford. They described the pain of hearing a child did not want to attend access, not being informed about medical treatment or not being able to visit their child in hospital, not receiving school reports or information about their welfare.

For those with children in kinship care, access arrangements could be easier and more flexible. However, they could also be more fraught as members of the family worked out their roles towards the children and what kind of relationship they would have with them.

Children moving between placements and to areas which were less accessible for access visits was a major problem for many families, including changes in the school they were attending. All of these decisions were being made without the participation of the parent, and the lack of information about their child's welfare was a constant anxiety.

> You don't get told anything, and it's your child. My child has had accidents and been knocked over and I don't get told about it until I ask what has happened. He went to hospital and everything and I wasn't told about it. Say something really bad happened, nearly dying of something, they wouldn't ring me and tell me. (parent)

In the longer term, parents described a number of more practical impacts on their lives – on their ability to get employment and occupation, to find accommodation and to break free of the shadow of CS. The time and costs of attending numerous Court hearings had impacted on their working lives, their employment and any volunteering they wanted to undertake, for instance at their children's school. With CPOs appearing in credit and police checks for both birth parents and young people subject to an Order, being involved in care proceedings can affect access to credit or a lease and to obtaining a Working with Vulnerable People Card, essential now even for casual work in MacDonalds:

> My lease is about to be up and I have to look for a new house. Do you know how much I hate handing over a piece of paper with my name on it? I went into Radio Rentals to get a washing machine. She rings me two hours later and says Karen and I say yes because I knew what was coming. I said don't worry about it. It is the same with midwives. If you go in and they look at you and you look rough or tough or bad they will just google you. I have no one to stand up for me. (parent)

> Because of the Court process our job, our business no longer exists. We've had to cut out so many jobs to get to Court for 3 o'clock. Or you go and spend two hours in a Section 52. (parent)

One mother caring for her son who had autism described how frightened she was that any difficulties she had would be attributed to her incapacity as a parent rather than dealing with a child with behavioural issues. It impacted on her willingness to seek any help or make her difficulties visible to mainstream support services. Another spoke about living with domestic violence:

> We go there for protection and it gets thrown in our face. I don't ring the police anymore because of welfare. We can't just get a job. We can't even afford to live in a house. I am 20 and still on Youth Allowance. How can I get a house, and I have to have a house before I can get my kids back. Just because there is domestic violence it doesn't mean we don't love our kids or care for our kids. (parent)

Parents talked about forever living in the shadow of CS:

> I think a lot of my story, and why I kept failing was you are never good enough. Nothing I ever did for child protection was ever good enough. Having a child removed doesn't make you a bad parent. Somewhere there was a bad decision made. It shouldn't define the rest of your life. One mistake doesn't define the two years prior to it. (parent)

At the same time parents also described how their experiences had made them stronger. They had been motivated to get on top of their substance use or leave a violent relationship, and been given increased confidence in doing the best they could for their children:

> You definitely have to change your path, you have to change everything. I snapped out of it and stopped hanging around with all the dickheads. There were people you wouldn't want around your kids. My first Court appearance I sat down and cried in front of the judge. I told him my story. Once they took him I went cold turkey. I knew they were on to me and it was about drugs, so I got on the Valium when I got frustrated and angry. (parent)

> I was really angry to start with, but if that had never happened then I wouldn't be where I am now. I would probably still be in that same cycle of domestic violence, smoking dope. I stopped smoking dope so I was better for the kids. Then I started getting involved with the school and the Child and Family Centre. I ended up making friends with the Neighbourhood Centre. I met a new partner and my own home was starting to be redone. I broke the cycle. (parent)

> If they hadn't taken my kids I probably wouldn't have had the willpower to stay away from him. I loved him. I do see why it was important for my children not to be with me at that time, but for the five days not for the five years. Not when I had moved on and got another partner, a respectful working man, never had a problem. It's ridiculous. (parent)

5.2 Implementing the intent of the legislation

The way in which CS and the legal system operates is framed by the legislation and the Principles of the Act. All research participants were asked how far they felt the legal system was able to implement the intent of the legislation and its Principles. Lawyers responding to the survey were asked to estimate in what percentage of their caseload these Principles had been implemented (see Table 2). A range of views were expressed, but overall they described high levels of dissatisfaction about the ability to effectively implement the legislation and that legal processes operated as a barrier to implementation.

Table 2: Implementing the intent of the legislation: the views of lawyers

Principles of the Act	Percentage of respondents stating Principles of the Act had been promoted with parent clients in the last two years in 'All' or 'Majority' of cases (n=36) %
Keeping children safe and stable	61
Supporting families to provide a safe environment	23
Treating families with respect at all times	20
Removal as a last resort with children eventually being returned	22
Supporting contact between the child, their family and their community	19
Providing families with information so they can fully participate in proceedings	19

5.2.1 ENSURING A SAFE AND STABLE ENVIRONMENT FOR A CHILD'S UPBRINGING

There was most satisfaction with the core Principle of the Act, keeping children safe. Here many parents and lawyers considered that enacting the law had ensured the safety of the child, at least temporarily. Three-fifths of lawyers who responded to the survey (61%) considered that children were always or in the majority of their cases in the past two years kept safe and stable. A number of parents commented that their child(ren) had been safe and supported in OOHC. They appreciated the care that had been given to them and the experiences they had had with carers.

While all agreed that the focus must be on the safety of the child, many had not had such positive experiences and there were a wealth of complaints about what had happened to children in OOHC and what parents saw as a lack of monitoring and review of care environments by the CSS. They reported abuse and neglect in OOHC, overcrowding, lack of access to necessary medical treatment and instability caused by frequent moves between placements and between schools. Those with teenagers were especially critical, and some reported uncontrolled behavioural issues, self-harming and a risk of suicide:

> My daughter, she was placed in a house. She stole a car and smashed the windows out of the car, she smashed the house up. She never did none of these while she was in my care. She is now a violent and angry person. She is not getting heard. She has gone downhill since she's been in their care. She is suffering from depression and self-harming. They are not even allowed to go into her room and check on her. She could just go into her room and slit her wrists and bleed out and they're not going to know. A lot of the time I panic and I put that stress back to my lawyer. They are not taking care of her. (parent)

> When Noah first went into care he was coming to me disgusting. They are taking these children from, as they say, an unsafe environment to someone they don't even know who could never have had a child in their life. There are not enough checks for that but we are supposed to have all these safety checks. (parent)

5.2.2 SUPPORTING THE FAMILY TO PROVIDE A SAFE ENVIRONMENT

Only a minority of research participants considered that families were supported to provide a safe environment for their children. Less than a quarter of lawyers (23%) considered that this applied to all or the majority of their caseload in the past two years. Parents commented on the lack of support for both themselves and for kinship carers prior to removal, during removal and when children were being reunified. Several parents described how they had asked for help in protecting their child but that had been used against them in affidavits to demonstrate their inability to cope:

> When I got the kids back from mum I was only on a Newstart payment. I asked if they could help me out with some stuff and they turned around and said no, you have to get support from your family. I can't ask mum for any more after all she's done. Mum got no assistance from child protection. Only $21 fortnight extra for her. She was so disgusted. Child protection was handing her all this money for this other child (she was fostering) who was not a blood relative. They don't support. They take them off you and expect you to be okay. I don't know any parent who is okay after that even if they were bad parents. (parent)

> I have never, ever been supported from child protection except for when I wanted my children in respite. Then I leant on child protection for support and it's been put in my affidavits that I was honest and then used against me. Leaning on child protection for support is my biggest downfall. They were supposed to support me and send me to these places. They didn't send me anywhere. (parent)

The impact of care proceedings could change relationships within the broader family, especially where there were kinship care arrangements, and reduce the entire extended family's ability to cope and provide a supportive environment:

> They are not just hurting the mothers. They are hurting the children and the grandmothers and the uncles and aunties. My kids would cling onto me to the extent that I have to hold them and put their seat belts on because they don't want to go. You have to sit there and just take it because if you have your say it's written against you. Everything is put as a black mark against you. (parent)

> Dad had two strokes 18 months ago. He was not real good. He was fit and healthy but now his brain is half gone. It put stress on him. (parent)

In particular parents expressed a lot of concerns about the impact on children – the trauma of removal, the moves between placements, being neglected or abused in care and the impact on their mental health. Many commented that their children were not receiving the therapeutic help they needed in the care system and this was a constant source of worry to them:

> My daughter is 15 and when she was taken she started self-harming. I've seen what it's done to my daughter and it's really destroyed her. She has tried to kill herself. They don't realise the trauma they are actually doing to the children. It's supposed to be all about them but at the end of the day it's not. It's traumatising and I don't understand how they can put a child through that. They had no contact, no talking to their mum or dad, knowing where they are or why they are there. (parent)

> Taylor chewed her hair continuously, which is probably part of trauma, and she is swearing a lot. Jacob started wetting the bed every night. Jackson was fine before he got taken. They are seeing the counsellor at the primary school about that. I think that's part of Jackson's behaviour as well, like he's really bad. I think that's why he has behaviour problems because he was taken. It made him angry. When they came home Taylor took so long to come out of her shell and she didn't trust me. Even with the speech pathologist she wouldn't participate in stuff, she was scared. She doesn't talk to no one. (parent)

And most significantly for some parents, their experience of care proceedings had a major impact on their confidence and capacity as a parent. The allegations of risk, the duration of care proceedings and the delays, being subject to a system which does not reward positive change, and the uncertainly about timelines all worked directly against their ability to provide a safe environment for their child, boost their confidence as a parent and help the transition to reunification:

> You are already scum, you are involved in child protection. You have very little self-esteem when you go in there to Court. And no one is sitting in there saying these changes that you've made are awesome, this is great. Even the social impact. The whole world still views anyone that's got anything to do with child protection as a scummy dog. You have bashed your kids, sexually assaulted them or you're a drug addict. It doesn't matter if you walk into an independent lawyer's office and say they've got my kids on a 12-month Order and I have done this for the last 12 months, everything they asked me to, but they are still not going to give them back to me. I did the parenting course three times. But it doesn't make me a three times better parent. (parent)

> My confidence was absolutely shot. I didn't harm my children, I was suffering from depression. When the children came home I know I should have been happy but I just felt so overwhelmed from having them to not having them and it all happened so fast.

> I guess child protection make it a gradual process and that is meant to help, but I felt chronically depressed. It didn't help that my psychiatrist kept saying I was fine and he wouldn't increase my medication. (parent)

5.2.3 TREATING FAMILIES WITH RESPECT AT ALL TIMES

There were similar levels of dissatisfaction expressed in the legal system's ability to promote respect for families. Parents and lawyers described a system which failed to respect the views and circumstances of families. Almost three-quarters of lawyers who responded to the survey (72%) indicated that a lack of respect towards parents pervaded all or the majority of their caseload. Parents' dissatisfaction with the way they were treated was more likely to be aimed at the CSS itself rather than at legal processes and practitioners, and there was certainly a consensus that unless you had developed a good relationship with your CS worker the CSS did not respect parents or their views. They emphasised how difficulties engaging and communicating with the CSS had left them disempowered, harshly judged, disrespected and 'feeling like shit':

> In Court yes, but not with Child Safety. I have had a worker in my face telling me I'm a dangerous woman, I am violent, as if there's no point trying because you won't get them back. Them saying that makes your whole world crumble, like you've got no chance in the world. I don't feel like I was treated with respect until the day they were signing off on my children. If they don't agree with how your family is run they don't respect it. I worked so hard for it, all the stuff they wanted you to do. I took a housekeeping course because they said there were problems in the way I was keeping my home. I had gone back to school studying and learnt to read a bit better mainly by reading to my son. I just worked my ass off. The worst thing is they don't tell you what you need to do. They are cryptic and you need to work it out yourself, which is wrong. (parent)

> It speaks for itself when you are being laughed at in Court. When you are being laughed at you are not being listened to. There is no respect there. Every parent will tell you that. You are made to feel like you are below. (parent)

However, parents also commented specifically on the behaviour of legal professionals in the Court. Some felt they had been shamed and demeaned and treated as though they had no rights and were not entitled to respect. A critical factor for parents was observing collegial relationships between their own lawyer and lawyers working for the Department. From their perspective this demonstrated a lack of respect for the seriousness of the situation for families and access to meaningful justice being a matter of luck rather than rights:

> I was treated like I was unintelligent just because I didn't understand. I had no power, no voice, no right to a voice. I was actually told I had no rights by child protection.

> I said I do have rights and I have these Orders but they said the children have rights, you don't. I wanted to challenge it and what they were doing. I felt insignificant because I was not getting the opportunity to talk to anyone or put across my concerns. I feel that people who have committed horrendous crimes have more representation to be honest. I knew it was a Magistrates' Court with lawyers and so on but it actually felt like a child protection Court, their Court. There is no need for the Magistrate, just them. I was so shocked. I never really knew that the state can effectively own your children, that it's a legal thing. (parent)

5.2.4 REMOVAL AS A LAST RESORT WITH CHILDREN EVENTUALLY BEING RETURNED

Two-thirds (66%) of lawyers in the survey considered that there had been a failure to treat removal as a last resort. At the same time most parents thought that more could have been done to avert removal, either through using the threat of removal as a 'wake-up call 'and giving considerably more support to the family or by providing more support earlier on before the family reached crisis point. As one parent said, removal is considered to be an easier solution than supporting families – 'they start with removal, they take them and then you have to fight to get them back':

> There is no support from child protection. There was no how can we help you keep these kids. I rang them and said I am losing it and my little boy was really high special needs. I need some help and I don't know where to go. She said I can't help you until there is an incident. Do you want me to bounce him against a wall and then give you a ring? Pretty much. Until you have an incident or a report you can't even get any help. (parent)

> They didn't use removal as the last resort. No way did they. They didn't try to support me to provide a safe environment to take my child home to. They didn't support me or my son with contact visits when he was born. I was lucky to know the Court proceedings and the next Court date. And the worker I had doesn't know the meaning of respect and she still treats parents and their children like they are crap to this day. (parent)

As part of the CS redesign process Intensive Family Engagement Services (IFES) has been established, offering an opportunity to work intensively with families who are on the cusp of removal and to prevent an application for an Order. This has been welcomed by parents and there are indications that IFES is beginning to slow entry into OOHC. However for families participating in the research there was too low a threshold for removal:

> They remove them very easily. Removal as a last resort is absolutely not happening. It's not a last resort. It's taking them there and then. (parent)

5.2.5 ENCOURAGING AND SUPPORTING CONTACT BETWEEN THE CHILD AND THEIR FAMILY AND COMMUNITY

Whether or not children are living at home with their family, a key goal of the Act is to sustain a child's links with birth families and communities. This is usually achieved through access arrangements so that birth families and children can build attachment, retain contact and sustain their relationships through spending regular time together. As the research has demonstrated, access is a fraught area and resource issues mean that the ability of the Department to comply with access arrangements can be compromised:

> On an 18-year order you are only entitled to four visits a year with your children. How ridiculous is that? How does that support contact between a child and their family? Does Child Safety not get that not seeing their parents is part of their behaviour problems? I'm allowed to send them cards but the Department are not interested in re-engaging us. I have been trying to push for more contact and I can't get it. I have been asking for photos, updates, school reports. I haven't had any of that, no school reports. I had to go to Court to get my son's autism diagnosis. (parent)

The majority of lawyers who responded to the survey (78%) identified a lack of capacity to support and maintain relationships between a child and their family and community in most of their caseloads over the past two years. Negotiating for parents to have more time with their children was a key aspect of the advice and representation they provided. For parents their experiences of restricted, unsuitable and cancelled access arrangements coloured their views of CS and of legal processes. Many had concluded that once a child is removed the Department has no interest in reunification or sustaining family relationships in the best interests of the child.

> While Child Safety services are addressing the need to protect the child from harm, they are not always supporting the right to family life. They fail to look at the solution to the problem by giving the family suggestions of what they need to do to have the children returned to their care. It is only through having lawyers that the parents are able to find out what it is that Child Safety services recommend they do. Even then, Child Safety services tend to change the goal posts throughout so parents have continual hurdles to get their children back into their care. In my experience, the Department does not facilitate a meaningful relationship between the children and their parents. In the majority of my cases, families usually see their children once to twice a month for a period of one to two hours. The Department also seems quick to cut time back where a parent does something that the Department doesn't like, for example having a drug relapse. (lawyer)

> Welfare set the access and chose how it all went. I would ask them for more time and what do I need to do to get more time. At first I just had two half hour visits a week. They were coming in, I was changing them and giving them a bottle, and then they were going. I felt like I wasn't able to bond with them in that small amount of time. And I was walking all the way from Clarendon Vale to New Town to see them. I wanted some bonding, not just feed and change. It used to take me four hours to get there. (parent)

One parent compared child removal to legal kidnap and said the drive for permanency worked against the need for community and connection to their family.

5.2.6 A RIGHT TO INFORMATION FOR THE FAMILY TO ENABLE THEM TO PARTICIPATE FULLY IN PROCEEDINGS

Lastly, both lawyers and parents were least satisfied with the ability of the Act and its implementation to provide families with the resources they needed to fully participate in proceedings. Only one-fifth of lawyers (19%) estimated that the families they had worked with in the past two years had been able to fully participate.

To participate fully and to meet the requirements considered necessary for access to justice, parents needed to be informed about and to understand their rights, proceedings and processes. They required opportunities to participate, access to legal representation and advice, to have information about their case and a chance to present their views, ask questions and clarify the situation. But parents commented on the generalised lack of information, communication and clarity in their dealings with the system and not being updated about what was happening to their children in OOHC and how they were faring. They described situations where they did not know what the allegations against them were, what their rights were or how to access legal help. They commented on the way in which procedures were implemented and their inability to hold the CS to account for a failure to comply with access arrangements.

> Parents don't know what their rights are. They aren't willing to participate because they are scared there will be legal words and terminology. I have tried to pick up bits and pieces. I didn't know for a long time that I could write an affidavit and then when I did I didn't have any support to do it. Child Safety should actually sit you down and tell you what your rights are. For some reason they don't. It's we want this and this. They know better than anyone what the Court system is all about, they know what the processes are, they know how you get your children back. So I can't see why when it comes to Court your worker or your team leader can't sit you down and tell you how the legal system works and say this is what you need to do in a supportive way. They just tell you what they want you to do. I think the workers in general could play a massive role in the legal system. If I had my workers telling me how the legal system works and sending me in the right direction I would have been in a better position. (parent)

These issues are especially pertinent for parents with disability. As one lawyer said:

> The rights of the parents are not well enough covered, especially parents with disabilities. I have sat in meetings where it is clearly known that parents have an intellectual disability and I have seen Child Safety staff use big words, speak rapidly and just basically confuse people. This only damages the relationship and possibly

> leads at times to being in an adversarial position. For parents with disabilities there needs to be a lot more clarity and advocacy for them. The legislation needs to reflect that there are some parents more than others who are particularly disadvantaged and need to have particular protections under the Act so they can fully participate in the process. That's not just about having a lawyer. It's about having an advocate or other people who can actually help. Stop talking and actually help these people. Many of the interstate Acts say a case or care plan is meant to be provided. To get that for a parent here is like getting blood out of a stone. It's extremely difficult. I see that as a fundamental right, that the parent should know what the plan is, to either have their child returned or for them to remain in care if that is the case direction. I don't understand why parents are not provided with what I consider basic information. I sit in meetings and I hear Child Safety say it is our plan to reunify this child. Often my response these days is that's great, put it in writing in a case and care plan. I have never received one and I don't think my clients have ever received one. (lawyer)

5.3 Barriers to implementation

The legal system oversees and makes decisions about the delicate balance between the need to protect the child from harm and the need to respect and support the right to family life. Sustaining the family and family relationships may ultimately be in the 'best interests' of the child and offer a way of breaking the cycle of vulnerability, intergenerational disadvantage and confrontation with authority which is characteristic of so many families in the system. Lawyers were asked how far they considered their work had managed to achieve the right balance. Few felt that the right balance was achieved in the majority of their cases. They qualified their answers by identifying a series of difficulties in achieving balance and supporting the right to family life. These were the under-resourcing of the welfare sector and a lack of understanding, consistency and compassion amongst CS workers and legal practitioners about the challenges facing families. This is compounded by the lack of voice for parents preventing their full participation in decision-making.

> The focus on the best interests of the child has been unhelpful in many ways. It means the Department says our business is children not families. They divorce and isolate the child from the parents. How will that achieve the kind of outcomes they want and that parents want? The starting point is a reorientation of the entire system so it's family-focused, not just child-focused. That is significant in increasing the level of skill the caseworkers actually have. It has to include skills in engaging with difficult families. You can't say a family won't cooperate. That is the nature of the work, to get them to cooperate and not simply push them away at your first attempt. (lawyer)

The under-resourcing of CS and the Justice system associated with it resulted in an inability to effectively engage with families and progress matters in a timely manner and to maintain relationships between a child and their family and community. The under-

resourcing of the broader child and family welfare system left parents trying to access support and treatment from services with long waiting lists and delivering support inappropriate to their needs (Hinton 2018)

> The Department doesn't have the workers. They don't train the workers they have because they have such a high turnover. Some of them unfortunately do have underlying beliefs that make it difficult to engage in the way they should. Some areas just have no support so the programs that the families could do that would assist them, they're not there. Workers to facilitate the amount of contact that the legislation really aims for, are not there. The amount of times that the Court has said well I want the children to see their parents three times a week, because there's a tiny little baby, and the response from the Department is we agree but we can't do that because we don't have the resources. The physical capacity to do what they are meant to do doesn't exist. They might have a lawyer but the lawyer can't fix the day to day problems like access, the things which mean a lot to them. Often we are asked questions and they are not legal questions, they are logistical matters that aren't being addressed. (lawyer)

The under-resourcing of the legal and Court system and an adversarial interpretation of the legislation means processes become punitive rather than providing pathways to family support and to reunification. These challenges are compounded by cultural issues which overshadow the way in which parents in proceedings are perceived and understood. This can lead to differential responses to vulnerable cohorts of parents, for example Aboriginal parents and those with disabilities.

> Under the Act there are clear timelines on the length of Orders, adjournments and hearings, but these are never complied with, for example the 10-week rule when an interim order is adjourned. That's a very wobbly line which no one pays too much attention to because you have to fit in with Court lists in the Magistrates Court. I think there does need to be a timelier response to matters once they are in the Court processes, but again you have to look at the resources to be able to do it and once you are in Court proceedings there doesn't seem to be a lot of accountability for the Secretary either. What are the reasons for late provision of reports and affidavits? A failure to comply with the Rules of Court requires more resourcing to ensure these rules are applied. It also requires an ability to make decisions on the spot so that everyone doesn't continually have to return to Court. (lawyer)

However, one of the biggest barriers to implementing the intent of the legislation was identified as the lack of voice for parents subject to proceedings. This research demonstrated how parents continually reported feeling they had no voice. Many did not understanding the legislative framework and the legal language, they lacked legal representation, they were misrepresented in Court documents or by their lawyers. Together with a focus on setbacks rather than achievements, this all contributed to a sense of not being listened to or respected and not being able to participate and put

across their own perspective. So many parents felt they were the victims of administrative procedures and timeframes and were at times bullied into consenting to Orders which they did not agree with.

> There is no voice. What I went through, the struggle has been a mother who just felt like she was being kicked and kicked. It's so important to be listened to and to have support. Child Safety don't do that. They're acting on behalf of the children, which is great. But give parents a voice. We should be able to stand up and say what we want to say as a parent and to defend ourselves, defend any evidence that is not actually true. You go and get a lawyer like you do in the criminal system but then you are told let your lawyer talk for you. Having a lawyer speak for you, no one can express the way someone feels like a parent can. They are all negative, all about what you have done wrong. You can't say this didn't happen, and then that sticks to you and you can't say how you feel. The legal system needs to change. When it comes to the lawyers, the system, the judge, they are judging us in a manner where we don't get voice, we don't get to say anything. The most important thing is to have a voice. There should be a whole complete different thing where the parents are allowed to stand up in Court. (parent)

Both parents and lawyers agreed that those with lived experience need to be at the front and centre of legal proceedings. When asked, lawyers reported that in 90% of their cases parents were not given enough voice within the system. A failure to include their perspective constituted a good argument for questioning the ability of the system to effectively safeguard parents' rights and the quality of the way in which procedures were implemented and decisions made.

There was a consensus amongst research participants that the legislation was good and recent amendments to it positive. However, as one lawyer said, the lack of resourcing to fully implement the aims of the legislation and make it happen meant that 'we potentially have a Rolls Royce system but with bike tyres'. Being able to properly apply the Act could change the operation of CS, its engagement with parents and the direction of proceedings.

> Tasmania's legislation is actually one of the best. It is phenomenal what its focus is. But how it's been implemented would be one of the worst. It has the pathways with the presumption to help families to reunify, but then in practice you can't get anyone to do the things they need to do to put that into effect. That's the difficulty that everyone encounters. So the framework, the legislation, I don't think needs to change. It just needs to work. It's resources. The implementation of the legislation, done properly, would be very resource intensive. (lawyer)

> To make a difference we need to use the principles of the Act – the family has primary responsibility for the child and is entitled to being treated with respect at all times. If this was implemented much would be solved with the dynamics of how parents interact with CS. CS is under-resourced and the practices they adopt generate conflict, increase pressures on staff and alienate those they should be cooperating

> with. The child is at the centre with rights and the parents have responsibilities rather than rights. If they engage the problem can be fixed via cooperation and strength-based work. By properly applying the Act it could change the direction of proceedings. A small number of amendments to the Act would improve the ability of Child Safety to manage and provide a better framework for all parties. (lawyer)

Several parents strongly agreed. As one parent said, 'the Act would be amazing if that was true and it was how they actually ran. It would be perfect'.

CHAPTER SIX

Change and Reform: What needs to happen?

Parents and lawyers were asked what kind of changes they would like to see to legal processes in order to better meet the aims of the legislation and increase the participation of parents and families in decision-making processes. Given that parents in the CSS face both social and legal challenges, any discussion of reform to the system highlighted changes required both to the CSS and to the legal processes associated with it.

Lawyers responding to the survey were asked to rank 14 options for incremental change in order of priority. Their top priority was keeping families out of the Justice system.

- Stronger pre-proceedings processes to divert from Court
- Dedicated/specialist Magistrates and/or Court
- Skilled lawyers with specialist expertise in the Child Safety area
- Improving parental access to a range of support and therapeutic services
- Better access to Legal Aid
- Better collaboration to promote solutions
- Trauma-informed Courts and legal professionals
- Non-legal advocacy and support for parents/families
- Improving the capacity of parents to participate
- Continuity of lawyers and Magistrates
- A Family Reporter[17] in the Magistrates Court
- Better interrogation of evidence
- Earlier legal intervention
- Legal practitioners access to research

17 In the Family Court a family reporter or consultant appointed by the Court provides independent assessments of the issues in the case and contributes expert opinion to making decisions about arrangements for children. The family reporter or consultant is usually a qualified social worker or psychologist with experience in working with children and families.

The research found a close match between the views of parents and lawyers about the changes required to the system, both incremental and transformative. As already described, when parents were informed about the legislation they agreed with lawyers that it provided a positive framework for the CSS and, if fully implemented, would fill many of the gaps and shortcomings of the current system, including their own access to justice and ability to participate.

6.1 Improving pre-proceedings processes to divert from Court

For most parents removal of their children had been 'a wake-up call' which alerted them to the need to change their behaviour and provide a safer environment. As one parent said, 'for me to lose my kids, that's what it took for me to wake up and realise I had to do something'. A number of parents in our sample had experienced removal with an Emergency Order. They said it had come out of the blue with no warning. They argued for more help prior to any application for a CPO, which would alert them to the seriousness of the situation, give them the support they needed to change their circumstances, avert proceedings and prevent the common experience of a downward spiral into crisis. They wanted to see more opportunities to work with CS prior to removal, including a greater use of Supervision Orders allowing children at risk to remain at home but under supervision.

> If welfare are going to come and remove your children from your care they should at least come to your door and give you a warning and say look if you don't clean up your act and give you an opportunity to turn it around. Instead of breaking someone's heart give them a chance. I would rather have a choice to change my ways at the start than go through hell. If they came in and I still had my kids with me and said wake up, pull your socks up, we are coming to check your house and we'll monitor you and see what you do with your kids, I would have worked in with them to stop my kids being taken off me. But none of that happened. They just went in, grabbed my kids. When they take kids out of a family, families break up. Children should be at home under supervision, but they don't have the workers. (parent)

> The biggest change I would like to see is you have young girls out there getting pregnant. Instead of walking in and taking their children, child protection should sit down, have a meeting with their parents and with the child and support the family in raising that baby. Then child protection don't have to become involved. When I had my kids they should have fostered me with them so I could learn how to do it. If they'd given me that none of this would have happened. If I had got support earlier I would have got my kids back much earlier. The biggest change is support and to give everyone a chance. Everyone deserves a chance to show they can look after their children. I wouldn't wish upon my worst enemy what I've had done to me. (parent)

For lawyers the top priority was to divert more families away from the legal system by boosting pre-proceedings processes prior to any application for an Order. They described a 'lawyering up' of the system because it was dealing with families in crisis. What they supported was promoting processes which would actively engage families in responding to the safety concerns of CS and provide opportunities for the family to come up with their own solutions. CS are currently exploring how to better use the FGC as a way of achieving this for more families.

6.2 Earlier access to legal advice

Research participants, including the judiciary, considered that earlier access to legal advice could assist as an early intervention measure to reinforce the seriousness of a family's situation, increase their engagement with CSS and support services and divert them from Court, as well as improving their experiences if they did enter the legal system. As they commented, too many parents find themselves unrepresented at initial hearings when Assessment or interim Orders are granted. These are crucial steps in supporting family preservation, contact and reunification and require the benefit of legal advice. Some advocated for independent legal representation for a family from the point of engagement with the CSS and certainly prior to consenting to any Order. Although CS practice stipulates referring families for legal advice, whether this occurs or whether families absorb this information at a time of crisis is a question for debate:

> Families need legal help well in advance of any Court hearing, but they are referred to social services not legal services and it's a legal problem. The biggest difference which could be made is Child Safety referring parents to lawyers sooner not later and providing information to clients that this is a legal problem and that they can get help. This is the single biggest thing that can be done for the Courts, for Child Safety, for the child and for the family. More Legal Aid funding with the Government resourcing additional Legal Aid for this cohort. (lawyer)

> As they are taking your kids they should give you a lawyer. They should have a lawyer for you to call. Even set an appointment when they come in, especially if they are going to make you sign forms. If you're going to sign forms to give up your kids you should have a lawyer. On the piece of paper I signed there was something like the Act says this. How am I meant to know what that Act is? I am a regular person. A lawyer would be able to talk you through the Act and advise you. (parent)

This, of course, requires improved access to Legal Aid funding and possibly a need to change the nature of legal representation which is offered to parents. As one lawyer pointed out, the current operations of the Children's Court are founded on a criminal model which is inappropriate for parents in the CSS. The issues here are not about guilt or innocence but whether a parent is cooperating with access arrangements, meeting Court demands and addressing the social issues which brought them into the system. The current model of legal representation is not routinely available to clients outside the

Court system, is not multi-disciplinary and is not actively involved in CSS administrative processes, which is where many important decisions are made.

A number of participants wanted to see a right to independent legal advice and advocacy incorporated into the legislation.

6.3 Skilled practitioners

There was support across the board for developing a more highly skilled workforce – both legal professionals and CS workers – which could more effectively work with parents. A lawyer skilled and experienced in the Child Safety jurisdiction was highly valued by parents.

> Parents definitely need access to a quality lawyer, someone who knows what they're doing. They understand it, they don't have to run off and ask their superiors. Someone who can be consistent as well, not a lawyer who is going to change depending on funding and you are having to retell and go through it all again. Things get missed because of the amount of people involved, so consistency is important. We know the younger lawyers do this work, but is it doing more damage than good? They need better training to do it well. Family is the core of all society. It should be priority that they have specialised lawyers. Some of them just don't know what they're doing. It seems like if you get a private lawyer you get a better lawyer than if you get the one [funded by a] Legal Aid [grant]. It shouldn't be like that. (parent)

There is no special accreditation required for lawyers, or for Magistrates, to work in Children's Courts and these cases are often used as a training ground for junior lawyers in private practice. A recognition of this has led to establishing the Child Safety Sub-Committee within FLPAT which aims to offer professional development and training and raise the profile of practice in this area. FLPAT have co-partnered with the LACT to provide training and the Commission has developed practice guidelines for Separate Representatives and developed resources for legal practitioners undertaking work for parents.

> These cases are often given to the young and inexperienced practitioner. Senior practitioners drop off, as this work is very frustrating because of the clients and because Legal Aid work is funded at a lower rate. So the system is constantly leaking expertise as practitioners leave the sector. If lawyers were better it would be better for parents. We should be developing specialist expertise in this area, for lawyers, the Department and for Magistrates. It is blind luck if you get a lawyer with experience. (lawyer)

Research participants also commented on similar issues in the CS workforce. They identified young, inexperienced and unsupported Child Safety workers, high turnover and a lack of professional development as contributing to an under-skilled workforce with large workloads. Parents advocated for ongoing multi-disciplinary training involving Child Safety workers, legal practitioners and Magistrates:

> A course about how they walk in and how they approach you, how they speak and how they look down on you. I think all people in child protection, lawyers that deal with child protection cases, they all need to do that training so you don't feel like you're the bad one and they are better than you. (parent)

Separate Representatives are usually senior, highly experienced legal practitioners who, as well as representing the child, can act as brokers between parties, reach resolution and take the pressure off the Courts. Lawyers and in some cases parents advocated for a broader role for Separate Representatives in mediating during care proceedings.

6.4 Court processes and procedures

The ability of parents to participate and have their voices heard is severely affected by the Court environment, the individual style of the Magistrate, the way in which processes operate in practice and the delays that are common throughout proceedings. Both lawyers and parents argued for changes to the physical environment in the Court and the better management of cases through the courts.

Parents commented on lengthy waits for hearings in inappropriate environments with no access to private space for conversations with their lawyers. Once in the courtroom they had difficulty hearing the conversation between Magistrate and lawyer. Combined with problems in understanding legal language, this effectively marginalised them from their own case. They wanted to see changes in the way the Court is designed, in the language being used and in the culture of the Court, which would differentiate it from the Criminal Court, make it more informal and provide more opportunities for parents to participate.

> The judge sits way too high in the Court. If there was a big table at least where everyone is on the same level so there's none of this levels and you're down here. Everyone should be in it together, discussing things together. That part could change. There is a problem with the language. What is Section 52? I don't know what that means. Can they just at least describe what that means? I had no idea what was happening or what they were talking about. I felt like I must be stupid and I now realise why should I understand it, I'm not a lawyer. They always say you don't need to hear because there is always someone at the end who will tell you what's going on. Not always. Also, something different from the Criminal Court environment which is not appropriate. It's very authoritarian and it doesn't need to be that way. I think that's the thing that stresses parents most. It shouldn't be at the Magistrates Court. With my mental health I would go there and a fight would break out. They have security guards all over the place. That frightened me. (parent)

Those who had been directly addressed or questioned by the Magistrate and drawn into the conversation fully appreciated the opportunity to use their own voice. This had an impact on their acceptance of any decisions made and their sense of having had a fair hearing. They wanted greater opportunities to participate unbrokered by lawyers.

All research participants advocated for tighter management of cases by the Magistrate. One parent said 'if a judge is going to be there can they have more of a role rather than just overseeing someone else running the Court'. Potentially this could counter some of the problems with CS compliance with the Rules of Court, address delays in the progress of cases through the Court and challenge the culture that allows these issues to continue, perhaps by awarding costs for a failure to comply with legal timeframes.

> If you don't get a lawyer then they say we are going to adjourn this for 28 days. If you fight them you have to wait for all the adjournments to get all the assessments and everything has to be presented to the Court. You wait six months because your lawyer says. Then child protection says we want this report and this report. By the time you get all your reports then you go back in three months' time and it's been adjourned. It tears you apart and then it's another four months waiting for your children. Maybe they should have all the information in Court and deal with it that day, tell you what to do that day instead of dragging it all out. (parent)

> One remedy is amendments to practice in the Magistrates Court about hearing Orders and applications to make Orders. Child Safety should operate with the concept of the model litigant and comply with the orders, rules, principles and procedures and never breach them. There should be a rule that all evidence should be submitted not later than 14 days before a hearing and with the Court asking for compliance with that. This is what happens in the Family Court. Child Safety should be required to follow procedures and checked by the Magistrate. This could be done with no increase in costs or a change to the legislation. There is provision in the Magistrates Court for applying costs under the Act as a sanction for bad behaviour, for example if the paperwork isn't there on time. (lawyer)

The Court considered that more intensive case management would be valuable. However, the Court was also concerned to maintain flexibility in order to cope with the diversity of family circumstances and did not support rigid timeframes as the solution or necessarily the imposition of sanctions for a failure to comply with the rules. All participants felt that under-resourcing of both the Court and CSS must be addressed in order for care proceedings to progress in a more timely and efficient manner and in a way that did not undermine the rights and interests of parents.

There were few areas of disagreement between parents and lawyers about the changes required to processes. The exception was the distress caused to parents by the presentation of evidence they considered false, misleading and out of context combined with the frequent reluctance of lawyers to contest that evidence in Court. Parents found this distressing and wanted evidence against them to be 'looked at properly' in the Court so that they were not judged on the basis of assumption and hearsay. The advice lawyers gave to not contest evidence was confusing for parents, particularly as uncontested evidence then remained on the Court file as 'true' and overshadowed any subsequent proceedings.

> The change needs to be that it's not a child protection Court environment. I have been through the mental health and Family Court too. You can present the information on both sides of the argument and it can be looked at. But with child protection it's not happening. It's only what they bring to the table and they are not listening to what else can be brought to the table. Rather they are concerned about what might happen if things went pear-shaped. The reason it's not happening is because it's better to act this way in case something bad happens. So more investigation on the judge's part, not just looking at what is black and white. It's a harsh decision to make. You don't want to make a wrong decision and put a child in danger. They go with the welfare decision and think that that is the best. (parent)

Lawyers, on the other hand, were operating more strategically. The testing of evidence supporting allegations of risk and inadequate parenting capacity was not a fruitful use of limited Legal Aid funding. Getting a better deal for parents in terms of access and moving on from that increasing the prospects for reunification was a better use of energies, more likely to be successful and key to better outcomes for both parents and children. They wanted to see better detailing of access arrangements – where, when and for how long – and supervision arrangements. This had to be underpinned by increased resourcing to prevent the catalogue of challenges parents faced due to the costs involved, frequent cancellations of access visits and arrangements being used as a punishment or reward for certain behaviours. The unwillingness of the Department to agree to detailed Contact Orders and the reluctance of the Court to issue them contributed to these difficulties.

> Why are parents only seeing their child four times a year, why are babies not seeing their mothers, or rarely? This does not support the aims of the legislation. Why can't Courts in this jurisdiction make Contact Orders in the same way as in the Family Court? There is no reason at all. Why do social workers require parents to jump through so many hoops to actually have an ongoing relationship with their children? Why isn't there better training for these young workers, who are keen and dedicated but just don't have the training or resources to do the job properly? What would fix all of this is better resourcing for access. If you could wave a magic wand it would be greater resources for access and then we could help more to bring matters to a conclusion. How can parents move forwards if they are limited to one hour a week? How do you improve your parenting, how do you prove you're better? (lawyer)

> We want to know about where access can occur and who can supervise it. We want those resources available to all lawyers in Tasmania. We want to find out why contact centres charge Child Safety an inordinate fee to supervise contact which never happens. We want to know why the Government won't put any money into an area that if it was properly funded, like a dedicated contact centre for Child Safety matters, could solve so many problems. Why we can't get supervision on the weekends. We

> want the Minister to tell us why there isn't money for this stuff, because if there was they would save money. (lawyer)

Currently the Department rather than the Court prescribes contact arrangements. Once an Order is granted research participants describe CS becoming non-responsive about access arrangements and information sharing and little action being taken between Court appearances to progress a case, for example assisting parents to access support and therapeutic services. Lawyers wanted to see a greater use of Contact Orders by Magistrates to better hold the Department to account in complying with access arrangements during the term of any Order. They also wanted to see more emphasis on establishing review periods to ensure procedural fairness and to keep CS accountable for access arrangements, whether or not the family is on a reunification path.

One further concern with the nature and use of evidence was the way in which the expert reporting system operated and could contribute towards the duration of proceedings and delays. A priority for lawyers was to improve this by having access to a Court Clinic or Family Reporting system as in the Family Court[18] to enable quicker access to independent expert assessments for families. It was also suggested that parents, in collaboration with their legal representatives, should be involved in defining the terms of reference for commissioning expert reports in order to improve their independence, enhance the perception of impartiality and reduce costs and delay. Earlier commissioning of reports could be fruitfully used as an early intervention mechanism by providing more immediate and expert identification of problems, issues and solutions.

6.5 Specialist Magistrates

There are 12 Magistrates in Tasmania, carrying a generalist list and with varying levels of expertise and experience in dealing with CS matters. Parents found it difficult when they appeared before different Magistrates over the course of care proceedings. Although the Court tries to ensure consistency in who presides over a case, parents wanted to see this improved.

> I think only one judge should work with the family all the time. My judges were always different. I don't think I had the same judge more than once. The judge should do home visits and get to know the family and know the people they are working with before they make decisions on them. It must be extremely hard on the Magistrates making the decisions. How long does it stay on their mind? How do they feel when they've had that call and that person is not going to get their kids back? They should be more specialised and the more they do it the more they learn themselves. It's a win-win situation. I got one who looked like it was a terrible inconvenience for him to be dealing with child protection. He said that pretty much he didn't want me in his

18 See note on page 120

> Court, which I found pretty offensive. They need specialists who just do that. It makes sense. (parent)

For lawyers a key priority for change was to see increased consistency and specialisation within the judiciary. As well as improving consistency in judicial decision-making across the state, specialist Magistrates enable continuity in individual cases, assist more intensive Court case management and increase efficiency due to a better knowledge of the case and the evidence. This can result in a decrease in adjournments and better decisions about Orders tailored to individual circumstances. Overall Magistrates would be better informed, have a specialist knowledge of the Act and be in a good position to guide and direct Court processes where parents felt someone had listened to them. It would improve the ability to develop a relationship between Magistrates and parents, often seen as key in driving behavioural change:

> The Magistrate and the defendant talking, just two people. That's a big thing, and I feel like in Child Safety it's still a big divide. You've got the Magistrate at the top looking down as they make this order, and that's the only involvement between the parents and the Magistrate. Having them a little bit more present in a less intimidating way. In these lists you're in and out. The Department lawyer says something, the other parent's lawyer says something, done. It's all over in two minutes. It's an intimidating process and it's very quick. Out you go and then the next ones come in. (lawyer)

A docketing system in Victoria, which provides opportunities for one Magistrate to preside over a case throughout proceedings, and a more intensive case management system have led to a significant decline in contested final hearings and a rise in negotiated settlement. Lawyers wanted to see specialist Magistrates resourced by Government. A further suggestion was introducing a specialist qualification as a prerequisite for presiding over the Children's Court.

> Magistrates' styles differ enormously and some are not compatible with child protection work, and they don't necessarily know the Act. For a Magistrate their list might be 15 criminal, civil and a handful of Child Safety matters. They come to it without the thought processes required for this cohort. These families need consistency. One presiding Magistrate with a Court team, like a family consultant, a drug and alcohol counsellor, a Child Safety worker. We need appropriate listings and also consistency of Magistrates between youth court and child protection so they are familiar with how problems are unfolding and how families fall apart. The Government should resource specialist magistrates. (lawyer)

Although a specialist judiciary is used in Youth Justice, in the Child Safety jurisdiction it could present challenges from a listing perspective. Small numbers of Magistrates in the

North West and serving rural areas meant difficulties in operating a specialist list. There was more potential for this option in the South.

6.6 Information and non-legal advocacy

Information is empowering and can encourage people to participate, but parents lack knowledge and understanding of legal and Court processes and their rights. Legal Aid Commission websites in other jurisdictions provide clearly marked web pages relating to child protection with written material, factsheets and videos. In some cases they provide tools and templates, for example how to prepare and submit an affidavit. This is not the case in Tasmania. Without accessing the 'Legal Talk' facility, LACT provides little information about the CSS, how to engage with it, how to find a lawyer and how to deal with Court and legal processes. Research participants considered that resources like this would not only be valuable to families but also to young legal practitioners commencing work in this area.

> Technically all the processes are in place for parents to have a voice but I think the reality is, this power imbalance means that they are not really being heard. We are dealing with a unique community here. There are such high illiteracy rates, drug and alcohol issues and a whole lot of co-morbidity issues that affect outcomes. The intention is there to support families with the options we have, but it's the delivery which is inconsistent and I don't think the expectations of parents when they become involved in the system is managed. That is an information issue. I think education and support to get the best possible outcomes is what we really need to provide. This is the most important piece that we're missing. (lawyer)

There is a statement of parent rights in the Tasmanian CSS which is available on the Department's website (see Appendix 3). The Charter promotes a shared understanding of the rights of families and translates the Principles of the Act in the legislative framework into what parents are entitled to expect in their dealings with the system. However, it appears that it is not widely disseminated or used. Interestingly, the Tasmanian Charter has now been adopted by the Family Rights Group in the UK[19] and is being used as a basis for a Family Rights Charter to clarify family expectations of the CSS and the Justice system.

One parent, contemplating her experiences in the system, described how useful an explanatory video would be, not only in providing information and overcoming any literacy issues but also in supporting parents who are feeling isolated and alone:

> Why isn't there a program run through child protection about the legal system and showing a story of a parent who got their child home. That would be a fantastic idea, or even another story where it's documented where they go wrong. Some sort of inspirational video with a good outcome and a different outcome and an outcome

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> that's in the middle of getting there. I think watching that would give someone some sort of an idea as to what not to do. They have all these parenting videos and DVDs but I've never seen a DVD or documentary about who is in the child protection process, ever. Some sort of course based on that which shows the story and basically just puts across people's real life stories. That would be a fantastic idea, showing videos. I have seen them work in groups like Circle of Security and in parenting courses. And also one which shows the legal system. Knowing you are not alone is very important. (parent)

Parents were especially keen on being able to work with non-legal advocates. Those who had received this kind of support, for example from the community support services they were working with, had found it enabled them to better understand their situation and participate. It had a positive impact on communications between parents, CS and lawyers and provided practical assistance like simplifying Court jargon and debriefing after Court attendances. Having 'someone on your side' enabled parents to keep their heads above water. Lawyers also wanted to see access to a non-legal advocate more readily available for parents in Tasmania.

> It used to be the case that there were a lot more advocates in the state. The gap came when FIN left. A specialist NGO for Child Safety only is something to aim towards, something like FIN but with funding. There is no point reinventing the wheel on this. A lot of my clients are out on their own without people like FIN or the Red Cross who care. I find the cases where there are supports like that really heartening because I can see they are getting a lot more of the support they need. I constantly feel I can't give them this. The gaps are there in the support so they come to their lawyers and then they get disappointed because I can't give them that as well. (lawyer)

> Support for parents, because it's scary. Someone who can be with them, take them places, get them to the lawyer, because it's really hard. It needs to be someone who is definitely in your corner, somebody to say okay I am here to help you, this is what you need to do. I had not a clue. I was feeling quite suicidal and I felt like people were out to get me. They just seemed to want to build a case against me. Some decisions that get made are really tough to take on board and you feel vulnerable afterwards. More support in the courthouse. There is no debriefing. Once you leave the courtroom your lawyer goes back to her office, you go home and wait for a phone call until the next meeting. Having support beforehand and then a debrief afterwards, rather than just walking out on the street and away you go. The legal system doesn't tell you everything. There are lots of things that advocacy would have known which I wasn't being told. It actually helped in that I didn't feel so alone. I felt calmer, not so on edge sitting in the waiting room waiting to go in. I had someone next to me who had actually seen some of what was happening, which was comforting. (parent)

Parents wanted to see more of a multi-disciplinary approach which would tackle both the legal and social needs of families and enable them to access a range of support services.

> If I'd had support when they were removed I wouldn't have gone so far downhill and they wouldn't have been gone as long as they were. You have suicidal thoughts when your children are taken, you're lost. You have trust issues because people tell you everything is fine and you're doing well and then they come in and take your kids. Then you have trust issues in the future with having people working with you. They shouldn't take peoples' kids off them without making sure they have someone to support them. The last lawyer was the most useful. They seemed to push welfare more, like they need to be spending this much time at home. It would have been nice to have this earlier, pushing for treatment for me, for how I was feeling after they took my children. They should have lawyers, counsellors, other family support for the parents of the child. When they are ready to take them, they should have all these things in place ready to go in and support that family. (parent)

While a key factor in being able to participate in proceedings is a better understanding of the legal system and being able to get effective legal representation, both parents and many lawyers wanted to see improved opportunities for parents to have their own voice not mediated by legal professionals. The ADR embedded in care proceedings – the FGC and the Section 52 conference – in theory provide for parents to present their perspective. However, in this research all participants raised some concerns about how these processes were managed and the extent to which parents felt able to participate, and wanted to see more clarity about how and when they were used in proceedings:

> I baulk at the idea that the only voice for parents is what lawyers present. Pre-conferencing is a unique opportunity for families to problem-solve. More lawyers and more funding for lawyers only means a more formal approach and more adversarial where every matter is litigated. Parents require more opportunities for their own voice but in an informed way, not just litigating because they don't like it. Pre-conferencing means they have to come up with reasons for opposing the actions of Child Safety rather than just not liking it. This pushes back on both parents and Child Safety to become more specific and remove it from the hands of lawyers and Magistrates. Some matters are very complex and do require litigation but many do not. But what base does the legal system provide for any voice to be heard? (lawyer)

> If you're in a courtroom and you hear the story of the parents, I think that could be beneficial to what the Magistrate hears. At the moment it's the lawyer who speaks on behalf of their client and Child Safety speak about the reason it's come to the Court. Even if the opportunity was given to the parents to put their case forward in their own voice, that gives them a bit of ownership. They might not want to, but you don't know unless you ask them. Lawyers do a great job, but how they put the wording together for the statement of the client doesn't totally capture the picture. Let's hear about

> the good things that the parents are doing and not the wrong things. They walk away from the courtroom feeling like they've failed. (lawyer)

Lawyers speaking for their clients is well-accepted in an adversarial system and can give the voice of the parent legitimacy. However it is not necessarily a substitute for parent participation and there may be other models of participation which more actively incorporate the parent voice while providing a therapeutic opportunity where the parent can feel they have really been heard. Aas one parent put it, 'to claim ownership of their own situation'.

6.7 Peer support

Both lawyers and parents saw peer support as especially valuable and that those who had 'been through it' were best placed to work with families. Where parents had encountered workers with lived experience, they said they felt more able to engage with them because they knew that they understood their predicament and the kind of support that they needed:

> Using parent advocates would be a very useful development here. Giving parents who have successfully used the system a more prominent and supportive role to other parents is well worth exploring. You get best results when you have people from the same demographic. They are trained, there is a greater sense of natural empathy rather than middle-class kids out of private schools going in there. Let's put advocates in here early on. (lawyer)

> Workers who have been to hell and back and got over it and are now a worker. They are more informal and there for you than the ones who go by the textbook, definitely. They have more understanding. That's how I changed from what I was doing. People who have actually gone through it and have turned their whole life around because of it and understand it. They are the people who are going to give you the true facts, what's going to happen in the system. You need someone to sit down with you and tell you this isn't going to be easy but this is what you need to do. If you're trusting a lawyer or listening to a lawyer it's great and they know the legal system, but you will get more cooperation off somebody else who has been through it. (parent)

When parents were asked what kind of advice they would give to others going through care proceedings, firstly and overwhelmingly they said legal advice from a good lawyer experienced in the CSS was crucial. Recognising that this was not always possible, they also recommended ensuring that they were fully involved in all the decisions rather than just leaving it to chance or to their lawyer and using any opportunities there might be to have their own voice in proceedings, especially when they were self-representing. This included giving detailed instructions about contesting any evidence presented by CS that they were not happy with.

> Make sure that you're actually there to make decisions with them. Don't let them do that off their own back. You need to be there as well. If you want advice go and seek a lawyer and tell them what you want, not what they want. Get your lawyer to get them to prove it. If nothing is concrete it's got to be wiped. But you need to speak thoroughly, clearly, not get in a tantrum, swearing and carrying on. It's how you present yourself and put yourself across, that's what matters. I know you feel angry and frustrated because of what they've done. Don't show it, don't let them see you like that, that's what they want. Let your voice be heard. Be proud of what you are. You are still a human being. (parent)

Secondly, parents advised others to do whatever was required of them by CS and do it as soon as possible. One parent said 'do everything they say, there is no other advice to give. I've learnt the hard way'.

> I changed my ways. Do what they tell you to do. Don't tell them what you want to do. You can't win, you're stuck, so do what they ask. It's their way or no way. Do what you're asked and you will get your kids back even if what they say is not true. If you don't you'll never get them back. Deal with it and accept it and go from there. Do parenting courses, do drug and alcohol courses. Do whatever you can do to support yourself because you won't get much. And if there are mental health issues get a psychiatrist on board straight away. Even if child protection just hint at something, just do it straight away and don't waste any time about it. (parent)

They recommended being strong, working proactively, documenting and recording what happens at meetings, communicating with emails rather than phone calls and getting as much support as possible.

> Be prepared. Don't be afraid to speak up with what you want. Don't just let them walk all over you. If you want visits speak up. As soon as I told them I want more time with my kids, I started getting more time. Be consistent. I have always been told to ask the questions, have a list of questions written down of what you want to ask your lawyer or child protection, and document everything. Everything that they ask of you, try and do it. Be active, speak your mind, go out there and tell them. Get the support you need, get advice about where to go to get the help. You need to change your ways, your attitude. If you sit there and think you're not going to do nothing you will never get your kid back. (parent)

Parents felt that, given their experiences, they had a considerable amount to offer which could ease the pathway of other families through the CSS, enable them to better engage with legal processes and foster better outcomes for the family in terms of family preservation and reunification. Indeed, some interviewees were using their previous

experiences to informally support other parents and advise them about how to best cope with what was happening. One mother described her involvement in trying to set up a support group for parents where they could share experiences so that they didn't feel so alone. This had proved difficult because parents didn't want 'to rock the boat' or say anything 'out of line'. They felt that if they raised their profile they would be punished, it would slow down processes or their access to their children would be affected.

One parent advocated for a system where policy, procedures and the delivery of services was more soundly based on the experiences of parents:

> You have to have families like us that have come through and are now success stories. They need to sift out cases that have been high risk and have changed that they never thought would change. That would be an asset all round. I have a lot to give. I haven't been through everything I've been through for no reason. I have acquired gifts and skills. These skills are only obtained because of the life we lived. I was a shit parent. I can stand up and own the fact that I did not deserve my kids. How can I use this to help you, the next person coming through with a new baby so she can stand up and say I am all right, I'm a good mum. We need a service which includes and is based on their policy and procedures, charter and mission statement and which has all come from parents like us that have been through the ringer, that come out the other end and say I'm all right. Even if it only benefits one out of fifty, it's one less person you are going to have in the system. (parent)

Another parent spoke for a number of families by encouraging them to 'reframe, retrain and reunite'. They considered this had the potential to revolutionise outcomes for families.

> I have learnt a hell of a lot. They have broke me down and I have rebuilt myself. Doing courses has inspired me and I actually want to start something between the families who have just lost their children or are at risk of losing them and child protection workers. I would like to be part of starting something. There is advocating I can do but helping them to get their own stuff across and reframe, retrain and reunite. That's what I want to do. I can help give them resources, to reframe what comes out of their mouth, retraining so that they have the words. They can learn to put their emotions on the backburner while they are dealing diplomatically with Child Safety. I know there are families out there that if they had someone with what I've got to offer they could change the way they think and act and do things quicker. That is what I want to do to give advice on, how to talk to the welfare. Their best representation is themselves when it comes to child protection because it has to be from their own mouth. You have a whole different perspective on how you deal with it. (parent)

> I am definitely very strong for some sort of group giving mums and dads a voice. Then mums and dads who have made mistakes and are in that spiral, if they just hear that little bit that I'm in the same boat and I believe you and I am hearing you. That could

> just be the boost that that parent needs to go all right then I am going to keep trying. We are going to stand up and we are going to fight because we love our children and we are sick of getting kicked in the guts every single time that we're getting somewhere. I know that works because I watched mums in prison come to me and say I'm not going to fight, I am going to do this. By the end of the time they finished talking to me like I'm going to fight, I am going to do this. All I had to do was tell them that it's not over, tell them what direction to go in, where to go and that they're not alone. I know that by doing that it works. (parent)

6.8 Transformational change

As well as incremental change or 'fine-tuning', all research participants were asked what transformational or systemic reform they considered appropriate in Tasmania. The four key reforms identified were improving the interface between the CS jurisdiction and the Family Law Court, embedding a problem-solving, therapeutic approach, more resourcing and cultural change across both the CSS and associated legal processes.

6.8.1 INTERFACE WITH THE FAMILY LAW COURT

A number of families in the research had been involved in both CS and Family Law proceedings and experienced duplication and confusion, particularly with the way in which the Court operates and its procedures. For some parents experiences in the Family Law Court compared positively with those in the Magistrates Court and they wanted to see these approaches adopted in the Child Safety jurisdiction. The Court environment and the way in which cases were dealt with was less formal and stressful, more efficient, and parents felt they had more voice.

> All child welfare should be Family Court not a Criminal Court. For me the Family Court is a lot less stressful and relaxed than the Magistrates Court. Just the way they were set up and the environment. When you come into the Magistrates Court you have to have a bag search, open this and do that. There is a lot of security in the Magistrates Court. I can understand why but with the Family Court it's not like that. The Magistrates Court has all this security but we are not criminals. Your name should not be listed with the criminals. The majority of times I've been it's either adjourned or the judge doesn't want to hear. Whereas when you go to the Family Court there is something which has to be dealt with within that timeframe and they deal with it. The judge won't be happy until it's done. There is less backdating from all the files sitting there that have to be addressed that should have been addressed months ago which aren't. They have a different approach in that they do try to encourage access and relationships. (parent)

Others wanted to see better management of the interface between the two systems:

> If you have the Family Court and child protection get involved it makes the Family Court Order obsolete. They just come in and the way the two Courts work side by

> side concerns me. It's like child protection are running the Family Court. And then if child protection leave it's just back in the Family Court and everything that was done is back in place without looking at how things may have changed. In the system sometimes child protection is being used as a tool so we need to acknowledge that. This needs to change. They do influence the Family Court with what they do. It's really hard, when child protection has done with you, to start afresh. It's always there, even in the Family Court. Child protection could have made a mistake but they run with it. There should be some boundaries with that sort of thing. (parent)

Both lawyers and parents recommended either a one-Court system so that families were able to run just one set of proceedings to finalisation or better integration with more information-sharing initiatives, joint training and increased collaborative working. One example given was the current pilot in the Northern Territory which allows parents in the CS jurisdiction access to Family Court Parenting Orders (see page 161).

6.8.2 A PROBLEM-SOLVING COURT

Throughout the research both parents and lawyers demonstrated how the adversarial nature of the Court system mitigated against collaboration between parents, Child Safety and legal practitioners to find a solution. There is now a global consensus about the need for a less adversarial approach to decision-making and an appetite for change towards more problem-solving courts and approaches which can restore, heal and provide opportunities for behavioural change.

> I really have problems with the idea that a Child Safety worker is on the opposite side to the family. This person, who is often quite a lovely human being, social worker trained, works with this family. They're overworked but they engage with people very well. They have a trust in each other. What then happens is that worker has to write an affidavit about how terrible these parents are. The case worker physically hands over a 20-page document to the parent saying you are awful. We get aggravated clients going I can't trust her and that relationship that they've been building dies. In the best case scenario, the presiding Magistrate everyone can all put their hate on because they're just sitting on the bench out of the way. Supporting them is the case worker providing information, along with the drug and alcohol counsellors, along with the representative from the community. That would be the team that informs the Magistrate. Then you'd have the Department's lawyer, whose job is to prosecute the parent and make the case for the Department's position. Whatever the Department's position, it is their job to advocate for it, not to prove a crime against the parent. That's not the test here. One of the problems with the current system is that by the time the Court is involved hostility is immediately created because none of the work which should have been done at an early stage has been done. (lawyer)

More inquisitorial and therapeutic approaches are increasingly being embedded in the current system, with a push to more efficiently manage cases through the Courts and change the style and culture of the Magistrate and the courtroom to better engage parents. These approaches place more emphasis on hearing from parents directly and giving flexibility to the Magistrate and to the Court to be a more active player in initiating change rather than a passive adjudicator. Research participants across the board were keen to move away from litigation to more of a partnership approach:

> It is a very legal process and ideally it should be collaborative and inquisitorial where the Court seeks information and it's not adversarial. Vulnerable families need support not forensic exposition. Lawyers work hard to try and maintain a collegial approach but Child Safety workers have a difficult job and the people they need to help resolve the problem are put offside and alienated. But once the State gets involved they are like rottweilers and parents are then on a railway track and they can't get off. Child Safety want Orders, but Orders don't fix problems. Child protection is not a fight to be won but problems to be resolved. (lawyer)

When introduced to the idea of the problem-solving Court and using the example of the FDTC[20], parents were enthusiastic about the approach, not just for those with substance use issues but for the broader population of families involved in care proceedings. As one parent said, 'the outcome is dependent on how things are done rather than the circumstances' and they welcomed a more therapeutic and collaborative approach which would support them to change their behaviour and improve their parenting capacity:

> It's a great idea. I would like to see something like that here in Tasmania for parents with drug and alcohol addiction, or if they have family violence or mental health or anxiety. It would make the person feel more motivated rather than to damn yourself, which doesn't help. It's a great idea. At the moment you do end up damning yourself as a parent and going downhill. You are unsupported, there is no reason to do it, why bother, you can't fight these people, you don't get anywhere. The depression creeps in and hopelessness can take over instead. The outcome is dependent on how things are done rather than the circumstances. It's good because you have someone keeping an eye on you. You could mess up a little bit and they are not going to give up on you, they are still there for you. And then you get praised for doing good and that gives you more confidence in yourself. And then you start getting better. (parent)

20 See page 153

A shift to problem-solving approaches changes the nature of the task of representation. As some lawyers commented, it meant an active involvement in out-of-Court work. A good lawyer cannot afford to ignore their role in helping parents to access services and negotiate all aspects of the process both in Court and in CS processes, where important decisions are made about access and reunification.

Lawyers were asked for their views about a Tribunal approach whereby cases are managed with the help of legal representatives in an inquiry style system overseen by a panel and away from the adversarial and more formal Magistrates Court. Lawyers in this research did not express any particular views about the use of Tribunals in the CS jurisdiction, beyond emphasising that removal of children is such a fundamental interference in family life that decisions must be 'lawful'. However, some jurisdictions have been piloting making and reviewing decisions about placement and access arrangements through a Tribunal rather than in the Children's Court. The Tasmanian Government is currently amalgamating several Tribunals and establishing one Civil and Administrative Tribunal. Tribunals are more informal that the Court, the rules of evidence do not apply and they consider the correctness of a decision rather than its lawfulness. The informality means that families can present their own case and do not necessarily need legal representation. Disputes can potentially be resolved more quickly and more cheaply.

6.8.3 RESOURCING

Parents and lawyers wanted to see more clarity about recovery pathways for families, supported by a resourced infrastructure which rewarded positive change and provided more intensive support, from the point of entering CS processes through to reunification and beyond. An under-resourced broader family welfare sector and an absence of critical support services which were accessible and appropriate to the needs of parents – mental health, counselling, family support, substance use treatment and accommodation support – was contributing towards inefficiencies in the operation of the Justice system and failing to offer pathways out of intergenerational cycles of disadvantage. For example, commonly suggested was access to residential facilities for families to promote intensive intervention to improve family functioning and parenting capacity. Such a resource does not currently exist in Tasmania. Significant gaps in support services for families once their children are removed distorts and delays legal processes and a family's pathway to recovery. Research participants commented on a deep unfairness in the expectation that families resolve complex problems in strict timeframes without first addressing resourcing and practice issues in the broader welfare sector. This undermined the rights and interests of families. As one parent said:

> A lot of children are removed because of drug and alcohol. Where are the drug and alcohol supports? There is nothing on this side of the river. They really need it over here. That's two buses and a hike and that's with not having the motivation too. If they knuckled down in this area with the drugs perhaps it would stop the next generation blowing it. I rang around trying to find a drug and alcohol course. I rang health and human services but it was only for heavy drugs. I said I need a course to get my kids back. They said you have just confessed to me that you are a marijuana user and we are going to ring child protection and report that. They were just so unhelpful. (parent)

> Workers are crying out for help. They want more exposure. They want people to know about the low morale, the lack of resources. They are sick of being told off by the Courts for not filing things on time, not giving access, when it's beyond their control. You [the Child Safety Legal Group] people are flat out and I understand there are only two administrative staff throughout the entire state. We as lawyers are always complaining that we don't get responses or emails, but there is no one to do it. But the wishes of both practitioners and litigants alike seem to be lost in the juggernaut of the bureaucracy and the under-funding. The survival of workers in the sector and their ability to cope is around funding. Reform can't happen if you're stuck with a system with holes and you're just trying to plug the holes. (lawyer)

As in any therapeutic approach to the Justice system, it should maximise the benefits for families and minimise the harm. A more clearly thought-through recovery pathway and structure for reunification requires a more comprehensive approach to the rehabilitation of parents and more resourcing.

> There is only so much a Court or legal process can do. It's a whole of community issue, whether that be housing, education, health. By all means you can look at a more therapeutic jurisprudence Court process like you have in drug diversion or mental health. That is very resource intensive in money and time. And you can have these Courts in place, but if you don't have the underlying support services you are just wasting your time. That up-front cost I would suggest would far outweigh the eventual costs of having so many people go through what is at the end of the day an adversarial system in our Magistrates Court. (lawyer)

6.8.4 CULTURAL CHANGE

Resourcing is not the only answer. As one lawyer said:

> People say we need more money or the government needs more workers but you can't keep throwing money at it, it doesn't fix it because the system itself is problematic. The system is broken and most people think so. (lawyer)

What is required, in both the CS system and the Justice system, is cultural change which better recognises the vulnerability of parents and their circumstances and acknowledges trauma. A consideration of the way in which negative views of parents are embedded in the operation of current processes is required to create a system better able to find solutions for families and their children.

> It requires cultural change. Legal processes are driven by past behaviour not future consequences of actions and the system needs to look forwards. It's clearer and easier to look back than forward but we need research about the keys to unlock the doors for the future and put substance to words, including how to tackle this

> culture where nothing happens in a 12-month order. We need to think creatively and imaginatively and create a level playing field with the Department and engage with them to forge a better way. Systems need to change so that the legal process becomes more effective for all involved. Significant cultural change is required and all should be engaged in training and appropriate skilling in this area. (lawyer)

Any cultural change has to be responsive to the needs of particular cohorts of families in the CSS, including Aboriginal and CALD populations and those living with disability.

> Other jurisdictions have cultural courts. That is a massive assistance. It takes that stigma away from the Court process a little and it allows community members to be present. They say the community is capable of solving some of the problems but they are not properly consulted. So children are taken into care when in all probability they could have found somewhere safe for the child within the Aboriginal community. In spite of the Aboriginal placement principle it is not actually happening all of the time. (lawyer)

Full compliance with the Principles of the legislation could resolve many of the cultural issues and drive cultural change across the system.

6.9 The road to reform

How is change and reform to be achieved? Some participants hoped that incremental change would drive more transformational change. They believed that even small changes can be valuable and that there are some changes, which would make a positive impact on individuals and their progress through the Court, that would not require intensive resourcing or changes to the legislation.

However, despite an increasing appetite for change from families, CSOs and the legal profession, the overwhelming complexity of the work and a lack of political will operate against transformational change. As lawyers commented, this is a cohort who have no economic or political power and families are trapped in a system where their own needs remain invisible and where there are too many gaps in the infrastructure designed to deal with them. As one commented: 'Just look at the aesthetic of child protection. It's housed at St Johns which is an old mental hospital, that sums it up. It's rotten. Put it over there out of my sight'.

> Those practicing in the area can fix some of it without money and poach good ideas from other jurisdictions which then need to be uniformly applied. But basically the clients don't matter politically, they have no economic clout. The middle classes aren't represented. It is the economic and social pressures which bring parents into Court and create the conditions for abuse and neglect as the basis of the problem. And the system designed to deal with them is under-resourced. (lawyer)

> The system is broken but there is no political capital in this. Most Ministers for child protection haven't got a clue how the system works and all they do is paper over cracks. They are not interested in reform and there are no votes in it for the Government. They don't care about these parents, they are not a powerful voting bloc, it's not the middle class. Sadly, it takes a terrible tragedy or series of tragedies. If you look around the world at how child protection systems have been reformed it's often after deaths of babies, failures to report. You need to create a sense of crisis in order to get reform. How did you get the Royal Commission into Domestic Violence? You had Rosie Batty and it snowballed, but it took a death. (lawyer)

This is a system that is unpicking multi-generational issues of disadvantage while trying to balance important and fundamental human rights and situations. The enormity of the task can overwhelm both families and those working to support them. Parents were keen to see their input into more systemic advocacy to improve the situation. They considered that the voices of those with lived experience should be at the centre of any changes to the legal system and involved in designing and determining what it therapeutic for them and ultimately in the best interests of their children:

> Parents should get together and we should be recognised and noticed. That's a big one for me. To make the Government understand that we need to change and what they are doing to people is wrong. Having a voice and letting the Government know that they need to change, this will save a lot of children in the future. The legal system needs a massive change, massive. (parent)

Some caution was expressed by legal practitioners about their own involvement in pushing for change when it could be seen as a criticism of the established order and an attempt to 'feather our own nests'. However, FLPAT, with the establishment of its Child-Safety Sub Committee, is now operating as a lobby group to push for change:

> Amongst our group there is a strong appetite for change and we are probably the first group in my memory that's actually got together to do something about it. That is because we've got a few people who have been doing this for a long time and now there are more senior practitioners and people willing to devote their time to this jurisdiction. I do see room for change and hopefully this group becomes bigger and better and ultimately it has to be a political group pressing for change. We have a better voice where there is a professional body involved rather than individual practitioners. This is how we can start to influence change. I feel more hopeful that there is some articulation of these issues. (lawyer)

Survey respondents also saw a critical role for professional bodies to assist in pursuing change in the Child Safety jurisdiction – FLPAT, the Law Society, the LACT, the Tasmanian Bar Council and the Family Law Pathways Network. They saw a role in advocacy with Ministers and government to push for amendments to the legislation and changes

to practice, procedures and timelines and funding for support services for families. Increasing the Legal Aid pool and breaking down the barriers to collaboration between lawyers, CS and families to create a less adversarial system was also crucial. Professional bodies have a role in ongoing professional development in this area – holding seminars and conferences and providing information, for example education about trauma and its impact or updated lists of services available to parents and what they offer. Lastly and most importantly they had a role in promoting the Child Safety jurisdiction as an important and recognised area of practice amongst legal practitioners. One lawyer summed up the situation:

> This is a frustrating and challenging area to engage with. It requires significant reform. Even as an early career practitioner, the cracks in the system are abundantly clear to me. I don't believe Child Safety will make the changes themselves as they already communicate they are hogtied. There is no question that they have a very difficult and underfunded area. However, this is not good enough for the parents and children who are caught up in this. Tasmania is a small place and has the opportunity to step up and be an example to the rest of the nation. Children and families who end up in this system are some of the most vulnerable people in our society and they deserve better than to have their lives crushed and run by a Department which is time and funding poor. It is imperative that change occurs. (lawyer)

CHAPTER SEVEN

Interventions and Reforms in Other Jurisdictions

Given the clear agenda for reform articulated by both parents and legal professionals in this research, what can be learnt from interventions which are being implemented in other jurisdictions?

States and territories in Australia and across the English-speaking world – in Canada, New Zealand, the UK and the US – have their own child welfare systems framed by legislation and a legal and court-based approach to making decisions about the safety of children. They share the same overall philosophy and principles around protecting children from abuse and neglect and supporting vulnerable families to provide a safe environment for their children (Wise 2017; Family Law Council 2015). They also all face similar pressures and have engaged in reviews, inquiries, research and reform to reduce the numbers entering the OOHC system and improve outcomes for children and families. In this push for change, the legal processes associated with Child Safety systems are attracting increasing attention. There has been a growing focus on what happens to vulnerable families in the Justice system, how far their voices contribute to decision-making processes and whether these processes assist in finding appropriate solutions which protect children and preserve families.

Using data from a literature review, from academics working in this field, the annual reports of Magistrates Courts and Legal Aid Commissions and approaches to Departments of Justice, National Legal Aid, Family Law Practitioner Associations and the National Association of Community Legal Centres, this chapter reviews the nature of reform in other jurisdictions both in Australia and internationally to improve the voice of parents and outcomes for families. It cannot claim to be fully comprehensive, but it does demonstrate the nature of the debate about the participation of families and their access to justice and the general thrust of initiatives and reform occurring at the interface between the CS and Justice systems.

7.1 Overarching themes

Recognition of the problems inherent in an adversarial court model of decision-making in CS practice has highlighted a critical need to better support families to participate in legal processes and engage effectively (Law Council of Australia 2018). This recognition is part of a broader concern that complexity in the law and justice system can render it incomprehensible to the public, prevent people from taking action or seeking advice and make it more difficult, time-consuming and costly to resolve problems (Productivity Commission 2014). The concept of 'legal capability', or the personal characteristics or competencies necessary for an individual to resolve legal problems effectively and understand the Justice system, is compromised amongst many vulnerable families, including those involved in CS matters. Poor literacy and communication skills, feelings of being overwhelmed, of despair and hopelessness, cognitive impairment and a distrust of the Justice system all reduce legal capability. Legal knowledge by itself is not sufficient to provide an effective judicial process and the system must be responsive to the particular issues faced by vulnerable families.

Across the world an acknowledgement of these issues is pushing a better understanding of parents and their needs and a more therapeutic, restorative justice and problem-solving court model to enable families to access justice in the Courts. Therapeutic justice approaches aim to address the underlying causes of legal disputes and encourage all participants to engage and collaborate in solving problems. Advocates for these approaches maintain that allowing all persons a voice in proceedings as active participants can enhance people's experience of justice and better effect behavioural change and the resolution of problems (Law Council of Australia 2018). These approaches can be applied to questions about how the intent of the legislation, which is to promote family preservation and reunification through collaborative processes rather than litigation, can be better pursued through changes to the way in which both Child Safety and legal systems currently operate.

Reforms to improve the ability of parents to participate have focused on a number of key issues. These include diverting families from legal processes through more collaborative and partnership working, improving access to skilled legal assistance and non-legal advocacy and support, moving from adversarial processes and procedures to a more inquisitorial and therapeutic system and addressing the needs faced by particularly vulnerable families. These reforms can entail changes to legislation and to policy frameworks and investment in campaigning and lobbying efforts to push for reform.

7.2 Improving access to legal advice and representation

In recognition of the obstacles parents face in accessing adequate levels of legal advice and representation in a timely manner, a number of jurisdictions have introduced initiatives to improve pathways to legal advice and reduce the numbers who self-represent.

EARLIER ACCESS TO LEGAL ADVICE

- **Health Justice Partnerships (HJPs).** This is a slowly growing national movement which recognises that people are more likely to tell a health professional about legal problems than a lawyer and that addressing legal needs can improve health. By basing legal practitioners in health settings like hospitals or health centres, lawyers can train health professionals to recognise legal issues, promote referrals for legal advice and prevent problem escalation. Health Justice Australia has recently reported on HJPs across Australia (Forell & Nagy 2019), including a number of examples where HJPs are working proactively with pregnant women subject to an unborn baby alert by providing early advice and legal representation co-located with maternity services.

- **Independent Family Advocacy and Support Service (IFAS).** Victorian Legal Aid (VLA) have established a pilot service staffed by non legal-advocates that provides a pathway to legal advice and representational advocacy for families at risk of or involved in CS during the early stages. Although it is not a legal service, it can refer for legal and other support to ensure that legal advice is available for initial hearings and interim Orders. The service supports parents to understand their rights and responsibilities and to become active participants in the system. The pilot prioritises Aboriginal families and those with intellectual disability and focuses on cases where there are long-standing issues in order to divert them from Court. A final evaluation of the pilot is due in mid-2021. A phone line is available one morning and one afternoon per week and they intend to explore possibilities for incorporating peer support in the future.
- **Child Protection Early Intervention Program.** Queensland Legal Aid is partnering with community organisations to deliver a holistic service for those involved with or at risk of involvement with the child protection system. Lawyers meet parents' legal needs and help them to negotiate with CS while community support workers assist with any social and emotional needs. This includes assistance in addressing safety concerns and avoiding statutory intervention prior to Court proceedings.
- **Legislative reforms** in New South Wales aimed to provide more focus on early legal support to increase parental participation and improve outcomes. Some Community Legal Centres were funded 1-2 days per week to provide it. Further legislative amendments came into effect in early 2019, but the sector is now concerned that funding for this work has recently been withdrawn to the detriment of early intervention work for birth parents.
- **Child protection duty lawyers** are one of the main paths for parents to access free specialist child protection legal services in a number of jurisdictions. The ACT has operated a full time pilot child protection duty lawyer system since September 2019. In Queensland a duty lawyer is available in specific courts and at specific times. The lawyer helps parents to fill out forms, review documents for that day and talk to them about their eligibility for legal aid and ongoing legal representation. They may also on occasion appear in Court on the parent's behalf. Both WA and NT have an extensive duty lawyer service at the Children's Court. There have been concerns about the nature of duty lawyer services, who is eligible for them and ensuring consistency of access and quality. VLA has recently published guidelines for child protection duty lawyers and is reviewing the duty lawyer service provided by private practitioners.

- **Legal Aid.** Access to Legal Aid funding is a key issue across Australia. In 2014 the Productivity Commission recommended that funding be boosted by $200 million and there is now a campaign established by the Law Council of Australia, Legal Aid Matters, calling on all sides of government to commit an extra $350 million to fix a service in crisis. Jurisdictions have been exploring how to cushion the impact on parents involved with the CSS (Productivity Commission 2014). These initiatives have included reviewing and in some cases expanding the criteria for child protection applications for Legal Aid and introducing more advice and information materials about how to self-represent.
  - » VLA has explored removing the means test for grants for parents in the CSS.
  - » From 2017 Queensland has increased funding for both initial hearings for the representation of children and parents in the Children's Court and for representation at later stages of proceedings.
  - » In WA the tightening of criteria for eligibility to Legal Aid in 2017 led to a public outcry. Funding was reinstated in 2019 but grants are still limited and often not enough for lawyers to write a 'responding affidavit' or for families to have representation throughout proceedings. A priority is providing Legal Aid for pre-hearing conferencing to promote earlier resolution.

What some of these initiatives have in common is the provision of social support alongside legal advice. For example, the Family Advocacy and Support Service (or FASS) is a free service which has been rolled out nationally to support families who have been affected by family violence with family law matters. FASS can help with advice and advocacy for families in state Magistrates Courts as well as matters in the Family Law Courts. While duty lawyers provide legal advice and in some cases represent families, community support agencies partner with them to assist with safety planning and referrals for support services. The interconnection of legal and social support at Court assists with the timely resolution of legal matters, supports holistic outcomes and reduces costs (Inside Policy 2018)

The legal assistance sector internationally has been pioneering multi-disciplinary service collaborations where families facing child removal are supported through a partnership of quality legal representation, non-legal advocacy and social supports. Family Defense in New York is one of the most developed models (see Box 1) and the Healthy Mothers and Babies program offers a similar model specifically to pregnant women (see Box 2). Evaluations have demonstrated significant improvements in reunification rates and a decrease in the time children spend in the care system.

BOX 1: FAMILY DEFENSE

The Family Defense model has been developed over the past 15 years in the US. It is based on a partnership between lawyers and social workers to support families through care proceedings and improve their relationships with the child welfare system. A study conducted in New York City in 2007 provided Court-involved families access to a support team consisting of a lawyer, social worker and parent advocate. Between 2007 and 2014 28,000 parents were assigned randomly to the new or the old model of parent representation (Gerber et al. 2019; Guggenheim 2019). Because many entering the OOHC system do so on an emergency basis, prior to any Court action it did not impact on the prevalence of entry to OOHC. However, Family Defense did reduce the length of stay in OOHC and speeded reunification, with an annual reduction in the foster care population of 12% and $40 million in costs.

Crucial to its success is not just providing parents with better representation in Court but also in meetings with the child welfare system where decisions are made about removal. The ability to intervene early in the case, coupled with advocacy about critical elements like access, placement arrangements, supporting connection with family, providing services to address parental needs and the opportunity for families to participate in case planning, were integral to the success of the model. A 2018 amendment to child welfare policy allows welfare agencies to seek reimbursement from federal government for the administrative costs for lawyers to provide legal representation. This allows for federal cost-sharing for legal services for parents in the CPS. It improves parent representation and also accelerates the return of children or even prevents removal in the first place.

A number of other states – California, New Mexico, Oregon, Minnesota – are now taking steps to develop interdisciplinary parental representation programs based on this model. It is also attracting younger lawyers and has increased the status of child welfare work so that it becomes a career opportunity.

BOX 2: HEALTHY MOTHERS, HEALTHY BABIES PROJECT (HMHB)

This was established in New York in 2013 to 'break the cycle' by providing support combined with advocacy and legal representation during the peri-natal period for at-risk pregnancies. HMHB is especially relevant when prior child protection involvement is used as the primary safety concern rather than current circumstances or progress made in addressing safety concerns. This can lead to high rates of removal at birth.

HMHB provides holistic support from the moment a system-involved woman identifies as being pregnant (Ketteringham et al. 2016). She is connected to a dedicated social worker and a parent advocate who work collaboratively with her legal representative as part of a team. The social worker helps her to access services, the parent advocate provides emotional support and encourages her to engage with support services and she has access to high quality legal defense and representation. The team assists in identifying what support she needs and offers complete confidentiality so that she can voice her problems and anxieties without fear of it being reported in Court.

The project also offers a weekly support group for women and can address individual problems like housing, income and poverty-related issues. Since its inception the team has worked with over 300 women and achieved significant reductions in the number of removals and greater use of kinship rather than foster care.

7.3 Quality legal advice and representation

Despite the complexity of this area of the law, many parents are represented by junior and inexperienced lawyers and there is limited training and professional support for lawyers working in the Child Safety jurisdiction. States and Territories have addressed this in different ways.

- **Care and Protection Practitioner Panels** have been established to ensure the best possible representation for clients and to improve ways of allocating lawyers to child protection work. Inclusion on the Panel can require specialist training and accreditation, compliance with practice standards and involvement in ongoing professional development.
- **Professional development and training for legal practitioners** is provided through masterclasses, webinars, conferences and workshops as well as written resources and guides. Often delivered by Legal Aid Commissions, training opportunities might address issues like trauma and disability awareness, conciliation and mediation and best practice representational skills. VLA wishes to play a more active role in supporting lawyers working in CS through coordinating the provision of professional development, research and tools to assist in the work. In 2019 they produced best practice guidelines on legally representing children and young people as well as guidance for duty lawyers (VLA 2019a, b). NSW organises an annual conference to address these issues and Queensland holds a child protection masterclass for in-house and preferred supplier lawyers, as well as operating a series of webinar sessions about child protection matters. In Tasmania the LACT and FLPAT make considerable investment in expanding and coordinating professional development in the CS jurisdiction. There are also national drives not specific to child protection to improve the training and competency of legal practitioners. A key example is investment in improving competency in family violence cases and working with the trauma they can cause. National training initiatives must overcome the challenges of cost, including cost to the individual practitioner, how to provide the training and by whom and how to standardise it for quality.
- **Disseminating research findings.** Research about child development, attachment and bonding and the impact of trauma is being used extensively and increasingly in CS decision-making processes. Concerns have been raised that these research findings can at times be used inappropriately in Court decision-making. This raises questions about how legal professionals, including the judiciary, can access this specialist expertise and keep abreast of fast-developing research fields. One model is demonstrated by the establishment of the Family Justice Observatory in the UK providing easier access to lawyers and to the judiciary to the latest research to inform decisions (see Box 3)
- **Out-of-Court work.** Given the recognition that good legal advice in the CS area has to respond to the social issues parents face, there is debate about the involvement of legal practitioners outside the courtroom and particularly in pre-litigation services. There has been a reluctance to involve lawyers prior to Court hearings due to a fear that an adversarial and legalistic approach would be counterproductive in meeting the best interests of the child and present an obstacle to any engagement parents may have with CS to address safety concerns. But increasingly a pre-litigation service is seen as addressing the escalating numbers

of voluntary agreements in some jurisdictions and reducing applications for Orders and the associated financial and emotional costs. For example, VLA has been exploring supporting more time with clients away from the Court through Legal Aid funding. Although current Legal Aid fees do include time for case preparation, this would provide more time for taking a full history, advising about support services and more thorough Court preparation. VLA is now developing a case preparation checklist with fees split between developing a case strategy and work away from Court including taking instructions, providing advice and engaging in negotiation.

BOX 3: NATIONAL FAMILY JUSTICE OBSERVATORY FOR ENGLAND AND WALES

As care proceedings move to more of a problem-solving approach to judicial decision making there is an increasing focus on how decisions are made and the skills, experience and evidence used to make them. Magistrates are required to be more investigative rather than forensic and have skills in mediation and access to high quality materials so that they are able to effectively assess the evidence available. A review of the family justice system in the UK (Family Justice Review Panel 2011) identified an evidential gap in how decisions are made and how research evidence should be placed before the Courts and legal practitioners.

This led to the establishment of the Family Justice Observatory (Broadhurst et al. 2018) to fill the gap by improving the use of data and research evidence in child protection cases and in judicial decision-making. The Observatory identifies priority issues where empirical evidence may help guide practice. It provides reliable summaries of what is known and not known from research or administrative data and combines that with insights from policy, professional practice and user experience to develop, update and test guidance. To date the Observatory has undertaken:

- A rapid review of the impact of family contact post-separation on children's wellbeing and development and the long-term impact into adulthood. This aims to ensure decisions about contact arrangements, their frequency, form and nature, are informed by the latest research.
- A report about how decisions are made about the removal of newborns and infants, including pre-birth assessment processes. It aims to enhance understanding of what the law requires the Court to consider in deciding whether to remove a baby or infant. This will lead to the first evidence-informed good practice guidelines for professionals involved in removal, which will then be piloted in eight local authorities (Alrouh et al. 2018).

Information from research and practice guidelines produced by the Observatory are made freely available to legal professionals and the judiciary in order to inform decision-making.

7.4 Adversarial to inquisitorial and solution-focused approaches

Whilst traditional legal processes are about determining the facts and applying the law to reach a decision, therapeutic jurisprudence encourages a focus on how the actions of legal professionals in legal processes can impact on parents and either impede or advance good outcomes for families including wellbeing, respect for the Justice system and the law. It puts a focus on addressing the underlying issues which have brought a family into the legal system in the first place. With an increasing awareness that adversarial approaches, particularly in the context of unsafe parenting, can aggravate rather than resolve conflict and perpetuate problems, adopting a more therapeutic and problem-solving approach offers opportunities for greater parent participation and engagement, faster Court processes, shorter stays in OOHC and fewer involuntary removals. These kinds of approaches are already being applied to varying degrees in the way in which Courts and legal processes operate.

PROBLEM-SOLVING COURTS

These originated in the US with the establishment of drug courts and domestic violence courts. Since then a range of problem-solving courts have been established primarily in the criminal justice system with dedicated drug and mental health courts. They seek to address the underlying issues rather than simply focusing on legal problems. They provide for judicial case management, a multi-disciplinary court team and a collaborative approach with participants.

- **Victorian Family Drug Treatment Court (FDTC).** This was established in 2014 and modelled on the UK Drug and Alcohol Court currently being rolled out across the Family Justice system in many local authorities in the UK (see Box 4). Some commentators suggest this approach should be extended to become the standard way of conducting care proceedings for the majority of cases, not just for those where substance use is an issue.
- The ACT recently announced the establishment of a **Therapeutic Care Court** for families and children going through the Children's Court on criminal and child protection matters. The model is currently under development but would encourage and support a therapeutic culture within a justice setting, with a courtroom designed specifically to encourage a problem-solving approach and to break the cycle of disadvantage in the child protection system. Dedicated judicial officers would ensure consistency in practice. The long-term cost savings to the Court are anticipated to be significant. The details of this model are yet to be announced.

With a recognition that traditional courts cannot handle the complexity of certain social problems, when failing to deal with fundamental causes almost guarantees re-offending, there has been some interest in Tasmania in developing a therapeutic court model. The Court stated that 'this approach to justice requires Courts to acknowledge that rather than simply processing cases the Court system should be concerned with taking approaches in an attempt to address the problems that lead to a person's appearance in Court and work to change offender behaviour and improve public safety where appropriate' (Magistrates Court 2017).

BOX 4: FAMILY DRUG AND ALCOHOL COURTS (FDACS)

A high percentage of cases reaching the Children's Court involve problematic parental substance use. This has driven the establishment of Family Drug and Alcohol Courts which operate as a 'last chance' for parents with substance use issues who have lost children to the care system and are at risk of permanent removal. Developed first in the US and then in the UK, they offer a radically different approach to standard care proceedings by treating parents as well as adjudicating (Harwin et al. 2018). Dedicated judges preside over fortnightly hearings which engage directly with the parent rather than through legal representatives and deal with cases in a collaborative rather than an adversarial manner. A specialist support team engages parents in tackling the problems that put their children at risk and provides access to intensive treatment programs. The Court closely monitors progress.

Independent evaluation of the FDAC model in the UK (Reeder & Whitehead 2014; Tunnard et al. 2016; Harwin et al. 2016) has included tracking the progress of families over a five-year period. It found that, compared with a comparison group, a higher proportion of parents ceased substance use by the end of the proceedings, the likelihood of reunification increased and lower proportions of families experienced relapse. There was also a substantial reduction in the costs of these cases to public sector bodies, with fewer children entering the OOHC system. Crucial to success has been a relationship-based approach offering consistency, the acknowledgement of disadvantage and trauma and respect for the family and their voice. Rather than the punitive approach offered in many traditional Court proceedings, the Court becomes an effective agent for change.

In the UK an FDAC now services Courts working in 20 local authorities in England. A National Unit was established in 2015 to promote the benefits of the approach and provide ongoing professional development in this area. A recent review of the care system (Family Rights Group 2018) recommended that the approach be extended to all care proceedings whether or not substance use was a factor.

A Churchill Fellowship study of FDACs in the US and UK led to establishment of a three-year pilot of the Family Drug Treatment Court in the Broadmeadows Children's Court in Victoria in 2014 using the UK model (Levine 2011). In 2016-17 the Court worked with 98 families who had children in OOHC due to substance use issues and who were seeking to reunify. Participation in the program requires regular Court attendance, drug testing three times a week, attending treatment appointments and working towards achieving the goals of a Family Recovery Plan. At the end of the program the Magistrate can order reunification, an extension of the program or a return to the Children's Court if no progress has been made.

Two independent evaluations found that families involved were over twice as likely to achieve reunification than a matched comparison sample (72.2% compared to 43.3%) and that cases were much more quickly resolved. The average length of time to a final order reduced from 3.5 years for those in the mainstream Court cohort to 1.1 years for those in the FDTC. Outcomes were also more sustainable, with FDTC participants 2.2 times less likely to have a substantiated report made to child protection in the post-Court period. The model has now been extended to another Children's Court in Victoria.

EMBEDDING A THERAPEUTIC JURISPRUDENCE APPROACH INTO CURRENT LEGAL PROCESSES

Increasingly a recognition of the needs of vulnerable families involved in care proceedings is changing the way in which current Court and legal processes operate.

- **Judicial style.** The way in which Magistrates engage with parents during Court hearings can have a major impact on a parent's view about whether their voice has been heard and their case fairly judged. A Magistrate's high status and their role in celebrating positive change and achievements, as well as opportunities for parents to speak unbrokered by lawyers, can play a pivotal role in motivating a parent to change their behaviour. As this research demonstrated, a positive comment from a Magistrate or praise for actions can be life changing. Increasingly, across the judiciary there is interest in developing more relationship-based practice in the Children's Court and exploring how best to engage parents and demonstrate respect, empathy and support as well as impartiality and neutrality.
- **More intensive judicial case management** to tackle the obstacles for parents built into current care proceedings, particularly the duration of proceedings and its impact on outcomes. This involves a focus on streamlining processes, procedures and timelines to provide more clarity and consistency, for example exploring what penalties a Magistrate can employ to enforce the Rules of Court. Queensland has established a Court Case Management Committee with rules and a bench book with practice directions. The ACT has implemented a new practice direction in the child protection jurisdiction with a closer focus on case management and improvements to achieve more timely finalisations.
- **Improving access to expert reporting.** Assessments by experts, usually psychologists and psychiatrists, are commonly used to make decisions in the Children's Court. But there are concerns about the terms of reference used to commission reports, their independence, the lack of skilled assessors and diversity in the quality of reporting. There are also concerns about the delays they can impose on care proceedings and how they are used by the judiciary to make decisions. To address these issues some states – NSW and Victoria in particular – have established Children's Court Clinics as independent bodies to conduct assessments and provide reports at the request of the Magistrate. Clinicians have a specialist knowledge in the child protection system and can provide advice about a child's situation, development and best interests as well as being available for cross-examination in the Court. The cost of the report is covered by the Clinic. Queensland has recently evaluated a pilot to improve access by Magistrates to expert assistance from psychologists and psychiatrists. The Australian Law Reform Commission recommended clinics should be incorporated into Children's Courts nationally (ALRC 1997).

ALTERNATIVE DISPUTE MECHANISMS (ADRS)

Most jurisdictions are actively reviewing and evaluating ADR mechanisms and how to make them more effective as an alternative for or a complement to Court processes.

They aim to either divert families from Court processes or to deliver earlier and more collaborative agreements and solutions. They are variously referred to as mediation, conciliation, pre-hearing or dispute resolution conferences, or family group meetings or conferences. They may be linked to Court processes or conducted by CS prior to any Court involvement to try and achieve a voluntary agreement. They provide an opportunity for parents to participate without necessarily having to speak through their lawyer.

PRE-PROCEEDINGS TO DIVERT FROM COURT

- **Family Group Conferencing** (FGC) is now an accepted part of child protection systems worldwide and used extensively to provide family-led decision-making. In Tasmania the FGC is embedded in the legislation and have been the model for family-led decision-making for the past 15 years. Most often initiated by the CSS, critiques have focused on their lack of independence from CS and the inability of parents to have their legal representative present, although the child is legally represented. Recent research has demonstrated that the way in which they are facilitated is crucial to their effectiveness (Nurmatov et al. 2019).
- **Public Law Outline** (UK)[21] details a requirement for ADR throughout care proceedings. This includes a pre-proceedings process whereby a 'letter before proceedings' is sent to the parent inviting them to a meeting with child protection to discuss concerns. The parent is advised to bring legal representation. This approach has been positively evaluated in terms of diverting cases from Court.

CONFERENCING DURING PROCEEDINGS

Most jurisdictions have Court-ordered conferencing during proceedings to identify issues and seek earlier resolution. Many are reviewing their processes and effectiveness.

- The **Signs of Safety Conference** in WA acts as a pre-hearing conference and involves summarising disputed facts and other relevant information from all parties. It occurs as early in proceedings as possible and aims to resolve applications in a less adversarial way by involving family members and focusing on the future safety of child. All discussions are confidential and presided over by a judge or Magistrate. There is also provision for a Signs of Safety lawyer-assisted pre-birth meeting where unborn babies have been identified as at risk. An evaluation report recommended expanding this model regionally and identified that the most important aspect of the work is developing a common language and shared understanding of the role of the conference in order to increase confidence in the model. WA Legal Aid also convenes Family Dispute Resolution conferences. In 2018-19 there were 834 mediations with 143 pre-hearing child protection conferences referred by the Court. They achieved a settlement rate of 99% (LAWA 2019).

21 The Public Law Outline was introduced in 2008 into the family justice system in the UK. It is a practice direction setting out what should happen before care proceedings are issued and the processes the courts should follow during proceedings. It aims to help families avoid entering the justice system and, if they do, to improve their understanding of processes, collaborative working and the case management of proceedings.

- The **Conciliation Conference** in Victoria was evaluated in 2016 (Children's Court of Victoria 2016). Legal Aid funding provides for two conferences per case and 40% of the cases referred are settled at conference with only 26% moving to a contested hearing. The average Court costs for preparing and attending a six-day contested hearing are $6,280 compared with $680 for a conference. Critiques of the model include a risk of focusing on parents rather than the child, delays in getting unsettled cases back into the Court, a lack of clarity for some participants about the process and damaged relationships when the outcomes are perceived as poor.
- NSW is piloting the use of **Family Dispute Resolution** in child protection proceedings. FDRs are run by a professional mediator independent of the Court and can resolve contact and placement disputes. NSW Legal Aid has also established a new Care ADR program overseeing contact arrangements after final Orders. The model is non-litigation focused and invites parties to come to an agreement about contact arrangements with a focus on the voices of children. The program offers potential for establishing detailed contact arrangements expressed as appropriate Orders.

There is a debate about the role of legal practitioners in ADR mechanisms that occur before care proceedings begin. Lawyers, with an adversarial approach, can be perceived as hindering rather than assisting in these processes. Clarity about the purpose of ADR and the processes involved and a cultural shift from litigation to collaboration are seen as key to the participation of legal practitioners in ADR and pre-proceedings processes.

TRIBUNALS

Whilst the mandate of the CSS is protecting the child from harm, there is lesser emphasis on maintaining meaningful family relationships post separation. Approaches to decision-making about contact arrangements vary between jurisdictions (Family Law Council 2015). In some jurisdictions these decisions are determined by the Court and outlined in the CPO in terms of time, venue and whether supervision is required. In Tasmania these conditions are applied as notations to the Order and the Court does not have enforcement powers.

Tribunals provide a multi-disciplinary panel review of decisions made by public entities. They aim to review decisions fairly, informally, efficiently, quickly and cheaply outside the Court system. A number of jurisdictions are exploring the role tribunals might play in CS and in removing decisions about placement and contact arrangements from an adversarial Court system. Most jurisdictions have now consolidated different types of tribunal into a single civil and administrative tribunal (CAT) and Tasmania is in the process of doing so. Queensland is exploring how their CAT might make decisions under the Act about placement and access. In WA contact arrangements are included in the care plan developed by CS with an independent case review panel which can review and amend the Plan.

7.5 Specialist judiciary

The continuity provided by having dedicated or specialist Magistrates has been seen as integral to promoting more streamlined approaches in care proceedings. This includes more intensive case management, more consistency with an increased knowledge of the case and family circumstances, and improved inter-professional collaboration and involvement. A specialist judiciary is also seen as promoting quicker resolution, fewer contested cases, savings in Court time and reduced distress to families. NSW, Victoria, WA and SA all have specialist Magistrates working in the Child Safety jurisdiction.

- Victoria has a specialist judicial list for child sexual abuse cases – the D list – established via a pilot in 2013 (Sheehan 2006, 2016). These represent some of most difficult cases in the Children's Court and use an intensive case management approach to more effectively respond. The success of the specialist list saw it extended to regional courts as a more effective approach to managing and deciding complex cases.
- Victoria also uses a docketing system where one Magistrate oversees proceedings from commencement to finalisation. Introduced as a pilot in 2015, it was expanded to all child protection proceedings in Melbourne in 2017. Where docketing is in place finalisation rates exceed lodgment rates and it is seen as successful in managing workload and reducing delays and the number of hearings per matter whilst improving certainty and continuity for families.

In rural and regional areas the lack of specialist Magistrates and the need to rely on generalists who may have limited skills and experience in the Child Safety area is seen as a barrier to more effective Court case management. This is an issue for Tasmania where the size of the state and a decentralised population means a reliance on generalists in local courts.

7.6 Aboriginal and Torres Strait Islanders

With the over-representation of Aboriginal people in the CSS, some jurisdictions offer alternative and more culturally appropriate approaches to making decisions about Aboriginal families in care proceedings.

- **Care Circles** in New South Wales are based on a combination of FGC and circle sentencing models. Convened at the discretion of the Magistrate once a decision has been made that a child needs protection, a Care Circle consists of the Magistrate, a Care Circle project officer, a child protection worker and manager and legal representation for both parent and child, with an average of two Care Circle meetings per case. Circles act in an advisory role and provide direction about how a case should proceed, interim care arrangements, placement and contact as well as the services required to support the family. Community and legal representatives help child protection and families to develop strategies for safety, although they do not make decisions and cannot advise on removal of a child. If there is no agreement the case goes to a Court hearing.

- **Koori Family Hearing Day** in Victoria operates in a similar way to the Care Circle to support Koori families involved in the CPS. Developed from a Criminal Court model, they were established in the child protection jurisdiction in 2016. They aim to improve the participation of Koori families and communities in child protection proceedings by providing a culturally appropriate Court process overseen by the Koori Services Coordinator. Hearings involve intense overseeing by one Magistrate assisted by a collaborative culturally-informed team and increased community participation which recognises the status of elders in the community. Business is conducted in a less formal manner with all participates sitting at the bar table. Koori hearings operate at the Court one day each week.

Other approaches have been expanding through the work of Aboriginal legal services. For example the Aboriginal Family Law Service in WA offers a wraparound social support program for families intersecting with child protection proceedings. This includes assisting in communications with the Department and negotiations about access and reunification. Tasmania is currently exploring a notification system whereby Aboriginal families facing removal are automatically notified by CS to TACLS.

7.7 Advocacy and non-legal support

A range of community support organisations provide non-legal support and advice to families entangled in care proceedings on an ad hoc basis (see Hinton 2018). This is usually done 'off the side of the desk' where support with legal processes becomes an extension of the general support they are already providing to families. However, with a growing interest in improving pathways to accessing earlier legal advice and combining legal assistance with social support, a number of jurisdictions have supported the provision of non-legal advocacy to families to support them through their dealings with CS, through Court processes and through the challenges they face after proceedings. The majority of these interventions are in their infancy, small scale, often incorporating peer support and established initially as pilots. Models include:

- **Provision of information resources** about child protection proceedings, for example how to access legal advice, how to prepare an affidavit or self-represent or advice about conciliation or FGC. Many of these resources are produced by Legal Aid Commissions, with much diversity in their range and extent. Some Commission websites include extensive plain language written information about child protection proceedings, factsheets, videos and chat lines. Queensland has produced an information booklet for people with intellectual disability about Legal Aid Commission services. WA offers templates for developing responsive affidavits and detailed information about how to self-represent in Court.
- **Family Inclusion Networks** (FINs)[22] operate in most states offering varying levels of advice and support, ranging from a website with information resources to face-to-face individual and systemic advocacy for families involved with CS. FIN WA is

22 Family Inclusion Networks currently exist in Queensland, Victoria, New South Wales, the ACT and Western Australia, offering a range of services to support families in the CSS usually on a voluntary basis.

the most developed. Funded by the Department of Communities, it can provide individual advocacy for families including escorting them to Court and assisting in writing a 'responding affidavit'. FIN are currently drafting a proposal for the Children's Court to provide professional advocacy with peer workers being present at Court to help families navigate proceedings and link with support.

- **Victorian Advocacy League for Individuals with Disability** (VALID)[23] has partnered with FIN Victoria with Government funding to establish peer advocacy groups for parents with disabilities involved in care proceedings. VALID also offers training for parents and professionals involved with child protection services.
- **Parent Peer Support Project** in Newcastle, NSW, is a pilot advocacy project funded by the Law and Justice Foundation. Based in the waiting room of Broadmeadows Children's Court, it provides experienced 'parent partners' to support families to stay connected with their children. A workshop entitled My kids have been removed provides information about what to expect from CS and in Court, how to work with a lawyer and tips and ideas about how to manage the process and progress to reunification. Facebook updates are provided. The project is unable to provide legal advice but can listen and offer tips and ideas from peers' own experience. The pilot ceased in March 2020.
- **Birth Family Advocacy Support Service** in ACT is funded by government and run through the Red Cross. Six workers provide support, information and advice to families involved in care proceedings to promote good communications and positive relationships with CS, including attending CS meetings with parents. They will also assist with accessing legal assistance and support in Court processes, especially for those who are self-representing. Volunteers help to run a Court workshop which explains to families how to understand Court processes, for example what to wear, where to sit, timeframes and so on. FGC is also currently being introduced in ACT and it is anticipated workers from the advocacy service will assist families in the FGC process. Interim evaluation has demonstrated improved relationships between families and the child protection system.
- **US advocacy models.** A number of models currently used in the US have met the legal and social needs of families through social work/lawyer teams and recruiting a peer workforce. For example, the Child Welfare Organising Project in New York uses trained parent advocates to support families through the CPS (see Box 5).
- **Family Rights Group UK** (FRG). FRG provides an advice line, social media boards and a website with information resources for families involved in care proceedings. The advice line takes 17,000 calls per annum. It also provides training and accreditation for advocates and for those facilitating FGCs. This is working alongside a national push to improve pre-proceedings processes (Mason et al. 2017; Munro et al. 2017) and especially the way in which FGC is implemented across the country. The FRG has used the Tasmania Family Rights Charter (see Appendix 3) to manage the expectations of families involved in proceedings in England.

23 VALID has been advocating for people with disability in Victoria since 1989. It offers training tools, information and resources and advocacy to empower people with disability and their families.

BOX 5: CHILD WELFARE ORGANISING PROJECT (CWOP)

CWOP was developed in East Harlem in 2007 (Lalayants 2012; Tobis 2013). Funded by New York City, it trains parents who have been through the system to support families currently in the system. Peers, known as Community Representatives, attend the child safety conferences which are held after emergency removal to discuss safety concerns and make decisions with birth parents. They provide emotional support, resources and information about rights and responsibilities in the child welfare system. Community representatives help parents take steps to prevent removal and/or achieve reunification. They also run a parent support group.

Evaluation, which compared outcome data for safety conferences with and without community representatives, found significant differences in the percentage of cases resulting in reunification, fewer removals and high satisfaction ratings from parents. Key is building positive working relationships between representatives, parents and child welfare staff in a highly adversarial and legal environment.

7.8 Integration of Children's and Family Court systems

Child protection cases potentially present in three different jurisdictions and multiple courts. In addition to the Children's Court, families may also be involved in the Federal Family Court and in the state Criminal Court and Family Violence Court for similar issues. The interface between the Courts has been subject to a large number of submissions and inquiries in the last 20 years, especially in the family violence area, and the case for a unified family court with jurisdiction in both family law and CS matters has often been made (Jackson 2010; Family Law Council 2015). There have also been attempts to borrow best practice from the different jurisdictions to modify processes in the Children's Court.

- A review explored the jurisdictional interaction of the Federal family law system and the state/territory child protection systems to identity possibilities for ensuring that as far as possible children's matters arising from family separation are dealt with in the same proceedings (ALRC 2019). It made 60 recommendations for reform, including that family law disputes should be returned to State courts and that the Federal Family Court be abolished. This would prevent children and their families falling through the gaps between family law courts, Children's Courts and state responses to family violence and allow the resolution of all issues in one Court focused on the best interests of the child. There is no move at present to implement these recommendations.
- A number of states (NSW, Victoria, WA, Tasmania and ACT) have information-sharing provisions – the Magellan case management system[24] - to address issues for families

24 See note on page 31

enmeshed in both systems and who fall through the gaps. This is a Family Court initiative and Magellan cases focus on families where there are allegations of serious physical or sexual abuse of children.

- A pilot in the Northern Territory aims to improve access to justice for families and provide the Court with more options in the making of Orders by working across the interface between the Children's Court and the Family Court. The pilot allows the Magistrate to make family law parenting orders rather than child protection orders if all parties agree. This ends departmental involvement with a family and gives them more control over where children live and contact arrangements. It directs families away from child protection interventions to a Family Court pathway, from an adversarial system to a more collaborative approach which does not carry the same stigma as child protection processes.
- WA differs to other jurisdiction. It is the only state where the same Court administers both family law and child protection law. They have been exploring possibilities for parents in the CSS to register a Parenting Order with the Family Court. This offers opportunities for detailing contact conditions which can then be enforced in the Court.

7.9 Legislation, policy, research and campaigns

To improve experiences for families, states and territories have pursued inquiries into and reviews of legislation, policy and services. Legal Aid Commissions, rather than addressing legal problems in isolation, may be making submissions or advocating directly to Government and entering into collaborations with other organisations to conduct campaigns or law reform initiatives. Both Government and LACs conduct evaluations of ADR and other Court processes, including looking at parent representation and its impact on the chances of reunification (Morgan et al. 2012).

- Amendments to Acts. These promoted individually tailored responses by providing more options in terms of the type or length of Orders. Two states – Victoria and NSW – have introduced tighter timeframes for care proceedings to prevent drift in care and promote stability for children through permanency frameworks. Prescribed timeframes reduce the time available for interim care arrangements and amend how families can apply for reunification. These approaches have been critiqued for imposing arbitrary timeframes on decision-making and reunification processes in an environment which often lacks the capacity to properly resource appropriate support for families (Mackieson et al. 2019).
- Fuller use of flexibility within legislation to secure improved conditions for birth families, for example the use of Contact Orders that outline the specifics of frequency and nature of contact between parent and child. NSW uses Parent Capacity Orders which direct parents to attend a service or treatment to build or enhance parenting skills. Victoria is now using Family Reunification Orders which determine timeframes for reunification and contact arrangements. This approach has been critiqued for increasing the power of the CSS and reducing the powers of the Court to extend or alter the length of Orders (Mackieson et al. 2019).

- High impact test cases to clarify points of law and the way in which laws are applied in practice in the Court and to develop case law. For example, in 2017 VLA appealed to the Supreme Court to clarify parental rights in a case where the Children's Court determined a child in OOHC should be vaccinated against a parent's wishes. The Supreme Court decision subsequently led to the clarification of Children's Court powers to make decisions about a child's schooling or access to medical procedures. There may be opportunities to use test cases to challenge breaches of statutory obligations, for example when CS fail to provide the resources necessary to support a parent to achieve reunification.

SERVICE REVIEWS AND RESEARCH

- VLA has conducted a review of its Child Protection Services (VLA 2017). The review was driven by a dramatic growth in child protection work characterised by the significant over-representation of Aboriginal families, a lack of support for families to participate, a service model centred around urgent cases rather than earlier intervention and inadequate capacity and quality of legal assistance. The review aimed to establish a system where child protection legal services are timely and appropriate and which better meet client need rather than the needs of Court and legal processes. It resulted in 36 actions which are currently being implemented. These include providing better information about child protection services, better representation of children, increasing support to families prior to Court proceedings, improving access to legal help and supporting the development of specialist skills amongst legal practitioners and the judiciary.
- ACT conducted a review of child protection decision-making and its ability to ensure that the best interests of the child remain paramount. It examined how to better manage the tensions between the rights of the child and the wishes of adults (Justice and Community Safety Directorate 2019). The review explored both internal and external merit review processes being used in other jurisdictions in order to see how ACT might improve the transparency of child protection decision-making.
- In 2017 Queensland reviewed how to improve the conduct of child protection matters in the courts (DJAG 2017). Implementation and outcomes of the reforms will be measured against baseline data in 2018-19 and 2022-23. The Court reforms included:
  - Establishment of a Court Case Management Framework to more actively manage child protection proceedings. Aiming to promote fair and quick resolution of matters and reduce unnecessary delay, the framework covered the rules, the bench book and practice directions made by the Chief Magistrate.
  - A Legal Aid funding review to improve access to legal representation for families.

- » Appointment of a Director of Child Protection Litigation to provide greater oversight and independent scrutiny for CPO applications and ensure they are supported by good quality evidence, protect against unwarranted removal and allow CS workers to establish and develop supportive relationships with families. The reform is seen as promoting evidence-based decision making and enhancing procedural fairness and natural justice and the proactive management of care proceedings.
- » Exploring a tribunal approach to review administrative decisions made by the Department. Queensland Civil and Administrative Tribunal (QCAT) provides a one-stop shop for dispute resolution. QCAT can review administrative decisions made under the Act about placement and contact arrangements through a multi-disciplinary tribunal panel which includes child protection expertise.

CAMPAIGNS

- A WA Legal Symposium held in March 2019 brought together a coalition of CLCs, private practitioners, CSOs, academics, Magistrates and FIN WA to push for improved access to legal representation for families involved in care proceedings. The Symposium has spawned a large working group and a forum pushing for more pro bono work, co-ordination of training across the legal sector and developing models of legal, support and advocacy practice to assist families. A second Symposium is proposed for June 2020 to keep the issue of legal representation on the broader community agenda. FIN WA are currently drafting a proposal to provide professional peer advocacy for families in the Children's Court to help parents navigate proceedings and link them with caseworkers for referral and emotional support.
- A judge in the UK with decades of experience presiding over care proceedings has recently produced a play, *Who Cares?*, in partnership with the National Theatre to explore the 'harsh environment' of the family justice system. Performed by professional actors, the play advocates for greater independent scrutiny of the Court in the context of rising numbers entering the OOHC system and the establishment of a review of transparency in the Court system. The review, which will report in May 2020, aims to establish whether the status quo is 'fit for purpose' and hopes to rebuild confidence in the family justice system amongst its users, including families who have been negatively affected.

7.10 In summary

This review highlights a number of incremental changes which have been made to improve parents' participation in legal processes. They address issues such as earlier and better access to quality legal representation, the provision of non-legal support to assist parents before, during and after care proceedings and approaches to improving the decision-making process itself. They seek to ensure that what happens in a courtroom and the way in which different procedures are implemented does not operate as a barrier to parent participation, family preservation and reunification.

Models and interventions which might be described as offering more transformational change are much less common however. One of the few examples which offers an alternative to conventional adversarial court proceedings is the FDTC. Based on a therapeutic jurisprudence approach, it appears to radically impact on the engagement which parents with substance use issues have with the system, their motivation to change behaviour in order to meet safety concerns and on the outcomes which can be achieved. Here evaluation work has clearly demonstrated the ability of FDTCs to reduce the time children and young people spend in OOHC and improve reunification rates which are then sustainable. Despite this ,the number of FDTCs is small in the USA and the UK and there is only one example in Australia, in Victoria.

The Victorian model was established through a local commitment with leadership from the judiciary. Yet support for additional FTDCs, including from individual Magistrates, has not translated into funding or persuaded government of the need for the wholesale reform of the Child Safety jurisdiction (Harwin et al. 2019). As Harwin et al. identify, numerous operational challenges involved in bringing together the Justice system and the CSS and dependence on what are described as individual 'pioneers' mean that, certainly in the short term, FDTCs are likely to remain the exception rather than the norm.

CHAPTER EIGHT

Conclusions and Recommendations

8.1 Conclusion

This research has explored the interface between the Child Safety system and the Justice system. Although only a small proportion of families in contact with Child Safety journey across this interface, their numbers are increasing. The experience is described as often unsupported, confusing, highly stressful and operating to the detriment of a family's chances of preservation or reunification or of sustaining of family and community relationships after children are removed from their birth families. There are very significant social justice issues inherent in the management of the CS jurisdiction and parents, and many lawyers, are commonly left with a feeling of not having access to a fair and just system that makes decisions in the best interests of the child. This is only reinforced by diversity in the way in which procedures and processes are implemented across the state, diversity in the approach of different CS offices and the lack of consistency in judicial styles, which gives the sense of a postcode lottery.

The current system is underpinned by high workloads and a lack of resourcing that impacts on both the CSS and the Court. From difficulties in access to adequate levels of Legal Aid funding, a lack of capacity in the broader welfare sector to support parents to achieve change and the ability of the Court to ensure care proceedings happen in a timely manner, the culture of underfunding is endemic and affects the attitudes of both systems and individuals. It fuels a disconnect between the intent of the legislation, the CS redesign process, practice realities and opportunities to hear the voice of families. The resulting experience for families and outcomes for children need to be addressed.

There is a substantial hidden expense in not acting to improve the current situation – for individuals, families and communities. The costs of unresolved problems are shifted to other areas of government spending. When families are split and children unnecessarily removed or not reunified, it entrenches disadvantage and CS involvement continues across generation. The costs of delay and inefficiency resulting from an absence or denial of legal representation are less visible but substantial. It is extraordinary that such vulnerable families, facing a crisis induced by removal of their children, are expected to navigate a complex legal system with limited access to support or skilled legal advice. This should provoke urgent debate about how to rectify the situation.

Families have problems which require solutions, but an adversarial judicial system encourages winners and losers rather than collaboration. There is no doubt that children and young people may need to be removed from their family either temporarily or in the longer term in order to meet their best interests and to support their wellbeing. But for parents, seeing the system as fair and just and being heard and treated with respect and dignity may be more important than losing or regaining custody of a child. As this research demonstrates, the interactions between parents, CS workers, Magistrates and legal professionals can be life-changing, with systems becoming healing agencies and catalysts for behaviour change. Many commentators, including those participating in this research, want to see justice delivered in a more therapeutic and humane way within a cohesive structure which can engage both the CS and the Justice system in a well thought-out process which promotes the aims of the Act – family preservation and reunification.

8.2 Recommendations

These recommendations call for a rebalancing of the scales in the relationships between children, families, the Child Safety system and the Justice system so that families become key players in finding solutions to the challenges they face and in making decisions about their future.

The *Children Young Persons and Families Act 1997* and the Principles which accompany it are clear about the priority which must be given to partnership working with families and to sustaining the family unit in the best interests of the child, whether or not children are reunified. Fully implementing the intent of the legislation would improve the operations of the Child Safety system and of care proceedings, promote outcomes in the best interests of children and reduce the numbers entering the out-of-home care system. The current lack of capacity and resourcing to fully invest in implementation means, as one lawyer said, 'we have a Rolls Royce system but with bike tyres' where it is not possible to give full effect to the legislation.

Improving the parent experience and access to justice is multi-faceted and involves reconceptualising processes, procedures, culture and resourcing across the Child Safety and Justice interface. A multitude of changes and reforms varying in scale will impact on the parent experience and implementation of the goals of the legislation. These range across a spectrum from practical changes which could be implemented immediately to transformational change which alters the way in which systems operate at a more profound level.

The recommendations outlined here are transformative. They combine a clear reform agenda identified by research participants with current thinking in other jurisdictions and in the research and policy literature about how to more effectively meet the needs of vulnerable children and families in Tasmania's Child Safety system. They are general in nature, but the specifics about how to achieve them are expressed in the text accompanying each recommendation.

Some significant challenges in the current system are not addressed here. These include the interface between the Child Safety jurisdiction and the Family Law Court. They also include any discussion about the benefits or otherwise of removing some types of decisions in the Child Safety jurisdiction to a tribunal format. These are complex issues and it has not been possible to address them in the context of this research.

IMPLEMENTING THE INTENT OF THE LEGISLATION

Recommendation 1: That the Department of Communities, the Department of Justice and the Magistrates Court collaborate to ensure a strategic approach to family preservation and reunification across the Child Safety and Justice interface.

The research found that the current processes and procedures being used to implement the goals of the legislation fail for too many families, and in a number of instances operate as direct obstacles to meeting the legislative goals. There is an absence of

a strategic approach to families, their reunification and preservation and of any clear conceptualisation of the interface between the Child Safety and Justice systems. This means parents are subject to a series of inconsistencies as they move between sectors, severely prejudicing the ability of both systems to make timely and effective decisions about the safety of children and the future of families and family relationships. This fuels the entry of children into out-of-home care and feeds multi-generational disadvantage at enormous expense to Tasmanian society. It also fuels high levels of frustration and distress amongst those working in the system or subject to it.

What is required is a smoother, well thought out, more supported pathway for vulnerable families in order to provide them with every chance to stay together and/or maintain family relationships whenever possible in the best interests of the child. This pathway must be perceived as fair and just and provide the opportunity for the recovery and rehabilitation of families, whether or not children are returned. As well as reforms to Child Safety interventions stipulated in Recommendation 3, key elements to be considered as part of any strategic approach are:

- **Full resourcing of regularly reviewed access arrangements between parent and child.** If a decision is made that it is in a child's best interests to have an ongoing relationship with the parent, then this must be supported with adequate resourcing as key to meeting the aims of the legislation. Access arrangements must be proactively funded and promoted to support attachment and bonding, parenting skills, reunification and family preservation rather than the parent/child relationship being thwarted by under-resourcing.
- **Clarity about the reunification path.** Parents must be provided with approved plain English Care and Case Plans so that they, their supporters and the Court are clear about what needs to happen in the journey towards reunification and/or family preservation.
- **Specialist Magistrates** wherever possible to promote continuity of approach and expertise in the Child Safety jurisdiction as well as the ability to build a productive relationship with birth families that can be used to motivate change.
- **More intensive Court case management.** Non-compliance with administrative processes and timelines is endemic in the Child Safety jurisdiction and there can be a reluctance amongst the judiciary to hold parties to account. More intensive case management by the Court would improve compliance, minimise delay and the length of proceedings and reduce inconsistency in Court practice across the State.
- **Improving Alternative Dispute Resolution mechanisms** both before and during care proceedings to ensure they drive processes under the legislation, that there is clarity about their role and status as decision making mechanisms and that they offer skilled facilitation and the full involvement of families in proceedings.
- **Improving the Court environment** so that families are better able to be included as active participants in proceedings and there are routine opportunities for direct communication between parents and the Magistrate to ensure the parent voice is heard.

- **Reviewing the role of expert opinion** in decision-making processes to ensure the Court is informed by objective advice provided in a timely manner, with all parties contributing to the terms of reference for commissioning expert views. Consideration should be given to an independent Court process to provide greater confidence in the system by removing any potential bias on the part of experts commissioned by the Child Safety system. The model of the Family Reporter system in the Family Law Court should be considered.
- **Increasing the capacity of the broader welfare sector** to provide timely, appropriate support and therapeutic programs to assist families to provide safe environments for their children.

Recommendation 2: That the Department of Communities and the Department of Justice identify who has the duty of care towards parents to ensure a supportive infrastructure for those crossing the interface into the Justice system.

Whilst Child Safety has a duty of care to the child and seeks to maximise their best interests, there is no matching duty of care to support parents to provide a safe environment and to promote reunification. The system too often remains blind to their needs and they are left to deal with the 'collateral consequences' of child removal with limited access to a complex network of family support programs, which are not specifically targeted to their needs and lack the mandate to actively support them.

Investing in the child must include investing in the parents. A wraparound supportive infrastructure is required which recognises the interdependence of parent and child and the importance of responding to the needs of parents in order to promote the best interests of the child. Any supportive infrastructure must consider:

- A **co-designed case management model** both before and after removal which can address current issues and underlying causes and be delivered at varying levels of intensity.
- Free, **non-legal independent advocacy** for families involved with the Child Safety system to support them practically and emotionally by having someone 'on their side' to assist with communications with Child Safety and legal professionals and allow their voice to be heard.
- **A review of multi-disciplinary models of legal help in other jurisdictions** and their appropriateness for Tasmania, such as supporting parents with a team consisting of a social worker, a parent advocate and a legal professional. These models have demonstrated a decrease the length of time children spend in out-of-home care and an increase in reunification rates.
- **Peer support models**. The research identified a number of parents who have been through the system and now want to 'give back' by supporting others. This should be exploited to provide effective support for those currently in the system.

Recommendation 3: That the Department of Communities makes further investment in pre-proceedings processes to divert families from the Justice system.

Although only small numbers of families involved with the Child Safety system cross the interface into the Justice system and have their child(ren) removed from their care, the number of children and young people in out-of-home care in Tasmania continues to grow. The Child Safety redesign process and the establishment of Intensive Family Engagement Services are beginning to have an impact on stemming the tide by working with families on the cusp of removal. However, further intervention is required to provide what families described as a clearer 'wake-up call' for those on the cusp that combines support and early participation of families in decision-making about their future which maximise opportunities for resolving problems without having to go to Court. This is especially the case for those mothers who are pregnant, subject to an unborn baby alert and facing the risk of removal at birth or during infancy.

Boosting the use of current Child Safety tools used to work with families - like Signs of Safety and Family Group Conferencing - may effectively divert families from legal proceedings. Consideration must also be given to the involvement of legal professionals and/or non-legal advocates in more structured pre-proceedings processes in order to strengthen parent engagement in Child Safety interventions and provide a more pro-active diversion from the Justice system.

Recommendation 4: That the Tasmanian Government ensure a right to legal representation in the Child Safety jurisdiction is embedded in the legislation and that the Legal Aid funding pool is expanded to meet this need.

Too many Tasmanian families enter the Justice system and attend Court with no or limited access to legal representation and advice. Although children are granted Legal Aid and supported by Separate Representatives, many parents are involved in legal proceedings unrepresented either because they have not sought help, have not understood how or when to get legal help or have been unable to access adequate levels of Legal Aid funding. This places an additional workload on the Court, lengthens care proceedings and leaves highly vulnerable people navigating their way through a complex legal system unsupported. A right to legal representation is a basic prerequisite of a fair and just system. If highly significant decisions about families are going to be made in a legal process, then there must be a requirement for representation for all families at risk of prosecution by the State.

An embedded right to representation will require an expansion of the Legal Aid pool to allow high quality representation for all families throughout care proceedings and a more robust check and balance on Child Safety interventions. This includes the involvement of legal professionals in out-of-Court and pre-proceedings work, case preparation, Alternative Dispute Resolution and assisting parents to accessing support and therapeutic programs.

Recommendation 5: That the Department of Communities, the Department of Justice and the Legal Aid Commission collaborate to increase the capacity of the legal assistance sector to support and respond to the particular needs of families in the Child Safety system.

Families report being unaware that they require legal advice, difficulties in accessing information about their rights and about care proceedings and late access to legal advice once proceedings have begun. A collaborative approach is required to promote access to information and advice for families and ensure earlier access to legal assistance. This must include:

- Ensuring that families subject to Child Safety intervention have access to **'warm referrals' for legal advice at the earliest opportunity**. This might include access to a plain English pamphlet laying out what is happening and the action to be taken when an application for an Order is made.
- Promotion of a **Family Rights Charter** (see Appendix 3) to increase parent awareness of their and their children's rights and entitlements in the Child Safety and Justice systems.
- The **involvement of legal professionals in pre-proceedings processes** to improve the engagement of families.
- The establishment of a **specialist Child Safety duty lawyer system** in the Magistrates Court.
- An **expansion of the Legal Aid Commission website** to include more plain English information about Child Safety proceedings and an exploration of the potential for explanatory videos for families in order to overcome literacy issues.
- An **exploration of the potential of Health Justice Partnerships in Tasmania** to ensure earlier access to legal advice, better engagement with Child Safety interventions and a collaborative approach from the beginning of a family's involvement with Child Safety. Health Justice Partnerships are particularly appropriate in maternity settings and, for example, in Child and Family Centres.

Recommendation 6: That the Department of Communities, the Legal Aid Commission, the Department of Justice and the Magistrates Court make further investment in the ongoing professional development of their workforce in the Child Safety jurisdiction.

Skilled professionals who can effectively engage families in Child Safety interventions and provide high quality support, representation and decision-making are essential to the effective operation of the Child Safety system, the Justice system and the protection of children. The research found a disconnect between policy and practice and inconsistency in practice across the Child Safety and legal system amongst child safety workers, lawyers representing parents (particularly in private practice) and the judiciary.

The Legal Aid Commission and Family Law Practitioners Association invest in ongoing professional development for legal practitioners in the Child Safety jurisdiction. The judiciary also have access to ongoing education in this area. This must continue and expand. The value of establishing an accredited legal specialism which sets standards for legal professionals representing parents and children and for the judiciary, promoting an understanding of rights, trauma, attachment and child development, should be explored. Delivery on a multi-disciplinary basis would promote understandings between the Justice and Child Safety system sectors.

Recommendation 7: That the Tasmanian Government fully explore the potential for introducing a therapeutic, solution-focused Court in the Child Safety jurisdiction.

A therapeutic, problem-solving and restorative justice approach is increasingly the subject of discussion in Child Safety systems across the world as a more effective way to address complex family problems and make solution-focused decisions. The current Tasmanian system already embraces the potential for more therapeutic processes, and this is pushing a move from adversarial processes to inquisitorial ones. These include judicial styles which encourage the participation of parents, more intensive Court case management and effective Alternative Dispute Resolution processes. Parents who have experienced them are complementary about their impact on their own self-esteem, their ability to address the underlying causes of their difficulties and their motivation to change their behaviours and provide a safe environment for their children.

Transformational change in how Tasmania deals with complex family issues and providing a smoother pathway for families through the system means reconceptualising the therapeutic role of the Court and doing things differently. The Family Drug Treatment Court operating in Victoria and in the United Kingdom offers a potential model for a problem-solving court that can work with all families who cross the interface into the Justice system. The appropriateness of this model for Tasmania should be explored.

PROGRESSING THE RECOMMENDATIONS

Recommendation 8: That the Tasmanian Government commission a high-level working group to explore a whole systems approach to addressing the needs of vulnerable families involved with the Child Safety system.

To rebalance the scales and ensure families have access to a fair and just system which can operationalise the goals of the legislation, collaboration is required across sectors and departments. A high-level working group involving the Departments of Communities and Justice, the Legal Aid Commission, the judiciary and legal professionals, the community sector and parent and carer representatives needs to change the current frustrations expressed by so many stakeholders into a positive energy to transform the current system through collaboration and a more strategic approach.

The Group must be charged with addressing the range of cultural and resourcing issues which distort implementation of the legislation. Cultural change must see families as capable of change whilst promoting family-inclusive practice, trauma and disability awareness and the adaption of processes to the needs and capabilities of parents. In addition, the Group must be able to address widespread under-resourcing which currently supports the failure of the system to promote the goals of the legislation. Adequate resourcing underlies all of the recommendations in this report, including the more technical aspects of how the recommendations might be implemented. The Group will need to examine where investments can be made and how much they cost.

APPENDIX ONE

Themes from the Research and Policy Literature. What Do They Tell Us?

Reviews of current trends in child welfare policy (Wise 2017; Smith 2018) tell us that all child protection systems in Australia and globally are facing significant challenges. Although systems remain child-centered, there is an increasing recognition that the best interests of the child are often served by taking into account and meeting the needs of their families. A growing body of research explores family accounts of what has happened to them and how far these experiences align with policy frameworks promoting family inclusion and partnership in CS and legal processes.

Here we identify the key studies which have examined the interface between the law and child welfare and the experience of families and those working to support them as they move across that interface. This is not a comprehensive review. Much of the literature in this area is evaluative. It explores the effectiveness of interventions which aim to improve family inclusion and participation and has been referenced in Chapter 7. This section draws together the key themes arising from the broader literature and what this means for directions for reform.

The family experience

Over the past decade a number of studies, in Australia and elsewhere, have documented the difficulties parents face in Court and legal processes which can impact on the intent of the legislation (Harries 2008; Hunt 2010; Hinton 2013, 2018; Ross 2017). The research tends to be qualitative rather than quantitative and based on small unrepresentative samples (Hunt 2010); however it does reveal a consensus about the nature of these experiences and the kind of challenges parents face.

The lives of parents facing the removal of their child(ren) are dominated by the challenges involved in accessing legal assistance, attending Court hearings and negotiating the conditions attached to CPOs, including the kind of access they have to their children in OOHC. Across the research literature parents commonly describe these experiences as unpleasant, disrespectful, traumatic and disempowering. They struggle to gain access to adequate levels of legal aid representation and to understand procedures, which limits their ability to fully and actively participate in the legal processes and impacts on their lives and those of their children. Despite their vulnerabilities, they enter a highly adversarial process where the focus is on winning rather than collaboration or problem-solving. Even when they are able to access legal representation, when their case is mediated by lawyers they can feel silenced and unheard and unable to challenge orders or the conditions attached to them (Ross 2017). They can be left feeling they have been unfairly treated and that justice has not been done. This impacts on their ability to live with whatever decisions have been made and sustain a positive relationship with their children, whether or not they are returned to them. Parents across Australia report:

- poor access to Legal Aid funding and to a quality legal service, and high levels of self-representation in court;
- an absence of non-legal advocacy and support to smooth pathways and help navigate the legal system;

- the implementation of Court and legal processes directly impacting on a parent's ability to participate equally in proceedings;
- being treated with a lack of respect, feeling stereotyped and feeling outcomes are a matter of luck rather than meaningful justice;
- an under-utilisation of non-adversarial decision-making mechanisms;
- closed Courts which reinforce a lack of public scrutiny and accountability in Court procedures and outcomes; and
- an under-resourcing of the broader child and family welfare system, impacting directly on the operation of the Court, including its ability to fulfil its mandated purpose.

These experiences are exacerbated when parents are affected by mental health or substance use issues, low levels of literacy and intellectual and cognitive disability.

The neglect of parents' needs has been subject to significant critique, especially for those who have babies or infants removed. A number of studies have explored the 'collateral consequences' of child removal and the context in which care proceedings occur (Broadhurst et al. 2017; Fidler 2018; Hinton 2013, 2018). Removal can propel families into crisis, where a combination of grief, social stigma, the escalation of mental health issues, substance use and domestic violence and loss of income impose an additional burden on people who are already disadvantaged.

Some work has addressed the particular challenges inherent in balancing the rights and interests of children with those of parents. They identify the systemic issues that restrict any capacity to support and hear the voice of parents and a gap between the theory and practice in terms of mechanisms used to promote their participation (O'Mahony et al. 2016). As one commentator said, the ultimate act in protecting children is to remove them from their families (Ainsworth & Hansen 2012). This causes trauma for the child, distress for parents and harms the family. It raises questions about whether this can be justified in the name of protecting children from abuse and neglect and the need to better explore what a humane society can do to ameliorate the harm.

These studies are part of a broader and expanding literature about the impediments to accessing justice for people facing significant economic and other disadvantages. Aiming to provide a basis for advocacy to improve access to justice for disadvantaged populations, the Law Council of Australia has carried out a review exploring the obstacles vulnerable people – those with a disability, Aboriginal people, LGTBI, prisoners, older people, those affected by poverty, family violence and living in rural and regional areas – can face (Law Council of Australia 2018). It looked at the evidence and gaps in knowledge in this area and identified measures effective in addressing barriers to justice and the components of an effective justice system. It pointed to the need to invest in promoting the legal capability of disadvantaged people, access to quality legal representation, alternative dispute resolution mechanisms, improving the capacity of the Courts to process cases and, critically, non-legal support services.

Experiences of legal professionals

There is a consensus throughout the research literature about the importance of good legal representation for parents, not just for their own benefit but also for the smooth operation of the legal system. However, only a small number of studies have explored what legal representation involves, its nature, the skills required and parents' access to it (Hunt 2010).

A key study completed in the UK employed ethnographic methods to explore the care proceedings process, the task of legal representation and client management and the impact on Court decision-making processes (Pearce et al. 2011). Through observation of 109 hearings and case studies compiled in four courts, it explored the roles lawyers play, what strategies they deploy in managing 'problematic clients' and how this fits with client expectations. It found that proceedings and their direction and timing were largely determined by the actions of lawyers rather than managed by judges as Court rules require. The study concluded by emphasising the key themes which run through the literature: the need for skilled and experienced representation, how to make this accessible to more parents, the role of active judicial case management and the training and support required by judges to make better decisions. It also raised questions about the scope of proceedings and how to create a better fit with the developmental timescales of the child, whether Courts are best placed to determine contact arrangements and how to change the ingrained culture and approach to care proceedings while retaining fairness for parents.

Far fewer studies have addressed the role of the judiciary and judicial decision-making in the Child Safety jurisdiction and there is a dearth of research in this area. A cross-national comparison of judicial decision-making in England, Finland, Norway and USA found a judiciary relatively satisfied with the opportunities given to parents and children to participate in proceedings. However, the views of children and parents were not so positive and they critiqued the decision-making process. This was seen as reflecting a complacency and acceptance of the status quo among the judiciary which was stalling improvements in opportunities for parents and for children to participate (Berrick et al. 2019).

Research commonly demonstrates poor access to good quality legal representation. A review of the Tasmanian legal assistance sector (DoJ 2018) and its ability to meet the legal needs of vulnerable people outlined a number of gaps in provision, including for those entangled in the CSS. The review recommended improved access to better online resources and education sessions tailored to individual needs, no wrong door for accessing assistance and further training for providers of legal assistance services. It also recommended clearer eligibility criteria for Legal Aid grants and that priority should be given to those facing imprisonment, in family law parenting matters and in Child Safety proceedings who are unrepresented in court.

A re-analysis of data about access to representation from a national study of Australian Children's Courts in 2013 concluded that, despite the evidence that quality legal representation has a positive effect on outcomes for children and is vital to mitigate the power imbalance between CS and the family, it is not always available to vulnerable groups (Thomson et al. 2017). This has implications both for the care system and for the future of the Courts and how they operate. A soon-to-be completed study in Queensland examining the circumstances of parents who self-represent in Court will cast light on this experience and its implications for Court practices and outcomes (Reeves 2020 forthcoming).

There are important questions about how far legal representation for parents impacts on outcomes for children. The evidence is patchy, as lawyers do not consistently record the outcomes they obtain for their clients and there is some ambiguity about what a positive outcome is. However numerous US studies report differences in the rates of family preservation and reunification between represented and unrepresented clients due to encouraging parents to work with CS and engage in Court processes (Guggenheim 2019; Ketteringham et al. 2016; Lalayants 2012). They therefore infer a positive correlation between representation and success. A study by Sheehan (2006) in Victoria found that the quality of legal advice to parents significantly affected outcomes. More generally, the Law Council estimates that for every $1 invested in Legal Aid there is up to $6 in economic savings on healthcare, lost jobs and lost homes.

The need for both legal and non-legal advocacy for families, in order to get the best outcomes for children and to improve Court processes, has frequently been demonstrated. Empirical research with lawyers and community service providers concluded that free legal representation is essential for parents but that non-legal advocates providing more generalised support and working as a team with lawyers were also required to get the best outcomes for children (Walsh & Douglas 2011). A study of the systemic issues restricting opportunities for parents to have their voices heard identified the importance of advocates and well-resourced lawyers with time to prepare cases as well as an increased transparency and clarity in decision-making processes. (O'Mahony et al. 2016).

Blending social work and legal knowledge and skills is seen as especially relevant to particular cohorts of parents, particularly those who are overrepresented in the system – Aboriginal people and those with intellectual disability. For parents with intellectual disability, socioeconomic disadvantage, assumptions of parenting incapacity and an inability to understand or use legal processes or instruct lawyers can deny them equal access to justice. A study exploring specialist non-legal advocacy for those with intellectual disability demonstrated it can ensure parents exercise their legal capability and bridge the gap between parent and professional whilst maintaining compliance with Australian obligations under the Convention on Rights of Persons with Disability (Collings et al. 2017, 2018). It considered that specialist advocacy should be available for all parents with intellectual disability and be accompanied by greater disability awareness and cultural sensitivity by child welfare workers.

Legal processes and procedures

The practical implementation and operation of care proceedings and how they might impact on outcomes like parental participation, family preservation, reunification and ultimately access to justice for families have been the subject of a number of reviews and evaluations. But assessing outcomes of Court processes is problematic and outcomes are difficult to define and to quantify. Although the first consideration is always for children to remain with the family or be returned to the family, results are ambiguous in terms of the risk and potential benefits of care proceedings and a better understanding is required of decisions in the best interests of the child, given a CSS characterised by tension, risk aversion and constant debate about the way forwards (Dickens et al. 2019; Katz 2019).

It has been argued that the concern of the Courts with even-handed treatment rather than with broader matters of social justice directs the judiciary to be consistent in their application of rules and deliver impersonal justice divorced from the broader context of shortcomings in public policy (Broadhurst & Mason 2017). This fidelity to rules and procedure, where a lack of attention to the parent is detrimental to all involved, constrains judicial imagination and a longer-term rehabilitative approach.

There is research which has focused on the dynamics of courtroom interactions and how this impacts on a parent's ability to participate. An ethnographic study of interactions between judges, lawyers and parents in the US courts explored how judges encourage or inhibit parents' participation and the tactics used to influence parent behaviours and obtain cooperation with Court Orders (Lens 2017). Through observations of 94 care proceedings over a one-year period with nine different judges employing different styles, the study highlighted the significance of the Court environment and the approach of the judge in affecting outcomes, even in an adversarial system. Chastising parents, portraying them as irresponsible and refusing to engage directly with them sent messages of disrespect and unworthiness and reinforced their low social status. A more participatory approach where parents were able to engage directly with the judge, were involved in discussions and were complimented on their progress and achievements, improved engagement and cooperation and parents' satisfaction with the process. The study demonstrated the value of integrating a more therapeutic jurisprudence approach into the current system and the pivotal role judges can play in motivating behavioural change.

Increasing attention is being paid as to how decisions are made and the evidence and arguments used to make them from both a parent and a professional perspective. Juhasz (2018) examined the arguments parents use in Court. Two main types of legal defence were identified. Firstly, there were justifications, or that the act was not wrongful and was morally justified by a lack of support, a bad placement, or a child wanting to come home. Secondly there were excuses – that the parent was not morally culpable, that they had their own tragic history, that there was a need for a second chance or that their circumstances had changed.

An exploratory study of care proceedings in four local authorities across England looked at the professional reasoning used to justify the decisions being made (Trowler 2018). The study concluded that the majority of families in care proceedings were subject to a 'red line decision', where the decision to remove a child could go either way. This cohort should be diverted from court and separated from those where children were at risk of significant harm. The legal principle of no Order should be more readily applied in practice and voluntary removal and shared care[25] should be reclaimed as a respected service, with attention being given to not undermining any progress being made in child protection practice with individual families. In effect, the study declared there should be a re-emphasis on partnership working and family inclusion.

Some research challenges the foundational assumptions used to make decisions, such as risk and attachment theory. Risk of harm to a child and assessment of that risk currently and into the future is a key factor in decision-making about removal, contact and reunification. By unpacking some of the underlying constructions of risk, studies have explored how the paradigm of risk is used and assessed in CS cases (Smeeton 2018). Smeeton argues that working within a risk paradigm obscures rather than clarifies understandings. The social harms which children experience, often due to the economic, environmental and cultural barriers faced by their families, are not recognised because of the focus on individualised risk factors (Featherstone et al. 2018). These studies present arguments for an alternative approach which is more hopeful and progressive for children, families and communities, using a social model to reform a system dominated by risk and risk aversion.

Attachment has become a very influential concept in CS decision-making and is one of the factors considered when making decisions about placement and level of contact with the birth family (McLean 2016). Attachment needs are considered to be the foundation for later healthy social, emotional and cognitive development. Disorganised attachment is strongly associated with neglect and abuse and with parents who have issues with mental health, substance use and unresolved loss or trauma (McLean 2016). At the same time, the evidence base offers little clinical guidance about the needs of children and their attachments and the theory does not provide clear directions for practitioners in how or when to intervene to address attachment needs. Not much is known about children's ability to develop multiple attachments with multiple caregivers from an early age or the protective capacity of subsequent attachment relationships, for example with a foster carer. There is evidence that children in OOHC appear able to manage multiple attachments and loyalties, but there is a research gap in terms of how they are able to achieve this.

25 Shared care typically refers to circumstances where a child's care is shared between birth parents and foster or kinship carers.

Magistrates use expert evidence in Court proceedings to inform decision-making about the best interests of the child, and there are different jurisdictional arrangements for this. Experts can assess issues like parental conflict and child development and provide synopses of current research about relevant factors like attachment and bonding between parent and child. Given the significance of these reports in the decision-making process, research has examined their use, their quality and some of the underlying assumptions which might be employed in assessing parental capacity. A study in Queensland examined the provision of expert reports to support decision-making, their availability and quality, and the capacity of the judiciary to appraise them (Tilbury 2019). The study concluded that adequate funding, guidelines, standards and other mechanisms to improve accessibility and the quality of evidence are required and that current arrangements were unsatisfactory. In particular there was a need for enhanced legal and judicial capacity to appraise evidence and improved access to experts.

In appraising Court procedures, a particular focus has been ways of addressing the increasing rates of removal of newborns and infants. These removals are seen as draconian by many courts and are leading to intense scrutiny of this area, with several studies examining how to work with families and assess them when there are concerns about an unborn child (Masson & Dickens 2015; Harnet et al. 2018; Lushey et al. 2018; Alrouh et al. 2018). A foetus has no legal rights until birth, which reduces any urgency to act and delays intervention until late in pregnancy. The consequences of this for families have been well-documented (Broadhurst & Mason 2017; Hinton 2018). Research has looked at professional perspectives and the system-level challenges involved in pre-birth assessment and producing guidance for the removal of infants at birth (Mason et al. 2019). The research concludes that a consistent and earlier response is required in pregnancy which can engage parents and support earlier intervention to promote behaviour change. One study found that the presence of a lawyer in a pre-proceedings process helped to secure engagement, encourage protective initiatives and avoid emergency intervention when a child is born (Lushey et al. 2018). Most recently a case law review of court decisions relevant to the removal of newborns from their parents at birth or shortly after considered the judgements which had been made. The review aimed to provide information to legal professionals and CS staff involved in making decisions about the legal framework for removal and its application to assist with decision-making (Ryan & Cook 2019).

There has been a general push to develop best practice principles to ensure that the voice of families help to shape service intervention and what happens in the Justice system. A study of Children's Courts across Australia examined the current and future challenges they face from the perspectives of key stakeholders – lawyers, police, CSS, CSOs, Indigenous groups, advocacy groups and academic researchers (Sheehan & Borowski 2013). The study concluded that, despite the resource implications, a problem-solving non-adversarial court is required for dealing with child abuse and neglect. A follow-up study assessing the challenges facing the Victorian court (Sheehan & Borowski 2014) supported the need for more research about the understanding parents and families have of procedures and decisions and further examination of the interface between the child protection system and the legal process.

Several studies have highlighted that improving and reforming procedures is not just about introducing new ones but also requires changes in Court culture and practice (Masson et al. 2008; Pearce et al. 2011; Masson et al. 2013). Problems with delay and costs, major flaws in data collection, a lack of consistency between different courts, and difficulties with pre-proceedings processes all affect the engagement and participation of families in the system. The findings from these studies have led to reforms to care proceedings in the UK to change the way courts process cases and to reduce costs.

Most recently a review examining reasons for the rise in the numbers entering the OOHC system identified a number of changes to both CS and the Court system to stem the increase (Family Rights Group 2018). The review proposed twenty options for change but key was promoting relationship-based practice throughout the system. Recommendations included offering FGCs to all families, access to free (and early) specialist legal advice and representation, better use of pre-proceedings processes and adopting best practice in pre-birth assessments for those facing newborn removals. The review recommended that the FDAC model (see page 153) be extended to become the normal way of hearing care proceedings in the majority of cases and that families should be provided with dedicated post-removal support.

Alternative dispute resolution and pre-proceedings processes

ADR mechanisms provide opportunities for parents and children to participate in problem-solving and resolution and have their voices heard outside the courtroom. Their use either prior to initiating legal proceedings or during proceedings to promote earlier resolution has attracted much research interest. As the key mechanism for parent and child participation, research has focused on how and when they are used in care proceedings, their design and their effectiveness in resolving problems from the different perspectives of those who participate. Most jurisdictions have carried out evaluative work to ascertain how effective they are proving, how far they provide genuine opportunities to hear parents and how they could be improved. Given the current emphasis on expediting permanency arrangements for children in a number of jurisdictions, this focus has gathered pace. There is a particular interest in the use of ADRs before care proceedings to promote early family engagement with safety concerns and divert families from the Court system.

In the UK, under the Public Law Outline[26] a 'pre-proceedings' letter is sent to families facing removal inviting them to a meeting. Evaluation has demonstrated how this can successfully divert cases from the Court system (Lindley 2013). Further evaluation found that a quarter of cases in England subject to formal pre-proceedings processes did not enter legal proceedings, but that the absence of guidance meant wide variations in practice and a national protocol was required to promote consistency (Masson et al. 2013).

26 See note page 155

A study in England and Wales looked at pre-proceedings processes to assess the prospects for new approaches and improvements (Dickens & Masson 2016). The study involved a file survey, observation of pre-proceedings meetings and interviews with key participants. It raised concerns about the danger of pre-court practice becoming less about family support and preventing proceedings and more about gathering evidence to support an application for a CPO and preparing for Court.

This risk has driven a debate about how far legal representation and/or advocacy should be available to parents in pre-proceedings processes. Most, in order to make them problem-solving rather than adversarial, do not involve legal assistance for parents, although children will be legally represented. They can however be pivotal in the direction of the case, the impression created and the actions parties take afterwards and this has led to discussion about the role of advocacy for parents in these forums and the tensions in providing legal assistance for parents. One study examined professional advocacy for parents in pre-proceedings processes (Holt et al. 2013). It concluded that this requires different skills to advocacy in Court but is important both to facilitate parents' understanding of the issues and to afford a level of protection of their rights, particularly in spaces which are largely controlled and owned by CS. The study put forward a persuasive argument for advocacy – legal and non-legal – in these forums, particularly with the current impetus to move decision-making outside the Court.

The UK is now seeing increasing emphasis on keeping families out of the legal system, including an expansion of FGC across the country. Studies of FGC operations have found their use has led to statistically significant reductions in the numbers entering the OOHC system, the average caseload per CS worker and re-referral rates for domestic violence (Munro et al. 2017; Mason et al. 2017) They also measured an increase in reunification rates, significant cost savings to both the CS and the legal system in reducing delays and higher levels of satisfaction amongst families, who felt the FGC had given them a voice. A recent systematic review of shared decision-making with families emphasised the importance of the way in which family meetings are facilitated to their effectiveness (Nurmatov et al. 2019). Awareness of this, and the diversity in implementing and conducting FGCs is being addressed in the UK by awareness raising, training and accreditation to raise their consistency and quality.

There has been research on the operation and impact of pre-proceedings processes for those on the edge of care proceedings. It involved analysing Court files in six local authorities in England, observation, and interviews with participants including judges, lawyers, social work managers and parents (Masson et al. 2013). The process was found to divert cases from the courts, ensure better prepared CS applications and reduce Court time. The presence of a lawyer meant that parents felt supported and helped them to engage. It did not necessarily speed up court proceedings and could indeed delay decisions because of attempts to use the process to give parents more time to make changes. However, parents saw it as effective 'wake-up call' about the seriousness of the situation and their need to act and engage even if they did not necessarily accept the safety concerns.

Direction for reform

There is a remarkable consensus across the research and policy literature both about the obstacles to parent participation and engagement in legal procedures and the interventions which are required to overcome them. This is a consensus shared not just amongst Australian jurisdictions but internationally across child protection systems in the US, UK, Canada and New Zealand.

The culture of an adversarial legal system and mutual distrust between parties, inadequate access to legal and non-legal advocacy and representation and the way in which processes operate during care proceedings all serve to mitigate against the involvement of parents in decision-making about their families. This is compounded by a culture which generates insensitive and demeaning practices, delays, confusion and unclear outcomes where parents feel they have been failed by the system and have not been able to access justice. The literature makes a case for a fundamental reappraisal of state responses when children are removed and a more holistic justice response to those already challenged by disadvantage.

Reforms, many of which are detailed in Chapter 7, entail a move towards a more inquisitorial system which can streamline care proceedings, make greater use of ADR processes and integrate more problem-solving approaches to further family preservation and reunification. Changes recognise that the legal system cannot work alone and that any reforms need to be underpinned by increased resourcing for the broader welfare sector to better meet the needs of children and their families (Ministry of Justice et al. 2011; Welbourne 2016; Sheehan & Borowski 2014; Ivec 2013). At their heart is an understanding that to keep children safe and operate in their best interests, consideration must be given to meeting the needs of families. Families are not just the problem but are also part of the solution.

APPENDIX TWO

Characteristics of research participants

How far was our sample of parents and legal practitioners representative of those involved in legal processes?

Parents

This was an opportunistic sample reliant on parents responding to an invitation to participate in the research. The criteria for recruitment was experience of Court and legal processes relating to CS and custody of their children in the past five years.

The characteristics of our sample closely match what we know about this cohort of parents. Three-quarters were mothers or grandmothers (75%), but eight fathers were also involved in interviews and included five couples. There was a spread across the age range. Forty-two percent were aged 30 and under with nine aged under 25 years. The remainder were aged over 30 years and had longer term involvement in the CSS spread over a period of years. Well over a third (37%) identified as Aboriginal. When asked if they had a disability of any kind, approaching one-third (31%) said that they did. This ranged from intellectual disability and acquired brain injury to borderline personality disorder and mental health issues. They came from across the state but with the majority (69%) based in the South and the rest split evenly between the North and the North West.

Between them they had extensive experience of the legal system and were able to talk about the removal of over 78 children (some more than once) and the care proceedings that accompanied those removals. About half of these removals (51%) were of children aged two years or more, but there were also ten removals at birth and 28 removals of infants and children aged under two.

While all of them had experienced removal of some or all of their children, 13 (36%) had also been reunited with at least one child at the time of interview. They described the level of contact they had with their children in the OOHC system. This varied from none or quarterly for those living with long-term Orders to up to two days per week with babies or infants. Six of the removed children were now 18 and living independently. Contact arrangements for five families were currently being negotiated.

Parents were asked how many times they had attended the Children's Court because of CS issues. Only a minority (five respondents) had attended just one or two times. The majority recorded attending Court three to five times, with ten people (27% or over a quarter) saying they had attended Court more than five times. One parent had attended 20 times. Thirteen parents said they had always had legal representation when they attended Court, but approaching two-thirds (64%) had experience of attending Court on numerous occasions without any legal representation. In some instances they described attending more than ten times without support from a lawyer and had represented themselves throughout proceedings.

Legal professionals

Lawyers working with parents were recruited into the research in two ways:

- An invitation to undertake a one-to-one interview with the researcher face-to-face or on the telephone. Twenty-four lawyers responded.
- Participation in an online survey. The survey was promoted by FLPAT through their membership, through the Tasmanian Bar Association and through the Law Society of Tasmania via their weekly newsletter. The criteria for participating in the survey was involvement in giving advice to or representing parents involved with CS in the previous two years.

Forty-three lawyers responded to the survey. Two-thirds (67%) were female and over half (56%) located in the South of the state. The rest were evenly divided between the North and North West regions.

While 42% were based in private law firms, a quarter (26%) worked with the Legal Aid Commission and 18% with community legal centres. Half of these were working with the Tasmanian Aboriginal Community Legal Service. Four barristers also responded.

This was an experienced and skilled group of practitioners (see Table 3). Half (49%) had experience of more than 11 years post admission and 42% had practiced in the CS jurisdiction for a similar period of time.

Table 3: Levels of experience of legal practitioners

Years of experience	Past admission %	Child Safety practice %
1-4 years	23	42
5-10 years	28	16
11+ years	49	42
Total respondents	43	43

Whilst they all had experience of representing and advising parents, 40% also had experience of working with children as Separate Representatives in FGC. Twenty-eight percent had represented carers and three had also worked for the Director of Public Prosecutions prosecuting parents. For the majority (74%) their primary area of practice outside CS work was in family law, and for 18% it was criminal law.

Table 4 : Caseloads of legal practitioners

Number of CS cases	Current %	Previous two years %
None	12	4
1-10 cases	47	33
11-20 cases	28	16
21-40 cases	9	19
41+ cases	4	28
Average caseload	14 cases (ranging from 1 to 120)	64 cases (ranging from 1 to 600 cases)

On average, survey respondents were carrying a current caseload in the CS jurisdiction of 14 cases, ranging from a handful to over 100 individual cases. When combined with their caseload in the last two years, respondents were able to reflect on their experiences of representing over 2,500 families involved in the CSS. Most of this work (81%) was funded through Legal Aid grants. However, twelve percent was identified as private work and seven percent as pro bono work supplied on a no fee or reduced fee basis.

It is suggested that respondents to the survey represent a good cross-section of the bulk of lawyers in the state doing any significant work in this area in terms of sex, experience and caseload.

APPENDIX THREE

Rights of Parents of Children in Out-of-Home-Care

As clients of Child Protection Services, parents of children or young people in the care of the Department have to right to be treated with:

- **Respect**
- **Fairness; and**
- **Integrity**

Parents have the right to know what is happening and are expected to participate in the development of plans that affect them or their children, so long as their child's safety is not compromised.

While the safety and wellbeing of children must always come first, parents have a right to:

- Be involved in care planning and informed of their child's progress and development
- Be fully informed about the child protection process and the assessment of safety and risk (carried out in accordance with the Tasmanian Risk Framework) wherever possible
- Have access to relevant and up-to-date information about the child protection process
- A comprehensive explanation of all matters and decisions in a clear and understandable manner
- Provide an opinion as to whether or not they agree that the child/young person is at risk or in need of care and protection and to request reviews of decisions by applying to the manager or to the Magistrate
- Legal advice and representation in Court
- Be told where their child is placed in care, unless Child Protection staff believe that this information would harm the safety, welfare and wellbeing of the child, their carer or their family
- Have an interpreter (language or signing) if required
- Request services and supports which could help them establish and maintain a safe environment for their child and to return them to their care where possible and in the best interests of children
- Be treated with respect regarding their religious beliefs, cultural identity, family and community affiliations and sexuality
- Involvement of an Aboriginal organisation, if they identify and are recognised as Aboriginal
- Consider matters in private at any time
- Attend meetings with a support person or advocate if they wish
- To be contacted by child protection to arrange a convenient time to meet or visit the home (unless there is risk to a child/young person's safety)

- Expect their ideas, plans and suggestions to be considered seriously and accepted unless they are impractical, not in their child's best interests or are in breach of the law
- Provide feedback and make a complaint to a senior worker or manager
- Request a Family Group Conference in writing to review arrangements for the care of their child (under the Children, Young Persons and Their Families Act 1997, two or more family members or a child can request an FGC to review the care plan)

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